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Pennsylvania Workers' Compensation Bulletin

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"GIG WORKERS" and the PENNSYLVANIA WORKERS' COMPENSATION ACT

By Margaret M. Hock, Esquire

A growing number of Americans no longer hold steady jobs with a single employer. Instead, they are now working in what is known as a "gig" format, although they are not musicians or artists. As a gig worker, an individual is hired to work on a particular project or for a defined period of time. Examples of such workers are employed by Airbnb, Uber, Lyft, and similar companies which use the internet to offer ride sharing, food delivery, lodging rentals, house cleaning and many other services to both individuals and corporate entities.

This flexible employment, also referred to as contingent or temporary labor, made up approximately 11 percent of the labor force in 2005. According to Forbes, gig workers could make up more than 50 percent of the work force by 2020. Many companies view their gig workers as independent contractors because it allows for lower costs and avoidance of some traditional employee benefits, such as pension payments, and government mandated benefits, such as health insurance, the employer's half of social security taxes, and workers' compensation and unemployment compensation benefits.

But, it is unlikely that a Pennsylvania employer could successfully argue that it should not be held liable for workers' compensation benefits for an injured gig worker merely because the worker has been labeled as an independent contractor by contract or employer policy.

Instead, the traditional rules of "independent contractor" vs. "employee" will apply. Pennsylvania courts have been addressing this issue for years, most recently in the case of Agatha Edwards v. Workers' Compensation Appeal Board (Epicure Home Care, Inc. and State Workers' Insurance Fund), No. 1106 C.D. 2015, Filed March 10, 2016. In that case, the Commonwealth Court reiterated the applicable standard, which bears repeating here:

> *"While no hard and fast rule exists to determine whether a particular relationship is that of employer-employee or owner-independent contractor, certain guidelines have been established and certain factors are required to be taken into consideration…"* Hammermill Paper Co. v. Rust Eng'g Co., *243 A.2d 389, 392 (Pa. 1968). Courts consider many factors including:*

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COMMONWEALTH COURT CASE REVIEWS

Jamie Gahring v. Workers' Compensation Appeal Board (R and R Builders and Stoudt's Brewing Company), No. 534 C.D. 2015, Filed November 23, 2015.

(Notice—Where claimant notifies employer that his back pain is related to his increased work hours, claimant has given employer sufficient notice of a repetitive trauma injury under the Act.)

Claimant suffered a work-related back injury while working for Employer I in 1997. In 2002, he entered into a Compromise and Release Agreement with Employer I, resolving his claim for wage loss benefits. Employer I remained responsible for claimant's medical expenses relative to his disc herniation at L3-4 and L4-5, as well as his chronic back pain.

In 2010, claimant began working for Employer II. In 2011, his back pain increased, resulting in surgery on November 17, 2012. On January 24, 2013, claimant was released by his physician to modified duty work; however, Employer II could not accommodate the restrictions. Claimant's employment was thus terminated.

Claimant filed claim petitions against both employers. Employer I filed a petition for joinder of Employer II. Claimant also filed a petition for penalties against Employer I. All of the petitions were consolidated before the Workers' Compensation Judge.

The WCJ found that claimant had suffered a work injury in the form of sacroilitis, post laminectomy fusion syndrome and pain over iliac crest sites resulting in the November 2012 surgery. The WCJ further found that these injuries occurred while claimant was employed by Employer II. However, because claimant did not give notice of the aggravation of his pre-existing back condition within 120 days of the last day of his employment with Employer II, his claim was time barred by §311 of the Act.

The petitions filed against Employer I were dismissed.

Claimant appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision. In so doing, the WCAB acknowledged that the worsening of claimant's condition occurred slowly rather than as a result of a sudden, traumatic event. Also, the WCAB acknowledged that claimant had reported to Employer II that the worsening of his condition was related to an increase in his work hours. Nevertheless, the WCAB concluded that claimant's statements were not specific enough to put Employer II on notice that claimant's work was causing his more recent back complaints.

Claimant sought further review by the Commonwealth Court, again arguing that his statements to his supervisor that his increased hours of work were causing his worsening back pain constituted sufficient notice of a work injury. Claimant contended that where, as here, the work injury resulted from a cumulative trauma, as opposed to a single accident, his statements were sufficient to put Employer II on notice that he may have a work-related injury.

The Court noted that §311 of the Act requires a claimant to inform his employer of a work injury within 120 days of its occurrence. When cumulative trauma/aggravation injuries are at issue, the last day of employment is the critical date of injury for purposes of determining timely notice. Moreover, the claimant must have knowledge that his injury is work-related. Accordingly, §311 states that "the time for giving notice shall not begin to run until the employe knows" that his injury is work-related.

In the case of a cumulative trauma, the Supreme Court held in the case of Gentex Corporation v. WCAB (Morack), 23 A.3d 528 (Pa. 2011) that a claimant need not state with certainty that his injury is work-related, as long as employer is informed of the possibility it was work-related. The adequacy of notice is determined from an examination of the totality of the circumstances. For example, in the recent case of Morris v. WCAB (Ball Corp. and Sedgwick CMS, Inc.) 1172 C.D. 2014, filed January 16, 2015, the Court held that the several conversations clamant had with employer, taken together, put employer on notice of a potential work injury.

Here, claimant not only reported his increasing back pain to his supervisor, but correlated this additional pain to the additional hours he was required to work. Although Employer II believed, as did claimant, that his problems were a recurrence of his 1997 work injury, the mistaken belief is of no moment. Claimant's statements to Employer II about his back pain were sufficient to inform Employer II of "the possibility that it was work-related."

The decision of the WCAB was reversed and remanded for a calculation of the benefits owed to claimant.

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Melissa Walter v. Workers' Compensation Appeal Board (Evangelical Community Hospital), No. 139 C.D. 2015, Filed November 23, 2015.

(Injury Description—Section 413 (a) of the Act allows a WCJ to amend an NCP that is incorrect in some material aspect in the absence of a review petition provided the evidence supports the amendment.)

Claimant, an Emergency Medical Technician, injured her left shoulder while lifting a patient on May 20, 2007. Employer issued a Notice of Compensation Payable describing the work injury as a left shoulder "strain" and paying total disability benefits.

In December of 2008, employer sought to terminate benefits. Claimant then filed two review petitions seeking to amend the description of injury. On February 24, 2010, the

Workers' Compensation Judge denied the termination petition and granted the review petitions, amending the NCP to include: Left impingement syndrome, tendonosis, distal supraspinatus left, sensitization left shoulder, left AC joint synovitis, left infraspinatus muscle atrophy and left shoulder scapular dyskinesia.

Thereafter, in April of 2011, employer filed a second termination petition. The WCJ credited claimant's testimony that she was not fully recovered but rejected her description of her symptoms, finding that she was magnifying them. The WCJ rejected the IME physician's opinion that claimant was fully recovered from all work-related diagnoses, but credited his opinion, corroborated by claimant's treating physician that she had fully recovered from three diagnoses, i.e., tendonosis, AC joint synovitis and infraspinatus muscle atrophy. The WCJ credited claimant's treating physician's testimony that claimant's suprascapular neuropathy was related to the work injury. Thus, the WCJ granted the termination for tendonosis, AC joint synovitis and infraspinatus muscle atrophy, but denied the termination for the remaining diagnosis and expanded the work injury to include left suprascapular neuropathy, from which claimant was not recovered.

Employer appealed to the Workers' Compensation Appeal Board, arguing that the WCJ erred in expanding the description of injury in the absence of a review petition. The WCAB agreed noting that, although a WCJ can expand the work injury in the absence of a review petition, it was inappropriate to do so here because employer did not have notice that the injury description was at issue.

Claimant sought review by the Commonwealth Court. The Court noted that, in Cinram Manufacturing , Inc. v. WCAB (Hill), 975 A.2d 577 (Pa. 2009), the Supreme Court held that, under §413(a) of the Act, a WCJ can order a "corrective amendment" to an accepted work injury in the absence of a review petition if the evidence supports it.

Here, the WCAB interpreted the Supreme Court's decision in Cinram as requiring a claimant to give an employer "overt notice" of the relief sought, i.e., a corrective amendment, during the proceedings. The Commonwealth Court agreed that an employer must have the opportunity to contest a corrective amendment; however, employer was well aware of the claimant's suprascapular nerve injury. In fact, claimant had undergone a suprascapular nerve decompression in July 2010 and employer filed a utilization review questioning the need for that surgery. Further, the IME physician noted in his report and during his testimony the claimant's diagnosis of a chronic suprascapular neuropathy. In short, employer had adequate notice that claimant considered her suprascapular neuropathy part of her work injury. The WCAB erred in concluding that the WCJ lacked authorization to expand the description of the work injury and to correct a material defect in the NCP.

The order of the WCAB was, thus, reversed.

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Robert Dietz (deceased) by Judith Dietz v. Workers' Compensation Appeal Board (Lower Bucks County Joint Municipal Authority), No. 2051 C.D. 2014, Filed August 14, 2015, Reported December 3, 2015.

(Fatal Claim—Where overwhelming circumstantial evidence shows that exertion from decedent's regular work activities over a 14-hour workday caused his heart attack, precise details of the decedent's final workday are not required.)

Decedent was employed as a field maintenance worker for 20 years. His job involved heavy labor. On November 7, 2007, decedent left his home at 6 AM as usual, and began work at 7 AM. At 9:35 PM, he called his wife to tell her that he and the other crew members were still working but that the job would likely soon be finished. He told her that he had been doing roadwork and jack hammering for hours, and that he was tired. At 10:45 PM, one of decedent's co-workers came to the house and took the decedent's wife to the hospital, where she learned that her husband had died of a heart attack after collapsing on the job.

A Fatal Claim Petition was filed by decedent's widow. Employer stipulated on the record that the decedent's heart attack occurred in the course of his employment, but specified that it was not stipulating that the heart attack was caused by his employment.

The widow then presented testimony from Dr. Wolk, a specialist in emergency medicine and thoracic surgery, which includes cardiac surgery. Dr. Wolk reviewed the relevant medical records and opined that decedent's death resulted from a fatal cardiac dysrhythmia induced by a sudden heart attack. A sudden heart attack occurs when there is a blood clot in an artery of the heart. Conditions such as cold weather, stress and physical labor all cause a release of adrenaline that causes the blood to thicken. Thus, coupled with a small tear in the lining of the artery caused by physical labor, leads to sudden clotting and a heart attack. Dr. Wolk testified that decedent's long hours of strenuous physical labor caused his fatal heart attack.

In opposition, employer presented testimony from Dr. Swartz, who is board certified in internal medicine with a focus on cardiology. After reviewing the records, Dr. Swartz noted that, as early as 2000, decedent had peripheral artery disease in his legs, which is a hardening of the arteries that restricts blood flow. Decedent had many heart attack risk factors, including a family history of coronary artery disease, decedent's peripheral artery disease, elevated cholesterol and blood fats, a long history of heavy smoking and weight problems. Dr. Swartz opined that decedent's death was not caused by his job duties; but rather, decedent

was bound to have a heart attack at some point in time, regardless of his activities.

The Workers' Compensation Judge credited Dr. Swartz over Dr. Wolk and found that decedent's heart attack was not causally related to his job. The widow appealed, and the Workers' Compensation Appeal Board remanded the case "for reconsideration of the credibility determinations." On remand, the WCJ then granted the claim. Employer then appealed to the WCAB, which reversed stating that Dr. Wolk's testimony could not support a finding that the long workday caused the heart attack because Dr. Wolk actually stated that cold weather, stress, physical labor and the long workday all combined to induce the heart attack. Moreover, Dr. Wolk's opinion of causation was not supported because he did not know the decedent's exact duties on the day of the heart attack and no testimony had been presented from his co-workers.

The widow then sought review by the Commonwealth Court, arguing that she did meet her burden of proving causation because her evidence, which the WCJ credited, showed that decedent's 14-hour workday, doing physical labor, induced his fatal heart attack.

The Court agreed, noting that an expert witness is permitted to base an opinion upon facts of which he has no personal knowledge, as long as those facts are supported by the record. Where a decedent was performing his usual job assignment at the time of a fatal heart attack, and the connection between his job and the heart attack is supported by competent medical testimony, the claim must be granted. Where, as here, exertion leads to a fatal heart attack, there is no need to pinpoint the exact work duty which caused the exertion.

The WCAB erred in requiring the widow to present evidence from decedent's co-workers on exactly what happened when decedent collapsed. The order of the WCAB was reversed.

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Karen Davis v. Workers' Compensation Appeal Board (PA Social Services Union and Netherlands Insurance Company), No. 216 C.D. 2015, Filed December 30, 2015.

(Subrogation—Employer is entitled to subrogation against claimant's recovery of uninsured motorist benefits from a policy purchased by a non-negligent third party.)

Claimant, a passenger in a vehicle owned and operated by her co-employee, was injured when an unknown motorist hit the co-employee's vehicle. The claimant was acting in the course and scope of employment at the time of the accident, such that employer paid claimant $56,213.00 in wage loss benefits and $33,572.22 in medical benefits.

Claimant then filed an uninsured motorist claim against her co-workers' motor vehicle insurance carrier, Allstate. Employer asserted a lien in the amount of $89,785.22. Claimant settled her claim with Allstate for $25,000.00. She incurred $8,333.33 in attorney's fees and $196.59 in costs.

Employer filed a petition seeking to enforce its subrogation lien against the settlement proceeds. The Workers' Compensation Judge concluded that employer was entitled to subrogate against claimant's proceeds from Allstate. The WCJ noted that the co-worker purchased the motor vehicle insurance that provided the benefits in dispute. Because the policy was purchased by someone other than claimant, employer was entitled to subrogation in accordance with §319 of the Act. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

In her appeal to the Commonwealth Court, claimant argued that employer should not be entitled to subrogation against her recovery from a personal automobile policy for which employer did not pay.

The Court noted that §319 of the Act provides:

> Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer…

Claimant argued that §319 of the Act clearly limits an employer's right of subrogation to those instances where the claimant recovers from a third-party tortfeaser, and does not apply where, as here, the claimant received uninsured benefits pursuant to an accident insurance policy held by an insured who was not responsible for the claimant's injuries.

The Court was not pursuaded. Relying upon its prior decision in Hannigan v. WCAB (O'Brien Ultra Service Station), 860 A.2d 632 (Pa.Cmwlth. 2004), the Court held:

> …[W]here a claimant has purchased his own insurance which pays for his injuries because of the premiums he has paid, he is entitled to the double recovery ordinarily barred by §319 of the Act. The same cannot be said, however, of a claimant who recovers under a policy of insurance purchased by some third-party, such as a co-worker…

Because claimant's co-employee paid for the insured motorist insurance policy, employer was entitled to subrogate against claimant's settlement proceeds.

The decision of the WCAB was affirmed.

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Mary Ann Protz v. Workers' Compensation Appeal Board (Derry Area School District), No. 402 C.D. 2015, Filed January 6, 2016.

(Subrogation—Medical Malpractice Action—Section 508(c) of the MCARE Act disallows subrogation with respect to benefits paid up to the time of trial, but does not preclude an employer's or carrier's right to subrogation with regard to future benefits.)

Claimant suffered a work-related injury to her knee in 2007. Subsequently, the work injury necessitated a total knee replacement. The surgery was negligently performed, resulting in an inadvertently transected popliteal artery. As a result, claimant filed medical malpractice actions against the hospital where the operation was performed and the operating doctor.

In December 2012, employer filed a petition to review compensation benefits indicating that claimant received a third party recovery in the medical malpractice action and seeking subrogation against that recovery under §319 of the Workers' Compensation Act. Claimant denied that employer was entitled to any recovery given the Medicare Care Availability and Reduction of Error (MCARE) Act.

The Workers' Compensation Judge issued a decision awarding employer subrogation benefits from the time of the settlement of the malpractice action forward because employer established that claimant's third party settlement was for the malpractice injury sustained during surgery to treat the work injury and the complications that sprang from that injury, for which employer was paying claimant medical and indemnity benefits. Based upon §508 of the MCARE Act, the WCJ determined that employer was precluded from obtaining subrogation of the medical malpractice proceeds with regard to payments for *past* medical expenses and *past* lost earnings paid before the time of trial in which claimant sought benefits for the malpractice. At the same time, the WCJ held that §508 of the MCARE Act did not preclude employer from seeking subrogation with respect to *future* payments.

Claimant appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision. The WCAB explained that, under §319 of the Workers' Compensation Act, the right of subrogation is automatic and absolute. Because the plain language of §508 of the MCARE Act expressly eliminated subrogation rights with respect to past medical bills and past lost earnings, but was silent on the issue of future payments of expenses and lost earnings, the WCAB affirmed the WCJ's order.

Claimant filed an appeal with the Commonwealth Court, raising the same argument. The Court agreed with the WCAB that §508 of the MCARE Act precludes subrogation of plaintiffs' medical malpractice proceeds only to the extent those proceeds represent recovery of past medical expenses or past lost earnings incurred to the time of trial. Section 508 does not address future medical expenses or future wages. Thus, because future expenses and wage loss are not covered, the prohibition against subrogation found in §508 does not apply.

Accordingly, the order of the WCAB awarding employer subrogation of claimant's third party medical malpractice recovery with respect to the award of future medical expenses and wage loss was upheld.

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Penske Logistics and Gallagher Bassett Services, Inc. v. Workers' Compensation Appeal Board (Troxel), No. 713 C.D. 2014, Filed June 17, 2015, Reported February 23, 2016.

(Notice—Injured employee cannot meet his burden under the Act of proving that he gave timely notice to employer of his work injury simply by telling a co-employee of the injury.)

Claimant worked at employer's warehouse as a "yard jockey," which required him to drive trucks around the facility, loading and unloading. On February 3, 2011, claimant fell on ice, hitting his back, shoulder and arm. He went inside the building and told Brian Yoder, a co-worker who worked in the shipping department, that he had fallen. Yoder gave claimant an injury report form and told him to give it to his supervisor.

Claimant's supervisor is his daughter-in-law. Claimant maintained that, because of this family relationship, he did not report injuries to her, but to her supervisor. Nevertheless, the record showed that claimant had reported several injuries over the course of his employment with employer, in writing, to his daughter-in-law or to another supervisor.

In August 2011, claimant informed a manager that he needed treatment for his February 2011 injury. The manager replied that there was nothing in the claimant's file about the incident. Claimant then located a copy of the February 2011 injury report, which was completed on both sides by claimant, at his home. The report was then given to the manager. Claimant was informed that it was too late to report a February 2011 incident. A Claim Petition was then filed.

Employer presented testimony from Yoder before the Workers' Compensation Judge. He had no recollection of claimant telling him that he fell on February 3, 2011 and that, if claimant had reported a fall, he would have told him to fill out an accident report and give it to his daughter-in-law.

Employer also presented testimony from claimant's daughter-in-law. She confirmed that she does not discipline claimant due to the family relationship, but he does report injuries to her and has done so in the past. She testified that the first time she heard about the alleged February 2011 work injury was on December 1, 2011, when her boss handed her claimant's copy of his injury report. Claimant had complained of general aches and pains involving his neck and right arm,

but he never told her the pains were related to his work.

The Workers' Compensation Judge found claimant to be credible and discredited employer's fact witnesses. The WCJ found it incredible that claimant's daughter-in-law, who saw claimant regularly as a family member and at work, never asked claimant about the cause of his neck and arm complaints. Thus, the WCJ found that claimant provided timely notice of the injury to the employer when he reported it to Yoder on February 3, 2011.

Employer appealed to the Workers' Compensation Appeal Board, which affirmed. On appeal before the Commonwealth Court, employer argued that the WCJ's factual findings could not support the legal conclusion that claimant gave timely and proper notice of the injury to employer. Employer contended that simply telling Yoder that he fell, even if true, did not satisfy the Act's notice requirements.

The Court noted that §311 of the Act requires a claimant to inform his employer of a work injury within 120 days of its occurrence. Failure to do so will render the claimant ineligible for compensation. Section 312 of the Act sets forth what information must be included in the notice, i.e., a description of the injury, in ordinary language, sustained in the course of employment on or about a specified time, at or near a specified place. Section 313 states that the notice "*may be given to the immediate or other superior of the employe, to the employer, or any agent of the employer regularly employed at the place of employment of the injured employe*." The Court noted that "any agent of the employer" does not mean that information about an injury may be given to any other employee. Rather, "agent of the employer" means "a person whose position justifies the inference that authority has been delegated to him by the employer, as his representative, to receive a report or notice of accidental injury."

Here, because Yoder was not a supervisor or agent of the employer for purposes of receiving notice of claimant's work injury, and because claimant did not describe the injury to Yoder, notice to Yoder was insufficient. Because claimant failed to provide employer with timely, proper notice of a work injury, the Claim Petition must be denied.

The Order of the WCAB was reversed.

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Peter Schwartzberg, D.C. and Philadelphia Pain Management v. Workers' Compensation Appeal Board (Bemis Company, Inc.), No. 1914 C.D. 2015, Filed March 30, 2016.

(Compromise and Release—Where employer denies liability for alleged work injury when settling claim, employer has no obligation to pay claimant's medical bills.)

Claimant *allegedly* suffered a work injury on November 13, 2009. Employer filed a timely notice of workers' compensation denial. On December 16, 2009, claimant began treating with a chiropractor, Peter Schwartzberg, D.C. On July 1, 2010, claimant filed a claim petition. Employer filed a timely denial.

At a hearing before the Workers' Compensation Judge, claimant amended his claim petition to seek approval of a Compromise and Release Agreement reached between the parties. The C&R Agreement described the injury as an "injury to the neck, thoracic spine and lumbar spine." The C&R Agreement further stated that it was a resolution of wage loss and medical benefits. Finally, the C&R Agreement stated that it was not considered to be an admission of liability by the employer.

The WCJ granted the petition seeking approval of the C&R Agreement and that decision was not appealed.

On February 6, 2013, Chiropractor Schwartzberg filed a penalty petition alleging that employer violated the Act by resolving the claim through a C&R Agreement with claimant without giving him notice and an opportunity to intervene. Schwartzberg further alleged that employer violated the Act when it failed to pay claimant's medical bills given the C&R Agreement.

The WCJ found that employer did not agree to pay medical bills as a result of the alleged injury. Paragraph 5 of the C&R Agreement indicated that no medical bills were paid and there was nothing in the Agreement itself addressing payment of medical bills. The WCJ found that a C&R Agreement that is silent on the payment of medical bills does not obligate the employer to pay medical bills.

Schwartzberg appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision.

On appeal to the Commonwealth Court, Schwartzberg again argued that employer's failure to pay claimant's medical bills in accordance with the C&R Agreement is a violation of the Act. The Court did not agree.

Section 449(b) of the Act provides that an employer or insurer may submit a proposed C&R Agreement stipulated to by both parties to the WCJ for approval. The agreement must be explicit with regard to the payment, if any, of reasonable, necessary and related expenses. Here, employer and claimant entered into a C&R Agreement that was approved by the WCJ. The C&R Agreement stated that it was not an admission of liability by the employer. Additionally, the C&R Agreement did not require employer to pay any past or future medical expenses. Thus, contrary to Schatzberg's assertion, nothing in the C&R Agreement obligated employer to pay claimant's medical expenses.

Employer denied that claimant suffered a work injury and never admitted liability. Further, there was no finding or adjudication that claimant's injury was work-related. Thus, employer was not obligated at any time to pay claimant's medical bills.

(Continued from page 1)

(1)control of manner the work is done; (2) responsibility for result only; (3) terms of agreement between the parties; (4) nature of the work/occupation; (5) skill required for performance; (6) whether one is engaged in a distinct occupation or business; (7) which party supplies the tools/equipment; (8) whether payment is by time or by the job; (9) whether the work is part of the regular business of the employer; and, (10) the right to terminate employment. Am. Rd. Lines v. Workers' Compensation Appeal Board (Royal), 39 A.3d 603, 611 (Pa. Cmwlth. 2012); accord Hammermill.

Although no one factor is dispositive, control over the work to be completed and the manner in which it is to be performed are the primary factors in determining employee status. Universal Am-Can, Ltd. v. Workers' Compensation Appeal Board (Minteer), 762 A.2d 328 (Pa. 2000); Am. Rd. Lines. Control exists where the alleged employer: possesses the right to select the employee; the right and power to discharge the employee; the power to direct the manner of performance; and, the power to control the employee." Am. Rd. Lines, k39 A.3d at 611 (citing 3D Trucking v. Workers' Compensation Appeal Board (Fine & Anthony Holdings Int'l), 921 A.2d 1281 (Pa.Cmwlth. 2007)).

Moreover, payment of wages and payroll deductions are significant factors, as is provision of workers' compensation coverage. Id.; Martin Trucking Co. v. Workmen's Comp. Appeal Board (Andrushenko & Clark Searfoss), 373 A.2d 1168 (Pa.Cmwlth. 1977). However, payment is not determinative. Am. Rd. Lines; see Martin. In addition, a tax filing denoting self-employment, while a relevant factor, is not dispositive on the issue. See Guthrie v. Workers' Compensation Appeal Board (The Travelers' Club, Inc.), 854 A.2d 653 (Pa.Cmwlth. 2004). Similarly, the existence of an employment or independent contractor agreement is another factor to consider, but it is not, by itself, dispositive. Hammermill.

In all probability, these are the same factors that the Workers' Compensation Judges and appellate courts will review when determining if an injured gig worker is an employee or an independent contractor. The label placed on the worker, by contract or otherwise, will not be determinative. The existence of an employer-employee relationship is a question of law based on the facts presented in each case. Although it is the claimant's burden to establish the existence of an employer-employee relationship, the Supreme Court has stated that 'neither the compensation authorities nor the courts should be solicitous to find contractorship rather than employment, and that inferences favoring the claim need make only slightly stronger appeal to reason than those opposed.' Universal Am-Can, 762 A.2d at 330 (quoting Diehl v. Keystone Alloys Co., 156 A.2d 818, 820 (Pa. 1959). The bottom line is that simply calling workers "gig workers" or "contingent" or "temporary labor" will not relieve the true employer of liability for work-related injuries under the Pennsylvania Workers' Compensation Act.

Bureau Alert: Revised LIBC-601 (Utilization Review Request Form)

For clarification of treatment dates to be reviewed, the LIBC-601 (Utilization Review Request) has been revised. The start and end dates have been separated to better identify the dates of treatment to be reviewed. If the end date is indeterminate, please enter "ongoing." If requesting a prospective review, simply state "prospective." If one date of service is requested, enter that date for both the start and end date.

Instructions for completing a Utilization Request can be found on the DLI website in the forms spreadsheet. If you have questions or concerns, please contact the Medical Treatment Review Section at 717-772-1914.

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ATTENTION READERS: The editors of the Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin invite you to submit questions you may have dealing with workers' compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified workers' compensation attorney.

Send questions to: Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219, hwr@trc-law.com.

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