

OWNER -OPERATORS: ARE THEY INDEPENDENT CONTRACTORS?

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The use of independent contractors has been a long-standing practice certainly in the truckload portion of the trucking industry.¹ California Vehicle Code §34624 defines an owner-operator as a person who holds a class A or B driver's license or a class C license with a hazardous materials endorsement and who owns, leases or otherwise operates no more than one power unit and not more than three towed vehicles.² An owner-operator is required to obtain a motor carrier permit from the California Department of Motor Vehicles.³ Many owner-operators have registered as motor carriers with the Federal Motor Carrier Safety Administration.

The owner-operator typically enters into a written contractual agreement with the motor carrier and often leases a trailer from the trucking company he hauls for, is required to carry and pay for automobile liability and cargo insurance, is responsible for maintenance and pays for all of his other operating expenses. An owner-operator receives payment from the trucking company often as a split of revenues paid by the shipper, a flat fee or by mileage.

The trucking company treats the owner-operator as an independent contractor. It does not provide employee benefits, pay employment taxes including social security and unemployment insurance. It does not withhold federal or state income taxes. It does not provide workers' compensation insurance. It issues a Form 1099 for the payments made to the owner-operator.

Whether the owner-operator is truly an independent contractor is a dilemma the trucking firm must continually face. And the stakes of being wrong are substantial. Recent court decisions particularly as they relate to so-called "route drivers" characterize them as employees and not independent contractors.⁴ Employers can be responsible for overtime and vacation pay and other employee benefits, social security payments, unemployment insurance, interest and substantial penalties. In fact, misclassification can result in the revocation of the motor carrier's MC-P.⁵

¹ Interstate motor carriers must comply with the leasing regulations of the Federal Motor Carrier Safety Administration. See 49 C.F.R. Part 376 and especially, 49 C.F.R. §376.12.

² "Power Unit" with certain nominal exceptions, consists of a motor vehicle as defined in California Vehicle Code §34500 or a motortruck of two or more axles that is more than 10,000 pounds gross vehicle rating.

³ Motor carriers are required to carry various forms of insurance including workers' compensation under California Vehicle Code §34640.

⁴ See for example, *Estrada v. FedEx Ground*, Los Angeles Superior Court Case No. BC 210130. (After trial in the liability phase, Superior Court Judge Howard Schwab found that Fed Ex had misclassified its drivers as independent contractors and should have classified them as employees.) But compare *Millsap v. Federal Express Corp.* (1977) 227 Cal.App.3d 425 (holding Fed Ex driver involved a auto collision was an independent contractor). An article in the Los Angeles Times Business Section on December 2, 2005 headlined "Delivery Companies Pressured" stated that "California is stepping up its campaign against delivery companies that avoid an array of payroll taxes by classifying their drivers as independent contractors."

⁵ Under California Vehicle Code §34633 carriers with 20 or more vehicles are required to annually report to the DMV the number, classification, and compensation of all employees and owner-operator drivers hired or engaged. The DMV provides this information to the motor carrier's workers' compensation insurer. Under California Vehicle Code §34634 if the report is false or an "owner-operator" is injured and awarded workers' compensation benefits and

Without a doubt, the most significant and contentious facet of using owner-operators is workers' compensation. Although California law requires owner-operators to have workers' compensation insurance for their employees, owner-operators who do not have employees often do not have workers' compensation coverage, generally for financial reasons.⁶ If the owner-operator is injured while transporting a load, the trucking firm is then a target for legal action.⁷ Further, the owner-operator can institute a workers' compensation proceeding to obtain medical treatment, temporary and permanent disability and vocational rehabilitation.⁸

Michael v. Denbeste Transportation, Inc. (2006) ___ Cal.App.4th ___, (2006 DJDAR 3483; 2006 WL 726649) a case decided on March 23, 2006, is another example of the gravity of this issue. Michael was seriously injured at a construction site on the morning of January 18, 2002, when he fell about 10 feet from a loaded trailer to the ground while attempting without any fall protection to install a manual roll tarp over the trailer. Michael sustained a broken spine, which rendered him permanently paralyzed from his chest to his feet.

Michael owned a road tractor and operated a sole proprietorship under the name David Michael Trucking. Michael had many years of experience as a truck driver of end dump trucks and held a hazardous materials certificate. Denbeste and Michael entered into a "Subhaul Agreement" involving the carriage of nonradioactive hazardous waste. Michael provided his own tractor to pull a Denbeste-owned trailer, an end dump trailer. He paid for the fuel, maintenance, and insurance on his tractor. Michael had no employees and he was required to notify Denbeste if he needed to hire any employees. Michael could work for other haulers if Denbeste had no work for him, but the Subhaul Agreement prohibited him from using Denbeste's trailer on other jobs. The Subhaul Agreement required that the trailer be tarped after it was loaded with the waste materials and that Michael wear proper safety equipment, including a protective suit, goggles, and a breathing apparatus.

Denbeste characterized Michael as an independent contractor. Denbeste paid Michael on a per-job basis. Michael did not receive employee benefits.

Denbeste had a written health and safety program which applied to the job. One of the stated objectives of the Denbeste program was "[m]aintaining a system for prompt detection and correction of faulty procedures, unsafe practices and conditions." Management had the responsibility "to see that work is performed in a safe manner and that safety rules, regulation[s] and instructions are complied with." Before his accident, Michael had pulled about 10 to 15

receives a final judgment therefor which is not satisfied within 30 days, the carrier's MC-P is subject to revocation after a hearing.

⁶Most, if not all, lease agreements between the owner-operator and a motor carrier require the owner-operator to obtain and maintain coverage for the owner-operator and his employees. Often, however, these requirements are not carefully monitored and at the time of a work related injury, while the owner-operator may have occupation and accident insurance (often called "occ-acc" and not, by the way, a substitute for workers' compensation coverage), there is no workers' compensation policy in effect.

⁷See California Labor Code §3706. §3708 creates a rebuttable presumption of employment..

⁸The costs are often unaffordable for the small carrier and the Uninsured Employers' Fund is then joined in the case. It will pay the expenses and then require reimbursement from the carrier.

loads from the site, which constituted only a minor percentage of his overall work. Denbeste also employed at the site its own truck drivers who performed the same work as its independent contractor truck drivers. Denbeste's truck boss on the site, Donald Jensen, supervised the Denbeste workers, but it was Aman, an employee of another firm on the job-site, who directed the loading of the materials into the trucks and who directed the truckers to an area where they would tarp their loads. The tarping area varied but did not change very much during the six weeks Jensen was at the site. Jensen would check each hauler at the entrance to the site to make certain that the driver was wearing the protective equipment required by Aman, which included a Tyvek haz-mat suit and a respirator.

On the morning of his fall, Michael was wearing his Tyvek suit and respirator. He climbed onto the loaded trailer to place metal bows across the trailer in preparation for rolling the tarp over the bows. When he was at the rear part of the trailer, he lost his footing and fell off the trailer to the ground. Michael does not know whether he tripped or slipped. When Michael appeared to be taking longer than normal, Jensen advised Kuhn, Aman's senior project manager, that Jensen was going to check on Michael. Jensen put on a Tyvek suit and respirator and went to Michael's truck. Jensen saw Michael lying on his back on the ground to the left rear of the trailer. Michael told Jensen that he could not feel anything in his legs.

In September 2002, Michael filed a complaint for damages against defendants.⁹ After answering the complaint, each defendant brought a motion for summary judgment or in the alternative for summary adjudication of issues. All defendants maintained that they owed no legal duty to Michael. Denbeste also sought summary judgment on the ground that the action was barred by the principle of primary assumption of the risk, by the lack of causation, and by a contractual release from liability set out in paragraphs 11(B) and 15 of the Subhaul Agreement.

Michael's case against all defendants except Denbeste Transportation was dismissed and this has been upheld on appeal under the theory that the contractors owed him no legal obligation to provide a safe work place.¹⁰ But Denbeste's motion was denied and the court remanded the case to the trial court to address the independent contractor issue. In an unpublished portion of the decision the court observed that the following factors favored finding Michael as an employee because Denbeste Transportation controlled the "manner and means" of accomplishing the work:

1. The work Michael performed at the jobsite was part of the regular business of Denbeste which also used employees to perform the same work;
2. Michael did not have any employees and received assistance from Denbeste's employees in tarping the trailer;

⁹There were several contractors who were on this job and were sued.

¹⁰"In a line of cases from *Privette v. Superior Court* to *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 our Supreme Court, in a body of law known as the *Privette* doctrine, has defined the circumstances under which an injured worker who is an employee of an independent contractor may sue the hirer of that contractor. This case presents the first impression issue of whether the *Privette* doctrine applies where the injured plaintiff is not an employee, but an independent contractor, of that contractor. We conclude that the *Privette* doctrine governs because its policies and rationale are applicable here." *Michael v. Denbeste Transportation, Inc.* (2006) ___ Cal.App.4th ___, (2006 DJDAR 3483; 2006 WL 726649).

3. The Subhaul Agreement required that Michael wear protective clothing and Denbeste made sure Michael complied.

Michael was an “owner –operator” as defined by California Vehicle Code §34624. But he was not required to have, and did not have, workers’ compensation insurance. Denbeste is likely to be found to be Michael’s employer and held liable for his injuries. Whether it had workers’ compensation insurance is not clear but it appears as though Denbeste was uninsured.

Motor carriers that do not have workers’ compensation covering all drivers, employees or “owner-operators”, take a big risk of being sued or subjected to workers’ compensation proceedings and the payment of an award. Careful evaluation of the role owner-operators play in the business of the motor carrier and attention to detail in the drafting and monitoring of lease agreements can go a long way toward controlling this risk.