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# Independent Contractor Team Drivers as Statutory Employees: 49 C.F.R. § 390.5 and Coverage under an MCS-90 Endorsement.

By: Joshua Leizerman, Esq.

You receive a call, one afternoon, from a potential client. She tells you that she drives truck as part of a team and was injured when the other driver on her team drove off the side of the road. At the time of the crash she was asleep in the sleeper berth, getting her mandated rest. Liability is not an issue and there are clear, objective injuries. It seems like a no-brainer case, until the motor carrier's insurer files a declaratory action arguing that it has no obligation to provide coverage because your client is an employee and that the policy excludes bodily injury coverage for employees and the MCS-90 endorsement also excludes employees.

What is an MCS-90 endorsement? Federal regulations outline the minimum financial responsibilities that all interstate motor carriers must maintain. In most instances, these regulations are met via an MCS-90 endorsement in the commercial auto policy covering the carrier. The MCS-90 endorsement states that the insurer is responsible for any judgement against the motor carrier, up through $750,000, regardless of whether the policy itself provides coverage for that specific vehicle or driver. It essentially provides minimum coverage for that carrier, as a whole. It also specifically excludes coverage for employees of the carrier.

The issue is simple. Is your client an employee of the motor carrier? Obviously, if she is a W-2 employee of the carrier, the answer to that question is clear. However, the use of independent contractor drivers is prevalent in the trucking industry. If your client is an independent contractor, then she is not an employee and should be covered, right? Unfortunately, this is not necessarily the case.

The 5th Circuit Court of Appeals addresses the question of whether an independent contractor in the sleeper berth was an employee and excluded from coverage under the MCS-90 endorsement and the underlying policy, in *Consumers County Mut. Ins. Co. v. P.W. & Sons Trucking, Inc.*, 307 F.3d 362 (5th Cir. 2002). In that case, the insurer argued that under 49 C.F.R. § 390.5, independent contractors are considered statutory employees and thus excluded under the MCS-90 endorsement. It further argued that the commercial auto policy's definition of employee should incorporate the regulatory definition.

The Court looked at § 390.5, which defines an employee as "any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler. . ." It held that the driver in the sleeper berth was a statutory employee and then held that, because the policy included an MCS-90 endorsement, the policy was intended to comply with federal regulations and therefore was intended to use the definition for employee found in §390.5.

While the Court acknowledges and highlights the language including an independent contractor in the definition of "employee", it fails to address the fact that the definition only

includes independent contractors while they are in the course of operating a commercial motor vehicle. The Court's rationale for expanding the regulatory definition to the policy language outside of the MCS-90 endorsement might also be considered suspect. Unfortunately, many other courts have adopted the 5th Circuit's view, to varying degrees, including the Ohio 10th District Court of Appeals.

The 10th District addresses the issue of whether an MCS-90 endorsement covers an independent contractor passenger in *Basha v. Ghalib*, 10th Dist., Franklin Co., 2008-Ohio-3999, 2008 WL 3199464. Citing *Consumers*, the Court found that §390.5 included independent contractors in the definition for employee and, accordingly, that the MCS-90 endorsement did not cover the passenger. The Court did not, however, expand the §390.5 definition to supplant the definition of employee found in the commercial auto policy. Instead, it found that the policy did not cover the passenger because it had an Occupant Hazard Endorsement that excluded the passenger. Like the 5th Circuit, the 10th District failed to analyze the §390.5 language including independent contractors only while operating a commercial motor vehicle.

The 10th District again addresses the issue of coverage for an independent contractor who was a passenger in a tractor-trailer in *United Fin. Cas. Co. v. Abe Hershberger and Sons Trucking Ltd.*, 10th Dist., Franklin Co., 201-Ohio-561, 2012 WL 457715. Here, the 10th District does finally address the limiting language found in the §390.5 definition of "employee". The Court declined to follow a decision out of the Federal District Court of Connecticut that held that an independent contractor was only treated as an employee under § 390.5 while in the course of driving a commercial motor vehicle. Instead, the Court held that, "the regulatory language referring to an independent contractor 'in the course of operating a commercial motor vehicle' must relate to the second requirement under that section – that the employee directly affects commercial motor vehicle safety." Therefore, the Court held, that operating a commercial motor vehicle can be considered directly affecting commercial motor vehicle safety, but driving a motor vehicle isn't the only way for independent contractors to directly affect commercial motor vehicle safety. Once again, the 10th Circuit did not directly expand the § 390.5 definition of "employee" beyond the MCS-90 endorsement. At the trial court level the parties had stipulated that if the court found that the passenger was a statutory employee under § 390.5, then there was no coverage.

It seems woefully unjust that a motor carrier can avoid all liability for injury to its drivers by hiring independent contractors as drivers. Unfortunately a slew of poorly decided opinions has made this the majority view. In situations involving independent contractor team drivers, counsel should be aware of this issue and examine the state of the law in both the jurisdiction in which the suit was brought and the jurisdiction in which the commercial auto policy was written.