Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
No. SJC-12857

MARK MENDES,
Appellant

v.

FIDELITY GUARANTY INSURANCE COMPANY & another,
Appellees

ON APPEAL FROM THE REVIEWING BOARD
OF THE DEPARTMENT OF INDUSTRIAL ACCIDENTS

BRIEF FOR *AMICUS CURIAE* MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL

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STATEMENT OF THE *AMICUS CURIAE*

The Massachusetts Academy of Trial Attorneys (the Academy) offers this *amicus curiae* brief in the above-captioned case. The Academy is a voluntary, non-profit, Commonwealth-wide professional association of attorneys in the Commonwealth. The Academy's purpose is to uphold and defend the Constitutions of the United States and the Commonwealth of Massachusetts; to promote the administration of justice; to uphold the honor of the legal profession; to apply the knowledge and experience of its members so as to promote the public good; to reform the law where justice so requires; to advance the cause of those who seek redress for injury to person or property; steadfastly to resist efforts to curtail the rights of injured individuals; and to help them enforce their rights through the courts and other tribunals in all areas of law. The Academy has been actively addressing various areas of the law in the courts and the Legislature of the Commonwealth since 1975.

The Academy urges the Court to recognize that a worker is entitled to coverage under G.L. c. 152, where the worker has established sufficient significant contacts with Massachusetts, despite the contract of hire and location of injury occurring outside of Massachusetts.

RULE 17(c)(5) DECLARATION

No affirmative declaration pursuant to the conditions set forth in Mass. R. App. P. 17(c)(5) is warranted by the preparation and financing of this brief.

ISSUES PRESENTED

Does the "localization" doctrine, in keeping with the "broad scope" of the Massachusetts Workers' Compensation Act, G.L. c. 152, permit subject matter jurisdiction in Massachusetts where an injured Massachusetts worker has established sufficient significant contacts with Massachusetts, notwithstanding that both the place of hire and the location of the injury were outside of Massachusetts?

STATEMENT OF THE CASE

The Academy adopts the Appellant's statement of the case.

SUMMARY OF ARGUMENT

The standard of review in this statutory construction matter is *de novo*. (p. 11). Massachusetts currently recognizes three bases for subject matter jurisdiction over a claim under G.L. c. 152, the Workers' Compensation Act (the Act): the place of hire, the place of injury, or the

place of localization of employment. (pp. 12-14). However, these bases fail to provide sufficient guidance to the Reviewing Board of the Department of Industrial Accidents (Reviewing Board), nor do they contemplate a situation in which a worker lives in Massachusetts and conducts a significant portion of work here, but entered into the contract of hire outside of Massachusetts and was also injured outside Massachusetts. (pp. 14-15).

Other jurisdictions have adopted the "significant contacts" test to determine subject matter jurisdiction over a workers' compensation claim. (pp. 15-18). This approach is consonant with the Act's broad scope and promotes the Act's policy of providing adequate financial protection to the victims of industrial accidents. (pp. 18-21). This Court should adopt such a test to determine whether Massachusetts has jurisdiction over a workers' compensation claim. (p. 21).

Regardless of how the test is framed, the Reviewing Board erred in applying an incorrect standard to the Administrative Judge's decision. (pp. 22-23). Under the significant contacts test, Massachusetts has subject matter jurisdiction over Mr. Mendes' workers' compensation claim. (pp. 23-24).

ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*, BECAUSE THE ISSUE CONCERNS STATUTORY CONSTRUCTION.

The standard of review here is *de novo*, because statutory construction is for this Court and an error of statutory construction constitutes an abuse of discretion by the Reviewing Board:

> The workers' compensation statute directs that review of a decision of the [Reviewing Board] is to be in accordance with G.L. c. 30A, § 14(7)(a)-(d) , (f), and (g). See G.L. c. 152, § 12(2). [This Court] may thus reverse or modify the board's decision when, inter alia, it is "based upon an error of law" or is "[a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." G.L. c. 30A, § 14(7)(c), (g). [This Court] accordingly consider[s] "whether the decision is factually warranted and not '[a]rbitrary or capricious,' in the sense of having adequate evidentiary and factual support and disclosing reasoned decision making." *Carpenter's Case*, 456 Mass. 436, 439 (2010), quoting *Scheffler's Case*, 419 Mass. 251, 258 (1994).
>
> This case calls for a construction of statutory text. We accord substantial deference to the interpretation of a statute by the agency charged with primary responsibility for its administration, although "ultimately the 'duty of statutory interpretation is for the courts.'" *Moss's Case*, 451 Mass. 704, 709 (2008), quoting *Slater's Case*, 55 Mass. App. Ct. 326, 330 (2002).

DiFronzo's Case, 459 Mass. 338, 341-342 (2011). The issue is the proper construction of G.L. c. 152, § 26; therefore, the standard of review is *de novo*.

II. MASSACHUSETTS CURRENTLY RECOGNIZES THREE BASES UPON WHICH TO EXERCISE SUBJECT MATTER JURISDICTION OVER A WORKERS' COMPENSATION CLAIM.

Under the Act:

> If an employee … receives a personal injury arising out of and in the course of his employment… in the business affairs or undertakings of his employer, and whether within or without the commonwealth, he shall be paid compensation by the insurer or self-insurer....

G.L. c. 152, § 26. But the Act does not specify when Massachusetts has subject matter jurisdiction over injuries suffered outside the Commonwealth; instead, over time the Reviewing Board and the Appeals Court have defined jurisdictional limits. To date, this Court has not had occasion to decide this issue.

Massachusetts currently recognizes three bases for workers' compensation subject matter jurisdiction. First, Massachusetts has jurisdiction when it is the place of injury. *Lavoie's Case*, 334 Mass. 403, 406 (1956) ("an employee, as here, who suffers injury in this Commonwealth arising out of and in the course of his employment while performing work under a contract of hire made in another State where he was principally employed can recover under" the Act). Second, Massachusetts has jurisdiction when it is the place of hire. *Hillman* v. *Consolidated Freightways,*

Inc., 15 Mass. Workers' Comp. Rep. 67, 71 (2001) ("the fact that the contract of hire is made in Massachusetts is alone sufficient to confer jurisdiction in Massachusetts, even where the work contracted for is performed out of state"), citing *Conant's Case*, 33 Mass. App. Ct. 695, 697 (1992). Here, Mr. Mendes does not argue that Massachusetts was either the place of injury or the place of hire; the Administrative Judge "made a threshold determination, based upon the specific facts, that the location of hire was Pennsylvania, not Massachusetts," and further found that Mr. Mendes was injured in Maine.[1] R.A./II:184, II:187-188, IV:8-9.[2]

The final jurisdictional basis is "the theory of localization of employment." *Mendes's Case*, 28 Mass. Workers' Comp. Rep. 209, 214 (2014) [hereinafter *Mendes I*].

> The making of the contract within the state is usually deemed to create the relation within the state... [and] having thus achieved a situs, retains that situs until something happens that

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[1] Mendes originally argued that the contract for hire was created in Massachusetts, but this argument was rejected by the Reviewing Board. See *Mendes* v. *Franklin Logistics, Inc.*, 28 Mass. Workers' Comp. Rep. 209, 213 (2014). Mendes did not pursue this argument after that decision. He does not raise this argument on appeal, and the Academy takes no position on that question.

[2] The Academy cites to the Record Appendix as "R.A./[volume]:[page(s)]."

> shows clearly a transference of the relation to another state. This transfer is usually held to occur when either a new contract is made in the foreign state, or the employee acquires in the foreign state a fixed and nontemporary employment situs.

[Internal omissions omitted]. *Carlin's Case*, 3 Mass. Workers' Comp. Rep. 41, 42 (1989), quoting 2 A. Larson, Workmen's Compensation § 87.40 (1983). The localization theory holds that Massachusetts has jurisdiction if either (1) the employment contract is transferred to Massachusetts or (2) the employee "acquires in [Massachusetts] a fixed and nontemporary employment situs" (the "situs prong"). *Id*.

Here, the Administrative Judge did not find that the parties transferred the contract. See R.A./IV:8-11. Thus, the only potential basis for subject matter jurisdiction in Massachusetts is the situs prong.

III. THIS COURT SHOULD ADOPT THE "SIGNIFICANT CONTACTS" TEST FOR THE SITUS PRONG.

A. The "significant contacts" test is necessary because the situs prong provides no guidance in cases such as this.

The situs prong is vague in that it provides no guidance to the Reviewing Board in claims by workers who live in Massachusetts and conduct a significant portion of their work here, but who enter contracts of hire in another jurisdiction and are injured in yet another jurisdiction. New

York, however, has developed a "significant contacts" test that slightly expands the situs prong while providing concrete guidance in its application. *Matter of Nashko* v. *Standard Water Proofing Co.*, 4 N.Y.2d 199, 201-202 (N.Y. 1958). The Administrative Judge relied on this analysis on recommittal. *Mendes's Case*, Mass. Dept. Ind. Acc., Board No. 008775-10 (Mass. Dept. Ind. Acc. May 28, 2019) [hereinafter *Mendes II*] (attached). This Court should adopt either the significant contacts test or a similar test.

B. Other states have adopted the significant contacts test, which is a mere extension of the localization test.

The significant contacts test, like the situs prong itself, seeks to isolate the *de facto* state of a worker's employment. See *Matter of Nashko*, 4 N.Y.2d at 201-202 ("when determining the presence or absence of jurisdiction the appropriate test requires a determination as to the location of the employment"). See also Restatement (Second) of Conflict of Laws, § 181(d). The New York Court of Appeals adopted the test, and the New York Supreme Court Appellate Division has delineated the test as follows:

> When a claimant seeks compensation for an injury sustained outside of New York, the Board possesses subject matter jurisdiction over that claim if sufficient significant contacts between the claimant's employment and the state are found to exist ... The inquiry does not focus on the location of the

> employer, but upon the location of the employment ... Many factors may be considered in finding New York employment, including the location of the employer's office, as well as the location of the employee's performance, the locations where the employee was recruited and hired, and whether the employee resided in New York, was regularly contacted there by the out-of-state employer and was expected to return to New York after out-of-state assignments[.]

[Internal citations and punctuation omitted]. *Bugaj* v. *Great Am. Transp., Inc.*, 20 A.D.3d 612, 613-614 (2005). "If upon examining the relevant factors it appears that the claimant's employment had sufficient significant contacts with New York such that it may reasonably be concluded that the employment was located here, then subject matter jurisdiction exists." *Williams* v. *Roadkill, Inc.*, 277 A.D.2d 764, 765 (2000). See *Matter of Nashko*, 4 N.Y.2d at 202; *Matter of Colley* v. *Endicott Johnson Corp.*, 60 A.D.3d 1213, 1214-1215 (2009); *Matter of Sanchez* v. *Clestra Cleanroom, Inc.*, 11 A.D.3d 781, 782 (2004).

A similar test in Connecticut is "pragmatic, with the purpose of determining whether the locations of the interactions between employer and employee demonstrate a sufficient connection with this state to compel the imposition of this state's workers' compensation law in general and in its benefits structure in particular." *Springer* v. *J.B. Transport, Inc.*, 145

Conn. App. 805, 833 (2013) (Beach, J., concurring). Connecticut allows recovery of workers' compensation benefits where Connecticut is the place of contracting, the place of injury, or "the place of employment relation." *Cleveland* v. *U.S. Printing Ink, Inc.*, 218 Conn. 181, 192-193 (1991), citing 4 A. Larson, Workmen's Compensation Law § 87.00 (1986). See Restatement (Second), Conflict of Laws § 181, cmt. b (1971). Connecticut's "test requires, at a minimum, a showing of a significant relationship between Connecticut and either the employment contract or the employment relationship." *Burse* v. *Am. Intern. Airways, Inc.*, 262 Conn. 31, 38 (2002). In *Burse*, for example, a pilot was denied benefits despite his residence in Connecticut because his only connections to the state were "his residence as one of the departure points for his assignments; the location of his own records of business expenses; and the fact that [he] occasionally flew in and out of Connecticut." *Id.* at 40. Moreover, the employer "did not require the plaintiff to live in Connecticut and [] his employment did not necessitate such residency." *Id*.

South Dakota's test is derived directly from *Nashko* and provides that if the worker's "sufficient significant contacts with South Dakota appear so that it can reasonably be said that the employment is located here, then the

Department has statutory jurisdiction." *Knapp* v. *Hamm & Phillips Serv. Co., Inc.*, 824 N.W.2d 785, 790 (S.D. 2012). The test is applied on a "case-by-case basis to determine the location of the employment relationship." *Id.* at 789, citing *Martin* v. *Am. Colloid Co.*, 804 N.W.2d 65, 67 (S.D. 2011).

C. The significant contacts test is sound public policy and advances the purposes of the Act.

Massachusetts courts have not endorsed the notion that mere residence is sufficient to confer subject matter jurisdiction upon Massachusetts; instead, something more is needed. *Conant's Case*, 33 Mass. App. Ct. at 697 ("although residence alone may be an insufficient basis for the exercise of jurisdiction, cases from other States support a broad interpretation of compensation statutes to protect workers injured outside their borders"). The situs test, however, without more is imprecise. The significant contacts test balances the need for flexibility in jurisdictional analysis by placing proper emphasis on the unique facts of each case and clearly stating the purpose of the analysis: to determine whether the worker's employment is located in Massachusetts. See *Williams*, 277 A.D.2d at 765.

The broad scope of workers' compensation laws stems from the report and recommendations of the National Commission on State Workmen's Compensation Laws. *Patton* v. *Indus. Comm.*, 147 Ill. App. 3d 738, 742 (1986).

> The Commission submitted its report to Congress and to the President on July 31, 1972. The report criticized many aspects of State workmen's compensation programs and made numerous specific recommendations for a modern compensation program.... Recommendation 2.11 of the National Commission… stated: "We recommend that the employee be given the choice of filing a claim for workmen's compensation in any State where he was hired, or where his employment was principally localized, or where he was injured."

Id. at 742-743, quoting Report of the National Commission on State Workmen's Compensation Laws, in 4 A. Larson, Workmen's Compensation Law app. G 609 (1986). The Commission proposed a model workmen's compensation law that gives a state jurisdiction if the worker "is domiciled and spends a substantial part of his working time in the service of his employer in" the state. *Id*. at 743, quoting Workmen's Compensation and Rehabilitation Law (Revised), in 4 A. Larson, Workmen's Compensation Law app. H 629, 649-650 (1986). The intent of modern workers' compensation laws therefore favors jurisdiction in the state where the employment is "principally localized." *Id.* at 743.

Indeed, this Court has described the Act as "a humanitarian measure designed to provide adequate financial protection to the victims of industrial accidents." *LaClair* v. *Silberline Mfg. Co.*, 379 Mass. 21, 27 (1979). See *Conant's Case*, 33 Mass. App. Ct. at 697. It provides that "an employee may receive workers' compensation benefits for an injury received 'within or without the commonwealth.'" *Conant's Case*, 33 Mass. App. Ct. at 697, quoting G.L. c. 152, § 26. Underlying the Act is the Commonwealth's legitimate interest in avoiding the burden of a resident employee injured in another state who is unable to travel to seek benefits and possibly becomes a public charge. *Conant's Case*, 33 Mass. App. Ct. at 697, citing *Alaska Packers Assn.* v. *Indus. Acc. Comm'n of Cal.*, 294 U.S. 532, 542 (1935). To that end, Massachusetts courts give "broad scope" to jurisdiction under G.L. c. 152. *Conant's Case*, 33 Mass. App. Ct. at 697. It is entirely appropriate to adopt a test that promotes those goals.

Massachusetts courts have suggested the need for a broad and flexible analysis. As the Appeals Court observed, "[a]lthough residence alone may be an insufficient basis for the exercise of jurisdiction, cases from other States support a broad interpretation of compensation statutes to protect workers injured outside their borders." *Conant's Case*, 33 Mass.

App. Ct. at 697. See *Hillman*, 15 Mass. Workers' Comp. Rep. at 72. Similarly, the Reviewing Board acknowledged that the localization test was used "to find that the place of employment relation was in Massachusetts, and thus to broaden, rather than narrow, Massachusetts jurisdiction." *Hillman*, 15 Mass. Workers' Comp. Rep. at 74.

Significantly, *Carlin* applied a fact-based inquiry nearly identical to the significant contacts test. The Reviewing Board considered the residence of the employee, where he worked, and where he was issued pay checks. See *Bugaj* v. *Great Am. Transp., Inc.*, 20 A.D.3d at 613-14. As *Carlin* concluded:

> By virtue of his eighteen-month tenure at the West Springfield, Massachusetts, store and the issuance of his pay checks at that location, the employee acquired a fixed and nontemporary employment situs in Massachusetts. Moreover, although he sustained his fatal injuries in New York, the employee was a resident of Massachusetts. *These together are sufficient contacts with the state to give Massachusetts a legitimate interest in this case*.

[Emphasis added]. *Carlin*, 3 Mass. Workers' Comp. Rep. at 42. Considering the substantive move in the cases towards consideration of a worker's significant contacts, the Court should take this opportunity explicitly to adopt this test.

IV. THIS COURT SHOULD REVERSE THE DECISION OF THE REVIEWING BOARD BECAUSE THE REVIEWING BOARD APPLIED AN INCORRECT STANDARD AND BECAUSE MASSACHUSETTS HAS SUBJECT MATTER JURISDICTION OVER MR. MENDES'S CLAIM UNDER THE SIGNIFICANT CONTACTS TEST.

A. Regardless of how the test is framed, the Reviewing Board erred in applying an incorrect standard to the Administrative Judge's decision.

The Reviewing Board criticized the Administrative Judge's analysis:

> Here, the administrative judge deviated from the crucial findings required for a proper localization assessment. In order to confer jurisdiction in line with *Carlin*, there must be a showing that "something happened." Some change or transference of the relationship established in the contract must occur in order to support jurisdiction in Massachusetts.

Mendes II, *supra*. This analysis is unduly restrictive. Under the situs prong, an employee must "acquire... a fixed and non-temporary employment situs" in Massachusetts. *Carlin's Case*, 3 Mass. Workers' Comp. Rep. at 42. See Argument II, *supra*. Here, the transfer occurred *ab initio* upon the commencement of Mendes' employment. Put another way, "something happened" at the moment that Franklin Logistics, Inc. hired Mendes: Franklin Logistics, Inc. knew that Mendes would be living in Massachusetts, performing deliveries in Massachusetts, and parking his truck in Massachusetts. R.A./IV:10-11. The Reviewing Board's holding

would limit recovery only to instances where the location of employment became Massachusetts after the employee was hired. This result contravenes the "broad scope" of the Act. *Conant's Case*, 33 Mass. App. Ct. at 697.

B. Massachusetts has subject matter jurisdiction over Mr. Mendes's claim under the significant contacts test.

As the Administrative Judge found in applying the significant contacts test to this case, Massachusetts has subject matter jurisdiction over Mendes' claim. "A case in New York with facts remarkably similar to the Mendes' case follows this line of thinking." R.A./IV:14. In *Bugaj*, the worker brought a claim for workers' compensation benefits in New York. *Bugaj*, 20 A.D.3d at 613. Bugaj was a resident of New York, just as Mendes is a resident of Massachusetts. Compare *id*. at 614 with R.A./IV:8. Bugaj parked his truck in New York, just as Mendes parked his truck in Massachusetts. Compare *Bugaj*, 20 A.D.3d at 614 with R.A./IV:9. Bugaj obtained his employment from a solicitation in New York, just as Mendes was solicited in Massachusetts. Compare *Bugaj*, 20 A.D.3d at 614 with R.A./IV:8. Moreover, Mendes performed deliveries in Massachusetts.

R.A./IV:10. These factors satisfy the significant contacts test for subject matter jurisdiction in Massachusetts.

CONCLUSION

For the foregoing reasons, the Academy requests that this Court adopt the significant contacts test, reverse the decision of the Reviewing Board, and hold that Mendes is entitled to workers' compensation benefits.

Respectfully submitted,

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title III. Laws Relating to State Officers(Ch. 29-30b)
Chapter 30A. State Administrative Procedure (Refs & Annos)

M.G.L.A. 30A § 14

§ 14. Judicial review

Effective: October 27, 2015
Currentness

Except so far as any provision of law expressly precludes judicial review, any person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled to a judicial review thereof, as follows:--

Where a statutory form of judicial review or appeal is provided such statutory form shall govern in all respects, except as to standards for review. The standards for review shall be those set forth in paragraph (7) of this section, except so far as statutes provide for review by trial de novo. Insofar as the statutory form of judicial review or appeal is silent as to procedures provided in this section, the provisions of this section shall govern such procedures.

Where no statutory form of judicial review or appeal is provided, judicial review shall be obtained by means of a civil action, as follows:

(1) Proceedings for judicial review of an agency decision shall be instituted in the superior court for the county (a) where the plaintiffs or any of them reside or have their principal place of business within the commonwealth, or (b) where the agency has its principal office, or (c) of Suffolk. The court may grant a change of venue upon good cause shown. The action shall, except as otherwise provided by law, be commenced in the court within thirty days after receipt of notice of the final decision of the agency or if a petition for rehearing has been timely filed with the agency, within thirty days after receipt of notice of agency denial of such petition for rehearing. Upon application made within the thirty-day period or any extension thereof, the court may for good cause shown extend the time.

(2) Service shall be made upon the agency and each party to the agency proceeding in accordance with the Massachusetts Rules of Civil Procedure governing service of process. For the purpose of such service the agency upon request shall certify to the plaintiff the names and addresses of all such parties as disclosed by its records, and service upon parties so certified shall be sufficient. All parties to the proceeding before the agency shall have the right to intervene in the proceeding for review. The court may in its discretion permit other interested persons to intervene.

(3) The commencement of an action shall not operate as a stay of enforcement of the agency decision, but the agency may stay enforcement, and the reviewing court may order a stay upon such terms as it considers proper. Notwithstanding the foregoing, if the sex offender registry board issues a stay of a final classification in a sex offender registry board proceeding, then such stay shall be for not more than 60 days but if a court issues a stay of a final classification in a court appeal held pursuant to

section 178M of chapter 6, then such hearing shall be expedited and such stay shall be for not more than 60 days, without written findings and good cause shown.

(4) The agency shall, by way of answer, file in the court the original or a certified copy of the record of the proceeding under review. The record shall consist of (a) the entire proceedings, or (b) such portions thereof as the agency and the parties may stipulate, or (c) a statement of the case agreed to by the agency and the parties. The expense of preparing the record may be assessed as part of the costs in the case, and the court may, regardless of the outcome of the case, assess any one unreasonably refusing to stipulate to limit the record, for the additional expenses of preparation caused by such refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(5) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court.

(6) If application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material to the issues in the case, and that there was good reason for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of such additional evidence and shall file with the reviewing court, to become part of the record, the additional evidence, together with any modified or new findings or decision.

(7) The court may affirm the decision of the agency, or remand the matter for further proceedings before the agency; or the court may set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced because the agency decision is--

(a) In violation of constitutional provisions; or

(b) In excess of the statutory authority or jurisdiction of the agency; or

(c) Based upon an error of law; or

(d) Made upon unlawful procedure; or

(e) Unsupported by substantial evidence; or

(f) Unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (6) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or

(g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

The court shall make the foregoing determinations upon consideration of the entire record, or such portions of the record as may be cited by the parties. The court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.

If the court finds that the action of the appointing authority in discharging, removing, suspending, laying off, lowering in rank or compensation or abolishing his position, or the action of the commission confirming the action taken by the appointing authority, was not justified, the employee shall be reinstated in his office or position without loss of compensation and the court shall assess reasonable costs against the employer.

Credits

Added by St.1954, c. 681, § 1. Amended by St.1957, c. 193, § 1; St.1968, c. 637, § 1; St.1973, c. 1114, § 3; St.1976, c. 411, §§ 1, 2; St.1998, c. 463, § 33; St.2015, c. 108, eff. Oct. 27, 2015.

Notes of Decisions (907)

M.G.L.A. 30A § 14, MA ST 30A § 14
Current through Chapter 153 of the 2019 1st Annual Session and Chapter 16 of the 2020 2nd Annual Session

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 152. Workers' Compensation (Refs & Annos)

M.G.L.A. 152 § 12

§ 12. Enforcement of orders; appeals from decisions of reviewing board; costs; reported questions; copies of judgments

Currentness

(1) Whenever any party in interest presents a certified copy of an order or decision of a board member or of the reviewing board and any papers in connection therewith to the superior court department of the trial court for the county in which the injury occurred or for the county of Suffolk, the court shall enforce the order or decision, notwithstanding whether the matters at issue have been appealed and a decision on the merits of the appeal is pending. In the event that the order or decision is reversed on appeal, the enforcement order shall be deemed vacated and unenforceable from the date of such reversal. If the request for an enforcement order is presented to the superior court for the county of Suffolk, the court may, on motion of any party in interest, order the case removed to the superior court for the county in which the injury occurred.

(2) Any appeal from a decision by a reviewing board shall be taken pursuant to section fourteen of chapter thirty A, except that such appeal shall be filed with the appeals court of the commonwealth and provided further that clause (e) of paragraph seven of section fourteen of chapter thirty A shall not apply to such appeals.

(3) In rendering an order or judgement under this section or following a rescript of the supreme judicial court after an appeal from such an order or judgement the court shall award costs to the prevailing party, to be assessed as in actions at law. This paragraph shall not authorize the awarding of costs to or against the industrial accident board or reviewing board.

(4) In the event of a judgement of the appeals court, the court may, on motion of either party, by a brief statement of facts agreeable to the parties, report questions of law raised by the decree to the supreme judicial court for determination.

(5) Immediately after the entry of a judgement under this section, whether final or interlocutory, the clerk of the court shall prepare and forward to the department and to the parties an attested copy of such judgement. Upon the entry of an interlocutory judgement under this section recommitting a case to the board, counsel for the parties shall immediately notify said board by appropriate motion for action in accordance with the requirements of such judgement.

Credits
Amended by St.1932, c. 117, § 1; St.1953, c. 314, § 6; St.1985, c. 572, § 26; St.1991, c. 398, § 32A.

Notes of Decisions (24)

M.G.L.A. 152 § 12, MA ST 152 § 12

Current through Chapter 153 of the 2019 1st Annual Session and Chapter 16 of the 2020 2nd Annual Session

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 152. Workers' Compensation (Refs & Annos)

M.G.L.A. 152 § 26

§ 26. Injuries arising out of and in course of employment

Currentness

If an employee who has not given notice of his claim of common law rights of action under section twenty-four, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer, and whether within or without the commonwealth, he shall be paid compensation by the insurer or self-insurer, as hereinafter provided; provided, that as to an injury occurring without the commonwealth he has not given notice of his claim of rights of action under the laws of the jurisdiction wherein such injury occurs or has given such notice and has waived it. For the purposes of this section any person, while operating or using a motor or other vehicle, whether or not belonging to his employer, with his employer's general authorization or approval, in the performance of work in connection with the business affairs or undertakings of his employer, and whether within or without the commonwealth, and any person who, while engaged in the usual course of his trade, business, profession or occupation, is ordered by an employer, or by a person exercising superintendence on behalf of such employer, to perform work which is not in the usual course of such work, trade, business, profession or occupation, and while so performing such work, receives a personal injury, shall be conclusively presumed to be an employee, and if an employee while acting in the course of his employment receives injury resulting from frost bite, heat exhaustion or sunstroke, without having voluntarily assumed increased peril not contemplated by his contract of employment, or is injured by reason of the physical activities of fellow employees in which he does not participate, whether or not such activities are associated with the employment, such injury shall be conclusively presumed to have arisen out of the employment.

If an employee is injured by reason of such physical activities of fellow employees and the department finds that such activities are traceable solely and directly to a physical or mental condition resulting from the service of any of such fellow employees in the armed forces of the United States, the entire amount of compensation that may be found due shall be paid by the insurer, self-insurer or self-insurance group; provided, however, that upon an order or pursuant to an approved agreement of the department, the insurer, self-insurer or self-insurance group shall be reimbursed by the state treasurer from the trust fund established by section sixty-five for all amounts of compensation paid under this section.

Credits

Amended by St.1937, c. 370, § 1; St.1943, c. 302; St.1943, c. 529, § 8; St.1945, c. 623, § 1; St.1955, c. 174, § 5; St.1973, c. 855, § 1; St.1986, c. 662, § 26; St.1991, c. 398, § 40.

Notes of Decisions (554)

M.G.L.A. 152 § 26, MA ST 152 § 26
Current through Chapter 153 of the 2019 1st Annual Session and Chapter 16 of the 2020 2nd Annual Session

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2019 WL 3323169 (Mass.Dept.Ind.Acc.)

Department of Industrial Accidents

Commonwealth of Massachusetts

MARK MENDES, EMPLOYEE
FRANKLIN LOGISTICS, INC., EMPLOYER
FIDELITY & GUARANTY INS. CO., INSURER

Board No. 008775-10
Filed: May 28, 2019

Appearances
***1** John M. Sahady, Esq., for the Employee at Hearing
Michael S. Sahady, Esq., for the Employee on Appeal
John F. X. Lawlor, Esq., for the Insurer at Hearing
Richard L. Neumeier, Esq., for the Insurer on Appeal

REVIEWING BOARD DECISION

The case was heard by Administrative Judge Braithwaite.

FABRICANT, J. The insurer appeals from an administrative judge's decision on recommittal conferring Massachusetts jurisdiction for the employee's work-related injury under the theory of localization. Finding that the judge erred in his analysis as a matter of law, we reverse the decision.

We recount the facts pertinent to the appeal. The employee, a Massachusetts resident and tractor-trailer operator, entered into a contract for hire with the employer in Pennsylvania, after the completion of a driver orientation program. (Dec. II, 5, 6; Tr. I, June 29, 2011, at 28-31; Tr. I, September 16, 2011, at 28-31, 114-15.) [1] The hiring process was quite involved. Positions were advertised via national media, such as magazines, and through information displayed on the employer's trucks. Upon contacting the company, individuals were directed to complete an online application. If an individual met threshold qualifications, and after verification, he/she was invited to attend a three-day orientation program in Roaring Springs, Pennsylvania. Although the company provided transportation and lodging, attendance at, and participation in the orientation process was not considered employment, and no job offer was extended before the end of the program. (Dec. I, 8-11.) The employee was hired in Pennsylvania at the conclusion of the program, and no offer of hire was conveyed to the employee in Massachusetts. (Dec. II, 6; Tr. I, September 16, 2011, at 28-29.)

The employee used the same truck to perform all his deliveries during the next year, and, when close to his home in Massachusetts, frequently parked the truck overnight in New Bedford, Massachusetts. He would typically pick up trailer boxes in Massachusetts and deliver them throughout the northeast. The employer utilized, but did not own, terminals in Leominster, Bondsville and Weymouth, Massachusetts. (Dec. I, 14.)

On January 18, 2010, while in Rumford, Maine, and in the course of his employment, the employee sustained an injury to his lower back. (Dec. I, 14.) In his original hearing decision, filed on October 31, 2012, the judge found that the employee suffered a work-related injury, although there was no Massachusetts jurisdiction. Thus, he denied and dismissed the claim. (Dec. I, 20-21.) Without making any explanatory findings, the administrative judge found only that the jurisdiction test in Carlin v. Kinney Shoes, 3 Mass. Workers' Comp. Rep. 41 (1989), is not applicable to the facts of this case. (Dec. I, 18.) The employee appealed, and after determining that the employee was not bound by the contractual forum selection clause, we recommitted

the case for the judge to address whether the facts found are sufficient to confer jurisdiction in Massachusetts under the theory of localization, consistent with our decisions in Hillman v. Consolidated Freightways, Inc., 15 Mass. Workers' Comp. Rep. 67 (2001) and Carlin, supra. See Mendes v. Franklin Logistics, Inc., 28 Mass. Workers' Comp. Rep. 209, 217-218 (2014).

***2** On recommittal, [2] the judge found that the employee had satisfied the evidentiary requirements necessary to find jurisdiction in Massachusetts based upon the theory of localization of employment. (Dec. II, 8, 11.) Quoting the New York Supreme Court in Bugaj v. Great Am. Transp., Inc., 798 N.Y.S. 2d. 529 (2005), regarding "sufficient significant contacts," he reached the following legal conclusion:

New York uses the "sufficiently significant contacts" test to determine jurisdiction that is similar to the "broad scope" used in Massachusetts. A party seeking jurisdiction is to "build their case by amassing as many significant New York contacts as they can find. ... The court found jurisdiction in New York, as (1) the employee was a New York resident; (2) he returned to New York between jobs; (3) the Employer phoned the Employee in New York for assignments; (4) the Employee was recruited by an ad in a New York newspaper, and (5) the Employee parked his truck in New York when not in use. The facts in *Bugaj* are virtually identical to the findings in this particular case. (*See* Findings of Fact, nos. 1, 7, 9, and 8.) The *Bugaj* court found that even if contact with New York is slight, the contacts with other jurisdictions favored by the Employer, because the transitory character of the employment, were if anything even slighter, and New York could assert jurisdiction.

(Dec. II, 11-12.)(citations omitted.)

The insurer argues on appeal that the judge's analysis is contrary to law. We agree.

We held in Hillman, supra at 74, that the "place of employment relation" cited in Carlin, supra, is an alternative test for determining jurisdiction. In Carlin, we stated:

> The making of the contract within the state is usually deemed to create the relation within the state ... [and] having thus achieved a situs, retains that situs until something happens that shows clearly transference of the relation to another state. This transfer is usually held to occur when either a new contract is made in the foreign state, or the employee acquires in the foreign state a fixed and non-temporary employment situs.

Id. at 42, quoting 2 A. Larson, Worker's Compensation § 87.40 (1983). In that case, a claim brought by the widow of a Massachusetts resident employee who sustained a fatal injury in New York was considered to be properly filed in Massachusetts, as the employee had attained a fixed and non-temporary employment situs in the Commonwealth. Massachusetts thus had a legitimate basis upon which to assert jurisdiction. Carlin, supra at 42. We concluded that a new Massachusetts contract for hire was created when the employee assumed the manager post in the West Springfield store. Furthermore, by virtue of his eighteen-month tenure at the Massachusetts store, and the issuance of his paychecks at that location, the employee acquired a fixed and non- temporary employment situs in Massachusetts. Id. at 41.

***3** Here, the administrative judge deviated from the crucial findings required for a proper localization assessment. In order to confer jurisdiction in line with Carlin, there must be a showing that "something happened." Some change or transference of the relationship established in the contract must occur in order to support jurisdiction in Massachusetts. Instead, the judge found that the employee has satisfied the theory of localization due to the work having been performed significantly more in Massachusetts than in Indiana, [3] that Massachusetts has a very substantial and essential nexus to the employee successfully performing his work, and the employee had constant contact with Massachusetts during the time he worked as well as when he was off duty at his home in New Bedford. (Dec. II, 11-12.)

Furthermore, the employee contends he was transporting goods in and out of Massachusetts constantly on behalf of the employer, and he points out the routine use of the employer's three terminals in Massachusetts. Finally, he asserts that Exhibit 4, ("Detail Report / Driver Movement, period: January 28, 2009 through December 31, 2010"), demonstrates "Massachusetts had a very substantial, crucial, and inextricable nexus to the employee's performance of his work." (Employee br. 15.) This may or may not be the case, but this profile does not support a finding of jurisdiction by "localization" as a matter of law. [4] Without some change in the employment, subsequent to the original contract, clearly showing the employee acquires a fixed and non-temporary employment status in Massachusetts, jurisdiction cannot be found under the theory of localization. [5]

Since the decision is based upon an erroneous legal analysis, we find it arbitrary, capricious and contrary to law. G.L. c.152, § 11C. Accordingly, we reverse the decision conferring Massachusetts jurisdiction for the employee's work-related injury.

So ordered.

Bernard W. Fabricant
Administrative Law Judge
Catherine W. Koziol
Administrative Law Judge
William C. Harpin
Administrative Law Judge

Footnotes

1 The first decision in this case issued on October 31, 2012 and is designated here as "Dec. I," with corresponding hearing testimony referenced as "Tr. I." The recommittal decision was issued on June 29, 2018, and is designated here as "Dec. II," with corresponding hearing testimony referenced as "Tr. II."

2 At the time of recommittal, the presiding judge had left the department and this case had been re-assigned.

3 The employee entered into a contract of hire with the Employer in Pennsylvania. (Dec. II, 6.) The contract signed by the employee stated that it was to be interpreted under the laws of Indiana. Mendes, supra at 215.

4 We note that the precedential cases cited seemingly run counter to the employee's argument that a healthy percentage of work miles logged within the Massachusetts borders would necessitate a finding of local jurisdiction.

5 As stated by Larson,

> In some kinds of employment, like trucking, ... the employee may be constantly coming and going without spending any longer sustained periods in the local state than anywhere else; but a status rooted in the local state by the original creation of the employment relationship there, is not lost merely on the strength of the relative amount of time spent in the local state as against foreign states. An employee loses this status only when his or her regular employment becomes centralized and fixed so clearly in another state that any return to the original state would itself be only casual, incidental and temporary by comparison. This transference will never happen as long as the employee's presence in any state, including the original state, is by the nature of the employment brief and transitory. 9 A. Larson & L. Larson, Workers' Compensation Law § 87.42(a), (b) (1998).

2019 WL 3323169 (Mass.Dept.Ind.Acc.)

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RULE 16 CERTIFICATION

I, Thomas R. Murphy, hereby certify that the forgoing brief complies with the rules of court, including, but not limited to:

Mass. R. App. P. 16(a)(13) (addendum);

Mass. R. App. P. 16(e) (references to the record);

Mass. R. App. P. 18 (appendix to the briefs);

Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. App. P. 21 (redaction).

I further certify, pursuant to Mass. R. App. P. 16(k), that the forgoing brief complies with the length limitation in Mass. R. App. P. 20 because it is printed in a proportional spaced font, Book Antiqua, at size 14 point, and contains 3,320 words in Microsoft Word 2013.

/s/ Thomas R. Murphy

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Date: February 24, 2020

CERTIFICATE OF SERVICE

I certify that on the 24th day of February, 2020, I served the foregoing brief on the parties in this matter by electronic delivery via the efileMA system to their attorneys of record or, if such attorneys are not registered with efileMA or if such parties are *pro se* and not registered with efileMA, via Priority Mail. The attorneys served are:

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