

When Workers' Comp Covers A Contractor's Injury Claims

By Drew Kemp

Law360 (February 20, 2019, 12:15 PM EST) --

The exclusive remedy provision, a cornerstone of workers' compensation law, provides that accidental, work-related injury claims between an employee and an employer must be resolved only under the state workers' compensation system, and not in court. The legislatures in all 50 states now have passed laws which create some form of workers' compensation, and virtually all make it the exclusive remedy for injured employees.



Drew Kemp

Importantly, most states choose to define, by statute, what qualifies as an employer-employee relationship, rather than simply relying on the traditional common law test. In asbestos personal injury cases, a worker that may traditionally be viewed as an independent contractor may find that their lawsuit against a premises owner or general contractor is barred by the exclusive remedy provision.

Recently, in *Matthews v. E.I. DuPont de Nemours and Co.*, the U.S. District Court for the District of South Carolina granted summary judgment in favor of DuPont, and dismissed an asbestos personal injury lawsuit pursuant to South Carolina's workers' compensation exclusive remedy provision.[1] The plaintiff, Jerry Matthews, alleged that he developed lung cancer after being exposed to asbestos at one of DuPont's facilities in South Carolina.[2] Matthews was an insulator.[3] On several occasions during the early 1960s, he mixed bags of asbestos-containing insulation mud and handled, sawed and applied asbestos-containing thermal insulation to pipes at DuPont's plant.[4]

Matthews was not an employee in the usual sense: he was not paid directly by DuPont; he used his own tools; and DuPont didn't even employ insulators on a full-time basis.[5] Rather, DuPont contracted with Matthews' employer, Armstrong Contracting & Supply Corporation, to perform insulation work at a few of DuPont's facilities during some extensive remodeling and new construction projects.[6] DuPont argued that it was entitled to summary judgment, and that Matthews' claims belonged under the exclusive purview of the workers' compensation law.[7]

As the court noted, in South Carolina “an employee of an independent contractor may be deemed the ‘statutory employee’ of the hiring premises owner if the work performed is part of the premises owner’s ‘trade, business, or occupation.’”[8] At the time, DuPont was in the business of, among other things, construction and maintenance of its own facilities. It had a separate corporate division that was responsible for maintaining and upgrading existing plants.

At times, employees within this division worked alongside independent contractors in order to complete these projects. Thus, this type of work was still considered part of the ‘trade, business, or occupation of DuPont, even when delegated to a contractor like Matthews. The court ultimately concluded that Matthews qualified as a ‘statutory employee’ and that, therefore, his exclusive remedy against DuPont was by way of a workers’ compensation claim.

Similarly, in 2017, a Louisiana appellate court came to the same conclusion in another asbestos case. Louisiana law provides that “a principal who has contracted with others to perform work ‘which is part of his trade, business, or occupation’ is a statutory employer.”[9] In *Fletcher v. Anco Insulations*, a maintenance contractor’s asbestos exposure claims against Exxon were barred by the exclusive remedy provision because the plaintiff was deemed to be a statutory employee of Exxon.[10]

There, Exxon had hired the plaintiff’s employer, a contractor, to help Exxon’s direct employees with maintenance activities on existing crude oil processing units.[11] The Louisiana appellate court, in upholding the trial court’s judgment in favor of Exxon, said that Exxon’s direct employees oversaw and were involved in the same activities the plaintiff was contracted to do.[12]

South Carolina and Louisiana’s laws that define an employee to include independent contractors who perform work that is part of the premises owner’s business are not unusual. The primary purpose for such rules is to discourage employers from avoiding their obligations under workers’ compensation (e.g., securing insurance coverage for injuries) by simply hiring independent contractors to do work that direct employees would normally do.[13] If employers are required to cover injuries of so-called ‘statutory employees’ anyway, then there are fewer incentives to avoid hiring a direct employee in the first place. Under either scenario, since the premises owner is liable to pay workers’ compensation benefits, the exclusive remedy provision also applies to bar a civil lawsuit against the

premises owner.

Indeed, several states have similar “statutory employee” rules. In Virginia, a premises “owner becomes liable for workmen's compensation to statutory employees only if by contract he has work performed which work he, the owner, would normally do with his own employees.”[14] In Colorado, the test for whether an employer is a statutory employer is whether the work contracted out is part of the employer’s regular business.[15] In Arizona, the premises owner must “retain supervision or control” over the contractor’s work and the contractor’s “work is a part or process in the trade or business” of the premises owner.[16] In Missouri, a contractor is considered a statutory employee if he contracts for work that is done on the premises and that work is “in the usual course of [the] business” of the statutory employer.[17]

Missouri and Pennsylvania, however, carve out an exception for premises owners. In other words, a premises owner cannot qualify as a statutory employer; the scenario would only apply between a general contractor and a subcontractor.[18] Even so, the Missouri Supreme Court has recognized the situation where the premises owner is also acting as its own general contractor.[19] Under such facts, both the statutory employee rule and the exclusive remedy provision apply.[20]

Other states aren’t specifically concerned with the type of work the alleged statutory employee is doing, but rather make a premises owner liable to provide workers’ compensation coverage to an employee of a contractor, if that contractor does not have proper insurance to cover the injury.[21] Under such circumstances, the exclusive remedy provision may also apply.

Although many courts in several states have addressed the issue of statutory employees, the recent decisions in *Matthews* and *Fletcher* demonstrate courts’ willingness to apply the rule to asbestos personal injury claims. In any case involving an injury at a premises, it is important to identify the nature of the work that the plaintiff was allegedly doing when he or she was injured. The workers’ compensation exclusive remedy provision should not be discounted simply because the plaintiff was not a direct employee; further investigation and analysis is required.

[N. Drew Kemp](#) is an associate at [Tucker Ellis LLP](#).

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] [Matthews v. E. I. DuPont De Nemours and Co.](#), No. 4:16-CV-02934-RBH, 2018 WL 5978111, at *1 (D.S.C. Nov. 13, 2018).

[2] *Id.* at *3.

[3] *Id.* at *2-3.

[4] *Id.*

[5] *Id.*

[6] *Id.* at *1.

[7] *Id.* at *3.

[8] *Id.* at *4.

[9] [Fletcher v. Anco Insulations Inc.](#), 208 So.3d 467, 470 (Ct. App. La., Jan. 11, 2017).

[10] *Id.*

[11] *Id.* at 469.

[12] *Id.* at 471.

[13] [Distefano v. Saint-Gobain Calmar Inc.](#), 272 S.W.3d 207, 212 (Mo. Ct. App. WD, 2008).

[14] [Shell Oil Co. v. Leftwich](#), 187 S.E.2d 162, 165 (Va. 1972).

[15] [Humphrey v. Whole Foods Market Rocky Mountain](#), 250 P.3d 706, 709 (Co. Ct. App. 2010).

[16] [Wagner v. State](#), 242 Ariz. 95 (Ct. Ap. Az. 2017).

[17] Distefano, 272 S.W.3d at 211-12.

[18] RSMo § 287.040.2; [Peck v. Delaware County Bd. Of Prison Inspectors](#), 572 Pa. 249 (Pa. 2002).

[19] [West v. Posten Const. Co.](#), 804 S.W.2d 743 (MO. 1991).

[20] Id.

[21] See [Stringer v. Robinson](#), 155 Idaho 554 (2013); [Maguire v. Dominion Development Corp.](#), 241 Ga.App. 715 (1999).