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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Can a prior determination that employees were actually independent contractors be used as evidence in a later audit on the same issue?

The BWC reserves the right to audit employers to determine if the premiums paid are consistent with the number and type of employees on the employer's payroll. Among the issues which can generate an audit is when claims are filed by employees who are designated by the employer as independent contractors. If the BWC determines that they are in fact employees, it can assess premiums, back premiums, or in particularly egregious cases, charge an employer with workers' compensation fraud. Employers can appeal adverse decisions through an administrative process prescribed by statute. Recently, the Supreme Court of Ohio considered a case involving an employer who contested an administrative finding that workers were employees, and whether a previous determination that workers were independent contractors was binding.

State ex rel. WFAL v. Buehrer, 144 Ohio St.3d 21, 2015-Ohio-2305, involved an employer who provided labor for construction projects. In 2010, the BWC undertook an audit of the company after two workers' compensation claims were allowed by alleged contractors. The BWC investigated and concluded that the employees satisfied 15 of the 20 factors listed in R.C. 4123.01(A)(1)(c), and therefore were employees for workers' compensation purposes. The employer took issue with the results of an audit, claiming that the alleged employees were in fact independent contractors, and filed a protest of the audit findings. The Adjudicating Committee and the Administrator's Designee both affirmed these findings, prompting a *mandamus* action in the Tenth District Court of Appeals. When the Tenth District affirmed, the employer brought an appeal as of right to the Supreme Court.

The Supreme Court affirmed, finding that there was no abuse of discretion in concluding that the workers were employees. Evidence included that the employees were paid hourly, were supervised on site by the owner of the company, were required to follow instructions from the owner or lead carpenter, that the employer retained the right to discharge, and there was no basis for the alleged contractors to incur profit or loss. In response, the employer claimed that "collateral estoppel" should apply and that the BWC should be estopped from concluding that the same workers were employees, because a 1999 BWC audit and IRS audit both concluded that workers were contractors. However, the Court rejected this argument, noting that the audit was for different workers at a different job site, and the audit occurred 10 years earlier. The employer did not present any evidence of similarities in the audits to support the contention that "collateral estoppel" should apply.

The employer in *WFAL* claimed that the results of a prior audit should apply, which may be the reason that several basic factors were seemingly ignored, including paying workers on an hourly basis and direct supervision. While the Supreme Court did not rule out the application of "collateral estoppel" as a matter of law, there was no evidence to support it in this case.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

Donald G. Drinko, Esq.
Certified Workers' Compensation Specialist,
Ohio State Bar Association
Gallagher Sharp
1501 Euclid Avenue
Cleveland, OH 44115
Direct: 216.522.1326
ddrinko@gallaghersharp.com
www.gallaghersharp.com