

## I. INVESTIGATING THE CLAIM

### 1.0 Coverage and Identifying the Employer.

The Pennsylvania Workers' Compensation Act applies to all work injuries occurring within the Commonwealth.<sup>1</sup>

In specific limited circumstances, the Pennsylvania Workers' Compensation Act may also apply to injuries which occur outside of the geographic boundaries of the Commonwealth. For example, there may be Pennsylvania coverage where an Employee is working under a contract of hire made in Pennsylvania for employment which is: principally localized in Pennsylvania; principally localized in another state; or not principally localized in any one state.<sup>2</sup>

Workers' Compensation Insurance is required of all Employers with at least one Employee. In many instances, the Insurer is said to "stand in the shoes" of the Employer, for application of statutory obligations or affirmative defenses. Accordingly, it is essential to correctly identify the Employer and to correctly identify the corresponding Insurer, at the time of injury.

The Employer/Insurer is responsible for the payment of wage loss and medical expenses associated with the work injury.<sup>3</sup>

The Pennsylvania Workers' Compensation Act is the exclusive remedy of the Employee against the Employer for any "damages" incurred as the result of a compensable injury. The opportunity for the Employee to file and pursue a separate civil action remedy against the Employer for "damages" arising from a work injury is limited to significant violations of a clear public policy.

Example: a civil action may be filed by the Employee against the Employer where the allegation is that the Employee was terminated for the filing of a workers' compensation disability claim.

*Schick v. Shirey*, 716 A.2d 1231 (Pa. 1998).

### 1.1 Definition of "Employer."

The definition of the term "employer" is rather concise.

"The term 'employer,' is 'the term employer,' as used in this Act, is declared to be synonymous with master, and to include actual persons, partnerships, joint stock

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<sup>1</sup> Section 101; 77 P.S. §1.

<sup>2</sup> Section 305.2; 77 P.S. §411.2.

<sup>3</sup> Section 301; 77 P.S. §431 and Section 306 (f.1); 77 P.S. §531 (1).

companies, corporations for profit, corporations not for profit, municipal corporations, the Commonwealth, and all governmental agencies created by it.”<sup>4</sup>

The definition of “Employer” is more clearly delineated/explained in appellate case law decisions.

## 1.2 **The Employer’s Right to Control the Employee.**

In controversies, as to the existence of an employment relationship, the factor considered most significant is – whether one retains the right to control the manner and performance of the work to be done and does in fact exercise that right of control. *J. Miller Company v. Mixer*, 277 A.2d 867 (Pa. Cmwlt. 1971).

1.2a The workers’ compensation claimant has the burden of proving the existence of an employer-employee relationship at the time of injury. Whether an employment relationship exists is a question of law to be determined on the basis of the facts of each case.

1.2b Example: In *Baum v. WCAB (Hitchcock)*, 721 A.2d 402 (Pa. Cmwlt. 1998), the employer owned and maintained a truck used by the worker, instructed him on how to load the trucks, use of specific travel routes, and controlled the scheduled deliveries, and the mode of payment made by the delivery customers. This was found to be the requisite control to determine that the truck driver was an employee.

## 1.3 **Who is an “Employee?”**

A significant element in a workers’ compensation claim is the determination of whether or not the injured individual is an “**employee**” subject to the provisions of the Workers’ Compensation Act. The Act defines the terms “**employee**” and “**employer**” at §104 and §103, respectively. Interestingly, when the Pennsylvania Workers’ Compensation Act was drafted in 1915, the Old English Common Law concepts of **master** and **servant** were employed and these definitions have been interpreted over the years, but never replaced with terms that one might consider more politically correct.

1.3a “**Employee**” is defined by §104 of the Workers’ Compensation Act as follows:

“Section 104 (a). The term ‘employee,’ as used in this Act, is declared to be synonymous with servant, and includes – all natural persons who perform services for another, for a valuable consideration, exclusive of persons whose employment is casual

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<sup>4</sup> Section 103; 77 P.S. §21

in character and not in the regular course of business of the employer and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in the worker's own home, or on other premises, not under the control or management of the employer....”<sup>5</sup>

### 1.3b “Casual” Employee? Who are They?

The §104 definition of employee excludes **casual employees** and **home workers**. There are several additional statutory exclusions and inclusions, which are made as a matter of public policy, which we will discuss below.

**Casual employees** are excluded from the definition of “employee” if their employment is both casual in nature and not in the regular course of the business of the employer. Employment is “casual in nature” when there is infrequent service at irregular intervals for a limited or temporary purpose. The “regular course of business” means the normal business operations, which regularly constitute the business of the employer in question.

### 1.3c “Home Workers” are Not Employees.

As specifically mentioned in the §104 definition of employee, **home workers** are **excluded** from Workers’ Compensation coverage if they meet the specific definition, particularly that they are not under the control or management of the purported employer. **Note: “Home workers” are not equivalent to people who work from their residence.**

1.3d **Domestic service workers** are excluded from coverage unless the employer has purchased insurance coverage for these workers, in which case the employer may not assert the domestic service defense. This is referenced at both §305 and §321 of the Act. Section 321 states:

### 1.3e Borrowed Employee – Who is the Employer?

Another question arises as to whether one is a borrowed employee and whether the lending employer has retained sufficient control over the employee, so as to be considered the employer for workers’ compensation purposes. Under the borrowed employee doctrine, the **borrowing employer** must control or have the right to control the borrowed employee with regard to both the work to be done and the manner of performing it, in order to subject the borrowing employer to workers’ compensation liability. See: *Smith v. WCAB (Miller)*, 152 Pa. Cmwlth. 77, 618 A.2d 1101 (1992).

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<sup>5</sup> Section 104, 77 P.S. §22.

- 1.3f Example: Where a lending employer provided temporary workers to unload trucks, the U.S. District Court granted a Motion for Summary Judgment and dismissed the employee’s lawsuit against the warehouse owner/borrowing employer as the Court concluded the injured worker was an **employee** of the **borrowing employer** at the time he sustained his injury as they controlled the details of his employment. See: *Shaw v. Thrift Drug, Inc. and J. C. Penny Properties, Inc.*, U.S. Dist. Ct. Nov. 2, 1999, 14 PAWCLR 2025.

#### 1.4 **Temporary Agency Employees.**

In certain situations, employers retain the services of a temporary agency or personnel placement firms to interview, hire, and assign employees for temporary work assignments. This business management is also utilized where an employer contracts with a “professional employment organization,” a “PEO,” to perform administrative duties such as pre-employment screening, payroll, and tax forms. Where a bonafide business arrangement, utilizing temporary employees is constructed to “transfer” worker compensation liability from one business entity to another, the appellate courts have looked beyond the terms of the contractual agreement and have resorted to the **right to control** standard to determine the existence of an employer-employee relationship. A factual distinction has been made in the situation of a temporary employee agency referral where the employee possesses specialized training or skills.

- 1.4a Example: In *Accountemps v. WCAB (Myers)*, 120 Pa. Cmwlth. 489, 548 A.2d 703 (1988), the lending agency was considered the employer where the employee possessed sufficient skills such that the individual was not trained or supervised in the details of his performance of accounting work.

#### 1.4b **Another Set of Facts – Another Result.**

In *JFC Temps v. WCAB (Lindsay and G&B Packing)*, 680 A.2d 862 (1996), the Supreme Court of Pennsylvania found that G&B had the right to control the manner of performance of the claimant’s work. The claimant was hired by JFC, a temporary employment agency which assigned him to G&B, a warehousing company, to drive a tractor-trailer. The claimant sustained a slip and fall injury leading to blood clots and the subsequent amputation of his leg. In reviewing the employment relationship, the Court noted that the claimant applied with JFC and was assigned to G&B, which had no control over which driver appeared. The claimant reported daily to G&B where the operations manager informed him of his work hours, what truck to drive, and where to go. Each day they would give the claimant documents for freight, a bill of lading, and keys to the trailer. A small portion of the claimant’s duties involved maintenance and picking up tools and supplies for G&B. No representative of JFC was present at

the facility. JFC paid the claimant's salary through time slips completed by G&B. If the claimant was unable to work, JFC would provide a replacement to G&B.

The Court distinguished this situation from *Accountemps*. Although G&B did not train the claimant regarding the operation of the tractor-trailer, the record reflects G&B **directed him as to the specifics** of the deliveries to be made. He reported to the office at the start and at the end of each work day and performed miscellaneous odd jobs under its direction. JFC paid the claimant, selected him for the position, and had the power to actually terminate his employment. Notwithstanding these factors, the Supreme Court found that the right of G&B to control the performance of the work is the overriding factor in determining the employment relationship.

#### 1.5 **Alternative Employer Endorsement.**

**Written contracts** between the leasing company and the client are necessary to establish the relationship between the two parties and establish which company will be responsible for specific duties and responsibilities with regard to the leased employees. The leasing company will generally be responsible by contract to provide workers' compensation insurance coverage for the leased employees. If the leasing contract and the workers' compensation policy are not written properly, the client company may still have problems when an injury occurs to a leased employee.

##### 1.5a **The Leasing Company's Workers' Compensation Policy.**

The workers' compensation policy carried by the leasing company should include:

- the alternate employer endorsement,
- a waiver of subrogation naming the client company, and
- an endorsement that requires the insurer to give the client company thirty (30) days notice of cancellation or nonrenewal.

These requirements should be verified with a **certificate of insurance and copies of the endorsements.**

- 1.5b The alternate employer endorsement is as close as one can get to an additional insured endorsement on a workers' compensation policy. When endorsed to the leasing company's policy, it would apply to injuries to the leased employees while in the course of special or temporary employment by the client company, named as the alternate employer in the endorsement.

1.5c **The Client Company’s Workers’ Compensation Policy.**

As a final step to protect itself, **the client company should maintain its workers’ compensation policy.** This can be done by leaving one or more employees, even executive officers, out of the leasing agreement. With a separate policy in its own name, the client company will be protected if it hires a worker who is not subject to the employee leasing arrangement.

1.5d **Conclusions.**

An insurance agent should explain to clients considering an employee leasing agreement some of the special insurance problems that exist in this situation. Clients should understand that they will not escape a workers’ compensation premium problem (because the experience modifier follows them into the leasing arrangement) and that they may also be vulnerable to other legal and insurance problems relating to general liability, auto liability, and employee dishonesty coverage. They should be told of the unlimited liability they may incur if the employee leasing company does not carry workers’ compensation coverage on the leased employees.

1.6 **Statutory Employer – A Term of Art.**

In limited circumstances, typically where a general contractor on a construction project is in control or possession of the premises, they are liable for any claim of an injured worker of a subcontractor, unless the subcontractor has workers’ compensation insurance. The employee of the subcontractor may pursue a claim against the **“statutory employer.”** An owner of land cannot be a statutory employer. Section 302 (b) of the Act provides that if the immediate employer of the injured worker (usually a subcontractor) has not provided insurance coverage or is not a qualified self-insurer, the employer “next up the ladder” from the immediate employer (usually the general contractor) becomes liable to pay benefits due to the injured employee. (See: *McGrail v. WCAB (Count of Lackawanna)*, 604 A.2d 1109 (Pa. Cmwlth. 1992).

1.6a **Statutory Employer “Protection” in Civil Litigation.**

In *Fonner v. Shandon, Inc.*, 724 A.2d 903 (Pa. 1999), the Supreme Court of Pennsylvania allowed the dismissal of a civil action against the general contractor as the general contractor fell within the “statutory employer” definition and was immune from a civil action lawsuit by an injured worker employed by one of the subcontractors at a construction site. **The Court described five essential elements to the creation of a “statutory employer” relationship so that the statutory employer would be immune from a civil action for negligence: (1) an employer who is under contract with an owner or one in a position of an owner; (2) premises occupied by or under the**

**control such an employer; (3) a subcontract made by such an employer; (4) part of the employer's regular business entrusted to such a subcontractor; and (5) an employee of such a subcontractor. See also: *McCarthy v. Dan Lepore & Sons Co., Inc.*, 724 A.2d 938 (Pa. super. 1998) and *Emerv v. McCollum*, 725 A.2d 807 (Pa. Super. 1999).**

**1.7 Independent Contractors. The General Rule:**

A legal distinction is drawn in the situation of the **“Independent Contractor.”** **In contrast to the “Employee,” the Independent Contractor** has a much different relationship as control over the work to be done and the manner of its performance is not retained or exercised by the individual who hires for these services.

**1.8 Workers' Compensation Insurance Required.**

An entity which meets the criteria for consideration as an employer within the intent and meaning of the Workers' Compensation Act, does not avoid workers' compensation benefits payment liability by failing to secure appropriate insurance coverage.

**1.8a Penalty for Failure to Insure.**

Any employer who fails to comply with the requirement to secure workers' compensation insurance may be charged with/convicted of a misdemeanor of the third degree. If the failure to comply is found to be intentional, the infraction is increased to a felony of the third degree.<sup>6</sup>

1.8b Each day's violation will constitute a separate offense.

1.8c A judge may add restitution equal to the amount of the workers' compensation award to the fines and penalties imposed.<sup>7</sup>

1.8d An employee has the option to sue in civil action for tort or pursue a workers' compensation claim.

**1.9 Uninsured Employers.**

The Uninsured Employers Guaranty Fund was created by Act 147 for injuries arising on and after January 8, 2007.

1.9a Note: **The existence of Workers' Compensation Insurance and the manner of wage payment to the worker have not been**

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<sup>6</sup> See: Section 1601, 77 P.S. §2701 *et seq.*

<sup>7</sup> Section 305, 77 P.S. §501.

**decisive in reported decisions on this issue.** Where an employment agreement between the city and school district gave the city full control over the work site and actual control over the work and manner of its performance, that was decisive of the employee/employer question, the control over the work performed, not control over funding. *Phyllis G. Wetzell v. City of Altoona, et al.*, 152 Pa. Cmwlth. 309, 618 A.2s 1219 (1992).



## 2.0 **Interviewing the Claimant.**

“The palest ink is better than the best memory.” – Chinese Proverb.

Best Practices dictate prompt investigation of the circumstances surrounding the work injury.

Memories fade, witnesses relocate, evidence is not retained – these factors are all good reasons for prompt investigation.

### 2.1 **Pre-Accident Planning is Essential to a Successful Workers’ Compensation Program.**

Policies and procedures for investigation of work incidents should be discussed and implemented before the first injury report. Who will investigate? Who will retain any evidence? Who will prepare necessary reports and forms? These are among the topics which should be addressed in the planning phase.

2.2 Statements should be obtained from the injured worker, the employer representative, eyewitnesses, and other parties (EMT; dispensary nurse; police; security officer; risk/safety manager).

### 2.3 **Securing Statements is Not Merely a Process of Asking Questions and Waiting for a Response.**

There is a good deal of skill involved in securing a “good” statement. In order to secure an effective statement, you should understand, as much as possible, about the incident and information you want to pursue. You should have a list of questions of the topics to be addressed during the interview, BUT DO NOT merely read through your list of questions without asking follow-up questions to further detail the responses. There should be an “interactive” aspect to the interview.

#### 2.3a **Some Aspects of a “Good” Interview:**

- i. conduct the interview in a non-adversarial fashion.
- ii. demonstrate concern.
- iii. allow the individual to talk.
- iv. describe your involvement in the investigation process.
- v. note you are recording the interview at the outset.

## 2.4 **Employees Often Decline to Provide an Interview for a Variety of Reasons.**

Advise the employee of the necessity to obtain information to timely and properly review the claim for acceptance or denial.

The Employer and Insurer are required to “promptly investigate each injury reported or known to the Employer.” An acceptance or denial must be made within 21 days of the notice of the injury.<sup>8</sup>

## 2.5 **A Suggested Claimant Interview.**

### a. Background Information.

1. Claimant name, nicknames, maiden name, also known as.
2. Date of birth, age.
3. Height and weight.
4. Hair color, facial hair (for identification purposes).
5. Current address, how long? Prior address?  
Apartments, condo, house, or trailer.
6. Telephone number, cell phone number, e-mail address?
7. Marital status, children (ages), other household members or dependents?

### b. Employment History.

1. Name of employer, date of hire, how long employed?
2. Current position - job classification, how long, prior positions?
- 2a. How do you perform your job?
3. Physical requirements of job - sitting, standing, walking, climbing (stairs, ladders), lifting, carrying, bending, stooping, kneeling, twisting?
4. Hand movements, foot movements, repetitive?
5. Describe each activity, frequency per minute, per hour, per day?

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<sup>8</sup> Section 406.1; 77 P.S. §717.1.

6. Education or training required for position.
  7. Educational background - GED, high school graduate - year, college attendance, college graduate?
  8. Tools utilized in performing job. (Personal or employer provided).
  9. Machinery operated or utilized in performing job duties? (Employer owned and maintained – or a third party).
  10. Workplace environment, indoors, outdoors, on employer=s premises, on customer premises?
  - 10a. Supervision – Are you supervised by Employer’s staff? Are you ever supervised by another company or business?
  - 10b. Are you a union member?
  - 10c. Are your work assignments made through a union local – which one(s)?
  11. Do you drive a personal vehicle to perform your job duties? Do you drive a company-owned vehicle to perform your work duties? Are you paid for travel time? Are your out-of-pocket expenses reimbursed?
  12. Number of hours worked per day, number of days worked per week, availability of overtime, availability of bonuses and/or benefits?
- c. Injury/Accident.
1. Date of injury or accident? Time – A.M. or P.M.
  2. Location of accident, on employer premises, off employer premises? Where exactly?
  3. Describe what happened in detail, in the order of events which occurred? How did this occurrence differ from your usual work duties?
  - 3a. What time did this incident occur?

- 4a. What time did you start/stop working on that day, did you finish your work shift?
  4. Were there any witnesses who actually observed the work incident?
  5. Were there individuals in the area near the occurrence of the incident, whether they are known to have observed the incident or not (what did they hear)?
  6. Did the employee state, shout or yell any remarks at the time of the incident?
  7. Was this incident reported to an individual designated by the employer? Who? When? Via telephone or face-to-face?
  8. Did you prepare an accident report or any other documents for the employer?
  9. What type of bodily injury resulted from this incident, sprain/strain, fracture, laceration, etc? The type of injury struck by an object, slip and fall, repetitive motion, over exertion?
  10. Did you experience any physical symptoms as a result of this incident? (Open-ended question!)
  11. Where did you experience those physical symptoms? What body region, which part of that body region, front, back, left-right?
  12. Was the onset of the symptoms immediate or delayed? How long did it take before you noticed each symptom?
  13. Describe any symptoms of pain **\*(do not offer any suggestions)** - dull, sharp, stabbing, burning? Did you hear or notice any sound from your body at the time of this incident (pop, crack)?
  14. Is each symptom located in one body region? Does each symptom radiate or Atravel? $\cong$
- d. Disability.
1. Did you complete the work day or work shift as scheduled?
  2. When did you stop working? Time; date?
  - 2a. What did you do after end of work shift?

3. Did you immediately seek medical treatment or evaluation?
  4. How were you transported for this medical care?
  5. If there was a delay in medical treatment, what did you do from the time of departing the workplace until you arrived for medical treatment or evaluation?
  6. Did you work with another employer at the time of your injury? (Concurrent employment?)
  7. Were you able to continue to perform work duties with this other employer?
- e. Prior Disability or Injury.
1. Have you ever experienced a similar nonoccupational incident/injury/accident?
  2. Have you experienced prior work injuries with this employer? With a prior employer?
  3. Have you been involved in any motor vehicle accidents as a passenger or driver?
  4. Have you been involved in any nonoccupational injuries such as a slip and fall?
  5. Have you sustained any sports-related or recreation-related injuries?
  6. Have you had any overnight hospital stays?
  7. Have you made any visits to the hospital emergency room during the last five years? Which hospital emergency room?
  8. Who is your family physician (PCP) - how long? Who was prior?
  9. *For each reported injury/accident, question the individual regarding the manner in which this incident occurred and the body regions involved with symptoms, as noted above.*

f. Medical Treatment for Work Injury.

1. Did you seek immediate medical treatment following the work incident/accident/injury?
2. Did you continue to perform your work duties until the end of the work shift?
3. If there was delay in medical treatment, what did you do from the time you departed the workplace until the time you sought medical treatment?
4. Name the hospital, emergency room, dispensary or medical facility at which you first sought treatment or evaluation.
5. What day and what time did you report for treatment or evaluation?
6. Did you treat with a medical provider designated by the employer?
7. Did you participate in any post-injury drug testing, consistent with any employer policy?
8. What treatment or evaluation was performed at the initial facility? Name each treatment provided.
9. Were there any diagnostic tests such as x-ray, MRI, CT scan, sonogram, ultrasound, EMG/NCV, etc?
10. Was any assistive device provided at this facility, such as a cane, brace, cast, sling, crutches, wheelchair.
11. Were any medications provided at this initial care or prescribed by the initial evaluator?
12. Was any physical therapy or occupational therapy scheduled?
13. Was any psychological counseling provided or scheduled?
14. Were any referrals made to any other medical specialists? Are there scheduled dates for appointments?
15. Were you released to return to work after the initial evaluation? Was there discussion of a target date for your medical release or return to work?

16. Do you have any other health conditions which would affect your recovery from this work injury?
17. If you have any other medical conditions, who are the medical practitioners who are providing and/or evaluation?
18. Are you receiving any medications or treatment for this condition?

g. Current Symptoms - Disability.

1. What are your present symptoms? Identify and describe each symptom separately, in your own language..
2. Have any symptoms changed since the date of injury? (Worsen or improve, stay the same.)
3. Have any medical treatments relieved any symptoms? Please describe the symptom relieved and the treatment provided.
4. What present symptoms prevent your return to work?
5. Which work duties can you perform based upon your present condition?
6. Could you return to work if duties were modified? Which duties would need to be modified and in what fashion?
7. Are there any other positions or work assignments that you believe you may presently perform? When do you believe you will be able to return to work?
8. Has your medical provider indicated when you will be released to return to modified-duty or full-duty employment? Did you ask?

h. Activities of Daily Living.

1. Please describe your present daily activities from morning to evening? AHow do you spend your day?≡
2. Do you drive a vehicle to your medical appointments or for errands?
3. How frequently do you drive? What is the longest distance you have traveled (as passenger or driver) since your injury?

4. Describe the type of duties/tasks you perform at your residence - cooking, cleaning, laundry, shopping?
5. Have you performed any home repairs or maintenance since your injury? What are the types of repairs and maintenance that you performed before your injury?
6. Do you have any difficulties with performing personal hygiene as a result of your injury?
- 6a. Are you responsible for care to any other individual? Child, spouse or parent.
7. Do you perform any outdoor activities such as lawn care or gardening?
8. Are you the member of any social or fraternal organizations (Elks, Eagles, VFW, etc.)?
9. Do you engage in any sports or recreational activities? What were the recreation activities you pursued before your injury?
- 9a. Do you engage in any activities with your children (coach)?
10. Do you have any hobbies or perform any crafts?
11. Do you hunt, fish or camp?
12. Do you ride a motorcycle or an all terrain vehicle (ATV)?
13. Do you own a boat? Do you own a snowmobile?
14. Do you perform any maintenance or repairs on any of your vehicles?
15. Are there any activities that you performed in the past that you can no longer perform as a result of your work injury?
16. Did you contact the employer re: return to work?
17. Do you have earnings from any activity or services provided?
18. Do you have a computer?



## 2.6 **Investigation Tools.**

In addition to the interview of all involved parties, the compensability of a work injury may involve further investigation to establish fundamental elements of a claim:

- i. Does Pennsylvania law apply – jurisdiction.
- ii. Is there proper and timely notice of injury.
- iii. Is there a timely claim – statute of limitations.
- iv. Is there an employment relationship.
- v. Is there a disability – medical evidence.
- vi. Are there any affirmative defenses that disqualify an otherwise compensable injury.
- vii. Is a third party involved in the cause of the injury – subrogation.

### 2.6a **Corroborative Records and Reports.**

Do the EMT, police or third party investigations comport with claimant's version of events? (Or the employer's version?).

- Do the medical records confirm the allegations of injury and disability?
- Do the claimant and witness reports corroborate the description of events?
- Are there past medical records that are relevant to a causation issue?
- Are there prior injury reports which are relevant to the causation and disability issues?

### 3.0 **Interviewing the Employer.**

The above recommendations regarding interviews and accident investigation are equally applicable to securing information from the Employer representative. The Employer may be a source of information regarding past injury claims or past illness or absence. The Employer may also be a source of corroboration of the trustworthiness and good work habits of the worker.

The Employer should provide information regarding application and eligibility for ancillary benefits which may be a credit or offset to worker compensation benefits:

- i. unemployment compensation.
- ii. sickness and accident benefits.
- iii. short term – long term disability insurance.
- iv. pension – retirement – severance payments.
- v. employee salary continuation.

### 3.1 **Suggested Points for Review with the Employer.**

- a. Accident Investigation.
  1. Were statements secured from witnesses, soon after the work injury?
  2. Did supervisory personnel provide written reports or statements following investigation?
  3. Are photographs or a schematic sketch of the site of injury available?
  4. Is the mechanism of injury or manner in which the injury is described to have occurred, consistent with claimant=s description?
  5. Was there an unsafe condition which resulted in your injury?
  6. Was a guard or safety disabled, removed or non-operational?
  7. Did your injury occur as a result of a defective machine or tool?
  8. Did your injury occur as a result of inadequate lighting?
  9. Did your injury occur as a result of improper ventilation?

10. Did your injury occur as a result of unsafe conditions such as poor material storage, chemical hazard, or fire hazard?
  11. Was claimant wearing any personal protective equipment at the time of injury?
  12. Did this injury occur as a result of an unsafe act or omission by a third party?
- b. Other Benefits Available.
1. Has claimant received any unemployment compensation benefits since the injury?
  2. Has claimant received any worker compensation benefits before the work injury?
  3. Has claimant received any short-term disability or long-term disability provided by an employer program or provided by a personal insurance policy?
  4. Has claimant received any Department of Public Welfare Benefits or medical expense reimbursements?
  5. Has claimant received any Social Security Disability Benefits, including Medicare or Medicaid reimbursement of medical expenses?
  6. Has claimant received any pension benefits? Does claimant receive any retirement benefits from any prior employers?
  7. Does claimant have a health insurance policy through your employer plan?
  8. Does claimant have health insurance available through your spouse or through another employer? Have you utilized personal time or vacation days while disabled from work?
  9. *Have you been contacted by an attorney to investigate or file a lawsuit against a third party for any act or omission which caused this work injury?*

3.2 WORKPLACE FRAUD - NONE OF THESE ITEMS MEAN THAT FRAUD HAS OCCURRED, BUT THEY MAKE ME WONDER...

1. Employee has an unstable work history, employee often changes jobs.

2. Employee has a history of reporting subjective injuries without objective physical exam findings.
3. Employee is consistently uncooperative or unavailable for contact.
4. Employee was recently disciplined, demoted, past over for promotion or terminated.
5. Employee is near retirement.
6. Employee has been making excessive demands in the workplace.
7. Employee called soon after the injury and inquires regarding settlement.
8. He moves out-of-state or out of the area, soon after the work injury.
9. He changes his address to a P. O. Box.
10. He receives his mail at another address, a family friend or family member.
11. He provides the telephone number of a family member or friend.
12. At the workplace, there have been labor disputes.
13. The workplace is scheduled for shutdown, layoff, or job termination.
14. Employee has reached or is near the end of his probationary period.
15. Regarding the injury - there are no witnesses.
16. There are only subjective complaints.
17. The injury was not promptly reported.
18. First notice is from an attorney or medical provider, not from the employee.
19. Claimant's physicians have vastly different physical exam findings and opinions regarding disability.
20. There is no sound medical basis for the extent of disability alleged.

21. The employee claims disability exceeding that which is normally consistent with that type of injury.
22. The injury was alleged to have occurred on Friday afternoon or early Monday morning.
23. The injury is alleged to have occurred at an odd hour, early morning, lunch time, or prior to quitting time.
24. The injurious task is one employee would not typically be involved in.
25. The details of the work injury are vague or contradictory.
26. The employee frequently changes physicians.
27. The employee changes physicians when a work release is provided.
28. Physical examination findings are inconsistent with a disabled individual, i.e., grease, dirt or calloused hands.
29. Employee has a pattern of missing medical appointments.
30. Employee has a pattern of seeking prescription narcotic medications.
31. Other family members receive disability benefits.
32. When contacted, there are strange/unusual background noises on the telephone.
33. Employee is never home when called; he is unavailable or Asleeping.≡
34. Employee leaves different telephone numbers at different times of the day.
35. Employee=s work is seasonal, i.e., landscaping, roofing and Ait is convenient≡ to be injured during the off season.
36. Employee needs time off for personal reasons such as family illness, home remodeling, traveling, or child care.
37. Employee has a trade or craft whereby he could work and earn unreported income.

3.2a **Workplace Fraud.**

As part of a thorough investigation, the Employer and Insurer should consider whether there are any “red flags” to raise a concern regarding the legitimacy of the injury claim.

When one suspects fraud, you should obtain as much information as possible regarding the claimant’s alleged fraudulent activity before you proceed with any reporting to a governmental agency.

The Insurance Fraud Section of the Office of the Attorney General has statutory authority to investigate and institute criminal proceedings for any violation of the workers’ compensation laws that involve more than one county or involves Pennsylvania and another state.

Each county district attorney has authority for suspected acts occurring within one county.

**3.3 The Fraud Provisions of the Pennsylvania Workers’ Compensation Act  
Appear at Section 1101; *et seq*; 77 P.S. §1039.1 *et seq*.**

#### 4.0 **Excess Insurance Issues.**

An insurer may provide an employer with insurance coverage in excess to an underlying insurance policy. The typical excess insurance policy will provide coverage for a loss incurred in connection with a work injury where the underlying insurance is exhausted solely as a result of the actual payment of losses by the underlying insurer in connection with a prior claim or claims.

The insured, not the excess insurer, will fear the risk that the underlying insurance is or may be uncollectable, even if such uncollectability is due to the financial impairment or insolvency of the underlying insurer. Coverage under the excess policy does not “drop down” for any reason. The excess coverage is not available unless and until all underlying insurance has been exhausted by the actual payment of losses by the underlying insurer.

#### 4.1 **Limitation of Liability.**

The excess insurer liability is limited to the amount stated in the Declarations Page of the policy. This will be the maximum amount payable by the excess insurer for all loss. This typically includes the payment of defense expenses. Defense expenses are considered part of, not in addition to, the limit of liability. [A “defense inclusive” policy]. Payment of defense expenses deduces the limit of liability, unless the converse is explicitly stated in the policy. [An “ultimate net loss” policy].

#### 4.2 **Conditions of the Excess Policy.**

A typical excess insurance policy will require that the insured employer provide the excess insurer with prompt notice of:

- a. any claim under any underlying insurance;
- b. settlement offers and demands whether or not the excess coverage is implicated;
- c. payment of any claims under any underlying insurance;
- d. cancellation of any underlying insurance;
- e. modification of any underlying insurance endorsement; and

- f. any additional or return premiums charged or allowed in connection with any underlying insurance.

#### 4.3 **Notice of Claims.**

Notice of a work injury claim give by the employer to the underlying insurer is not notice to the excess insurer. The underlying insurer must provide the excess insurer notice of any claim or circumstance which could give rise to a claim. Typically, the method of providing notice is specified in the excess insurance policy.

#### 4.4 **Best Practices Regarding Excess Insurance Issues**



## 5.0 **Worker Compensation Insurance Costs - Experience Rating Issues.**

Nearly all of the states have established worker compensation rating bureaus to establish calculation of worker compensation insurance premiums. A premium figure is calculated and designed to represent the funds necessary to pay the losses in a particular industrial classification. The premium may be adjusted by an experience or merit rating.

The administration of the classification system is based upon the presumption that similar employers will face the same types of hazards and risks, and the rate will flow from there because it is based upon the actual experience of the employers in that classification. The rate for classification reflects the loss experience of the employers in that classification. In addition to the 600 job classifications, there are exceptions for standard professional positions.

In 1993, the Pennsylvania legislature authorized insurance companies to create sub-classifications which depart from the Pennsylvania Compensation Rating Bureau classes. The rates for a sub-classification may differ from the rates for a general classification code. As an example within restaurant businesses, there are “fast food” and “fine dining” establishments. The insurer may offer a different rate depending upon the specific business operations within a classification.

The assignment of a classification to an employer is designed to provide one basic classification which best describes each distinct business enterprise of the employer. Each classification includes all of the various types of labor found within a distinct business enterprise. Each classification is presumed to describe an entire business enterprise.

### 5.1 Classification of Employees

As noted above, classifications of employees have been standardized as many occupations have common work assignments. In a typical situation, the business of the employer is classified not the separate employments, occupations, or operations within that business. There are also standard exception classifications for common positions, such as clerical, office employees, or sales persons. As an illustration of this point, these classifications are defined as follows:

- clerical office employees - are employees whose duties are confined exclusively to keeping the books and records of the insured and conducting correspondence - who are engaged exclusively in office work where such books and records are kept or such correspondence is conducted, having no other regular duty of any nature in or about the insured=s premises. This classification applies only to employees who work in areas physically separate from other operations by structural

partitions and in which work of clerical office employees as defined in this rule is performed exclusively. If any clerical office employee has any other regular duty, the entire payroll of that employee shall be assigned in accordance with the class to which the business is assigned.

- sales persons, collectors, or messengers - are employees engaged in such duties away from the employer's premises. This classification shall not apply to employees who deliver merchandise or products. Employees delivering merchandise or products, even though they may also collect or solicit, shall be assigned in accordance with the classification appropriate to the business of the employer for which delivery is being made. This classification does not include any floor and/or counter sales persons who, as a regular part of their duties, handle or display the actual merchandise sold by the insured. Such employees shall be assigned in accordance with the class appropriate to the business at the location.

Salesmen, collectors and messengers shall be separately classified and rated, except in connection with those classes which specifically include all employees or all employees, except office workers. Employees who sell or solicit explicitly by telephone shall be assigned to Code 953, clerical/office employees.

These two examples provide an insight into the specificity in which the insurance industry classifies each employee and their work duties. Therefore, it is essential that the business owner provides sufficient information and remains involved in the application for insurance and any subsequent audits, to insure its employees are properly classified. Employer may challenge the worker compensation rating bureau designation of a class of employees. This administrative law process is subject to appellate review.

## 5.2 **Industry Experience Ratings.**

Just as the employees are specifically classified according to their job requirements, the National Council on Compensation Insurance has performed studies and calculations which establish an experience rating for each industry. The fundamental purpose of the classification system is to group employers into classification so that the rate for each classification reflects the exposures, to such distinct business enterprises.

One subject for review is the inclusion or segregation of commonly owned employer divisions or subsidiaries. Commonly owned employers may be classified together even though they may have separate functions. They are classified together if their functions are an integral part of an overall business operation. For example, a single classification such as a hospital classification includes all of the employees of the hospital, even clerical and the support

functions as well, such as laundry, security, food preparation, accounting, and bookkeeping.

An employer may challenge the classification of its subsidiaries and argue that each business is separate and distinct. The separate rate classification for each subsidiary may be desirable based upon an analysis of the cost - for each subsidiary versus the cost for the overall business operation.

### 5.3 **Employer Experience Modification.**

The worker compensation insurance premium is modified by the experience of the individual employer within an industry classification. This is the primary means by which a **Asafe** employer may reduce their worker compensation insurance costs, compared to a less diligent competitor within the same industry. The employer's experience modification rating will be based upon several years of experience; therefore, prior claims may affect the future worker compensation premium costs, for several years into the future.

For example, in Pennsylvania, the Rating Bureau will consider a five (5) year history, excluding the current year and one past year of information.

The experience modification factor is calculated based upon the claims paid out by the insured company compared with the average claims paid in that industry. It can raise or lower your premium depending upon "your" modifier.

#### 5.3a **Review of the "MOD" Factor.**

The experience modification factor is designed to adjust the insurance premium cost to reflect the actual loss experience of the specific employer. This is accomplished by comparing loss information for five (5) prior years to the future expected losses. The expected losses are calculated by using audited payroll figures and multiplying them by an "expected loss ration." The expected loss ratio figure for each classification is calculated by averaging the losses for all businesses in that classification, per hundred dollars of payroll.

5.3b Experience modifier formulas are complicated. Review the insurer's worksheet. Determine if there are any errors. Ask questions! Have your insurance professional provide answers.

#### 5.3c **PREMIUM WORKSHEET REVIEW.**

- i. check the payroll information which is utilized to calculate the expected losses.
- ii. check the claims paid information utilized to calculate your actual losses.

- iii. Confirm the payroll years used.
- iv. If your company is placed into a higher classification, without a change in its actual operations, the experience modifier should be recalculated.

A more expensive classification will have a higher expected loss ratio. Higher expected costs, compared to your actual losses will yield a lower experience modifier.

#### 5.4 **Payroll Audits and Review of Loss Runs.**

As a portion of the worker compensation insurance premium is based upon the payroll of the employees, the insurer will periodically audit the information provided by the employer. Increases in payroll and/or increases in the number of employees will give rise to further insurance costs.

As noted above, increased injury experience will increase Alosses≡ in the form of payment of worker compensation benefits, which will likewise increase the modification factor of the worker compensation insurance policy. Employers should be diligent to provide accurate information to the insurer, regarding past and present losses, and remain involved in the audit process.

The actual insurance premium will be determined by an audit after the policy year expires. The payment of the premium at the outset is considered a “deposit” against the final amount due.

6.0 **Multistate Jurisdiction Issues.**

**DOES THE PENNSYLVANIA WORKERS' COMPENSATION LAW APPLY?**

**Section 101 of the Pennsylvania Workers' Compensation Act states that this Act "shall apply to all injuries occurring within the Commonwealth..."**

This language broadly defines the **jurisdiction** of the Pennsylvania Workers' Compensation Act. The Act applies to all work injuries occurring within our borders. As noted below, there may be liability under Pennsylvania law, for injury which occurs **outside of the geographical boundaries** of Pennsylvania.

6.1 **APPLICATION OF PENNSYLVANIA LAW TO INJURIES BEYOND OUR BORDERS.**

Section 101 of the Pennsylvania Workers' Compensation Act states that this Act shall apply to all injuries occurring **within** this Commonwealth, irrespective of the place where the contract of hiring was made, renewed or extended.

The **Extraterritorial provisions** apply Pennsylvania laws to injuries outside the Commonwealth. These rules are provided in a difficultly worded passage at §305.1. Simply stated, this provision allows for the filing of a Pennsylvania workers' compensation claim where an employee is injured or killed while working **outside** the territorial limits of the state, if his employment is:

- a. **principally localized** in this state; or
- b. he is working under a **contract of hire** made in this state for employment, not principally localized in any state; or
- c. he is working under a contract of hire made in this state for employment **principally localized in another state** whose workers' compensation law is not applicable to his employer; or
- d. he is working under a contract of hire made in this state, for employment outside the USA and Canada.

6.2 **An Example of this Legal Rule:** - In *Goldberg v. WCAB (Star Enterprises)*, 696 A.2d 263 (1997), claimant's employment was found to be principally localized in Pennsylvania and injuries sustained while working outside of Pennsylvania were covered by the Pennsylvania Workers' Compensation Act.

The facts reflect employee was a Pennsylvania resident hired at employer's New Jersey office to set up and supervise a new program to expand full service and food service locations owned by employer, a subsidiary of Texaco. The

majority of store set-ups and business dealing were in Pennsylvania. He suffered a back injury while lifting frozen food at a store in New Jersey. The workers' compensation judge concluded that claimant met his burden to establish his employment was principally localized in Pennsylvania pursuant to §305.2 (a).

This section provides that one's employment is principally localized in this state when: his employer has a place of business in this state, he regularly works at or from such a place of business, or having worked at such place of business, his duties require him to go outside of the state for not over one year.

The facts demonstrate claimant worked at or from employer's Pennsylvania stores as a rule and not as the exception. His coordinator duties were not sporadic or intermittent as he performed these functions on an ongoing and continuous basis. As the employer maintained places of business in Pennsylvania, and claimant regularly worked at or from such places in business, he falls within the jurisdictional provisions of §305.2. The Pennsylvania law applies to this injury.

### 6.3 **Simultaneous Benefits.**

The 1993 Act 44 Amendments made it unlawful for any employee to receive benefits under the Pennsylvania Workers' Compensation Act for the same time period during which benefits are received from another state or federal program, for the same injury.<sup>9</sup>

Simultaneous benefits are prohibited; the claimant may receive Pennsylvania benefits after another jurisdiction has ceased payments.

### 6.4 **Written Agreements.**

Attempts to bind an employee to accept the workers' compensation benefits of another jurisdiction are not enforceable. See: *Robert M. Neff, Inc. v. WCAB (Buss)*, 624 A.2d 727 (Pa. Cmwlth. 1993).

- 6.4a A written agreement can determine that employment is "principally localized" in Pennsylvania or such other state, unless the other state refuses jurisdiction. See: Section 305.2 (d) (5). *Creel v. WCAB (Overland Express)*, 643 A.2d 784 (Pa. Cmwlth. 1994).

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<sup>9</sup> Section 322; 77 P.S. §677.

6.5 **Litigation Results.**

Jurisdictional issues, interpreting the “principally localized language, have yielded mixed results, dependent upon specific facts.