Do you know the rule?

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Do You Know The Rule?

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The Scenario

Kate and Michelle have been working together for five years at Let's Get this Party Started, LLC ("LGTPS"), a small family-owned catering business. Kate discovered that Michelle was in a relationship with Kate's boyfriend, who also works for LGTPS. Kate confronts Michelle about the relationship, and the two get into a verbal altercation. During the course of the fight, Kate threatens to go to HR about Michelle's job performance in retaliation for Michelle's having an affair with Kate's boyfriend. In response, Michelle takes a swing at Kate, and the altercation becomes physical. After the fight is over, Michelle realizes that her low back is hurting as a result of the scuffle.

Let's get this claim started

LGTPS has three members (officers/owners) and seven workers. Of the workers, two are part-time and four are treated as independent contractors by being given 1099s. Bureau investigator I. Will Getchou has performed an investigation and notified LGTPS that he believes they are not in compliance with the applicable laws regarding the classification of workers and need to secure workers' compensation insurance coverage. Will has also notified LGTPS that they may be required to pay a penalty. Does LGTPS actually need to get a workers' compensation insurance policy?

Let's get this claim started

A. Yes
B. No
C. It depends
D. I have no idea at this point and need more information

Tennessee Code Annotated section 50-6-102(11): "Employer" includes any individual, firm, association or corporation . . . using the services of not less than five persons for pay . . . .

Does LGTPS meet this definition?

Let's get this claim started

The Employer Questionnaire filled out by LGTPS indicates the following:

- The 1099 workers were required to wear a shirt with the employer's name on it when working;
- The 1099 workers had set hours they were required to work;
- The 1099 workers had authority to hire and fire additional staff if they needed help with an event or with event cleanup;
- The 1099 workers were provided with tools and resources to plan, implement, and complete the catering jobs 90% of the time;
- The 1099 workers could work for other employers if they wanted as long as it did not interfere with their work for LGTPS; and
- The 1099 workers were paid in cash after each event.

Does LGTPS need workers' compensation insurance?

Let’s get this claim started

A. Yes
B. No
C. It depends
D. I still have no idea

Let's get this claim started

- Tennessee Code Annotated section 50-6-106(5): This chapter shall not apply to . . . cases where fewer than five persons are regularly employed . . . .

- Tennessee Code Annotated section 50-6-102(10): Employee includes every person, including a minor, whether lawfully or unlawfully employed, the president, any vice president, secretary, treasurer or other executive officer of a corporate employer . . . in the service of an employer . . . under any contract of hire or apprenticeship . . . .
  - 50-6-102(1)(B): "Employee" includes . . . a member of a limited liability company who devotes full time to the [business] and who elects to be included in the definition of "employee" by filing written notice of the election.

Let's get this claim started

Tennessee Code Annotated section 50-6-102(10)(d)(i): In a work relationship, in order to determine whether an individual is an "employee," or whether an individual is a "subcontractor" or "independent contractor," the following factors shall be considered:

(a) The right to control the conduct of the work;

(b) The right of termination;

(c) The method of payment;

(d) The freedom to select and hire helpers;

(e) The furnishing of tools and equipment;

(f) Self-scheduling of working hours; and

(g) The freedom to offer services to other entities.

Mediation

Fortunately, although there was some initial concern that LGTPS didn't have workers' compensation insurance, it turns out there was a policy in place for Michelle's date of injury. Michelle has filed a Petition for Benefit Determination, and the adjuster has denied the claim. Michelle hires an attorney, Ed D. Monee, who files a notice of appearance. The parties begin the mediation process, but pretty soon communication between Michelle and Attorney Monee breaks down. They decide to part ways.

What should Mr. Monee do?

Mediation

A. Write to the court clerk and asked to be removed from the case

B. Call the local office and speak to the program coordinator to let her know he will no longer be on the claim

C. File a motion to withdraw with the court

Mediation

Tenn. Comp. R. & Regs. 0800-02-21-.04(3): representation continues until the case concludes . . . or the judge grants a motion to withdraw. An attorney seeking to withdraw must file a motion with reasonable notice provided to the represented party. An affidavit from the attorney must accompany the motion and contain the client's last-known mailing address, email address, telephone number, and a declaration that the attorney notified the client of both the effects of the attorney's withdrawal from the case and of any deadlines and scheduled proceedings. The motion must be heard by convening a hearing, unless the judge determines that a hearing is unnecessary.

Mediation

Before communication between Michelle and her attorney broke down, the attorney requested a wage statement from LGTPS. The adjuster responded by filing a payment ledger provided to her by LGTPS with the Clerk of the Court of Workers' Compensation Claims. Does this suffice?

A. Yes
B. No

Mediation

Tenn. Comp. R. & Regs. 0800-02-21-.10(6): Within seven (7) business days after the request of the mediator . . ., the employer must provide a wage statement on a form approved by the Administrator detailing the employees' wages over the fifty-two (52) weeks before the injury. The form must be fully completed and signed by the employer or counsel.

But wait . . . is that the only problem?

Mediation

Tenn. Comp. R. & Regs. 0800-02-21-.10(6): . . . If the mediator requests the wage statement, the employer must send the wage statement directly to the mediator. If the dispute certification notice is filed with the clerk, the employer must file the wage statement with the clerk. . . .

Filing a Petition for Benefit Determination

Kate also says she was injured in the fight, suffering a cut to her hand. She went to an urgent care clinic and received a tetanus shot and first aid. She needs no further medical care. However, she received a bill for her visit. She assumes it has not been sent to the adjuster for payment. She completes and emails a Petition for Benefit Determination (PBD) to a mediator she previously worked with on a prior shoulder injury claim.

Was the Petition for Benefit Determination filed correctly?

Filing a PBD

A. Yes, the PBD was filed correctly.

B. No, the PBD should have been sent to the local office.

C. No, the PBD should be filed with the Clerk at PBD.CourtClerk@tn.gov

Filing a PBD

The PBD was filed was filed incorrectly. It should be filed with the Clerk via email to PBD.CourtClerk@tn.gov (or some other acceptable method set out in Tenn. Comp. R. & Regs. 0800-02-21-.02).

Tenn. Comp. R. & Regs. 0800-02-21-.02(16)(a)(3): For purposes of this chapter, a document is considered filed on the date the document reaches the clerk if transmitted by first-class mail, facsimile, or by electronic transmission approved by the bureau

Resolving a PBD

The mediator lets Kate know that her PBD was not filed correctly. Kate sends her PBD to the correct email address, it is stamped filed, and it is assigned to a mediator. The correct adjuster is identified by the Bureau, and, after the mediator reaches out to the adjuster, the bill is paid. Kate and her adjuster feel the claim is resolved. The mediator issues a Dispute Resolution Statement (DRS).

Is the Petition for Benefit Determination now resolved?

Resolving a PBD

A. Yes, the PBD is resolved.

B. No, the PBD is still pending but not actively being mediated.

C. Maybe…

Resolving a PBD

The adjuster assigns an attorney to the file. Kate and the attorney file a joint motion for dismissal. The Judge grants the joint motion and dismisses the case.

Is the Petition for Benefit Determination now resolved?

Resolving a PBD

A. Yes, the PBD is resolved.

B. No, the PBD is still pending.

C. Yes, if Kate doesn't file another PBD within 90 days.

D. Yes, if Kate doesn't file another PBD within 30 days.

Resolving a PBD

The PBD is resolved if Kate doesn't file another PBD within 90 days.

Tenn. Comp. R. & Regs. 0800-02-21-.24(1): A party may move to voluntarily dismiss a Petition for Benefit Determination only once.... If the motion for voluntary dismissal is granted, either party may file a new claim within ninety (90) days of the order granting the voluntary dismissal.

Back to Michelle

An expedited hearing is set in Michelle's case. She is seeking temporary disability and medical benefits. The judge on the Court of Workers' Compensation Claims who presides over the hearing concludes Michelle was an employee and that she is likely to prevail at a hearing on the merits, so he orders LGTPS to pay temporary disability benefits and to provide a panel. LGTPS does not dispute the portion of the order requiring it to provide a panel, and it puts a case manager on the case.

Can the case manager prepare the panel of physicians?

(A) Yes, that's part of their job

(B) Yes, as long as they don't try to influence Michelle's choice

(C) Yes, as long as the adjuster is the one to actually provide it to Michelle

(D) No, case managers are not allowed to prepare panels

Case managers and panels

Tenn. Comp. R. & Regs. 0800-02-07-.04(2)(a): A case manager shall not prepare the panel of physicians or influence the employee's choice of physician.

Bonus: once a physician has been chosen from a panel, does that physician's treatment recommendations receive any presumptions?

Yes-Tenn. Comp. R. & Regs. 0800-02-06-.03(4): Any treatment that explicitly follows the Treatment Guidelines . . . adopted by the administrator . . . Shall have the presumption of medical necessity for utilization review purposes. This presumption shall be rebuttable only by clear and convincing evidence that the treatment erroneously applies the guidelines or that the treatment presents an unwarranted risk to the injured worker.

Medical appointments

Michelle selects a physician, Dr. Strange, and makes an appointment to have her low back pain evaluated. On the day of the appointment, Michelle was unable to attend.

Does the carrier have to pay for this appointment?

Yes – Tenn. Comp. R. & Regs. 0800-02-17-.14: A provider shall not receive payment for a missed appointment unless the appointment was arranged by the Bureau, the case manager, or employer. If the case manager or employer fails to cancel the appointment not less than one (1) business day prior to the time of the appointment, the provider may bill the employer for the missed appointment . . ., with a maximum fee being the amount which would have been allowed under these Rules had the patient not missed the appointment . . . Follow-up appointments are deemed to be approved unless the adjuster notifies the provider's office and the injured employee more than one business day prior to the appointment.

Medical appointments

Michelle reschedules her appointment with Dr. Strange, and he recommends physical therapy and Motrin. Dr. Strange submits the recommended treatment to the adjuster for approval.

How long does the adjuster have to either approve the recommended treatment or send it to utilization review?

(A) 7 business days

(B)4 business days

(C) Within 48 hours of receiving the recommendation

(D) Within a reasonable amount of time

Medical appointments

Tenn. Comp. R. & Regs. 0800-02-06-.06: If a recommended treatment requires utilization review, then an employer shall submit the case to its utilization review organization within four (4) business days of the authorized treating physician's notification of the recommended treatment . . . The four (4) business day interval begins when the adjuster receives the medical record that corresponds in time to the date of the treatment request.

Medical treatment

The adjuster denies the treatment recommended by Dr. Strange. She properly notifies Michelle, Dr. Strange, and the parties' attorneys by filing the proper Form C35(A).

What is the deadline for an appeal?

30 calendar days

Who can appeal the decision?

Michelle or Dr. Strange

Tenn. Comp. R. & Regs. 0800-02-06-.07: The employee or authorized treating physician shall have thirty (30) calendar days . . . to request an appeal with the Bureau.

Medical treatment

Dr. Strange appeals on Michelle's behalf.

- How many days does the adjuster have to send records to the Bureau?

  Five business days (Tenn. Comp. R. & Regs. 0800-02-06-.06(4))

Dr. Snyder reviews all the medical documentation relating to Dr. Strange's treatment recommendations for Michelle's low back claim, and he overturns the utilization review denial.

- How soon will the adjuster be able to appeal the same treatment to the medical director again?

  6 months (Tenn. Comp. R. & Regs. 0800-02-06-.06(9)(b))

- How soon must the adjuster schedule the recommended treatment?

  Within 7 calendar days of the receipt of Dr. Snyder's decision overturning the utilization review denial (Tenn. Comp. R. & Regs. 0800-02-06-.07)

Filing an appeal

As discussed above, the judge ordered LGTPS to pay temporary disability benefits and to provide a panel. LGTPS promptly provided a panel, but it does not believe it owes Michelle temporary disability benefits. LGTPS decides to appeal that issue. It files a notice of appeal with the clerk of the Appeals Board five business days after the trial court's order was filed.

What, if anything, was done wrong?

Filing an appeal

The notice of appeal was filed with the incorrect clerk.

Tenn. Comp. R. & Regs. 0800-02-22-.01(1): Any party may appeal any order of a workers' compensation judge . . . *with the clerk of the court of workers' compensation claims* . . . .

Filing an appeal

From a practical standpoint, what does that mean?

The appeal will not be considered filed until it is filed with the correct clerk. The Clerk of the Appeals Board will, upon receipt of the notice of appeal, immediately notify the appealing party that the notice was not filed with the correct clerk and that the appeal will not be considered filed until it is filed with the correct clerk.

Filing an appeal

After being notified that the notice of appeal cannot be considered filed until it is filed with the correct clerk, LGTPS's attorney re-files the notice of appeal 9 business days after the trial court's order was entered.

What, if anything, is the problem?

Filing an appeal

A: Nothing-the appeal is processed and will proceed as usual

B: It's late so LGTPS must file a motion to accept a late-filed notice of appeal

C: The appeal will be dismissed because it is not timely

Filing an appeal

Tenn. Comp. R. & Regs. 0800-02-22-.01(3): Any appeal in which the notice of appeal is not received by the clerk of the court of workers' compensation claims within [7 business days] *shall* be dismissed.

Michelle is at MMI . . . now what?

Michelle's treating physician gives an impairment rating of 6% as a result of her low back condition. Months later, LGTPS's attorney writes the physician, and the physician lowers his rating to 2%. Michelle applies to the Medical Impairment Rating Registry ("MIRR"), believing she has an impairment rating dispute in accordance with the MIRR Program rules.

Is she right?

(A) Yes, because the parties have two ratings and disagree as to which is correct.

(B) No, because the two ratings do not come from different physicians.

(C) No, because it is unclear which impairment rating is the treating physician's rating.

(D) Yes, because a dispute is triggered when the MIRR application is filed with the Bureau.

Rating disputes

Tenn. Comp. R. & Regs. 0800-02-20-.01(7): "Dispute of degree of medical impairment" means one or more of the following:

(a) At least two different physicians have issued differing permanent medical impairment ratings in compliance with the Act and the parties disagree as to those permanent impairment ratings;

(b) A physician has issued an opinion in compliance with the Act that no permanent medical impairment exists, yet that physician has issued permanent physical or mental (psychiatric) restrictions to the injured employee; or

(c) The employer and employee both wish to access the Medical Impairment Rating Registry because they agree that the permanent medical impairment rating issued by the authorized treating physician is incorrect.

More rating issues and the MIRR

Michelle also treated with a chiropractor, who gave her an 8% impairment rating. She seeks a second opinion from an orthopedic surgeon and receives a 12% in the Independent Medical Evaluation (IME) report. Based on the above facts, does the injured worker qualify for the MIR Registry?

(A) Yes, because the parties have two impairment ratings and disagree as to which is correct.

(B) Yes, because ratings given by chiropractors are not valid under Tennessee law.

(C) No, because ratings given by chiropractors are not valid under Tennessee law.

(D) No, because chiropractors are not recognized as physicians according to the MIR Registry rules.

Rating disputes

Tenn. Comp. R. & Regs. 0800-02-20-.01(7)(a): "Dispute of degree of medical impairment" means one or more of the following: At least two different *physicians* have issued differing permanent medical impairment ratings in compliance with the Act and the parties disagree as to those permanent impairment ratings . . . .

Tenn. Comp. R. & Regs. 0800-02-20-.01(4): "Physician" means a person currently licensed in good standing to practice as a doctor of medicine or doctor of osteopathy.

Bonus question

Currently, which of the following does not qualify as a dispute to access the Medical Impairment Rating Registry:

(A) The parties jointly and voluntarily seek an MIR because they agree the treating physician's rating is incorrect.

(B) The treating physician is either unable or unwilling to give an impairment rating.

(C) Two different physicians have given impairment ratings and the parties disagree which rating is correct.

(D) The treating physician issues a 0% impairment rating but also assigns permanent restrictions.

Bonus question

Health care providers are required to submit medical bills to insurance carriers electronically except when:

(A) They have opted out of e-billing.

(B) They have 10 or fewer employees.

(C) They have submitted fewer than 120 workers' compensation bills in the previous calendar year.

(D) Both B and C.

Breaking news

A new program is being born: the certified physician's program. What will be required of a physician wishing to become a certified physician?

(A) Accept workers' compensation patients

(B) Follow the Bureau's "Best Practices for Treating and Evaluating Injured Workers"

(C) Take a free online certification course and pass the test

(D) All of the above

The case is settled, now what

Michelle and the adjuster have reached an agreement regarding the extent of her permanent impairment and the amount of her award. She is receiving10 weeks of benefits and open medicals. It has been 18 weeks since she reached maximum medical improvement, and she has continued to work for LGTPS (although she is no longer allowed to work the same events as Kate or Kate's boyfriend).

Does she have to have her settlement approved?

(A) Yes, because all settlements must be approved

(B) No, because her initial compensation period has already expired

(C) Yes, because she is retaining her right to future medical treatment

(D) No, because her award is worth less than 5% permanent vocational disability

The case is settled, now what

Tenn. Comp. R. & Regs. 0800-02-21-.23(1): In any case where the parties reach a full settlement, the settlement will not become effective until it has been signed by all parties and approved by a judge.

Questions?

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We hope you enjoyed this session. Please enjoy a 15-minute Networking Break. Coming up next:

"Empowering the Injured Worker to Improve Case Management Outcomes"

Agenda

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