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Performing Artists' Entitlement to Compensation Under the N.Y. WCL

By Harvey S. Mars

Workers' compensation statutes exist in this country for two basic reasons. First, they provide a streamlined procedure through which employees who are injured during their employment can receive income replacement if they are unable to work temporarily because of these injuries. Second, by placing financial limitations on the award employees can recover from an employer because of a work-related injury, the law protects and ensures the solvency of employers. Employers are legally required to obtain insurance that will provide the financial means by which workers' compensation awards may be satisfied. Nevertheless, one factor that limits the reach of workers' compensation laws is that only employees are eligible to apply and receive it. For many years, this fact precluded performing artists from successfully applying for workers' compensation as they were characterized as independent contractors. For performing artists to obtain recompense for work related personal injuries, they had to engage in protracted legal proceedings at a substantial cost, both in terms of time and money.

After a herculean effort by advocates for performing artists that extended several years, in 1986, the definitional section of the N.Y. Workers' Compensation Law (WCL), § 2(4), was amended so that professional musicians and other persons engaged in the performing arts rendering services for various entertainment establishments and venues were now statutorily defined as employees. The justification for the amendment cited in the memorandum that supported it was that

> [m]usicians 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.[1]

This legislative reform was the initiative of a diverse array of proponents, including various unions that represented performing artists. For instance, the AFL-CIO wrote in support of this amendment that "[t]he entertain-

ment industry in New York is unique and deserving of interest, support and, where necessary, legislative protection. For too long these workers were without union representation and the resulting benefits because they were classified as essentially independent contractors."[2] Assemblyman Roger J. Robach, then chairman of the Assembly's Committee on Commerce, Industry and Economic Development, noted in a letter he wrote in support of the amendment that the

> vast majority of musicians and performers who are not in the "star" category are under the direction of an employer, whether directly or as a contractor. Under common law these groups are eligible as employees since they meet the test of being under an employer's direction, supervision and control. Currently these employees must now litigate to be awarded their due benefits.[3]

At the same time, the definitional sections of the N.Y. Unemployment Insurance Law and the N.Y. State Labor Relations Act (NYSLRA) were amended to provide that performing artists were statutorily presumed to be employees. Because of the comprehensive amendment, WCL § 201 now states:

> "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.

Unemployment Insurance Law § 511(1)(b)(1-a) was added to the definition section of that statute, which now states that:

> The term employee is defined as:
> (1-a) as a professional musician or a person otherwise engaged in the performing arts, and performing 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 services about the production of or performance in any artistic endeavor which requires artistic or technical skill or expertise.

NYSLRA, the statute that applies when the National Labor Relations Board (NLRB) does not have jurisdiction, such as when an employer does not have significant revenue, has similar language to the other statutes because of the amendment:

> NYSLRA § 701(3)(b):
> (b) The term "employee" shall also include a professional musician or a person otherwise engaged in the performing arts who performs services as such. "Engaged in the performing arts" shall mean performing services about production of or performance in any artistic endeavor which requires artistic or technical skill or expertise.

Without this presumption, musicians cannot avail themselves of the protections of state representational and unfair labor practice proceedings when the NLRB is incapable of exercising jurisdiction.

The import of these sections is that they create a presumption that musicians and other performing artists are employees, rather than independent contractors. This is an important distinction since by operation of these statutes, employees are entitled to unemployment insurance, workers' compensation benefits and the protections and the ability to form a union afforded by the NYSLRA, whereas, independent contractors are not. Benefit entitlement hinges upon the classification of the worker involved in the proceeding. For performing artists such as musicians, these provisions remove a significant obstacle to coverage. As it now stands, performing artists do not have to prove that they are employees. Rather, employers must prove that they are independent contractors.

Under the National Labor Relations Act, a multi-factored "right of control" test is utilized to ascertain whether a worker is an independent contractor or employee.[4] Under this test, an individual is considered an employee if the one for whom services are performed retains the right to control the manner and means by which he or she achieves the result sought. 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 (even though the way they play their instruments is not).[5]

The fact that the right of control test may be satisfied for musicians when many of the facts indicate independent contractor status was made clear by the NLRB in a case involving the American Federation of Musicians (Royal Palm Theatre) musician's union.[6] There, the board held that freelance musicians who were hired to make recordings used at a dinner theater were employees, even though the musicians were not selected by the employer and were utilized for only a few hours with no real expectation of future employment. The board held that these factors, which would normally indicate independent contractor status, 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."[7] Prior to the amendment of New York's statutes, performing artists were often misclassi-

fied as independent contractors, despite precedent under federal law.

Until recently, performing artists' entitlement to workers' compensation benefits and unemployment insurance under New York law remained unquestioned. However, recently performing artists' coverage under the WCL has been called into question. This was the result of a horrific accident that occurred on the stage of the one the world's most celebrated opera houses – The Metropolitan Opera (Met). On December 17, 2011, during a performance of Gounod's "Faust," veteran Metropolitan Opera mezzo-soprano Wendy White fell from a platform eight feet above the stage. Evidently the accident was caused by a faulty hinge connecting the platform to a stairway leading to the stage. While she did not suffer any broken bones from the fall, the fall ended her career as an opera singer. The fall injured her torso and caused nerve damage that prevents her from singing sustained high notes. She also has trouble standing for long periods of time. Because of her inability to sing at a professional level, the Met terminated her contract and refused to pay her the remaining balance.[8] Not surprisingly, Ms. White commenced a breach of contract suit against the Met. However, the primary defense the Met has raised to the suit is that it is barred by operation of the WCL.

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Under most circumstances, because of the 1986 legislative amendment, an injury sustained by a performing artist while performing, such as what happened to Ms. White, is covered by the WCL. However, typically, workers' compensation claims are limited to lost wages and medical expenses. If a personal injury lawsuit were filed instead of a workers' compensation claim, potential recovery is much greater because additional forms of damages, such as compensation for "pain and suffering" and front pay, would be available. The financial limitations on recoverable damages in a plenary suit will be much less. However, if a claim is covered by the WCL, it is barred from being pursued as a personal injury claim. Financial recovery under the WCL on a claim such as Ms. White's inhibits Ms. White from receiving the full range of damages she may be entitled to because of her career-ending accident. Thus, to ensure that her suit may proceed to a determination on the merits, she is seeking legislatively an exception to § 2(4). These efforts have been problematic for performing artists.

In an initial attempt to surmount the potential legislative roadblock to the suit, in 2015, legislative lobbyists secured passage of an amendment to § 2(4) by both the Assembly and Senate. This amendment would have permitted musicians and other performers to opt out of coverage.[9] Viewed in its best light, the amendment was a retrograde throwback to the pre-1986 legal landscape where musicians and other performers once again can be considered non-employees. While this consequence might have been unintended and not immediately obvious, it existed and would have had an adverse impact on those musicians who, not understanding the ramifications and ultimate effect of seeking exemption from coverage under the workers' compensation law, would have by doing so lost the protection of employee status.

It was suggested that the amendment would have no impact on the beneficial purposes of the 1986 amendment. A close examination of the proposed amendment, however, did not bear this out. Once a musician or performer exercised their newly conferred statutory right not to be considered an employee eligible for workers' compensation, their choice would have been immutable and they would no longer be entitled to employee status. Once they returned to work after their injury abated, the precedent would have been set and their employer would have legal justification in excluding them from employee status.

This possibility existed even though collective bargaining agents were given the legal right to veto the performer's request, because a significant portion of performing artists are often compelled to work in non-union contexts to make a living. Moreover, once they have been designated as independent contractors, there is no longer any possibility that these performers can unionize, because independent contractors are excluded from coverage under the National Labor Relations Act as well as NYSLRA.

Nor was this exclusion from employment status warranted or necessary. The fact remains that the WCL exempts corporate officers from coverage under § 54, subdivision 6. The fact also remained that the amendment may not have its intended effect since many courts will still make an independent assessment of whether a particular performing artist is truly an independent contractor under traditional common law analysis, although they operate as a corporate entity.

While the amendment passed both the State Assembly and Senate, on December 22, 2016, it was vetoed by Governor Cuomo.[10] In his veto message Governor Cuomo stated that the bill 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. It would "violate that basic compromise by defining certain individuals as non-employees" and "create confusion by treating an individual as a non-employee for workers' compensation benefits but an employee for the purpose of other laws."[11]

As it stands there have already been three bills presented to the legislature meant to permit Ms. White's suit to proceed. Each attempt, however, failed, partially because the definitional revision to the Workers' Compensation Law potentially adversely impacted performing artists.

While the legislature has not yet accorded Ms. White the ability to proceed with her suit, the Appellate Division, First Department was more willing to do so. Its recent decision in the pending personal injury suit litigation, *White v. Metropolitan Opera Association, Inc.*,[12] reveals that the results of this suit and further legislation that is anticipated to be proposed in tandem with it could have a far-reaching impact upon professional musicians and performing artists alike.

On January 5, 2017, the appellate court 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. As an initial ground for the affirmance, the court determined that since Ms. White worked as an employee of her own company, Wendy White, Inc. (WW, Inc.), she might be exempt from the reach of the § 2(4) statutory definition since she was the employee of another employer. The fact that WW, Inc. did not maintain a separate Workers' Compensation insurance policy was not deemed fatal to this holding because that issue was between WW, Inc. and the Workers' Compensation Board, and not Ms. White.

However, the appellate court went further and indicated a second reason for its denial of the motion to dismiss. During the suit, documentary evidence was presented revealing that the legislature intended to exempt "star" performers from coverage. The court noted that the evidence produced "indicates that the statutory definition of employee was intended 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."[13] The court determined that based upon this legislative history star performers were not intended to be considered employees.[14]

This determination is problematic for performing artists. How can the judiciary determine which musician should be considered a "star" exempt from the WCL? Many star performers may still be considered employees under the common law right of control test. If the only parameter that is relevant to coverage is a performer's leverage to negotiate an individual services contract, a huge number of musicians may be potentially excluded from coverage.

The fact that the motion to dismiss has been denied simply means that the case may proceed and further proceedings may result in a further determination that the WCL bars this suit. Further, the Met may decide to pursue a discretionary appeal before the N.Y. Court of Appeals.

However, subsequent to this decision a new amendment to the definition section of the WCL was introduced that would limit the exception only to Ms. White's accident.[15] Such legislation, known as a "picture bill," would allow Ms. White's suit to proceed but would not otherwise disturb the broad coverage the law extended to performing artists. The enactment of this amendment would modify the Appellate Division's holding and produce an optimal situation by allowing Ms. White to pursue full compensation, without jeopardizing performing artists' ability to seek statutory protection as employees.

On March 15, 2017, Governor Cuomo signed this amendment into law. In the justification section of the bill sponsor's memo, it is noted that "[t]his bill is not intended to impact the beneficial purpose of the 1986 amendments and the right to workers' compensation for other musicians and performing artists, but to remedy an unfair interpretation of the law for a particular performer. Every musician or other performing artist would still be automatically covered by the statute as amended in 1986." Hopefully, this amendment will mitigate the negative impact of the *White* decision. ■

1. *See* NYLS' Governor's Bill Jacket, 1989 Chapter 43, p. 6.

2. *See* NYLS' Governor's Bill Jacket, 1989 Chapter 903, p. 50.

3. *See* NYLS' Governor's Bill Jacket, 1989 Chapter 903, p. 6–7.

4. 29 U.S.C. § 152(2).

5. *See Lancaster Symphony Orchestra v. Nat'l Labor Relations Bd.*, 822 F.3d 563 (D.C. Cir. 2016) (holding that musicians are employees under the "right of control" test).

6. 275 NLRB 677 (1985).

7. *See also In re Faze 4 Orchestra, Ltd.*, 245 A.D. 2d 929, (3d Dep't 1997). In that case, musicians were ruled to be employees of their booking agent, who set their fee and instructed the band where and when to play.

8. *See Singer Files Suit Against Met Opera Over Fall*, NewYork Times, August 2, 2013, https://artsbeat.blogs.nytimes.com/2013/08/02/singer-files-suit-against-met-opera-over-fall/.

9. The pertinent portion of the amendment stated that: "Employee" shall also mean, for the purposes of this chapter *only, and not for the purposes of any other provision or statute dependent upon the definition of employer*, 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 theater, 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, *or exempt from the requirement of coverage because the musician or person is an executive officer of a corporation who is deemed excluded from coverage under paragraphs C and E of subdivision six of section fifty-four of this chapter.* "Engaged in the performing arts" shall mean performing services in connection with the production of or performance in any artistic endeavor which requires artistic or technical skill or expertise (emphasis supplied). *See* Senate Bill 4402, 2015–2016 Regular Sessions.

10. *See* http://laborpress.org/sectors/municipal-labor/9294-cuomo-vetoes-bill-exempting-performers-from-workers-comp.

11. *Id*.

12. 2017 N.Y. App Div. LEXIS 90, 2017 N.Y. Slip Op. 00093 (1st Dep't Jan. 5, 2017).

13. *See* NYLS' Governor's Bill Jacket, 1989 Chapter 903, p. 6-7.

14. The court did take judicial notice of the fact that legislation had been proposed further refining the law's definition of employee to exclude executive officers of corporations, but held that this fact was not dispositive of the issue.

15. The Bill, Senate 3353, only excludes certain musicians or persons who had a work-related accident on December 17, 2011 who are an executive officer of a corporation who contracts for the musician or person's services from the definition of employee for purposes of the Workers' Compensation Law.