A COMPARISON OF THE RHODE ISLAND

AND MASSACHUSETTS WORKERS' COMPENSATION ACTS

Obviously, if you as counsel are admitted in one state versus both, you will want to keep the case in the jurisdiction in which you are admitted. However, this may not always be in your client's best interest. Let's take a look at the differences between the two states to see which one would be best for your client's particular claim.

COVERAGE

With the change in the Rhode Island Workers' Compensation Statute allowing for jurisdiction in instances where an employee, although hired in another state, is injured in Rhode Island, the Rhode Island Workers' Compensation Court has jurisdiction over more injuries. However, this does not necessarily mean that the Rhode Island Workers' Compensation Court has jurisdiction over the insurer who would normally cover the case. Likewise, where a Rhode Island employee (some one hired in Rhode Island) is temporarily sent to Massachusetts and injured in Massachusetts, the Department of Industrial Accidents may have jurisdiction over the case. The problem arises as to whether or not the insurer has coverage in the other state. Both the Rhode Island and the Massachusetts pool policies indicates that the insurer will provide coverage in another state where an employee is injured in that other state but there are two conditions:

1. the employee must be a "Massachusetts employee" for the Massachusetts policy to cover or the employee must be a "Rhode Island employee" for the Rhode Island policy to cover an injury and
2. the employee was *temporarily* in the other state when injured.

A 'Massachusetts employee' is defined as one who is hired in Massachusetts to perform temporary work in the other state. A 'Rhode Island employee' is defined as one who is hired in Rhode Island to perform temporary work in the other state. The most current case law on the issue of how to determine if the employee was actually hired in Massachusetts is Hudnall v. Raytheon, 26 Mass. Workers' comp. Report 105 (2012) where the employee's last act of hire was determined to be in California as that was where he was standing when he accepted the job offer. Rhode Island has taken a similar stance in determining the contract of hire.

Thus, if I was hired in Massachusetts and then while driving from my office in Massachusetts to Rhode Island to go to court was involved in a motor vehicle accident on Interstate 195 in East Providence I would have not only choice of jurisdiction but my Massachusetts insurer would be forced to cover me under Rhode Island law if I chose to bring the claim for benefits there. The same is true of a Rhode Island hire temporarily in and injured in Massachussetts.

If these two criteria are not met, the insurer will not cover the employer in Rhode Island. However, where these criteria are met, the employee has a choice as to where to file and be certain to have an insurer to cover the claim. As we have seen of late, there are occasions where the employee with the choice of jurisdictions may be bringing a claim against the employer who, although it may have insurance in one state has no coverage for the claim because the employee was hired, for example, in Massachusetts but was permanently assigned to Rhode Island or visa versa. The real complicated cases appear where, for example, a Massachusetts company with Massachusetts workers' compensation insurance, goes into Rhode Island to do a job and hires some one while in Rhode Island who is then injured in Rhode Island. In such cases, the insurer will deny coverage.

Per the "Limited Other States Endorsement" and "Massachusetts Workers' Compensation Assigned Risk Pool Special Bulletin no.12-04 Massachusetts Limited Other States Insurance Endorsement" the so-called multi-states endorsement "the only purpose of this Endorsement is to describe the limited situation(s) when a pool policy will pay other state's benefits to *a Massachusetts employee who is injured while temporarily working in another state* in furtherance of his Massachusetts employment." Where an employee alleges jurisdiction in Rhode Island based purely upon contract of hire in Rhode Island and injury in Rhode Island and does not allege an injury in Rhode Island while furthering his Massachusetts employment, there is no policy of insurance from the Massachusetts insurer to cover such an injury before the Rhode Island Workers' Compensation Court. This is also true where the employee was hired in Massachussetts and the employer only has the Rhode Island policy of insurance whose language is quite similar. The Rhode Island policy under "Part Three" contains the definition of a Rhode Island employee. "A Rhode Island Employee" is an employee whose *principal place of employment and place of hire* are within the State of Rhode Island and who performs the most substantial portion of employment within the State of Rhode Island."

The Massachusetts Workers' Compensation Rating and Inspection Bureau (WCRIB) is given statutory authority to write and interpret via Special Bulletins the Massachusetts pool policy. The most recent Special Bulletin dealing with this issue was issued on March 26, 2013 and states:

> Over the past several years, the WCRIBMA issued special bulletins and circular letters (Special Bulletin 09-02, Special Bulletin 12-04 and Circular Letter 1983) in response to requests for clarification as to the purpose and meaning of certain words within the Massachusetts Limited Other States Insurance Endorsement. The purpose of the New Endorsement is to clearly define, within the endorsement itself, both the purpose and the limitations of the endorsement.
>
> The New Endorsement makes clear that it does not provide other states insurance coverage, it does not satisfy the requirements of another state's workers' compensation law, and that benefits will not be paid to employees hired to work outside of Massachusetts or to employees working in another state for whom the insured should have obtained separate workers' compensation insurance.

A Massachusetts workers' compensation policy with this New Endorsement will pay the workers' compensation benefits of another state to a Massachusetts employee, only in the very limited situation when the Massachusetts employee is injured while working for the insured in another state **and**, as of the date of injury, that employee's work for the insured has primarily been conducted in Massachusetts.

The WCRIB letter from 11/3/04 defines 'temporarily working' in the other states by limiting it to injuries which occur within the first 180 days of that other state employment.

EMPLOYEE

While the verbiage is different, what or who constitutes an employee is similar between the two states. In either state, one employee is sufficient to trigger the requirement of workers' compensation insurance. Corporate officers in Massachusetts are covered without need for election into the system. However, self-employed, sole proprietors or unincorporated company owners must intentionally opt into the system. Therefore, where an unincorporated business has workers' compensation coverage, the principals of the business will not be covered for work related injuries unless they each opt into the system in the policy itself.

UNINSURED EMPLOYERS

First, if there is no workers' compensation coverage at all, you are best to bring the case in Massachusetts. This is because Massachusetts has a Fund which pays employees much like an insurer when the employer is completely without workers' compensation coverage. The Fund then pursues the employer for reimbursement. If the employer is insolvent, the employee still is covered for the claim. This includes all provisions of the Workers' Compensation Statute except for certain penalty provisions for failure of the insurer to pay ordered benefits in a timely manner. Therefore, the employee's weekly, medical, permanency and vocational benefits are all covered by the Trust Fund. This Fund is made up of fees charged to insurers for each claim against them that makes its way through the workers' compensation system.

WEEKLY BENEFITS

The Massachusetts Statute, like Rhode Island, sets a maximum amount available to an employee for weekly benefits. The change in the amount takes place on October 1st of each year. The current Rhode Island maximum is $1017.00 reviewed September 1st of each year. The current Massachusetts maximum is $1,181.28. Obviously, if your client is a high wage earner, you may want to consider Massachusetts over Rhode Island. The weekly benefit in Massachusetts is 60% of the

gross average weekly wage. Unlike Rhode Island, concurrent employment is added into the wages only where both of the employers for which the employee worked are insured under the Massachusetts Statute. However, the average weekly wage in Massachusetts is based upon the past 52 weeks including overtime and bonuses as opposed to Rhode Island's 13 weeks. Part-time employment in Massachusetts is not treated any differently than full time for purposes of the average weekly wage calculation. However, seasonal employees and teachers are treated differently. The average weekly wage of the seasonal employee and teachers is divided by 52 weeks whether or not the employee actually worked during that entire 52 week period. Unemployment benefits are never included in the average weekly wage calculation. Therefore, a seasonal employee would fare better in Rhode Island.

Unlike Rhode Island where there is little difference between what an employee receives on total versus partial, in Massachusetts the partial weekly benefit rate can be no greater than 75% of the total disability rate. Earning capacity assignments are more common in Massachusetts. While the maximum number of weeks that one can collect partial disability in Rhode Island is 312 weeks, the maximum amount in Massachusetts is 260 weeks depending upon the number of weeks the employee collected temporary total disability. This can be, but is rarely, extended to 520 weeks where the employee can show a 75% loss of function. While Rhode Island has no cap on the number of weeks the employee can collect temporary total disability, Massachusetts limits total to three years. Since the maximum of temporary total disability is three years, the Massachusetts Statute has built into it a provision for permanent and total disability. This increases the employee's rate to two-thirds of the average weekly wage and entitles the employee to a Cost of Living Adjustment the next October 1st following the order or decision placing the employee on a permanent and total disability benefit.

RETIREMENT

Massachusetts has a retirement provision (Section 35E) where once the employee reaches age 65 and is not collecting permanent and total disability benefits, the insurer may be entitled to a termination of benefits if the employee had intended to retire at age 65. This is a very convoluted part of the Massachusetts statute where the legislature actually listed evidence which cannot be used by the employee to defend against the retirement allegation.

VOCATION REHABILITATION

If your employee is likely to be found partially disabled but unable to return to work in his or her prior employment and lacks the transferable skills to obtain employment which would earn the employee close to or the equivalent of the employee's pre-injury average weekly wage, the employee may be entitled to vocational rehabilitation in Massachusetts and Rhode Island. In Massachusetts, this program may last up to 104 weeks. However, once the employee settles the case, the right to begin a vocational rehabilitation program ends two years after the date the settlement is approved. The vocation rehabilitation can be anything from assistance with job placement to obtaining an associates degree. It all depends upon the employee's background and prior education.

DISFIGUREMENT AND LOSS OF FUNCTION

When deciding which jurisdiction to bring an employee's case, scar-based disfigurement may be a large factor. This is because Massachusetts limits payments for scar-based disfigurement to hands, wrists, neck and face only. Further, while an employee in Rhode Island may receive up to $45,000.00 for disfigurement, Massachusetts limits the disfigurement amount to an aggregate of $15,000.00. The amount received is based upon a measurement of the scar multiplied by the State Average Weekly Wage (the maximum available weekly benefit) at the time of the injury and a determination by the D.I.A. official reviewing the scar as to whether it is severe or mild in nature. In Rhode Island, disfigurement evaluation is much more subjective.

On the other side, the loss of use, called loss of function in Massachusetts, is more generous than Rhode Island. While Rhode Island limits loss of use to 312 weeks, $28,080.00, Massachusetts has no such cap. Therefore, an injured employee may stack the injured body parts until each is appropriately accounted for. This can add up to far in excess of $100,000.00 depending upon the nature of the injury. Like Rhode Island, Massachusetts requires the use of the latest A.M.A. Guidelines to determine the loss of function

COMPENSABLE INJURIES

Massachusetts and Rhode Island are very similar on the basic concept of compensability. The differences arise in apportionment, mental injuries and the Statute of Limitations. The Statute of Limitations in Rhode Island is two years. In Massachusetts it is four years from the time that the employee knew or should have known of the connection between the injury and work.

In Rhode Island and Massachusetts, if an employee has a clear-cut injury on the job, benefits would be awarded. With one minor exception, Massachusetts has no true equivalent to the apportionment Statute. It is an all or nothing proposition. If you have an employee in Massachusetts who has a prior *work-related* injury, the injury cannot be used to apportion benefits or disability no matter what the nature of the injury may be. The last insurer on the risk at the time of the last injurious exposure or injury is responsible for the entire claim. This is Massachusetts' so called 'successive insurer rule'. However, a prior non-work related injury may be used to terminate benefits if the employee's work injury does not remain "a major" cause of the current disability. There has been a huge amount of litigation lately on what is the definition of "a major" cause of the disability. To boil it down, it really only requires that the physician testify that the work injury remains *a* major but not necessarily *the* major cause of the employee's ongoing disability. In those circumstances, the employee would be entitled to continuing benefits.

PSYCHIATRIC INJURIES

Rhode Island and Massachusetts are similar as to how they treat mental-mental and mental-physical injuries. On the purely emotional mental injury, Rhode Island's standard of proof is much more stringent than Massachusetts'. Massachusetts requires that the work related stressor be the predominant cause of the disability and that the work related stress not be caused by bona fide personnel actions. In other words, a legitimate action by the employer to either discipline or terminate the employment. So, if the employee was fired for cause and the employee has a severe emotional reaction to being terminated, the employee would generally not be entitled to benefits. The definition of bona fide personnel action has narrowed over the last few years, thus given a choice between the two states an employee has a greater chance of prevailing in Massachusetts on a pure mental injury than Rhode Island. This is because Rhode Island requires that the work related stress suffered by the employee actually caused the injury, not just contributed to it, and that the stress be greater than normally experienced by others in the same job. Like Rhode Island, Massachusetts subjects emotional injuries arising from a physical injury to a much lighter standard of proof.

DISABILITY

One of the major differences between Massachusetts and Rhode Island is the medical issue of disability. In Rhode Island an employee's disability is defined by the requirements of his or her individual job. Massachusetts looks at disability in the open labor market. Thus, in Massachusetts, if an employee is disabled from his or her regular job, that same employee may not be disabled from earning the equivalent amount in the open labor market based upon past experience, age, education and the extent of the disability. This is where Massachusetts assigns injured employees earning capacities which reduce the weekly partial disability benefit. In Rhode Island, an employee may remain partially disabled and entitled to receive weekly benefits as long as he or she is unable to return to the job the employee held at the time of the injury. In these situations, the insurer/employer will seek a determination that the employee is at maximum medical improvement and seek a 30% reduction of the weekly benefits.

PAYMENT WITHOUT PREJUDICE

In Massachusetts an insurer may make weekly payments without prejudice for up to 180 days. This may be extended to 360 days where the employee agrees and signs an extension of the pay without prejudice period. During this period the employee may not file a claim just to establish liability. However, if there is a legitimate issue regarding treatment or the average weekly wage, a claim will be allowed to proceed before the Department of industrial Accidents. Rhode Island allows the insurer to pay without prejudice only up to 13 weeks. However, during that period of time the employee may file a petition to establish liability.

PROCEDURE BEFORE THE DEPARTMENT OF INDUSTRIAL ACCIDENTS

Conciliation

All cases in Massachusetts are brought before the Department of Industrial Accidents which is an administrative agency. Claims before the D.I.A. are subject to a three stage process. The first stage is a conciliation. It is an informal information gathering process where an individual employee of the Department of Industrial Accidents makes a determination as to whether the moving party has sufficient documentary evidence to proceed before an administrative judge. The employee is usually not required to appear unless he or she has filed a claim for disfigurement. The conciliator is usually the person to determine the value of the disfigurement claims. There is no fee for filing a claim.

Conference

The next step is a conference. Similar to a Rhode Island pre-trial conference, it is technically an informal process consisting of oral arguments to the judge. At the Massachusetts conference, the parties are each required to produce two copies of their medical evidence and a digital copy for the Department's computer system. Also, as in Rhode Island, the judge has the power to order or deny the relief sought at the conference. The difference here is that if there is any medical issue at all the case must go to an impartial examiner. The party who appeals the judge's order, you have 14 days to do so, must pay an appeal fee of $450.00. If the employee ultimately prevails at the hearing, he or she will be reimbursed the appeal fee. If the employee cannot afford the fee, he or she may file a request for indigency waiver of the fee. The employee must file an indigency affidavit.

The report of the impartial examiner is prima facie evidence of the medical issues addressed in the report. Without permission from the judge, it is the only medical evidence that will be submitted at hearing. There are ways to supplement the report with the opinions of your own physician by arguing that the report of the impartial examiner is either inadequate or that the medical issues are complex.

Hearings

Once the report is in, the case is scheduled for a full evidentiary de novo hearing before the same judge. The trial procedure in Massachusetts is nearly identical to Rhode Island except that the medical depositions are done after the lay testimony. This is because the ability to perform any pre-trial discovery in Massachusetts is very limited.

Appeal

The appeal period for a hearing decision is 30 days. You will be e-mailed a copy of the hearing transcript and a pre-transcript conference will be scheduled in Boston before the Department of Industrial Accidents Review Board. The Review Board is

similar to the Appellate Division in Rhode Island except that it is made up of administrative law judges whose primary job is to write appellate decisions and review lump sum settlements and Section 15 Petitions (third-party case settlements) for approval or denial. The next level of appeal upwards would be to the Appeals Court and then to the Massachusetts Supreme Judicial Court.

PROCEDURE BEFORE THE RHODE ISLAND WORKERS' COMPENSATION COURT

Pre-trial conference

Similar to the Massachusetts system, Rhode Island uses a pre-trial conference to determine immediate issues of compensation. The procedure is different in some ways which include the requirement to pre-file any documents you intend to use at the time of the pre-trial conference and there is a fee for each Petition filed. The fee is paid by the party filing the Petition. Orders must be appealed within 5 days in order to be perfected.

Initial Hearing

This is where the parties inform the judge of the names of their witnesses and the dates set for deposition(s). This allows the judge to determine the amount of time need for trial and to set a trial date. In Rhode Island, unlike Massachusetts, the parties are allowed to take depositions prior to the trial, including the deposition of the employee.

Trial

This procedure is very similar in both states. It is a bench trial under oath. The difference here is that the Massachusetts judge will always issue a written hearing decision where the Rhode Island judge may issue a 'Bench Decision" wherein the judge dictates the findings and determination on the record before the parties.

Appeals

Appeals are before the Appellate Division which is made up of a 3 judge panel from the regular trial judges. Appeals from their decisions go on to the Rhode Island Supreme court.

SETTLEMENTS

Massachusetts normally favors settlements. They usually make it as swift and painless a process as possible. The settlement documents are can be found at the D.I.A.'s website (http://www.mass.gov/lwd/workers-compensation/). When you settle a case in Massachusetts, if liability is accepted, the employee's entitlement to medical treatment remains open and available for the remainder of the employee's life. This eliminates the need for Medicare set-aside agreements. If the case is unaccepted, it is just like a denial and dismissal in Rhode Island.

There are two sets of judges who have the power to approve settlements. The administrative judges, who are your trial judges, and the administrative law judges who are Review Board judges. The Review Board travels from region to region monthly. So, if you are in hurry, it is preferable to present the settlement to the administrative judge hearing your trial. If the case has not yet been assigned to a particular Administrative judge, the Department has established a new "Walk-in Lump Sum" procedure which requires 24 hours notice to the lump sum conciliator of the day in your region. In Massachusetts, unlike Rhode Island, the is no testimony at a settlement. The employee's attorney explains to the judge why the settlement is in the employee's best interests and the judge explains once again the rights the employee releases in exchange for the settlement and the rights which remain available. As you can imagine, most of the judges have this speech memorized. The conciliators also have authority to hear and approve settlements. The difference here is that the judges must make a determination that the settlement is in the employee's best interest. The conciliators only determine if the paperwork is complete. This paperwork, while standardized, usually includes allocations for a Scirotta offset to increase the employee's Social Security disability benefit.

Under no circumstances can the employer or insurer request or demand either a general release or a resignation from the employee in order to settle the case in Massachusetts. The request of such a release or resignation may result in the imposition of a penalty upon the party requesting it. However, in order to settle the case where the employer remains an experienced modified insured for premium purposes, the employer's written consent is required. The exact opposite is true of Rhode Island where as part of the standard settlement documents a General Release and a Resignation is included in the settlement.

Rhode Island does not presently have a standardized form for settlements. But as mentioned above, the documents usually contain a resignation and a general release. The employee testifies under oath to a number of questions mainly focused on his or her present condition as it applies to obtaining work and to the employee's understanding that the settlement closes out the case in its entirety as, unlike Massachusetts, a settlement in Rhode Island also closes out the entitlement to future medical benefits. Obviously, this raises issues of Medicare Set Asides.

ATTORNEY'S FEES

Fees are set by Statute in Massachusetts. It is a multiple of the State Average Weekly Wage and varies depending upon where you are in the process. The fee for conference is $1,574.83 which is paid by the insurer but the insurer may reduce your client's benefits up to 22% for the first month after the conference order or for permanency payments in order to defray the costs of the attorney's fee. The fee for trial is currently $5,511.91 plus the reimbursement of reasonable costs. The fee increase annually on October 1st.

When the case settles, the fees are determined by whether the case settles accepted or not. The fee for an accepted case is 20% and 15% for non accepted. However, the judge expects the fee to be reduced for any amount allocated in a settlement for permanency. The expenses outstanding at the time of the settlement are either waived by counsel or taken from the settlement proceeds.

In Rhode Island the fees are not subject to any standardization. It is determined on a case by case basis and within the discretion of the judge hearing the matter.

SECTION 51 INCREASED AVERAGE WEEKLY WAGE

Where you have a young employee, Massachusetts has a provision in its Statute for increasing the average weekly wage. The case law indicates that this provision is a young person's statute. It is used where the employee, but for the injury, would have developed skills that would have resulted in an increase in his or her average weekly wage. It does not increase wages for an increase in, for example, a union contract. It requires proof of skill acquisition. The easy example of this is where the employee was an apprentice in their chosen profession and, but for the injury, would have developed the skills to increase their status or rating which would have resulted in an increase in the average weekly wage.

SECTION 28 DOUBLE BENEFITS

Massachusetts has an unique provision which allows an employee to bring a claim directly against the employer where the employee's injury was caused by the quasi-criminal actions of the employer. As you can imagine, what is quasi-criminal has been a source of a great deal of litigation. This is because if the employee prevails on this claim all of the benefits are doubled and payable to the employee. This includes medical payments. The standard is very high. Evidence of quasi-criminal/wilful and wanton misconduct on the part of the employer includes a violation of state and/or OSHA regulations. The interesting thing about Section 28 is that where the employee prevails in one of these cases the insurer must make payment to the employee of the double benefit. It is then the insurer's burden to pursue the employer for reimbursement of this additional benefit.

REINSTATEMENT

Massachusetts does not have the same rights to reinstatement as Rhode Island. In Massachusetts, the employee's job may be filled at any time. However, the injured employee must be given preference for any available job. Enforcement of this provision is in the Superior Court. If the employee does return to work for the same company but is terminated within one year of resumption of work it is presumed that it is because the employee is physically unable to work as a result of the work injury. In Rhode Island, the employee has a right to be reinstated to his or her prior position within one year (up to 18 months under certain circumstances) even if that position has been filled.

MEDICAL BENEFITS

Massachusetts pays for medical treatment at rates set by the Rate Setting Commission known as the "Board Rate." Unfortunately, these rates are often so low, in some instances less than Medicare rates, that many physicians will refuse to treat injured workers. However, many insurers will agree to pay in excess of the Board rate for treatment with well respected physicians or facilities. In addition to the medical providers, the Massachusetts statute provides for reimbursement for out of pocket expenses such as mileage to and from treatment and IME appointments. Additionally, Massachusetts will order payment for reasonable accommodations such as widening doorways to accommodate a wheelchair or adding hand controls to a motor vehicle.

All treatment in Massachusetts must be approved through Utilization Review. The employee is sent a U.R. medical card which provides the treating physician or facility with all of the information required to comply with the U.R. process. If the request for treatment is denied the physician can appeal and the matter is then sent to a peer review. If the request is denied by peer review, the employee may bring a claim for the treatment before the D.I.A.

Rhode Island too has a Board rate for treatment which is set by the Medical Advisory Board. These rates often exceed the Massachusetts rates for treatment.

SECOND INJURY FUND & OVERPAYMENTS

Massachusetts has a Second Injury Fund which is alive and well funded. The parties may want to consider filing in Massachusetts where it appears that the employee may be entitled to permanent and total disability benefits as a result of the combination of two injuries. This would enable the insurer to file a claim for reimbursement against the S.I.F. However, unlike Rhode Island, the Massachusetts S.I.F. does not reimburse insurers where the order or decision results in an overpayment. The employee may be sued in the Superior Court for recoupment of the overpayment.

THIRD PARTY CLAIMS

Massachusetts, like Rhode Island, recognizes that the workers' compensation insurer has a lien on the proceeds of a third party tort case. This includes medical malpractice cases where the disability is extended as a result of the malpractice. The difference comes in the 'vacation' or 'holiday' resulting from the excess settlement proceeds. Massachusetts uses a very complicated formula to determine how much the insurer receives in reimbursement of its lien. Since it is so complicated the D.I.A. has included in its website an interactive form known as a 'Section 15 Petition' to help the parties work out the reimbursement as there are various offsets against the insurer's lien. The employee's benefits are reduced by approximately 2/3 until any 'excess' in the settlement is made up. This 2/3 reduction applied to all benefits, including medical and weekly benefits. All third party settlements must be approved by either the Review Board or the Superior Court in which the tort claim was filed.

CONCLUSION

While we have attempted to cover the basic differences between the two states' benefit structure, clearly each case will need to be evaluated based upon your client's specific factual situation. This outline was by no means meant to be exhaustive. Ultimately, where you bring a claim for benefits will depend upon which state's statutory scheme will best benefit your client.

APPENDIX

Attached are a few cases and some portions of the policies and Special Bulletins referenced in the discussion.

The WCRIB web page with the Special Bulletins can be found at:

https://www.wcribma.org/mass/ToolsAndServices/UnderwritingToolsandForms/DocumentRepository/CircularsBulletinsNotices/2013/sb06-13_03-26-2013_Forms,%20Endorsements%20and%20Rules.pdf

THE WORKERS' COMPENSATION
RATING AND INSPECTION BUREAU

Massachusetts Workers Compensation
Assigned Risk Pool

March 26, 2013

MASSACHUSETTS WORKERS' COMPENSATION
ASSIGNED RISK POOL

SPECIAL BULLETIN NO. 06-13

MASSACHUSETTS LIMITED OTHER STATES BENEFIT ENDORSEMENT
WC 20 03 06B

The Division of Insurance ("DOI") has approved an amended version of the Massachusetts Limited Other States Insurance Endorsement (WC 20 03 06A). The new version is titled **Massachusetts Limited Other States Benefit Endorsement** (WC 20 03 06B) and is now approved for use by Massachusetts workers' compensation insurers for new and renewal policies, effective on or after June 1, 2013 ("New Endorsement").

Over the past several years, the WCRIBMA issued special bulletins and circular letters (Special Bulletin 09-02, Special Bulletin 12-04 and Circular Letter 1983) in response to requests for clarification as to the purpose and meaning of certain words within the Massachusetts Limited Other States Insurance Endorsement. The purpose of the New Endorsement is to clearly define, within the endorsement itself, both the purpose and the limitations of the endorsement.

The New Endorsement makes clear that it does not provide other states insurance coverage, it does not satisfy the requirements of another state's workers' compensation law, and that benefits will not be paid to employees hired to work outside of Massachusetts or to employees working in another state for whom the insured should have obtained separate workers' compensation insurance.

A Massachusetts workers' compensation policy with this New Endorsement will pay the workers' compensation benefits of another state to a Massachusetts employee, only in the very limited situation when the Massachusetts employee is injured while working for the insured in another state **and**, as of the date of injury, that employee's work for the insured has primarily been conducted in Massachusetts.

Servicing carriers and voluntary direct assignment carriers are reminded to attach endorsement WC 20 03 06B to all Massachusetts residual market policies and enter "Coverage Replaced By Endorsement WC 20 03 06B" in item 3.C. of the Information Page.

Although the approved effective date of the New Endorsement is June 1, 2013, the DOI has indicated that the New Endorsement may be used immediately by any WCRIBMA member without the necessity of an adoption filing. The DOI asks that any company using this or any other approved endorsement form, which has been filed by the WCRIBMA on their behalf, include the issuing company's name on the endorsement.

Attached is a copy of the approval letter from the DOI (Attachment A). A copy of the new Massachusetts Limited Other States Benefit Endorsement (Attachment B) and the redline version of the Massachusetts Limited Other States Insurance Endorsement are also attached for your information (Attachment C). The Endorsement is now available in Word format on the WCRIBMA's website, www.wcribma.org, under *Helpful Info: Filed and Approved Endorsements* and also in PDF format under *Residual Market: Mandatory Endorsements*.

Any questions may be addressed to Daniel Crowley, Vice President –Customer Services at 617-646-7594; dcrowley@wcribma.org or Ellen Keefe, Vice President - General Counsel at 617-646-7553; ekeefe@wcribma.org.

Daniel M. Crowley, CPCU
Vice President –Customer Services & Residual Market

Attachment A

COMMONWEALTH OF MASSACHUSETTS
Office of Consumer Affairs and Business Regulation
DIVISION OF INSURANCE
1000 Washington Street, Suite 810 • Boston, MA 02118-6200
(617) 521-7794 • FAX (617) 521-7475
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JOSEPH G. MURPHY
COMMISSIONER OF INSURANCE

March 6, 2013

Ellen F. Keefe, CPCU
Vice President and General Counsel
Workers' Compensation Rating and
Inspection Bureau of Massachusetts
101 Arch Street, 5th Floor
Boston, MA 02110

RE: PROPOSED MASSACHUSETTS LIMITED OTHER STATES BENEFIT ENDORSEMENT WC 20 03 06 B

Dear Ms. Keefe:

The Massachusetts Division of Insurance ("Division") has reviewed your letter and attachments thereto, dated March 4, 2013, on behalf of the Workers' Compensation Rating and Inspection Bureau (alternatively "WCRIB" or "Bureau"), requesting approval of Massachusetts Limited Other States Benefit Endorsement WC 20 03 06 B (the "Endorsement"). The Endorsement is intended to replace the current Massachusetts Limited Other States Insurance Endorsement WC 20 03 06 A. In addition, the Division has reviewed those supplementary materials submitted in support of your request on March 6, 2013. Pursuant to your letter, the Endorsement would be effective for new and renewal policies on June 1, 2013.

Based upon the information provided, the Division has determined that the Endorsement will clarify policyholders' rights and responsibilities, as well as those of the insurers and the WCRIB, under workers' compensation contracts in Massachusetts. Consequently, the Division approves the Endorsement as filed.

As requested in your letter, the Endorsement shall be effective as of June 1, 2013. While the Endorsement may immediately be used by any WCRIB member without the necessity of an

adoption filing, we ask that all companies using this or any other approved form that has been filed by the Bureau on their behalf include the issuing company's name.

Sincerely,

Matthew Mancini
Director, State Rating Bureau

Attachment B

WORKERS' COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY WC 20 03 06 B

Effective June 1, 2013

MASSACHUSETTS LIMITED OTHER STATES BENEFIT ENDORSEMENT

THIS ENDORSEMENT REPLACES PART THREE OF THE POLICY: OTHER STATES INSURANCE.

A. How This Endorsement Applies

1. We do not provide other states insurance coverage as described in Part Three of the Policy. Furthermore, the Massachusetts Limited Other States Benefit Endorsement does not satisfy the requirements of another state's workers' compensation law. However, pursuant to this endorsement, we will pay promptly, when required by the workers' compensation law of a state other than Massachusetts, the benefits due to employees pursuant to such other state's law, but only if the claim for such benefits involves work performed by a Massachusetts employee. For purposes of this Endorsement, a Massachusetts employee is someone whose contract of hire was made in Massachusetts or whose work for you, as of the date of injury, has primarily been conducted in Massachusetts. Other state's benefits will **not** be paid if:

   a. The employee is claiming benefits in a state where, at the time of injury, you have other workers' compensation insurance coverage that would cover the injured employee, or
   b. You were, by virtue of the nature of your work or operations in that state, required by that state's law to have obtained separate workers' compensation insurance coverage in that state that would cover the injured employee.

2. If we are not permitted to pay the benefits directly to persons entitled to them under circumstances described in Item 1 above, we will reimburse you for the benefits required to be paid.

3. If you hire any employees to work outside Massachusetts or begin work or operations in any state other than Massachusetts, you must obtain any insurance coverage required by that state's laws, as this Limited Other States Benefit Endorsement does not satisfy the requirements of that state's workers' compensation insurance law.

4. This endorsement does not affect the payment of Massachusetts benefits under this Policy.

Notes:
1. Servicing carriers and voluntary direct assignment carriers must attach this endorsement to all policies issued through the Massachusetts Workers' Compensation Assigned Risk Pool. Voluntary carriers may, as an option, elect to attach this endorsement to any policy showing Massachusetts in Item 3.A. of the Information Page.
2. Enter "COVERAGE REPLACED BY ENDORSEMENT WC 20 03 06 B" in item 3.C. of the Information Page.

Attachment C

MASSACHUSETTS LIMITED OTHER STATES BENEFIT ~~INSURANCE~~ ENDORSEMENT

THIS ENDORSEMENT REPLACES PART THREE OF THE POLICY: ~~—~~ OTHER STATES INSURANCE. ~~OF THE POLICY is replaced by the following:~~

A. How This ~~Insurance~~ Endorsement Applies

1. We do not provide other states insurance coverage as described in Part Three of the Policy. Furthermore, the Massachusetts Limited Other States Benefit Endorsement does not satisfy the requirements of another state's workers' compensation law. However, pursuant to this endorsement, ~~W~~we will pay promptly, when ~~due~~ required by the workers' compensation law of a state other than Massachusetts, the benefits due to employees pursuant to such other state's law, ~~required of you by the workers compensation law of any state other than Massachusetts,~~ but only if the claim for such benefits involves work performed by a Massachusetts employee. For purposes of this Endorsement, a Massachusetts employee is someone whose contract of hire was made in Massachusetts or whose work for you, as of the date of injury, has primarily been conducted in Massachusetts. Other state's benefits will ***not*** be paid if:

   a. The employee is claiming benefits in a state where, at the time of injury, you have other workers' compensation insurance coverage that would cover the injured employee, or
   b. You were, by virtue of the nature of your work or operations in that state, required by that state's law to have obtained separate workers' compensation insurance coverage in that state that would cover the injured employee.

2. If we are not permitted to pay the benefits directly to persons entitled to them under circumstances described in Item 1 above, we will reimburse you for the benefits required to be paid.

3. If you hire any employees to work outside Massachusetts or begin work or operations in any state other than Massachusetts, you must obtain any insurance coverage required by that state's laws, as this Limited Other States Benefit Endorsement does not satisfy the requirements of that state's workers' compensation insurance law.

4. This endorsement does not affect the payment of Massachusetts benefits under this Policy.

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~~IMPORTANT NOTICE!~~

~~If you hire any employees to work outside Massachusetts or begin operations in any state other than Massachusetts, you must obtain insurance coverage in that state and do whatever else may be required under that state's law, as this Limited Other States Endorsement does not satisfy the requirements of that state's workers compensation insurance law.~~

Notes:
1. Servicing carriers and voluntary direct assignment carriers must attach this endorsement to all policies issued through the Massachusetts Workers' Compensation Assigned Risk Pool. Voluntary carriers may, as an option, elect to attach this endorsement to any policy showing Massachusetts in Item 3.A. of the Information Page.
2. Enter "COVERAGE REPLACED BY ENDORSEMENT WC 20 03 06 ~~A~~B" in item 3.C. of the Information Page.

042831-06 (2012). Mark Hudnall v.Raytheon Technical Services Co.
Massachusetts Workers Compensation Decisions
2012.
042831-06 (2012). Mark Hudnall v.Raytheon Technical Services Co
Mark Hudnall v.Raytheon Technical Services Co.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 042831-06

Mark Hudnall Employee
Raytheon Technical Services Co. Employer
Liberty Mutual Insurance Company Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Koziol)

The case was heard by Administrative Judge Solomon.

APPEARANCES
Brian C. Cloherty, Esq., for the employee
Richard N. Curtin, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

COSTIGAN, J. On November 10, 2006, the employee, a resident of Oklahoma, sustained an industrial injury to his back while working for Raytheon at a military installation in California. He was paid workers' compensation benefits under California law by Liberty Mutual Insurance Company (Liberty). He later filed a claim for benefits under the Massachusetts workers' compensation statute, G. L. c. 152.(fn1) (Dec. 5.) He appeals from the decision in which the administrative judge concluded that Massachusetts had no jurisdiction over his claim. (Dec. 9.) We affirm.

The sole issue addressed by the judge was that of jurisdiction. Crediting the employee's testimony, the judge made the following findings of fact. The employee, age forty-nine, has been a resident of Oklahoma since 2001 when he bought a home there. (Dec. 8, n.2.) He has a bachelor of arts degree as well as advanced avionics training. He became a Peacekeeper II nuclear missile launch officer, and served in the military from January 1984 to May 1989 as an aviation anti-submarine warfare technician. (Dec. 5.) In April 2006, the employee accepted a $145,000 a year position with Mantek, a Virginia company; he was to start that job on April 27, 2006. Prior to accepting that job, the employee had discussions with Raytheon regarding the company's missile shield program, but he had not received a job offer. (Id.) Addressing subsequent events, the judge

found:After accepting the Mantek position, the employee telephoned Raytheon and informed them that he had accepted employment elsewhere and thanked them for considering him. Representatives of Raytheon advised the employee that they had been planning to come forward with an offer for him and urged him to wait. The employee then had several telephone conversations from his home in Bartlesville, Oklahoma with two representatives of Raytheon who were in Burlington, Massachusetts. These telephone conversations included a discussion of the employee's experience and background; the employee asked about the physical requirements of the job because [he] had suffered a previous work-related back injury. Toward the end of April, *the Raytheon representatives, in the course of these telephone conversations with the employee in Oklahoma, offered the employee a job which he accepted.* The position offered and accepted was that of an operator/ maintainer of a missile shield early warning radar at an hourly rate of $26.50.

Having accepted the job and following Raytheon instructions, the employee flew to Texas for processing and then to Massachusetts for training. The temporary training assignment in Massachusetts began in May of 2006 and was to end in September of 2006. Following the employee's completion of his training assignment in Burlington, he was reassigned to Lompoc, California for a temporary assignment commencing on November 8, 2006. The employee's injury occurred 2 days into this new assignment in California.
(Dec. 5-6; emphasis added.)

Addressing the threshold jurisdictional question, the judge found that even though the employee's injury occurred in California, Massachusetts would have jurisdiction of his compensation claim if the contract of hire had been formed in Massachusetts. Lavoie's Case, 334 Mass. 403, 406 (1956). She determined, however, that the contract of hire was formed in Oklahoma, where the employee was when, over the telephone, he accepted the job offer from the Raytheon employees in Massachusetts. The fact that Raytheon began paying the employee a salary on April 22, 2006, two weeks before he arrived in Massachusetts to begin his training, and that he walked away from a $145,000 job he had previously accepted, were further indications that the contract of hire was formed when the employee accepted the job over the telephone. (Dec. 6-7.)

The judge also found that the documents the employee signed at each of his temporary assignments, entitled "Memorandum of Understanding/Temporary Domestic Offsite Assignment Agreement," (MOU), were not contracts of hire.

Unlike a contract of hire, they were signed after the employee had begun each assignment, and they described components of the temporary assignment, such as the start and stop dates, the location of employment, and any monetary benefits to which the employee was entitled. The MOUs did not indicate the position for which the employee was hired, the duties of the position or his "straight salary," information which normally would be included in a contract of hire and which, the employee testified, was transmitted to him by Raytheon over the telephone when he was in Oklahoma. (Dec. 8.) Even if the Massachusetts MOU, which was signed in Massachusetts, were

considered an addendum to the contract of hire, it was superseded by the MOU executed in California. (Dec. 8.) The judge concluded that there was, no substantial connection between Massachusetts and the employee that would warrant Massachusetts assuming jurisdiction over the employee's workers' compensation claim. Massachusetts was neither the place of injury nor the place of hire. In addition, the employee was not a resident of the Commonwealth and had not acquired a "fixed and non-temporary employment situs" in Massachusetts. [Footnote omitted.] The employee worked in Massachusetts on temporary assignment for five months completing a training program, which by its nature is temporary, and there was no testimony or evidence that he maintained significant contacts in Massachusetts thereafter. Hillman v. Consolidated Freightways, Inc., 15 Mass. Workers' Comp. Rep. 67, 73 (2001) citing Carlin v. Kinney Shoes, 3 Mass. Workers' Comp. Rep. 41 (1989).(Dec. 8.) Accordingly, the judge denied and dismissed the employee's c. 152 claim. (Dec. 9.)

On appeal, the employee does not dispute that the judge correctly stated the applicable law with respect to determining the locus of the contract of hire: "[A]n oral contract consummated over the telephone is deemed made when the offeree utters the words of acceptance." (Employee br. 6, citing Travelers Ins. Co. v. Workmen's Comp. App. Bd., 68 Cal. 2d 7, 14 (1967)). As the insurer notes, "[w]hile there is no Massachusetts case on point, the overwhelming majority of cases considering the issue have found that when a contract is made on the telephone, the transaction takes place where the person utters his acceptance." In re Standard Fin. Mgt. Corp., 94 B.R. 231, 238 (Bankr. D. Mass. (1988)).(fn2) We adopt that majority position as consistent with the approach taken by the Massachusetts courts. See Conant's Case, supra; see also Nason, Koziol and Wall, Workers' Compensation, § 5.4 (3rd ed. 2003)(employee's acceptance by telephone in Massachusetts of offer of employment should be enough to make Massachusetts the locus of the contract).

With the case law offering no support, the employee instead maintains that the judge misinterpreted the facts by finding that Raytheon offered the job in Massachusetts and he accepted the offer in Oklahoma. The employee argues that *he* "*offered* the Employer his availability for hire, and the *Employer*, in Burlington, Massachusetts, *accepted* the employee's offer," thus creating the contract of hire in Massachusetts and thereby establishing jurisdiction. (Employee br. 6-7; emphases added.)

The employee's argument is fanciful and unavailing. It is axiomatic that, " 'the judge's findings, including all rational inferences permitted by the evidence, must stand unless a different finding is required as a matter of law.' " Ford v. O'Connor Constr., Inc., 23 Mass. Workers' Comp. Rep. 145, 154 (2009), quoting Spearman v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 112-113 (1999). Here, the employee's own testimony was replete with the terms "offer" and "acceptance." The commonly understood usage of those terms amply supports the judge's finding that Raytheon representatives in Massachusetts offered the employee the job over the phone, and the employee accepted it in Oklahoma. (Dec. 6.).(fn3)

The employee cites no legal authority, nor have we found any, for the proposition he advances, which essentially turns the concept of offer and acceptance, in the context of employment contracts of hire, on its head. See Conant's Case, supra at 698-699(contractual relationship created between employer and worker when worker accepts the offer and undertakes to travel to the job site); Camuso v. Westinghouse Elec. Co., 11 Mass. Workers' Comp. Rep. 479, 483 (1997)(employee's acceptance, in Massachusetts, of offer of employment, formed Massachusetts contract of hire); Conte v. P.A.N. Constr. Co., 9 Mass.

Workers' Comp. Rep. 497, 499 (1995)(basic tenet of contract law that offeree [e.g., an employee] has power to bind offeror [e.g., an employer] by acceptance of offer; contract is formed at time of acceptance); see also Alexander v. Transport Distrib. Co., 954 P.2d 1247 (Okla Civ. App. Div. 4 1997)(it is not final assent of employer that establishes place where employment contract is made, but final assent of Oklahoma resident to offer of employment); and Jantzen v. Workers' Comp. App. Bd., 61 Cal. App. 4th 109, 114, 71 Cal Rptr. 2d 260, 263 (1997)(in absence of contrary evidence, inference is that employer, as party with superior bargaining power, is offeror). The employee's argument that he was the offeror is untenable.

The employee also asserts the judge erred in finding that the MOU he signed in Massachusetts was not a contract of hire. (Employee br. 7-8.) We disagree. The judge correctly found that the contract of hire was made over the telephone in Oklahoma and, at that time, the position, duties and salary of the job for which the employee was hired were communicated to him. The MOU, signed after the employee began his temporary training program in Massachusetts, merely described the start and stop dates for his temporary assignment, the location, and any monetary benefits to which the employee was entitled, such as an offsite allowance, and a per diem to cover lodging, meals and rental car payments. (Dec. 8.) See Hillman, supra (where contract of hire was made in Massachusetts, no new contract of hire was created in New York simply because employee was transferred there, when employee continued to reside in Massachusetts, continued to drive a truck into Massachusetts, and health and welfare benefits were paid to union in Massachusetts). See also A. Larson, Workmen's Compensation § 143.03 [4] at 143-20 - 143-21 (2010)(where contract of hire is made in one state, situs of contract does not change merely because contract is modified in another state, by changing salary or other benefits).(fn4)

Alternatively, citing the humanitarian nature of our workers' compensation act and proposing that he had both "sufficient minimum contact," (Employee br. 7), and "significant contacts," (Employee br. 8), with Massachusetts, the employee urges us to apply a broad scope for jurisdiction. (Employee br. 7-8.) He points to the five telephone conversations he, in Oklahoma, had with Raytheon representatives in Massachusetts; the fact that Raytheon flew him from Oklahoma to Texas, and then to Massachusetts for training; that Raytheon put him up in a hotel in Massachusetts; and that he bought a motor home in which he lived for three months at Hanscom Air Force Base in Massachusetts. (Employee br. 8.)

There is, indeed, a "broad scope" for Massachusetts jurisdiction. Conant's Case, supra at 697.

However, the only factors Massachusetts courts have used to determine whether Massachusetts has jurisdiction over an employee's c. 152 claim are place of injury and place of contract of hire. Lavoie's Case, supra; Conant's Case, supra; Hancock's Case, supra; Murphy's Case, 53 Mass. App. Ct. 424 (2001); see also Nason, Koziol and Wall, supra at § 5.7, 91-92.

This board has cited with approval the alternative jurisdictional test of "place of employment relation." See Hillman, supra at 74, citing National Commission on State Workmen's Compensation Laws. However, even under this test, the employee's argument fails. In Hillman, not only was the contract of hire made in Massachusetts, a factor sufficient by itself to confer jurisdiction, but the employee, a truck driver injured in New York, was a resident of Massachusetts who continued to make runs into Massachusetts and whose employer continued to pay health and welfare benefits to his union in Massachusetts. Id. at 71-72. None of these factors is present here.

The decision is affirmed.

So ordered.

_____
Patricia A. Costigan
Administrative Law Judge

_____
Mark D. Horan
Administrative Law Judge

_____
Catherine Watson Koziol
Administrative Law Judge

Filed: May 31, 2012

_____
Footnotes:

1. It is well-established that receipt of compensation in a foreign state does not bar a supplemental award of compensation in Massachusetts, provided there is a basis for jurisdiction here. Of course, the employee may not receive a double recovery, and the amount already received will be credited against the amount recovered under the Massachusetts act. Nason, Koziol and Wall, Workers' Compensation § 5.8 at 92-93 (3rd ed. 2003); Conant's Case, 33 Mass. App. Ct. 695 (1992)(Massachusetts and Vermont have dual jurisdiction over workers' compensation claim where contract of hire entered into in Massachusetts but employee injured in Vermont).

2. See Insurer br. 10-11 and cases and references cited. See also 99 Corpus Juris Secundum § 72 (2000)("In order to establish that an employment contract was entered into within the forum state, the employee must prove that he or she accepted the offer of employment within the forum state.")

3. The employee acknowledged that he had been "talking with Raytheon" for approximately two years prior to being hired. (Tr. I, 18, 79.) He testified that in April 2006, he called Raytheon from Oklahoma "as a courtesy" to tell them he had accepted a job with Mantek. (Tr. I, 16.) Raytheon employees responded, "If you'll just work with us here real quickly, we're going to come forward with an offer." Id. A Raytheon representative interviewed the employee over the telephone and, after several telephone conversations, Raytheon made "a contingency offer," subject to the employee obtaining security clearance, and passing drug and blood tests. Id. at 18. The employee testified that after a Raytheon employee called and told him he was hired, "because I had a 27th start date, I had to make sure that -- because I wasn't going to turn down 145,000 job with Mantek on a whim." Id. at 19. In other words, he had to make sure the offer from Raytheon was firm before he turned down the job with Mantek. Even the employee's attorney characterized the employee's actions not as an offer of his services, but as "acceptance of the job" with Raytheon. (Tr. I, 21.)

4. Cf. Hancock's Case, 355 Mass. 523 (1969)(employee, who worked for Massachusetts corporation [Manzi Dodge] as sales manager, entered into new contract of employment as general manager of New Hampshire corporation [also Manzi Dodge], after driving to

New Hampshire with boss, who put him in charge of car dealership there); Conte, supra (new offer for work and distinct contract of hire were made and accepted after employee completed each separate contract as painter).

2002-MBAR-019
R.E. Leveille Woodworking, Inc. v. Costello

Short Name: R.E. Leveille Woodworking, Inc. v. Costello

Long Name: R.E. Leveillee Woodworking, Inc. v. Gary Costello et al.

Other Parties:

Mass. L. Rptr. Cite: 14 Mass. L. Rptr. 300

Docket Number: 981996

As-is Docket Number: 981996

Other Docket Numbers:

As-is Other Docket Numbers:

Venue: Superior Court, Worcester, SS

File Date:

Caption Date: January 2, 2002

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh): McCANN

Opinion Title:

INTRODUCTION

The plaintiff, R.E. Leveillee Woodworking, Inc. (Leveillee), is represented by John A. Cvejanovich, Esq., O'Connell, Flaherty & Attmore, 1350 Main Street, 3rd Floor, Springfield, Massachusetts 01103. The defendants Gary Costello (Costello) and Rome Insurance Agency, Inc. (Rome) are represented by John M. Nataro, Esq., Morrison, Mahoney & Miller, 250 Summer Street, Boston, Massachusetts 02210.

BACKGROUND

In this matter, the plaintiff, Leveillee Woodworking, Inc., has brought suit against the defendants, Costello, an insurance broker for Rome Insurance Agency (Rome) and Rome. The claim is for the defendants' failure to procure workers' compensation insurance for the plaintiff, covering workers outside of Massachusetts, and for failure of the defendant to inform the plaintiff of this gap in its coverage. Because of the purported gap in coverage, an employee, John Hartley (employee), who was injured while working in New York was not covered under Leveillee's policy. The worker's claim was paid by New York's Uninsured Fund. That fund seeks reimbursement against Leveillee.

The Complaint is in 8 Counts. Count I negligent failure to obtain coverage against Costello; Count II vicarious liability against Rome; Count III negligent failure to inform of the lack in coverage against Costello; Count IV vicarious liability against Rome; Count V chapter 93A against Costello; Count VI chapter 93A against Rome; Count VII declaratory judgment against Costello for future damages which may occur as a result of the employee's workers' compensation claim; Count VIII declaratory judgment against Rome.

The plaintiff moves for summary judgment on Counts I, II, III, IV, VII & VIII, liability only. The defendant filed a cross motion for summary judgment on all Counts.

FACTS

Leveillee is a woodworking business located in Spencer, Massachusetts. Leveillee occasionally does work outside of Massachusetts.

Prior to 1992, Leveillee's workers' compensation insurance was issued by Aetna Insurance Company; Leveillee's insurance broker then was Mid-State Insurance Agency, Inc.

Some time during 1991-92, Costello, an insurance broker for Rome, began to actively pursue Leveillee's business. Leveillee allowed Rome to take over as its insurance broker.

Leveillee made it clear that it wanted the same coverage it had in the past but never specifically told Costello that "other states coverage" was needed. Past coverage included "other states coverage" that included coverage for New York. Costello agreed to establish the same coverage. He knew what the past coverage was through reviewing the old policies and speaking with Mr. Leveillee.

Leveillee never told Costello it intended to hire outside employees in other states, but Costello was aware that Leveillee occasionally worked outside of Massachusetts, and was also aware that Leveillee used out-of-state temporary employees.

Although temporary employees' insurance is generally provided by the temporary employment agencies, the plaintiff claims that Leveillee is still liable for workers' compensation claims by these employees.

Costello first procured workers' compensation coverage on behalf of Leveillee for the January 1, 1993-January 1, 1994 term, through Aetna Insurance. This policy had "other states coverage" which included New York. Costello again procured this same coverage for the January 1, 1994-January 1, 1995 term, again using Aetna.

During the 1995-96 term, the defendant procured a policy through Travelers Insurance, but on April 25, 1995, Costello procured coverage through Arbella Insurance Company. The Travelers policy and the Arbella policy did not have "other states coverage" that included New York State.

Costello never specifically told Leveillee of this gap in coverage, though he did forward the policy statements to Leveillee, and asked him to review them. The policies stated that if coverage outside the state was needed to contact the insurer.

Leveillee was working in New York in September 1995. On September 6, 1995 a Leveillee employee was injured while on the job. Arbella denied coverage. Hartley obtained coverage through New York's Uninsured Fund. New York has made a demand for reimbursement on Leveillee, which precipitated this suit against the defendant.

Costello apparently tried to obtain insurance on the "voluntary market" for the plaintiff (for the 1995-96 term), but was unsuccessful. Costello then had the plaintiff apply to the Workers' Compensation Insurance Plan of Massachusetts which administers the Workers' Compensation Assigned Risk Pool (Pool). The Pool issued the 1995-96 Travelers policy to the plaintiff. The Pool's Traveler's policy included the Massachusetts Limited Other States Insurance Endorsement, which limits coverage for other states. The plaintiff states that all Pool policies include this endorsement.

After the accident, Leveillee procured the necessary "other states coverage" which includes New York coverage. Leveillee used another broker; the policy was issued by Travelers Insurance.

Issues

a. The Plaintiff's Motion

for Summary Judgment

Leveillee's motion for summary judgment is for Costello's negligence in failing to obtain the "other states coverage," including New York, and for his failure to inform Leveillee that he had a gap in this part of its insurance. Also, the plaintiff seeks declaratory judgment against Costello for future damages which may occur as a result of the employee's workers' compensation claim.

The plaintiff also seeks judgment against Rome, through Costello, under the doctrine of vicarious liability.

The plaintiff's theory is based on the following arguments: (1) that it had worker's compensation coverage for states other than MA, including New York, prior to switching representation to Costello/Rome; (2) that Leveillee told Costello it wanted the same coverage and Costello agreed; (3) that Costello knew Leveillee did work outside of MA, and that they hired temporary employees to do out-of-state work; (4) that there was no coverage when a worker hired in New York, for a New York job, was injured; and (5) that Costello never informed Leveillee that there was no coverage. Therefore, Leveillee argues, Costello, and Rome as his employer, are liable for negligence in not obtaining the proper insurance and not informing Leveillee of the gap in coverage.

b. The Defendants' Opposition and Cross Motion for Summary Judgment

Costello and Rome's theories opposing summary judgment are based on the following arguments: (1) that they fulfilled their duty to obtain insurance, by making a diligent effort to obtain the proper insurance; (2) that all insurance in the "Pool," which they had to utilize in order to obtain insurance for the plaintiff, required the Limited Other States Endorsement; (3) that the plaintiff had constructive or actual notice of the gap in coverage, through the policy statements; and (4) that the plaintiff was comparatively negligent by not reviewing the statements, and not taking steps to remedy the problem.

In regard to Costello and Rome's motion for summary judgment, the defendants claim that: (1) Leveillee did not specifically request the extra coverage and there is no evidence the defendants knew or should have known of the need for the "other states coverage"; (2) absent a request, because there was no special relationship between the parties, the defendant had no duty to procure the extra insurance or advise the plaintiff of the need for out-of-state insurance; (3) there is no evidence that Leveillee would have procured extra insurance if advised of the gap; (4) the plaintiff had constructive or actual notice of the gap in coverage, through the policy statements; (5) chapter 93A fails because there was no duty to obtain the extra insurance and there is no evidence that the defendants' conduct caused any damage to the plaintiff in that it is alleged that it was Leveillee's failure to read the policy that caused the damage; and (6) Arbella is estopped from denying coverage.

c. Discussion

Insurance brokers are liable for failing to obtain insurance, when they are asked to procure a particular type of policy but fail to do so. See *Rae v. Air-Speed, Inc.*, 386 Mass. 187, 102 (1982). Agents, however, are not fiduciaries of the insured. Absent a special relationship, an insurance agent needs to "exercise reasonable diligence in providing [the insured] with a policy to meet its needs and to inform [the insured] what was covered and what was not covered under the policy." *Barrett Financial Corp. v. Pine Insurance Agency, Inc*., 11 Mass. L. Rptr. 467, 2000 WL 1273357 (Mass.Sup.Ct.) (Kern, J.) (citing *Baldwin Crane Equipment Corp. v. Riley & Riley Ins. Agency, Inc.* 44 Mass.App.Ct. 29 (1997)). An insurance broker is, however, an agent of the

insured, and the insured is allowed to rely on the broker's "superior expertise and assume the broker has performed his duties," where particular coverage has been requested. *Campione v. Wilson*, 422 Mass. 185, 195 (1996).

There are material questions of fact on all of the issues raised in this case.

The defendant claims it did everything that a reasonable broker needs to do in attempting to obtain the insurance. The plaintiff states that he did not, and points to the fact that a subsequent broker did obtain the insurance.

The defendant also claims that the duty to inform the plaintiff that the coverage did not include the extra insurance was met when it sent the plaintiff a copy of the policies. Further, the defendant claims there were warnings on the policy that stated there was no other states coverage.

The plaintiff states, in effect, that the policy was long and complicated, and could not be easily comprehended by Leveillee.

Would Leveillee have bought the extra coverage if it knew it was not covered? This creates a material issue of fact regarding proximate cause.

The defendant states that the plaintiff is estopped from recovery, for its failure to inspect the policies. The defendant bases this contention on *Sarnafil v. Peerless Ins. Co.*, 418 Mass. 295, 307 (1994). However, in the *Sarnafil* case the failure to inspect the documents was unreasonable because the policy was a few pages, the missing coverage was obvious and the business entity was sophisticated. Whether Leveillee was unreasonable in this case, with different circumstances, is a question of fact.

There is also a question of fact over what Leveillee requested from Costello. Costello says there was no request for the extra coverage. Leveillee says there was. By asking for the same coverage it had in the past, and showing Costello what the old coverage was, along with Costello's familiarity with the business and its out of state activities, Leveillee states that Costello knew Leveillee wanted the extra coverage.

There is also a material question of fact as to what duty was owed to Leveillee by Costello. If there was a special relationship, a duty may have been created. Here there was a three-year relationship, which occurred after Costello talked Leveillee into switching from his old broker to Rome/Costello. The extent of that duty is a material question of fact.

Consequently, there is a material question of fact on all issues raised in the plaintiff's motion for summary judgment, as on all issues raised in the defendant's cross motion for summary judgment. Defendants' motion to strike a portion of the affidavit of Leveillee is *DENIED*.

ORDER

It is *ORDERED* that the plaintiff's motion for partial summary judgment as to Counts I, II, III, IV, VII & VIII, liability only is *DENIED*; the defendants' motion for summary judgment is *DENIED*; the defendants' motion to strike the second, third and fourth paragraphs of the affidavit of Richard F. Leveillee is *DENIED*.

1999-MBAR-404
Hartley v. R.E. Leveille Woodworking, Inc.

Short Name: Hartley v. R.E. Leveille Woodworking, Inc.

Long Name: John W. Hartley v. R.E. Leveillee Woodworking, Inc. et al.

Other Parties:

Mass. L. Rptr. Cite: 11 Mass. L. Rptr. 111

Docket Number: 981993

As-is Docket Number: 981993

Other Docket Numbers:

As-is Other Docket Numbers:

Venue: Superior Court, Worcester, SS

File Date:

Caption Date: November 22, 1999

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh): FECTEAU

Opinion Title:

The plaintiff, John H. Hartley ("Hartley") brought this action in negligence against defendants, R.E. Leveillee Woodworking, Inc., ("Woodworking, Inc.") and Richard Leveillee ("Leveillee"), the president of Woodworking, Inc., regarding an injury sustained by the plaintiff in the course of his employment with Woodworking, Inc. Hartley asserts claims of negligence and of violations of G.L.c. 152 for failure to maintain workers' compensation insurance.

The defendants are before the Court on their motion for summary judgment asserting that the law of New York properly governs this case and that under the applicable provisions of the New York Workers' Compensation Law (NYWCL), plaintiff is barred from any recovery from either of the defendants. For the reasons stated below, defendants' motion for summary judgment is *ALLOWED.*

BACKGROUND

At all relevant times, Hartley resided in Spencerport, New York. Woodworking, Inc. is a corporation with its principal place of business in Spencer, Massachusetts. Leveillee is an individual who resides in Spencer, Massachusetts.

On September 5, 1995, Woodworking, Inc. hired Hartley through his union hall. Hartley's position included serving as a carpenter and installing wood fixtures in a store at the Eastview Mall in Victor, New York. Hartley claims to have been injured in the course of his employment with Woodworking, Inc., on September 6, 1995. At the time of the alleged accident, Hartley was a member of the Carpenters Union Local #85 in Rochester, New York.

Hartley filed a claim in New York with Arbella Mutual Indemnity Insurance for workers' compensation benefits and received payments for approximately seven weeks. Hartley also received welfare and social security benefits from the State of New York. Woodworking, Inc. received a Notice of Claim from the State of New York Workers' Compensation Board.

At all times relevant hereto, Woodworking Inc., maintained workers' compensation coverage with Arbella Indemnity Insurance. Arbella later determined, however, that the particular policy maintained by Woodworking, Inc. did not cover workers for injuries sustained in New York, and thereafter, ceased paying any benefits to Hartley. Hartley filed a claim for uninsured workers' compensation benefits with the State of New York. Said claim was granted by the State of New York Workers' Compensation Board on April 8, 1997.1

On September 3, 1998, Hartley filed a complaint against Woodworking, Inc. and Leveillee in Worcester County Superior Court in Massachusetts alleging, as to Defendant, Woodworking, Inc., negligence and vicarious liability under respondeat superior. Hartley also alleged failure to maintain workers' compensation insurance as to both defendants.

DISCUSSION

To prevail on summary judgment, the moving party must establish that there is no genuine issue of material fact on every element of a claim and that it is entitled to judgment on that claim as a matter of law. See generally Mass.R.Civ.P. 56(c); *Highlands Insurance, Co. v. Aerovox, Inc.*, 424 Mass. 226, 232 (1997); *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the moving party is entitled to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989). Once the moving party has established the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a genuine issue of material fact. *Id.* at 17.

A party moving for summary judgment who does not bear the burden of proof at trial must demonstrate the absence of a triable issue either by submitting affirmative evidence negating an essential element of the nonmoving

party's case or by showing that the nonmoving party has no reasonable expectation of proving an essential element of its case at trial. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). The nonmoving party cannot defeat the motion for summary judgment by resting on its "pleadings and mere assertions of disputed facts . . ." *LaLonde v. Eissner*, 405 Mass. 207, 209 (1989). Rather, the nonmoving party must respond by alleging specific facts demonstrating the existence of a genuine issue of material fact. *Pederson*, 404 Mass. at 17.

I. Choice of Law

Massachusetts applies its own choice of law rules to determine whether its law or that of another state governs a particular issue. *Greenwood Trust Co. v. Comm. of Mass.*, 776 F.Sup. 21, 69-70 (D. Mass. 1991), rev'd on other grounds, 971 F.2d 818 (1992), cert. denied, *Massachusetts v. Greenwood Trust Co.*, 506 U.S. 1052 (1993). Massachusetts has adopted a functional choice-of-law approach to contract cases, as in tort cases, rather than having such a decision turn on a single element, such as the place of the making of the contract. *Bushkin Associates, Inc., v. Raytheon Co.*, 393 Mass. 622, 630-31 (1985). Under this approach, the forum state applies the substantive law of the state with the more significant relationship to the transaction, looking at the interests of the parties, the states involved, and the interstate system as a whole. *Bradley v. Dean Witter Realty, Inc.*, 967 F.Supp. 19, 25 (D. Mass. 1997); see also *Bushkin, supra* 393 Mass. at 631; *Sargen v. Tenaska, Inc.*, 914 F.Supp. 722, 726 (D. Mass. 1996), aff'd, 108 F.3d 5 (1st Cir. 1997). In the present case, New York is both the locus of the alleged injury as well as the state with the most significant relationship to the claim.

In *Pevoski v. Pevoski*, 371 Mass. 358, 359 (1976), the court reaffirmed that the *lex loci delecti* doctrine2 was "a rational and just procedure for selecting the law governing the vast majority of issues in multi-State tort suits," *id*. but expanded its choice of law analysis, stating that "another jurisdiction may sometimes be more concerned and more involved with certain issues than the State in which the conduct occurred." *Id*. at 360. The next year, in *Saharceski v. Marcure*, 373 Mass. 304 (1977), the court affirmed a lower court's ruling that the interests of the forum where both parties resided, where the plaintiff was hired and worked, and where the plaintiff received workers' compensation benefits, outweighed the interest of the foreign state. 373 Mass. at 305-06. The court based its reasoning on a three part test which analyzed "the established relationship of the parties, their expectations, and the degree of interest of each jurisdiction whose law might be applied." *Id*. at 310; see also *Fraz v. Caufield*, 22 Mass.App.Ct. 105, 108 (1986) (after examining "all of the substantial contacts" that the plaintiff had with the forum state, the court rejected plaintiff's attempt to apply a state's law where the plaintiff had only minimal and temporary contact with that state, considering as a significant factor, the state in which the plaintiff had collected workers' compensation benefits). The *Saharceski* court noted that the most significant factor in the choice-of-law consideration was the reasonable expectation of the parties. 373 Mass. at 310.

Applying the three-part standard established by *Pevoski* and *Saharceski, supra* to the facts of the current case, New York law must apply to plaintiff's claim. First, the relationship of the parties was carried out entirely in New York with the plaintiff having no contact with Massachusetts. The plaintiff was, at all times relevant to this matter, a resident of New York. Furthermore, he entered into a contract of employment with the defendants while a member of a New York union hall. The subject matter of the contract was a construction job in New York, and the subsequent injury occurred in New York.

Second, in examining the expectation of the parties, Hartley never waived his New York workers' compensation rights to elect a tort remedy at common law against the defendants. In addition, both the plaintiff and the defendants were under the mutual expectation that they would be protected by New York workers' compensation law. Evidence of this fact is plaintiff's application for, and receipt of, workers' compensation benefits from the State of New York.

The third factor, the interest of the respective states, also implicates New York as the state with the most significant relationship. All the relevant circumstances, including Hartley's contract of hire, his job site, where he received his instructions, the location of his alleged injury, his diagnosis and treatment for his alleged injuries, his application for public assistance, the possibility of him and/or his defendants becoming further public charges, and his claim for workers' compensation benefits took place in New York. Thus, New York has the superior interest in this claim. Hartley's domicile is New York which has borne and will bear any social consequences of Hartley's alleged injury. Furthermore, New York also has an interest in providing its residents with appropriate remedies for injuries allegedly sustained in the workplace, weighing the interests of its citizens and those doing business in New York.

In 1985, in *Bushkin, supra*, a contract case, the court explicitly rejected the *lex loci delecti* doctrine in favor of a functional choice-of-law approach and advised that "[o]ne obvious source of guidance is the Restatement (Second) of Conflict of Laws (1971)." 393 Mass. at 632. Factors under Section 6 that are said to be relevant to the choice of the applicable rule of law include: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the

determination and application of the law to be applied. Restatement, *supra*, at 6(2).

New York has the most significant relationship to Hartley's alleged injury; application of New York law would further the reasonable expectations of the parties and would reflect the goal of workers' compensation law, i.e., to restrict the cost of industrial accidents and to afford a fair basis for predicting what those costs will be. New York also has a vested interest in preventing Hartley from circumventing its workers' compensation law and receiving a double recovery for his injury. New York workers' compensation law provides that compensation to the claimant is the sole and exclusive remedy in place of any other liability whatsoever. Hartley was awarded and received the benefits of a workers' compensation award by the New York Workers' Compensation Board. He now seeks to receive the additional benefit of a civil lawsuit in Massachusetts for the same alleged injury. Application of New York law would restrict Hartley to a single recovery as intended by the fundamental policies of workers' compensation law.

Furthermore, "the contacts to be taken into account in applying the principles of Section 6 to determine the law applicable to an issue include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." Restatement, *supra*, at 188(2). Every one of these factors rests exclusively with New York, except the domicile of the defendants. Hartley's union hall was in New York, all employment negotiations occurred in New York, the contract was entered into, was intended to be, and was entirely performed in New York. The subject matter of the contract was a construction job in New York. Hartley has been at all times relevant to this matter, a resident of New York. He was injured, diagnosed, and treated in New York. Accordingly, New York has the more significant relationship to this transaction and New York law properly applies to this case.

A. New York Workers' Compensation Law

Bars a Claim against Woodworking, Inc.

The New York Workers' Compensation Law (NYWCL) bars Hartley's claim against Woodworking, Inc. and Leveillee. The NYWCL states that compensation "shall be exclusive and in place of any other liability whatsoever . . . at common law or otherwise on account of such injury." NYWCL at 11 (1996). An exception exists "if an employer falls to secure the payment of compensation for his or her injured employees . . . an injured employee . . . may, at his or her option, elect to claim compensation under this chapter or to maintain an action in the courts for damages on account of such injury . . ." *Id*. The statute is in the disjunctive in that an employee has the option of either seeking workers' compensation benefits from the uninsured fund or resorting to the courts to remedy an injury allegedly sustained in the course of the employee's employment. Once the employee has chosen which option to pursue, that choice operates as a bar against the other option. See, e.g. *Babcock v. Lamb*, 247 A.D.2d 903, 668 N.Y.S.2d 856 (4 Dept. 1998) (where employee applied for and received benefits from the uninsured fund under workers' compensation law, he was deemed to have elected his remedy and forfeited any right to proceed by way of a tort action at common law); *Talcove v. Buckeye Pipe Line Co.*, 247 A.D.2d 464, 668 N.Y.S.2d 666 (2 Dept. 1998) (where plaintiff accepted workers' compensation benefits from the uninsured fund following heart attack, he was barred by the finality and exclusivity provisions of the Workers' Compensation Law from bringing a common law action against his employer); *Thomas v. City of New York*, 2139 A.D.2d 180, 657 N.Y.S.2d 634 (1 Dept. 1997) (employee's claim for and acceptance of workers' compensation benefits from the uninsured fund constituted an election of her remedy and barred her claim of disability).

In this case, Hartley applied for, and was awarded, workers' compensation benefits from the State of New York uninsured fund. As such, he is deemed to have elected that option and is barred from pursuing a common law tort claim against either of the defendants.

B. NYWCL Bars a Common Law

Suit Against Leveillee

Section 29(6) of the NYWCL bars a claim against a fellow employee. That statute provides that "[t]he option to maintain an action in the courts for damages based on the employer's failure to secure compensation for injured employees . . . shall not be construed to include the right to maintain an action against another in the same employ . . ." NYWCL at 29(6) (1996). An owner or manager is considered an employee. *Babcock*, *supra* (claimant precluded from bringing claim against a member of the partnership which was his employer); *Rossi v. C.C.Q. Equipment, Inc.*, 200 A.D.2d 933, 607 N.Y.S.2d 432 (3 Dept. 1994), leave to appeal denied, 84 N.Y.2d. 802 (claimant precluded from bringing action against owner of truck for whom claimant worked). See also *Lamm v. Lore*,247 A.D.2d 878, N.Y.S.2d 805 (4 Dept. 1998); *Cronin v. Perry*, 244 A.D.2d 448, 664 N.Y.S.2d 123 (2 Dept. 1997). In this case, Leveillee was an owner/manager and a co-worker of the plaintiff, and therefore New York's workers' compensation law bars a common law suit against Leveillee. NYWCL at 29(6).

This argument is also supported by the Restatement (Second) Conflict of Laws, which states that:

[r]ecovery for tort . . . will not be permitted in any state if the defendant is declared immune from such liability by

the workmen's compensation statute of a state under which the defendant is required to provide insurance against the particular risk and under which (a) *the plaintiff has obtained an award for the injury*, or (b) the plaintiff could obtain an award for the injury, if this is the state (1) *where the injury occurred*, or (2) *where employment is principally located*, or (3) *where the employer supervised the employee's activities from a place of business in the state*, or (4) *whose local law governs the contract of employment . . .*

Restatement, *supra*, 184 (emphasis added).

As discussed above, plaintiff applied for and was awarded workers' compensation benefits in New York from the New York Workers' Compensation Board. Under New York law, this award foreclosed Hartley from pursuing any other remedy against Woodworking, Inc. or Leveillee.

ORDER

For the following reasons, the defendants' motion for summary judgment is *ALLOWED*.

1 Decision of the State of New York Workers' Compensation Board dated March 12, 1999, rescinded a December 1, 1997 Memorandum of Decision and held that Leveillee was solely liable for Hartley's workers' compensation claim.

2 The law of the place of the making [of the contract] or the happening [of the tort].