## ARTICLE & DOCTRINE REVIEW

### WHERE'S THE ORCHESTRA? EMPLOYEE CLASSIFICATION OF PERFORMING ARTISTS

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*Review and commentary on*
Harvey S. Mars, *Performing Artists' Entitlement to Compensation under the New York Workers' Compensation Law*, 89-June NEW YORK STATE BAR JOURNAL 28 (June 2017), available at http://www.harveymarsattorney.com/articles-publications/.

I. Introduction

In a recent article, published in June 2017, Harvey S. Mars, current In-House Counsel to the Associated Musicians of Greater New York, has addressed both historical and recent developments in New York's treatment of performing artists for purposes of workers' compensation coverage.

Mr. Mars describes a period of legislative lobbying and advocacy for injured performers in the last decades of the twentieth century, ultimately culminating in the enactment of major statutory amendments in 1986.

Recounting further the 2011 injury of a high-profile Manhattan opera star, Mars reflects on the inherent tension in a system that seeks to guarantee workers' compensation for the average performer, while simultaneously attempting to create a carve-out for high-earning stars who have the advantage of significant leverage in their contractual negotiations.

Mars presents this dilemma and New York's solution with skepticism, impliedly asking, "can performers have their cake and eat it too?"

II. 1986 Amendments

Mars provides the backdrop for New York performers' workers' compensation struggles by describing the age-old battle between independent contractor and employee status. Indeed, the author indicates that, for many years, New York performing artists were precluded from workers' compensation coverage based on their categorization as independent contractors. Workers, under this regime, were required to sue in tort, and hence engage in protracted legal proceedings at substantial costs.

In 1986, following a protracted effort by advocates, the definitional section of the New York Workers' Compensation Law (WCL), § 2(4), was amended to include, as employees, professional musicians and others engaged in the performing arts and rendering services for entertainment establishments. The memorandum supporting the amendment remarks:

> musicians and performers are often required as a condition of employment, to sign a statement that they are independent contractors. Thus, these individuals are denied the basic rights afforded to other working men and women in New York State. This bill would provide basic coverage to musicians and performers who are presently excluded from many benefits and/or protections under the Labor Law.

Notably, at the same time as the New York WCL amendment, the definitional sections of both the state's Unemployment Insurance Law and State Labor Relations Act were similarly amended to include a statutory presumption of employee status for performing artists.

As to the workers' compensation law, WCL § 201 now provides:

> "Employee" shall also mean, for purposes of this chapter, a Professional musician or a person otherwise engaged in the performing arts who performs services as such for a television or radio station or network, a film production, a theatre, hotel, restaurant, night club or similar establishment unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by this chapter. "Engaged in the performing arts" shall mean performing service in connection with the production of or performance in any artistic endeavor which requires artistic or technical skill or expertise.

This proviso now creates a statutory presumption "that musicians and other performing artists are employees, rather than independent contractors." Rather than performing artists needing to prove they are employees, now "employers must prove that they are independent contractors."

And, as foreshadowed above, workers in this category are now entitled to unemployment insurance and the ability to form a union, afforded by the State Labor Relations Act.

III. The "Right of Control" Test

What forms the critical analysis in any disputes surrounding these 1986 changes? Pursuant to the National Labor Relations Act, a multi-factor "right of control" test is employed to determine whether a worker is an independent contractor or employee. If the one for whom services are being performed *retains* the right to control the manner and means by which he or she achieves the result sought, then the individual will be considered an employee. Mars points out that this test is "usually satisfied because most musicians' performances are controlled by the music director or conductor of the organization for which they are engaged…."

In a leading NLRB case involving the American Federation of Musicians, the Board held that freelance musicians, hired to make dinner theater recordings, were employees, despite the fact that they were utilized for only a few hours, with no real expectation of future employment. The Board held that, while these factors might normally weigh in favor of independent contractor status, they were outweighed by the fact that the employer's musical director "exercised complete control over the musicians, telling them when to appear, what to play, and how the music should sound." The Board concluded that the musicians were "under the

continuous supervision and exercised control of the musical director and subject to his complete discretion and artistic interpretation and taste."

IV. 2011 Metropolitan Opera Incident

Since the 1986 amendments went into effect, Mars reports that performing artists' entitlement to workers' compensation, and other benefits, "remained unquestioned." However, following a high-profile accident in 2011, performing artists' coverage under the WCL has once again been called into question.

On December 17, 2011, during a performance of Gounod's "Faust" at The Metropolitan Opera (Met), veteran mezzo-soprano Wendy White suffered serious injuries when she fell from a platform hoisted eight feet above the stage. Despite escaping the fall without any broken bones, the accident nonetheless caused nerve damage, preventing Ms. White from singing sustained high notes and standing for long periods of time. In light of her inability to perform the required job duties any longer, the Met "terminated her contract and refused to pay her the remaining balance."

Presumably workers' compensation would cover these injuries. Yet, Ms. White commenced a breach of contract suit against the Met. Her motive was plain – while workers' compensation claims are limited to lost wages and medical expenses, a civil lawsuit alleging personal injuries would permit potentially greater recovery for additional forms of damages, such as pain and suffering. Financial recovery under the WCL for a claim such as Ms. White's would inhibit her from receiving this full range of damages she may be entitled to "for a career-ending accident." In any event, the employer predictably raised the exclusive remedy of the WCL. Ms. White, in turn, sought to bolster her lawsuit via advocating a legislative exception to Section 2(4) of the WCL.

V. The Legislative Effort to Evade the Exclusive Remedy

During initial attempts to create a statutory exception, lobbyists secured passage of an amendment that would have permitted musicians and other performers to "opt out" of coverage before any injury. Mars characterizes such alterations as a "throwback to the pre-1986 legal landscape." Such a scheme would have had an adverse impact on those musicians who lacked any understanding of the ramifications inherent in such opt outs and loss of the protections of employee status. Further, if a worker chose to utilize such an exemption and were injured, upon their return to work, the employer could then invoke the employee's own characterization of the employment relationship and exclude the worker from future employee status.

Ultimately, the amendment failed when it was vetoed by Governor Cuomo. The governor stated that the amendment would violate the "'fundamental' bargain of the state workers' compensation system, that workers injured on the job are entitled to recover benefits for lost earnings and medical expenses while the employer is shielded from liability."

Three bills were presented to the legislature with the goal of permitting Ms. White's suit to proceed. Each of these attempts failed.

VI. Litigation of Ms. White's Case

On January 5, 2017, meanwhile, the Appellate Division, First Department, affirmed the Supreme Court of New York County's decision *denying* the Met's motion to have Ms. White's suit dismissed on the ground that it was barred by the WCL. The court found that Ms. White worked as an employee of her own company, Wendy White, Inc., and therefore, she might be exempt from Section 2(4)'s definition of an employee. If exempt, the employer's exclusive remedy would not apply.

The appellate court further determined that the legislative history indicated that "star" performers were intended to be exempt from coverage. Specifically, the court found that the statutory definition of employee sought to protect the "vast majority of performers, who are not 'stars' and that the statutory exception was designed to exclude those performers with the clout to negotiate the terms of their own engagements."

With the motion to dismiss denied, the case could now proceed, with the Met potentially pursuing a discretionary appeal before the N.Y. Court of Appeals.

Mars challenges the appellate court decision and legislative efforts in their totality. He asks how the judiciary can determine which musician should be considered a "star," asserting that, if the only relevant parameter to coverage is a performer's leverage to negotiate an individual services contract, a large number of musicians may be potentially *excluded* from coverage.

VII. Recent Developments

Mars notes that, subsequent to the appellate court decision, on March 15, 2017, a new amendment to the definition section of the WCL was introduced and signed into law by Government Cuomo. That amendment, known as a "picture bill," limited the exception *only* to Ms. White's accident, permitting her civil case to proceed without disturbing the broad coverage the law currently extends. The bill's sponsor noted that the amendment does not intend to alter the beneficial impact of the 1986 amendments, but "to remedy an unfair interpretation of the law for a particular performer."

VIII. Classification of Performers under Pennsylvania Law

Under Pennsylvania law, the leading precedent for determining employee status remains *Hammermill Paper Co. v. Rust Engineering Co.*[1] There, the Supreme Court of Pennsylvania established various factors to be considered in the determination of whether a worker is an employee, including the control of manner the work is to be done; the skill required for performance; whether one employed is engaged in a distinct occupation or business; and which party supplies the tools. (Other subsidiary criteria are also often listed in the case law.)

[1] Hammermill Paper Co. v. Rust Engineering Co., 243 A.2d 389 (Pa. 1968). For a workers' compensation precedent of late which cites *Hammermill*, see Dep't of Labor and Indus. v. WCAB (Lin and Eastern Taste), 155 A.3d 103 (Pa. Commw. 2017).

As every Pennsylvania workers' compensation practitioner knows, "control is king" in the Commonwealth. To this end, the Pennsylvania analysis closely mirrors the NLRB's "right to control" test (discussed above) – seeking to determine which party retained the right to control the work performed.

Given this fact-intensive analysis, no express rule exists in Pennsylvania, as in New York, establishing whether performing artists are employees or independent contractors. Each case must be judged by its particular facts and context.

The author of this note is an experienced vocal and piano artist, having performed more than 1000 thousand shows throughout Western Pennsylvania. From his perspective, individuals and bands, hired to perform one evening of entertainment for a business or social event, would not be considered employees under Pennsylvania law. While the business or event coordinator instructs the performers on arrival time and physical location for setup of instruments and equipment, the entirety of the performance is generally controlled by the musicians. The author typically determines what songs he will play, how he will perform them, and when the band will engage in breaks. Applying *Hammermill Paper Co.*, almost no control by the "employer" is retained over the performance of the music, a specialized skillset is required of the performer, and the performer provides most, if not all, of the required equipment necessary to perform the job.

Based on these factors, it is submitted that most bands and entertainers, falling under similar fact patterns, are deemed independent contractors in Pennsylvania. This starkly contrasts with the New York statute, which indicates that *any* person engaged in the performing arts – performing services for a hotel, restaurant, or night club – are presumptively considered employees and covered by the WCL. Further, New York case law has held that, despite "employment" of only a few hours and no expectation of future employment, musicians are still considered employees if the musical director exercises enough control over the performance. Such individuals would *not* fall within the definition of employee under the Pennsylvania Workers' Compensation Act.

IX. Insurance Coverage for Performers, beyond Workers' Compensation: The CGL

As the author submits that the typical performer is not going to qualify as an employee, what insurance coverage exists for such individual when he or she enters the performance venue and an unfortunate accident, featuring personal injury, occurs?

Often, businesses will insure against liability and loss through the purchase of comprehensive general liability (CGL) policies. These policies typically provide both defense in any suit brought against the insured, and coverage for any monies that are ultimately awarded.

However, a common exclusion to coverage, known as the "Entertainment Industry Exclusion" (EIE) exists in many CGL policies. These provisions often exclude from coverage any bodily injury suffered by an individual, "arising out of" certain activities, such as film, stage plays, radio, and music.[2]

[2] Edwin F. McPherson, *Entertainers Beware – You May Have Less Insurance Coverage Than You Think*, 45 SW. U. L. REV. (2015).

These provisions have impacted both entertainers and businesses; while businesses find themselves exposed to unforeseen liability due to such clauses in their CGL policies, entertainers have also found themselves the victims of oversight in their own policy purchases.

Particularly in locations such as California, recent litigation has developed where entertainers, with their own CGL business policies, were denied coverage after being injured in the course of their performances. Thanks to an imbedded EIE provision in their policy, the insurers construed the injuries occurring during the performance as arising out of the *music* rather than the *business itself.*

Judicial treatment of these provisions has varied, with some courts striking the language as illusory, while others have avoided the question altogether – choosing instead to decide the dispute on entirely different grounds.

Despite recent scrutiny regarding these provisions, insurers continue to regularly utilize them in standard CGL policies. Business owners and entertainers alike are advised to remain mindful of the pitfalls of these exclusions.

X. Postscript: Case of *Russell v. Torch Club*

In considering Mars' critique, one is reminded of a legendary 1953 New Jersey case, where a night club singer, pursuing a workers' compensation claim, was found to be an employee, rather than an independent contractor. This result followed despite the terms of her contract.[3] There, the claimant was "an entertainer in the art of song," performing four nights per week. Claimant was injured when, "following an appearance on stage, her dress caught fire from the open flame of a gas heater and she was severely burned."

As would a New York or Pennsylvania tribunal, the New Jersey court analyzed the degree of control the night club retained over the performer. Noting that "a complete dominance by [employer's] 'master of the revels,'" the piano accompanist, existed over Ms. Russell, the court found that the night club exercised total control over the "direction of [claimant's] performing in very positive ways." This control included selecting the specific songs to be performed, instructing the performer to mingle with the crowds during breaks, and expecting the performer to sit and drink with patrons at the bar.

Based on these facts, the court concluded that the night club exercised such a degree of control so as to create an employer-employee relationship, thereby rendering the performer entitled to workers' compensation benefits.

Notably, under Pennsylvania law, the *Torch Club* performer may well have also been considered an employee. Under typical circumstances, night-club entertainers provide their own equipment, choose which songs they play, and perform the material as they see fit. At the Torch Club, the "master of the revels" dictated many aspects of the work performance; by choosing which songs the performer would sing and instructing her exactly how to interact with the crowd,

[3] Russell v. Torch Club, 97 A.2d 196 (Hudson County Ct. 1953).