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# When Asserting "Casual Employment" Defense to Workers' Compensation Claim Filed Under NJ Homeowner's Policy, Respondent Bears Burden of Proof. If successful in asserting "casual employment" defense, Judge must dismiss claim for lack of jurisdiction.

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By Dario J. Badalamenti, Esq. of Marshall, Dennehey, Warner, Coleman & Goggin, P.C

Marco Antonio Cruz v. Ivania Perez Alonzo, Docket No. A-0444-11T4, 2012 N.J. Super. Unpub. LEXIS 1025 (App. Div., decided May 9, 2012)

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The petitioner was injured while remodeling the respondent's residential basement. The petitioner was introduced to the respondent through her uncle and, beginning in 2009, did occasional minor work around the respondent's home. Before beginning work on the basement project, it was agreed that the respondent was to provide transportation for the petitioner, who neither owned a car nor had a driver's license, and that the petitioner was to work only on weekends as he had a full-time job at a supermarket.

Although the respondent determined the time the petitioner spent on the basement project on any given day, the petitioner himself chose the days on which he would work. With the exception of the petitioner's own power saw, all other tools and materials for the basement project were provided by the respondent. On April 23, 2010, during his third weekend of work, the petitioner suffered serious injury to several fingers of his left hand while operating his power saw.

The petitioner filed a claim for medical and temporary benefits with the Division of Workers' Compensation claiming he was an "occasional employee" and eligible for workers' compensation coverage under the petitioner's homeowner's policy. The respondent moved for dismissal arguing that the petitioner was a "casual employee" and, thus, excluded from the Workers' Compensation Act pursuant to N.J.S.A. 34:15-36. That section defines "casual employment" as:

If in connection with the employer's business, as employment the occasion of which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring.

The Judge of Compensation granted the respondent's motion and dismissed the claim, finding that the petitioner was a "casual employee" and ineligible for benefits under the Act. The petitioner appealed.

In affirming the Judge of Compensations' ruling, the Appellate Division relied primarily on *Berkeyheiser v. Woolf*, 71 N.J. Super. 171 (App. Div. 1961) in which the court enumerated certain criteria in making its determination that the petitioner was not an "employee" as defined by the Act, but was, rather, a "casual employee." As the court stated:

[Petitioner] had a regular and permanent full-time job elsewhere at a substantial salary; had no expectation of regular and steady employment by the respondent; his work was not part of the respondent's ordinary business; the odd jobs he did for respondent occurred at irregular and isolated occasions and only when the need arose; and he did not perform the repairs on a regular schedule, but he himself chose the times when he would appear to make the repairs.

The Appellate Division found that utilizing the criteria set forth in *Berkeyheiser* required a finding that the petitioner in the instant case was himself a "casual employee" and that he failed to meet the correspondingly heightened burden of proving that his work was "regular, periodic or recurring." Accordingly, he was not entitled to benefits under the Act.

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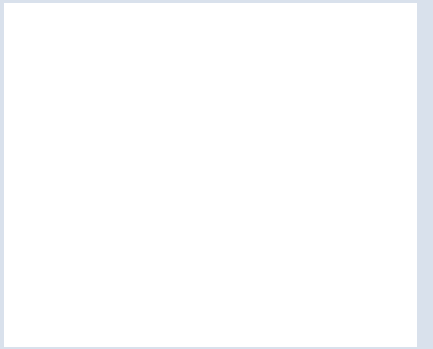
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