

Can the Construction Workplace Misclassification Act be Applied to Injuries Occurring Before its Effective Date and Can the Principles for Determining Independent Contractor Set Forth Therein be Used as Guidelines When it Does Not Apply?

Both questions have now been answered in the negative by The Commonwealth Court of Pennsylvania in the recent decision of *D & R Construction v. WCAB (Suarez, Travelers Insurance Company, Uninsured Employers Guaranty Fund and T & L Development)*, Nos. 1558 C.D. 2016 and 1578 C.D. 2016; filed August 1, 2017. The primary issue in the Claim Petition litigation was whether the injured worker was an employee of D & R construction (D & R) or an independent contractor. The Workers' Compensation Judge (WCJ) dismissed the claim on the basis that the injured worker was an independent contractor, not an employee, and therefore not covered by the Workers' Compensation Act.

The Workers' Compensation Appeal Board (WCAB) concluded that the injured worker was an employee and not an independent contractor at the time of injury. The WCAB utilized the elements of the Construction Workplace Misclassification Act (CWMA) as being instructive in evaluating whether a person is an independent contractor. The Commonwealth Court on appeal considered two issues: (1) whether the CWMA applies retroactively to injuries occurring before its effective date and (2) whether the CWMA's elements for establishing independent contractor status could be used as guidance for the application of the common law analysis to determine if an independent contractor status exists.

The Court noted that the CWMA was signed into law on October 13, 2010, with an effective date in 120 days, February 10, 2011. The date of injury in this case was on August 28, 2010, long before the CWMA became effective. The Court determined that the CWMA could not be applied retroactively to its effective date because it concerned "substantive" rights and the Legislature did not expressly provide for retroactive application in the statute.

The Court then considered the issue of whether the elements of the CWMA could be used as general guidance in determining whether an employee is an independent contractor even if the CWMA did not strictly apply to the case. In essence, the CWMA sets forth specific elements that are necessary to establish independent contractor status and if any one of these elements is not proven there can be no independent contractor. The traditional common law approach to determining independent contractor status weighed a number of factors. These included whether the employer supplied the tools; whether the employer withheld taxes; the nature of the work; the skill needed to do the job; the terms of the agreement entered into and others. None of these factors were solely determinative of the existence of an independent contractor relationship. However, the primary factor is control over the work to be completed and the manner in which it is to be performed.

While the WCAB reasoned that the elements of the CWMA helped to clarify the more traditional common law approach for deciding the independent contractor status, the Court disagreed. It reasoned that the elements of the CWMA differed significantly from the common law factors. For example: The CWMA requires that the independent contractor carry liability insurance of \$50,000, which was never a factor under the traditional approach. The CWMA also provides that the withholding of income taxes by the employer is not a consideration, while that is a factor considered under the common law test. The CWMA requires a written contract with the employer while the common law test does not. The absence of even one element of the CWMA test would negate an independent contractor relationship, while the common law approach required a weighing of several relevant factors. The Court was also concerned that replacing the common

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law test with the CWMA would result in the application of the CWMA test to industries and professions other than the construction industry for which it was intended. The Court remanded the matter back to the WCAB for application of the traditional factors of the common law test for independent contractor status.

Comment: The CWMA applies to the construction industry only. Therefore, it will be necessary to utilize the traditional common law approach when determining whether a relationship is that of employer/employee or independent contractor in cases not involving the construction industry. As discussed above, this requires the weighing of a number of factors such as: whether taxes are withheld; who supplies the tools and materials to perform the work; whether wages are paid on an hourly basis as opposed to upon the completion of a project; and most importantly, who has the right of control of the means and manner of performing the work.