Contractor vs worker - WorkCover claims Victoria

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Whether a person is deemed to be a “worker” or a “contractor” for the purposes of a WorkCover claim can have significant effects on their worker’s compensation entitlements, as people who are self-employed or engaged as a contractor are generally expected to cover themselves for any work-related injuries they may suffer. The distinction between worker and contractor is not always clear cut. It is important that where you have been injured at work, you are not denied your rightful WorkCover benefits and compensation.

Definition of “worker” under WorkCover legislation

For the purposes of a Workcover claim, a “worker” is defined under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (**”the Act”**) as an individual:

- who performs work for an employer; or
- who agrees with an employer to perform work — at the employer’s direction, instruction or request, whether under a contract of employment (whether express, implied, oral or in writing) or otherwise; or
- who is deemed to be a worker under the Act.

Can a contractor be classified as a “worker” for the purposes of a WorkCover claim?

A contractor is a person who is deemed to be working under a contract of service. A contractor can be individuals who operate as a sole trader or through a company, partnership or trust.

A contractor may be deemed a worker under the provisions of the Act if they are classified as a common law worker based on previous decisions and precedents of the Court.

WorkSafe (who administers the WorkCover worker's compensation scheme in Victoria) and its insurers will look to the following tests when deciding on whether a contractor is a 'worker' under the legislation.

Direction and control

Does the employer exercise significant control over the contractor's work methods, schedules, and tasks?

The nature, extent and control over the work you do, including whether or not the manner in which you are available to the employer, has been an important factor in pointing to the presence of an employment relationship of "worker/employer" at the time of your injury.

Standard of set hours

Does the contractor work fixed hours dictated by the employer?

Whether you work based on the hours given to you by the employer or you are able to choose your own hours of work can also help in determining whether you are classified as a worker for the purposes of a WorkCover claim.

Subcontracting

Can the contractor delegate or subcontract any of the work, or are they expected to perform the work themselves?

As a worker (defined under the Act), you cannot subcontract or delegate the work you are required to do or pay someone else to do the work. If you subcontract your work at the time you were injured, it is unlikely you will be deemed a worker by WorkSafe and its insurers.

Payment

Are payments based on hours worked, specific tasks, or a fixed fee?

Whether the renumeration you receive is for the time worked, a price per item, versus a commission or payment for a result achieved, based on a quote you provided. Recent case law also deemed that paying alleged employers paying income tax, annual or sick leave or superannuation are important factors as to classification of a worker.

Equipment and assets

Does the employer provide or reimburse the contractor for necessary equipment and tools?

If the alleged employer supplies all or most of the equipment you need for the job, it is likely that an employee/worker relationship exists.

Independence

Does the contractor operate independently of the employer's business, or are they integrated into the core operations?

The extent of your integration with the alleged employer is also an important factor in the determination of whether you are a worker. If you operate your business independently from the employer, you may be deemed to be a contractor.

If all or most of the above tests apply, you will likely be deemed a worker as per the definition in the Act. However, WorkSafe and its insurers will consider the whole relationship you have with your alleged employer when determining your status as a worker versus a contractor.

Can I still make a WorkCover claim if deemed a contractor?

Assuming you control your own hours and your business operates independently, and you are deemed a contractor, you may still be eligible to make a WorkCover claim as you may also be deemed a worker under the provisions of the Act.

Schedule 1, section 9 of the Act provides that an injured contractor may be deemed a worker if the following apply.

The work you do is directly related work to the employer’s business activities

The work performed by the sole trader, company, trust, or partnership must be directly related to and benefit the employer's business activities. The injured person’s services must contribute to the core functions or operations of the employer's business.

80% of the work performed must be done by you

The injured person must personally perform at least 80% of the overall work contracted by the employer. Limited delegation or subcontracting of work is permitted, but the individual must remain the primary contributor.

Payment by the employer must be for the labour, not equipment and materials

The payments received by the sole trader, company, trust, or partnership from the employer must primarily be for the supply of labour, not for the provision of equipment or materials. The compensation structure should reflect the injured person's role as a worker, not an independent contractor.

The employer must be your predominant source of income

At least 80% of the individual's overall gross income earned from all sources for similar services must come from the alleged single employer. The employer must be the primary source of income for the individual's work of this nature.

In addition to the above, WorkSafe and its insurers will also take into consideration the independence of the business you carry out as a contractor. If WorkSafe determines that in providing services to the principal (for example, the workplace where you were injured), you as a contractor are carrying on an independent trade or business, the above provisions may not apply, and you would not be eligible to make a WorkCover claim.

How can a WorkCover lawyer help?

Determining whether a contractor is a "worker", for the purposes of a Workcover claim, can be complex and involves careful consideration of specific factors and legal principles.

If you're injured while working, and you're unsure if you are a worker or contractor, don't guess. When dealing with uncertain or unique circumstances, it is imperative that you seek the advice of a WorkCover lawyer if you are unsure where you stand as to your worker's compensation rights and entitlements.

Guardian Injury Law are experts in WorkCover claims and will ensure you have access to all possible rights and entitlements. Your first consultation is free, so it costs you nothing to find out where you stand.

Contacting Guardian Injury Law

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