Multistate Workers' Compensation and Updates from WILG

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Emerging Issues

Conflicts of law:

Maximizing your recovery when handling Workers' Compensation claims involving multiple jurisdictions

by Andrew J. Reinhardt

Most workers' compensation attorneys who represent injured employees encounter, to a greater or lesser degree, cases having multistate implications, and therefore presenting conflict-of-law questions. Endless factual complications can be present. Consider, for example, a case where an employee is a resident of state A, was hired in state B, by a company having its principal place of business in state C, and is injured while working in state D.

It is important to be familiar the with typical requirements for any state to exercise jurisdiction over a claim. It should also be apparent that there are a number of cases that could be filed in one of several states or it could be that certain portions of a claim might be pursued in one state while another portion of the claim is pursued in another state. States may have different rules in regards to allowing such multiple filings depending upon whether there has been a binding election or acceptance of benefits from another state. It may also be important whether successive filings are for different benefits or periods of benefits. Generally, while double recoveries are not favored, on some occasions greater total recoveries may be obtained for an injured worker who pursues multiple state filings. Also, regardless of whether a workers' compensation claim can or should be pursued in more than one state, familiarity with the types of recoveries that can be obtained from one state versus another would be important to advise an injured worker as to what jurisdiction he should choose to pursue his case.

Q-1: What are the typical requirements for any state's workers' compensation tribunal to assert jurisdiction over a particular claim?

a. States will typically not subordinate their law to another state in regards to taking jurisdiction over a claim

It is initially noted that the U.S. Supreme Court, in *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965), held that the Full Faith and Credit Clause of the federal Constitution does not require that a state subordinate its workers' compensation policies to those of another state. *Crider* is frequently cited, and has been followed in such cases as *Robert M. Neff, Inc. v. Workmens Compensation Appeal Board (Burr)*, 155 Pa. Commw. 44, 624 A.2d 727 (1993). In *Neff*, it was held that a Pennsylvania employee injured in the state while working for an Ohio employer, was entitled to all Pennsylvania compensation and medical benefits to which he would otherwise be entitled, regardless of the fact that he had contractually agreed to be covered by the Ohio workers' compensation law, even if Ohio law authorized such an agreement. 624 A.2d at 732-33.

Some states do, however, as a matter of state law, decline to hear compensation cases where doing so would require enforcement of the compensation law of a state which (as do the majority of states) has an administrative (rather than judicial) enforcement scheme. For example, in *Jerry v. Young's Well Service*, 375 So. 2d 186 (La. Ct. App. 1979), it was held first that Louisiana courts had no jurisdiction to apply Louisiana compensation where the employment contract was entered into, and the accident occurred, outside the state, and then held that a Louisiana court was without jurisdiction to enforce the Arkansas compensation act, which was enforced by an administrative commission, and under which "any remedy [is] . . . inextricably bound to the administrative procedures of that commission." *Id.* at 188.

Similarly, in *Ray v. Aetna Casualty & Surety Co.*, 517 S.W.2d 194 (Tenn. 1974), it was held that, regardless of a lack of constitutional limitation on such power:

> The general rule is that courts of one state will not enforce the workmen's compensation laws of another jurisdiction, where the other state has provided

> a special tribunal to administer claims thereunder. *Id*. at 197.

The *Ray* Court quoted the approval of that principle in the leading academic authority on workers' compensation, which presently appears at 9 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 140.02(3), at 140-6, -7 (2000). Some jurisdictions, however, reject that principle. See, as illustrative, the Arizona statute providing:

> B. If a workman who has been hired without this state is injured while engaged in his employer's business, and is entitled to compensation for the injury under the law of the state where he was hired, he may enforce against his employer his rights in this state if they are such that they can reasonably be determined and dealt with by the commission and the courts in this state. Ariz. Rev. Stat. § 23-904(B).

b. Most states will take jurisdiction over claims for accidents in their state

It appears that, at present, most states will take jurisdiction of compensation claims for injury resulting from in-state accidents. Larson suggests "place of injury" as a basis for residual jurisdiction, thereby avoiding the danger of coverage by no state, explaining:

> The view that, whatever other arrangements it may make about applicability, each state should unreservedly take responsibility for injuries within its borders rests not on any survival of delictual conflicts rules but simply on statutory construction, on the unavoidable interest of the state in an injury that may affect its own citizens more than those of any other state, and on the desirability of providing a backstop liability to which claimants can turn when they find themselves on the wrong side of all other extraterritoriality rules. 9 Larson & Larson, *supra*, §143.03(1), at 143-16.

Attention is called to *Rutledge v. Al G. Kelly & Miller Bros. Circus*, 18 N.Y.2d 464, 223 N.E.2d 334 (1966), where the New York Court of Appeals rejected a rule previously applied in that state which denied compensation coverage of in-state injuries in some circumstances, and held:

> New York has a primary public interest in industrial accidents happening here and it may take jurisdiction when an industrial accident occurs here *even though control of the work, payment of wages, and employment of the claimant all may have their roots elsewhere*. 223 N.E.2d at 338 (emphasis added).

The *Rutledge* Court applied that rule so as to hold that the New York Board had jurisdiction over a compensation claim by an Arkansas resident employed by an Oklahoma-based traveling circus, who was injured in New York.

c. Some states, including Virginia, require other contacts with the state besides simply an in-state accident or in-state residence

The following Connecticut provision is illustrative of statutory provisions excluding some nonresident employees injured in in-state accidents from compensation coverage:

> (B) "Employee" shall not be construed to include:
>
> . . . .
>
> (vi) Any person who is not a resident of this state but is injured in this state during the course of his employment, unless such person (I) works for an employer who has a place of employment or a business facility located in this state at which such person spends at least fifty per cent of his employment time, or (II) works for an employer pursuant to an employment contract to be performed primarily in this state. Conn. Gen. Stat. Ann. § 31-275(9)(B)(vi).

In *Kluttz v. Howard*, 228 Conn. 401, 636 A.2d 816 (1994), the court took notice of this definition while holding that a nonresident employee injured in Connecticut prior to its effective date was eligible for Connecticut compensation benefits.

Assumption of jurisdiction over out-of-state accidents is a question subject to inconsistent statutory and case law. One approach is that taken in Virginia where it is provided by statute:

> A. When an accident happens while the employee is employed elsewhere than in this Commonwealth which would entitle him or his dependents to compensation if it had happened in this Commonwealth, the employee or his dependents shall be entitled to compensation, if:
>
> 1. The contract of employment was made in this Commonwealth; and
> 2. The employer's place of business is in this Commonwealth;
>
> provided the contract of employment was not expressly for service exclusively outside of the Commonwealth. Va. Code Ann. §65.2-508A.

In *Worsham v. Transpersonnel, Inc.*, 15 Va. App. 681, 426 S.E.2d 497 (1993), it was held that the statutory requirement that the employer's place of business must be in the Commonwealth is not satisfied by its merely conducting business in the state, and that the WCC had no jurisdiction where the employer was incorporated and maintained its principal place of business elsewhere and the claimant was not required to live in the state. 426 S.E.2d at 499; *see CLC Construction, Inc. v. Lopez*, 20 Va. App. 258, 456 S.E.2d 155 (1995), as an example of cases where, in contrast to *Worsham*, the place of business in the Commonwealth requirement was met. 456 S.E.2d at 158.

In *General Electric v. DeCubas*, 504 So. 2d 1276 (Fla. Dist. Ct. App. 1986), it was held that under a statute providing for payment of compensation for out-of-state injuries and deaths if, *inter alia*, "the employment was principally localized in this state," even if the contract of employment was made elsewhere, *Id*. at 1277, an employee working about 73 percent of his time in Florida qualified, rejecting the argument that the question to be determined was where the *employer* was principally localized. In *Johnson v. United Airlines*, 550 So. 2d 134 (Fla. Dist. Ct. App. 1989), it was held that an airline flight attendant's employment was "principally localized" in Florida, where she was based, although the majority of her flight time was spent outside of Florida airspace. In *Ewing v. George A. Hormel & Co*., 428 N.W.2d 674 (Iowa Ct. App. 1988), it was held that the Iowa Commission had no jurisdiction over a claim by an employee who, although an Iowa resident, had his employment "localized" in Nebraska and was injured in that state. *Id*. at 675.

The applicable Alabama statute provides that an employee or his dependants, if otherwise entitled to compensation had the injury or death resulted from an in-state accident, are entitled to compensation for an out-of-state accidental injury, provided:

(1) His employment was principally localized in this state;
(2) He was working under a contract of hire made in this state in employment not principally localized in any state;
(3) He was working under a contract of hire made in this state in employment principally localized in another state whose workmen's compensation law was not applicable to his employer; or
(4) He was working under a contract of hire made in this state for employment outside the United States. Ala. Code §25-5-35(d)(1)-(4).

In *Ex parte Flint Construction Co*., 775 So. 2d 805 (Ala. 2000), it was held the trial court (in a state utilizing the judicial rather than administrative method of enforcing its compensation act), had jurisdiction of a claim for out-of-state injuries, when his employment was not localized in any particular state, but his employment was pursuant to a contract for hire entered into in Alabama. *Id*. at 808.

Murray v. Ahlstrom Industrial Holdings, Inc., 131 N.C. App. 294, 506 S.E.2d 724 (1998), is illustrative of cases turning on whether the contract of employment was made in the forum state. There, the employee was injured in Mississippi after having been telephoned at his North Carolina home by his former, out-of-state employer and offered a job in Mississippi. The *Murray* court held that, under the rule that "for a contract to be made in North Carolina, the final act necessary to make it a binding contract must be done here," 506 S.E.2d at 726, the offer, and following telephone negotiation, acceptance by the claimant in North Carolina, was such final act, empowering the Commission to assume jurisdiction. In *D.L. People's Group, Inc. v. Hawley*, 804 So. 2d 561 (Fla. 1st Dist. Ct. App. 2002), it was held that Florida had jurisdiction over a claim for an employee's death in Missouri, where such employee signed the employment contract in Missouri and sent it to the employer's president, who signed and executed it in Florida. *Id*. at 563.

Ray should be noted as illustrating the point that if other requisite factors are not present, the mere fact that the employee is a resident of the forum state will not be sufficient to permit assumption of jurisdiction over his compensation claim. There, the Tennessee Supreme Court held that when the employee, a Tennessee resident, was injured in Missouri, and the contract of employment was entered into in that state, contacts with Tennessee were insufficient to justify application of Tennessee law. 517 S.W.2d at 197.

An interesting variation is presented by *Wartman v. Anchor Freight Co*., 75 Ohio App. 3d 177, 598 N.E.2d 1297 (1991). The *Wartman* Court applied a section of the Ohio act providing:

> If an employee is a resident of a state other than this state and is insured under the workers' compensation law or similar laws of a state other than this state, the employee and his dependents are not entitled to receive compensation or benefits under this chapter, on account of injury, disease, or death arising out of or in the course of employment while temporarily within this state and the rights of the employee and his dependents under the laws of the other state shall be the exclusive remedy against the employer on account of the injury, disease, or death.
>
> 598 N.E.2d at 1300 (quoting Ohio Rev. Code Ann. § 4123.54(G) (which remains in effect)) to the case of a Kentucky resident employed by a Michigan corporation who was injured while driving a truck through Ohio.

The court held that the employee was not insured under the workers' compensation law of another state, because he was not covered under Michigan law (as a nonresident of Michigan injured outside Michigan), and was also not covered under Kentucky law, regardless of his residency of that state. Therefore, he was not precluded from entitlement to Ohio compensation benefits. *Id*. at 1301-02.

Q-2: Where more than one state may assert jurisdiction over a claim because the employer's place of business is in one state and the accident occurred in another, what limitations might be placed on the employee's ability to choose the jurisdiction in which to file?

a. An injured worker will often have a choice of multiple jurisdictions in which to file claims

In general, it can be stated that, absent a specific statutory provision, there is no obstacle to prevent a compensation claimant from filing his claim in any state having jurisdiction. This point was recognized by the U.S. Supreme Court in *Thomas v. Washington Gas Light Co*., 448 U.S. 261 (1960), which (while primarily dealing with another issue, as discussed herein under Q-3, *infra*), held that it was "perfectly clear" that the employee there:

> could have sought a compensation award in the first instance either in Virginia, the State in which the injury occurred, *Carroll v. Lanza*, *supra*; *Pacific Employers*, *supra*, or in the District of Columbia, where petitioner resided, his employer was principally located, and the employment relation was formed. *Id*. at 279 (citations omitted).

The *Thomas* Court further stated, *citing, e.g*., *Cardillo v. Liberty Mutual Ins. Co*., 330 U.S. 469 (1947), and *Alaska Packers Ass'n v. Industrial Accident Commission*, 294 U.S. 532 (1935):

> [A]s those cases underscore, *compensation could have been sought under either compensation scheme* even if one statute or the other purported to confer an exclusive remedy on petitioner. Thus, for all practical purposes, respondent and its insurer would have had to measure their potential liability exposure by the more generous of the two workmen's compensation schemes in any event. 448 U.S. at 279-80 (emphasis added).[1]

In *Argonaut Ins. Co. v. Vanatta*, 539 S.W.2d 35 (Tenn. 1976), the deceased employee was a Tennessee resident, whose contract of employment was made in Alabama and who was employed there, and who died in a Tennessee accident. The court held that the claim was properly instituted in Tennessee:

> even though upon these facts the family of the deceased might also have had a claim under the Alabama statute, had they seen fit to pursue the matter in that state. *Id*. at 37.

In *Rutledge*, the New York Court of Appeals held that "[w]e ought not apply a rule of mutually exclusive jurisdiction . . . and deny jurisdiction here because under the same facts jurisdiction would be taken elsewhere." 223 N.E.2d at 338. In *Neff*, it was held that although the employee had a contractual right to claim benefits in Ohio, he had a right under Pennsylvania law to file for benefits there, and "requiring [him] to first submit claims to the Ohio Bureau constitutes an unreasonable burden." 624 A.2d at 733. In *Johnson*, it was held by the Florida First District Court of Appeal that the pendency of the employee's claim in Illinois did not affect her entitlement to Florida compensation benefits. 550 So. 2d at 135.

Q-3: What will be the impact on an employee's ability to pursue a workers' compensation claim in one state of his having filed for and/or been awarded compensation benefits in another state?

a. States may disallow successive recoveries for the same injury depending upon the state's approach to their having been both a filing and election in a prior state

The question of successive workers' compensation awards in different states has generated conflicting opinions, and cannot be regarded as completely settled. Consideration of the question should begin with three U.S. Supreme Court opinions. In *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1944), it was basically held that a final compensation award is entitled to the same full faith and credit as a court judgment, and that an employee therefore could not claim compensation in a second jurisdiction after claiming and recovering compensation in a first jurisdiction. In *Industrial Commission v. McCartin*, 330 U.S. 622 (1947), *Magnolia* was modified so as to permit an employee to file a compensation claim in a second state in the absence of "some unmistakable language by a state legislature or judiciary," *Id*. at 627, of the first state "cut[ting] off an employee's right to sue under other legislation passed for his benefit" in the first state. *Id*. at 628. In *Thomas*, the Court (in a plurality opinion) overruled *Magnolia*. *Id*. at 285. A majority of the *Thomas* Court held that the employee there had a right to file for an additional award in the District of Columbia after obtaining an award in Virginia, because the Virginia statute alleged to bar successive D.C. claim "lack[ed] the 'unmistakable language' which *McCartin* requires." *Id*. at 289-90 (concurring opinion).

Neff is illustrative of cases following *Thomas*. 624 A.2d at 732-33. However, *Gray v. Holloway Construction Co*., 834 S.W.2d 277 (Tenn. 1992), should be noted as illustrating the continuing, albeit minority, viability of *Magnolia*. In *Gray*, the court held that, under Tennessee law:

> an employee injured on the job in another state, who files a workers' compensation claim in that jurisdiction and obtains either an award . . . or a court-approved settlement of the claim . . . or who actively pursues a claim in a venue that has jurisdiction, is barred from filing a subsequent claim in Tennessee. *Id*. at 279 (citations omitted).

The court further stated:

> Although the basis for this rule is frequently expressed in the Tennessee cases in terms of an "election of remedies" on the part of the plaintiff-employee, it is also evident that an out-of-state judgment would be entitled to full faith and credit

> in the courts of Tennessee, and that a further recovery for the same injury under the Tennessee workers' compensation statute would be barred by the federal constitution. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149 (1943). *Id.*

b. A binding election might occur with acceptance of benefits from one state

In *Perkins v. Beak, Inc.*, 802 S.W.2d 215 (Tenn. 1991), a case cited in *Gray*, it was held that the employee's execution of an agreement for compensation providing that "benefits would continue until terminated in accordance with the workmen's compensation law of Virginia," *Id.* at 216, constituted a binding election precluding him from obtaining Tennessee compensation benefits. The *Perkins* court held that:

> [t]he circumstances of each case must be considered in determining *whether the employee has made a binding election*. The mere acceptance of benefits from another state does not constitute an election, but affirmative action to obtain or knowing and voluntary acceptance of benefits from another state will be sufficient to establish a binding election. *Id.* at 217.

The *Gray* Court approved *Perkins* and held that the employee in its case did not make a binding election to receive Texas compensation benefits by, inter alia, accepting Texas temporary disability benefits paid voluntarily by an insurer. The *Gray* Court concluded:

> The palpable if unspoken principle underlying our decision in *Perkins* was a perceived need to guard against unfair manipulation of the Tennessee legal system and a possible double recovery by an injured worker who has already secured an adequate compensation award in another jurisdiction. That concern remains a valid one. Nevertheless, to invoke the rule applied in *Perkins* to Walter Gray's case would produce just the opposite result—instead of a double recovery, there would be no recovery at all. Clearly, that result would constitute a perversion of the otherwise sound policy developed in the line of cases culminating in *Perkins*. 834 S.W.2d at 282.

c. The limitation caused by a binding election may depend upon a proper benefit comparison between states

The approach taken by Florida on the successive award issue can be contracted with the above-discussed Tennessee approach. It is provided in the Florida act:

> (d)If an accident happens while the employee is employed elsewhere than in this state, which would entitle the employee or his or her dependents to compensation if it had happened in this state, the employee or his or her dependents are entitled to compensation if the contract of employment was made in this state, or the employment was principally localized in this state. However, if an employee receives compensation or damages under the laws of any other state, the total compensation for the injury may not be greater than is provided in this chapter. Fla. Stat. Ann. §440.09(1)(d).

In *de Cancino v. Eastern Air Lines*, 239 So. 2d 15 (Fla. 1970), *appeal after remand*, 283 So. 2d 97 (Fla. 1973), where the employee filed a compensation claim in Florida while her claim in New York was pending, the court held:

> The only pertinence which compensation proceedings in another state may have is concerned with offsetting the amount of benefits received so that total benefits do **not** exceed what might have been awarded in a Florida forum. So long as this limitation on recovery is observed, it is of no importance what the stage of proceedings may be in another state. 239 So. 2d at 15.

In *Lee v. District of Columbia Department of Employment Services*, 509 A.2d 100 (D.C. 1986), it was held that under a section then providing that "[n]o employee shall receive compensation under this chapter and at the same time receive compensation under the workers' compensation law of any other state for the same injury or death," *Id.* at 103,[2] precluded the employee's receipt of D.C. compensation benefits for the period for which he had already received Maryland benefits. The *Lee* court held that the administrative rejection of proposed construction of the language as barring only complete double recovery was reasonable. *Id.* at 104-05.

It is worth noting that *Larson* takes a position upholding the public policy desirability of successive awards, arguing:

> On the policy question whether the availability of the supplementary-award procedure is a desirable thing there is some difference of opinion. Against it is the argument that it may subject the employer and carrier to repeated claims in different jurisdictions, protracting litigation and making it impossible for the employer and carrier to know with assurance when a claim has been fully satisfied. On the other side it is urged that employees typically are at a disadvantage in learning of their potential rights under various statutes of other states, especially since complex conflict-of-laws issues may sometimes be

> involved; hence they may quite forgivably make an unfortunate choice at the time of filing the first claim.
> . . . .
> In any case, the worst that can happen to the defendants, apart from the inconvenience mentioned above, *is that they will have to pay no more than the highest compensation allowed by any single state having an applicable statute—which is the same amount that would always be payable if the claimant made the best-informed choice the first time*.
> 9 Larson & Larson, *supra*, §141.06, at 141-10, -11 (2003) (emphasis added).

Q-4: How can an injured worker maximize benefits when more than one state is available as a choice for filing a workers' compensation claim?

a. Double recoveries are not favored but greater total recoveries may be appropriate

As stated by Larson, "a complete double recovery under the acts of two states" is an "impossible" result "except in a few rare fact combinations." *Id.* § 141.07 at 141-11 (2003). See, for example, as cases applying the general rule, *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608, 610 (1961); *Johnson*, 550 So. 2d at 135; and *Brooks v. Eastern Airlines, Inc*., 634 So. 2d 809 (Fla. Dist. Ct. App. 1994). It was held in *Brooks* that the Florida statutory preclusion of award of total compensation benefits in two or more states greater than provided by Florida law applied not only to payments made in multiple states for coinciding periods of disability, but also to payments made "during an altogether separate interval of disability." 634 So. 2d at 811.

Focus, therefore, should be on the cases involving the "rare" exceptions to the general rule precluding double recovery. One such case is *Uninsured Employer's Fund v. Wilson*, 46 Va. App. 500, 619 S.E.2d 476 (2005). There, the employee was a Michigan resident, hired by his Michigan-based employer for a job in Virginia. He filed a claim with the Virginia WCC, which awarded the requested benefits. He also entered into a settlement with the employer in Michigan for payment of the Virginia award, plus $75,000 and payment of all outstanding medical benefits, which settlement was approved in Michigan. The UEF (standing in the shoes of the employer) argued, *inter alia*, that it was entitled to a $75,000 credit against the employee's medical claims, claiming that the employee would otherwise be getting a "double recovery." 619 S.E.2d at 479. The court rejected that argument, holding that under the applicable statute settlement payments not approved by the Virginia WCC could only "be deducted from the amount to be paid as *compensation*" to the employee under Virginia law, *Id.* at 478 (court's emphasis), and that the Michigan settlement payments did not qualify. The court concluded:

> Voluntary payments made to a claimant pursuant to an unapproved out-of-state settlement may not be credited under Code §65.2-520 against an employer's liability to provide medical benefits. *Id.* at 480.

With respect to the "double recovery" argument, the *Wilson* Court held that:

> [w]hen a correct reading of the workers' compensation statute nonetheless results in the potential for "undeserved benefits," the decision to rebalance the ledger lies solely "within the province of the legislature, not the judiciary." *Id.* at 479 (quoting *Newport News Shipbuilding & Dry Dock Co. v. Holmes*, 37 Va. App. 188, 555 S.E.2d 419, 422 (2001)).

Ryder Truck Lines, Inc. v. Kennedy, 296 Md. 528, 463 A.2d 850 (1983), is an additional case where statutory language, there ambiguous statutory language, was construed as requiring that there be what might be regarded as a "double recovery." There, the employee, a truck driver, was a resident of Maryland, where, although married to a woman (Domenica) who lived in Florida with their minor child, he lived with his girlfriend (Donna), their minor child, and a minor child from the girlfriend's former marriage. The employee's fatal accident occurred in Virginia. Donna filed compensation claims in Maryland. Domenica filed claims in Virginia and was awarded survivors benefits there for herself and her child. Domenica then filed a total dependency claim in Maryland, and the employer, inter alia, sought credit for the Virginia award. The *Ryder* Court, following discussion of the relevant statutes in both states, held that the Maryland statutory language:

> [i]f an employee or the dependents of an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this article[,] 463 A.2d at 855,

was

> ambiguous because it does not clearly indicate whether the dependent receiving an award in a foreign state must be the same dependent in this State or may be a different and unrelated dependent before the operation of the statute is triggered. *Id.* at 855-56.

The court held that the employer could not receive credit in Maryland for the Virginia award to Domenica against the Maryland benefits due Donna and her children:

> To hold that Domenica and Teresa Grass'

> receipt of compensation under the laws of Virginia could bar Donna and her children from recovering in Maryland would in effect make the laws of Virginia supreme and binding in this State. They are not the same dependents and § 21(c)(4) does not apply. *Id.* at 857.

The court held, however, that the Commission properly denied a partial dependency award in Maryland to Dominica and her daughter "when they had received an award of total compensation in Virginia." *Id.*

b. Associations with out of state counsel may facilitate better representation of injured workers

Obviously, claimant's counsel are not always able to handle the multiple state filing by themselves. Counsel may need to consider referring their clients to attorneys in other states when available benefits are potentially greater with such referrals.

Similarly, consideration may need to be given to co-representation of a client and coordinated filings for different benefits and/or for successive periods of benefits that do not exceed allowable amounts in other states.[3] It is also maybe advisable to conduct a benefits and/or procedural comparison between states that considers, among other things, applicable statues of limitations, maximum and minimum average weekly wages, the maximum number of weeks for which temporary total or temporary partial benefits are allowed, the body parts for which permanent partial benefits may be payable, the types of work related injuries or illnesses that are compensable, the laws affecting vocation rehabilitation, the length of times or type of medical benefits that may be awarded, the extent to which bad faith can be claimed against employers or workers compensation insurance companies, the interplay between the workers compensation claim and any third party claims as well as the total maximum value of a claim or settlement that might be possible.[4]

Conclusion

There are general rules of thumb discussed above as to when a state's workers' compensation tribunal may exercise jurisdiction over a workers' compensation claim. The question of whether different or multiple filings may be made must also be considered. Multiple filings in different jurisdictions may result in a greater total recovery if the filings in each state are for different benefits or for different periods of time and the total benefits do not exceed that allowed by the workers compensation laws of the state in question. Failure to consider all of these issues may result in less than a total recovery for injured workers.

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Endnotes

1. While citation is to the plurality opinion in *Thomas*, the concurring and dissenting opinions did not indicate disagreement with that opinion on the point for which it is here cited.
2. The present equivalent section provides:
   > (a-1) No employee shall receive compensation under this chapter and *at any time* receive compensation under the workers' compensation law of any other state for the same injury or death. D.C. Code Ann. § 32-1503(d)(2)(a-1) (emphasis added).
3. Among the sources of capable attorneys who handle workers compensation claims around the country is the website of the Workers Injury Lawyers Advocacy Group, a national organization of attorneys representing injured workers. See www.wilg.org.
4. A benefits comparison is also available from a website sponsored by the United States Department of Labor. See www.dol.gov/esa/regs/statutes/owcp/stwclaw/stwclaw.htm.

B. Memo Regarding Ohio Law on Multi-state Workers' Compensation Issues

In a previous article, we discussed how various states address the pertinent issues that arise when a workers' compensation claim involves more than one jurisdiction.[1] The purpose of this article is to discuss how the state of Ohio statutes and cases have addressed those issues. This may be of some assistance to attorneys practicing in Ohio or attorneys from other states when their client's claims might potentially also be filed in this state. That is the purpose of this discussion below.

I. What Are The Requirements For Ohio To Assert Jurisdiction Over A Workers' Compensation Claim?

Ohio case and statutory law address when the Ohio Bureau of Workers Compensation (BWC) may assert jurisdiction over an accident that happens outside the State. In *Prendergast v. Indus. Comm.*, 136 Ohio St. 535, (1940), the Court stipulated that "an employee injured outside the state may recover under the Ohio Act if the employing industry and his relationship thereto are *localized* in Ohio" (emphasis added). In 1984, the Court explained that an employee could recover under Ohio's Workers' Compensation Act if there were "sufficient contacts" with the state, *State ex rel. Stanadyne, Inc. v. Indus. Comm., 12 Ohio St.3d 199,* (1984).

According to a 2009 memorandum released by the Legal Department of the Ohio Bureau of Workers' Compensation (BWC), a "totality-of-the-circumstances analysis is used to determine whether an employment relationship has sufficient contacts to be

[1] Andrew Reinhardt, *Conflicts of Law: Maximizing your recovery when handling Workers' Compensation claims involving multiple jurisdictions*, VTLA Journal, Summer 2006.

considered "localized" in the state."[2] The memorandum lists several factors articulated in Ohio case law that are used in evaluating and determining whether an employment relationship is "localized." These factors include: [3]

(1) the place of contract
(2) the place if injury
(3) where the employee performed the work
(4) the residence or domicile of the employee
(5) the employer's place of business
(6) the location from which the employee was supervised and controlled
(7) the state where the employee's payroll was processed
(8) the availability of workers' compensation in other states
(9) whether the work was to be performed solely in another state
(10) whether the work was to be performed exclusively in interstate commerce
(11) the relation of the employee's work to the employer's place of business, or situs of the industry, and
(12) the state having supreme governmental interest in the employee as affecting his or her social, business, and political life.

Indus. Comm. V. Gardinio, 119 Ohio St. 539 (1929) provides guidance in determining whether workers' compensation coverage applies to an employee working *temporarily* out of state. In this case, Ohio resident Frederico Gardinio, entered into a contract with an Ohio corporation, the Rice-Jones Company, to work in Pennsylvania where the company was constructing a bridge. Complying with Pennsylvania's Workers' Compensation Law, the Company insured its' workers in that state. The Company contributed to the Ohio workmen's compensation fund but had not returned a pay roll report for premium purposes. Mr. Gardinio was subsequently injured in the course of his

[2] Available at: http://www.ohiobwc.com/downloads/blankpdf/InterstateJurisdictionLegalMemo.pdf
[3] Id. at page 1. See also: *Prendergast v. Indus. Comm.*, 136 Ohio St. 535, (1940); *Stanadyne, Inc. v. Indus. Comm., 12 Ohio St.3d 199*, (1984); *Bridges v. Natl. Engineering & Contracting Co.* 49 Ohio St.3d 108, 113 (1990); *Dotson v. Com Trans., Inc.* 6 Ohio App.3d 98, 104l, (1991); *Lynch v. Mayfield*, 69 Ohio App.3d 229, 233 (1990); *Dailey v. Trimble* Franklin App. No. 95APE07-951(Dec. 29, 1995*); Horsley v. Best Cooling Tower Co*., Pike App. No. 447 (Sept. 20, 1990); and *Turner v. BWC* Miami App. No. 2002-CA-50 (May 9, 2003).

employment and received workers' compensation in Pennsylvania. He then filed an application for workers' compensation in Ohio.

The Court found that Ohio's Workers' Compensation Act controlled where the contract of employment was made in the state and the employee was engaged in performing *temporary* work in another state. The court noted, "the legislative intent is quite manifest that the provisions of the [workers' compensation] act shall apply to all those employed within the state, and also where, as incident to their employment, and in the discharge of the duties thereof, they are sent beyond the borders of the state." The Court note further, "an injury received by an employee of an Ohio employer is compensable under the Workmen's Compensation Law, though the injury was actually received in another state, if the service rendered by him in such other state was connected with, or part of, the duties and service contemplated to be performed in Ohio."

However, the Court distinguished the facts in this case explaining that Mr. Gardinio's contract "provided for the performance of no service whatsoever in Ohio, but, on the contrary, clearly specified that the service to be rendered thereunder was wholly in another state." The Court denied Mr. Gardinio benefits under the Act holding that the "workmen's compensation fund is not available to an injured employee engaged in the performance of a contract to do specified work in another state, no part whereof is to be performed in Ohio."

Ohio's Administrative Code also provides some guidance regarding employees working temporarily out of state. Rule 4123-17-23(A) provides that Ohio's workers' compensation law applies to employee's "whose contracts of hire have been

consummated within the borders of Ohio, employment involves activities both within and without the borders of Ohio, and the employer's supervising office is in Ohio."

The statute also provides that employers who have employees working out of state may reduce the payroll they report to the Ohio BWC by the amount paid to employees for work performed out of state. Specifically, Rule 4123-17-23(A) provides that if the employer "elects to obtain other-states' coverage under section 4123.292 of the Revised Code, the employer shall include in the payroll report only the remuneration for work the employees perform in Ohio and other work not covered by the other-states' policy."

Ohio also allows employers and employees to agree in writing to be bound by Ohio's workers' compensation laws or that of another state in circumstances where the work is going to be performed outside the state and there is a possibility of a conflict with respect to the application of workers' compensation laws. R.C. 4123.54(H) (1) provides:

> Whenever, with respect to an employee of an employer who is subject to and has complied with this chapter, there is possibility of conflict with respect to the application of workers' compensation laws because the contract of employment is entered into and all or some portion of the work is or is to be performed in a state or states other than Ohio, the employer and the employee may agree to be bound by the laws of this state or by the laws of some other state in which all or some portion of the work of the employee is to be performed. The agreement shall be in writing and shall be filed with the bureau of workers' compensation within ten days after it is executed and shall remain in force until terminated or modified by agreement of the parties similarly filed. If the agreement is to be bound by the laws of this state and the employer has complied with this chapter, then the employee is entitled to compensation and benefits regardless of where the injury occurs or the disease is contracted and the rights of the employee and the employee's dependents under the laws of this state are the exclusive remedy against the employer on account of injury, disease, or death in the course of and arising out of the employee's employment. If the agreement is to be bound by the laws of another state and the employer has complied with the laws of that state, the rights of the employee and the employee's dependents under the laws of that state are the exclusive remedy against the employer on account of injury, disease, or death in the course of and arising out of the employee's employment without

> regard to the place where the injury was sustained or the disease contracted. If an employer and an employee enter into an agreement under this division, the fact that the employer and the employee entered into that agreement shall not be construed to change the status of an employee whose continued employment is subject to the will of the employer or the employee, unless the agreement contains a provision that expressly changes that status.

In addition to examining whether the employee's contacts are sufficient to be considered "localized," the Ohio BWC must also take into consideration R.C. 4123.95 which provides that Ohio's workers' compensation laws "shall be liberally construed in favor of employees and the dependents of deceased employees."

II. Will Ohio Allow Simultaneous Or Successive Recoveries For The Same Accident And Injury In Multiple States?

No. Ohio R.C. 4123.542 provides that an employee or dependents of an employee may not receive workers' compensation benefits from more than one state for the same injury, occupational disease, or death. R.C. 4123.542 provides:

> An employee or the dependents of an employee who receive a decision on the merits of a claim for compensation or benefits under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code shall not file a claim for the same injury, occupational disease, or death in another state under the workers' compensation laws of that state. An employee or the employee's dependents who receive a decision on the merits of a claim for compensation or benefits under the workers' compensation laws of another state shall not file a claim for compensation and benefits under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code for the same injury, occupational disease, or death.
>
> As used in this section, "a decision on the merits" means a decision determined or adjudicated for compensability of a claim and not on jurisdictional grounds

For claims arising prior to September 11, 2008, the effective date of R.C. 2123.542, claimants are allowed to pursue workers' compensation benefits in Ohio in spite of receiving workers' compensation benefits from another state. Prior to the enactment of this law, R.C. 4123.54(H)(2) provided: "If an employee or his dependents are awarded workers' compensation benefits or recover damages from the employer under the laws of another state, the amount awarded or recovered, whether paid or to be paid in future installments, shall be credited on the amount of any award of compensation or benefits made to the employee or his dependents by the bureau."

III. What Is The Impact In Ohio Of An Acceptance Of Benefits Or Election In Another State?

R.C. 4123.54(H)(2) provides that if an employee or dependents pursue compensation benefits and either received a decision on the merits or recovered damages from the employer for the same injury, occupational disease, or death under the laws of another state, the amount will be credited against any benefits made by Ohio's BWC and the BWC may collect the amounts paid by "any lawful means." The statute also allows the Ohio BWC administrator or employer to collect from the employee or the employee's dependents "any costs and attorney's fees the administrator or the employer incurs in collecting that payment and any attorney's fees, penalties, interest, awards, and costs incurred by an employer in contesting or responding to any claim filed by the employee or the employee's dependents for the same injury, occupational disease, or death."

Additionally, R.C. 4123.54(H)(2) provides the amount of benefits BWC collects will not be charged to the employer's experience if the employer participates in the State Insurance Fund.

IV. How Will Ohio Do A Benefit Comparison To Allow A Maximizing Of Recovery Between States?

There is no case discussing how Ohio conducts a benefits comparison in order to maximize recovery between states. Again, as set forth in the answer to Question 2, pursuant to R.C. 4123.542, injured employees may not receive workers' compensation benefits from more than one state for the same injury, occupational disease or death for claims arising on or after September 11, 2008. Accordingly, if another state's benefits are more generous, than a claimant should consider filing in the other jurisdiction first.

C. Memo from Ohio BWC re Multistate Claims

MEMORANDUM

TO: James Barnes, Chief Legal Officer
Michael Glass, Director of Underwriting and Premium Audit
Kim Robinson, Director of Policy

FROM: Tom Sico, Assistant Legal Counsel

SUBJECT: Update on Interstate Jurisdiction

DATE: March 5, 2009

Introduction

This memorandum is an update of the Legal Department's March 12, 2007 memorandum on interstate jurisdiction. The previous memorandum set forth many of the most important principles regarding the interstate jurisdiction of Ohio's workers' compensation laws. This memorandum includes the changes to the laws made by Senate Bill 334, House Bill 562, and the amended administrative rules necessitated by the bills. SB 334 went into effect on September 11, 2008 and applies to all employers covered by the Ohio workers' compensation laws. HB 562 became effective on September 22, 2008 and applies to Ohio employers having employees covered by the federal Longshore and Harbor Workers' Act. For claims arising before the effective dates of the bills, the principles in the March 12, 2007 memorandum continue to apply.

I. The General Rule

The Ohio workers' compensation laws apply to employment relationships that the courts have described as "localized" in Ohio, *Prendergast v. Indus. Comm.* (1940), 136 Ohio St. 535, 543, or as having "sufficient contacts" with this state, *State ex rel. Stanadyne, Inc. v. Indus. Comm.* (1984), 12 Ohio St.3d 199, 202. A totality-of-the-circumstances analysis is used to determine whether an employment relationship has sufficient Ohio contacts to be considered localized in this state. The factors examined and weighed include:

(1) where the contract of employment was entered
(2) where the injury occurred
(3) where the employee performed the work
(4) the residence or domicile of the employee
(5) the employer's places of business
(6) the location from which the employee was supervised and controlled
(7) the state where the employee's payroll was processed
(8) the availability of workers' compensation in other states
(9) whether the work was to be performed solely in another state
(10) whether the work was to be performed exclusively in interstate commerce
(11) the relation of the employee's work to the employer's place of business, or situs of

the industry, and

(12) the state having supreme governmental interest in the employee as affecting his or her social, business, and political life.

The cases in which those factors are mentioned include: *Prendergast* at 538-539; *Stanadyne* at 202; *Bridges v. Natl. Engineering & Contracting Co.* (1990), 49 Ohio St.3d 108, 113; *Dotson v. Com Trans, Inc.* (1991), 76 Ohio App.3d 98, 104; *Lynch v. Mayfield* (1990), 69 Ohio App.3d 229, 233; *Dailey v. Trimble* (Dec. 29, 1995), Franklin App. No. 95APE07-951; *Horsley v. Best Cooling Tower Co.* (Sept. 20, 1990), Pike App. No. 447; and *Turner v. BWC* (May 9, 2003), Miami App. No. 2002-CA-50.

The most important jurisdictional factor has been said to be the place where the contract of hire was entered. *Horsley, supra*; Nackley, *Ohio Workers' Compensation Claims* (1994) 60, Section 5.3. But the mere fact that a worker was hired or injured in this state does not automatically invoke Ohio jurisdiction. Moreover, the fact that the employer is located in Ohio is not determinative of the issue. The law looks to the totality of the employment relationship's contacts with Ohio. The residence of the employee appears to be a comparatively insignificant factor. *Horsley, supra*; Fulton, *Ohio Workers' Compensation Law* (1991) 118, Section 6.18. Further, if an employee was initially hired in Ohio to work in this state, but is later transferred to work in and be supervised in another state, the employment relationship might no longer be localized in Ohio. *Dickerson v. Anchor Motor Freight* (Sept. 25, 1991), Hamilton App. No. C-900714.

BWC employees should be wary in claims where a self-employed claimant, or both the claimant and employer, have an Ohio address that is a post office box. Parties in other states have sometimes attempted to obtain fraudulent coverage. Where there is some legitimate Ohio contact, however, the Industrial Commission has consistently held that employers who have paid Ohio premiums in good faith should not be denied coverage. That practice is also consistent with R.C. 4123.95, which requires the Ohio workers' compensation laws – including the provisions addressing interstate jurisdiction – to be construed liberally in favor of injured workers and their dependents.

In sum, the general rule in addressing interstate jurisdiction issues is to examine and weigh the factors that the courts have identified as determining the strength of Ohio's interest in an employment relationship. If the contacts with Ohio are such that the employment relationship is localized in Ohio, this state's workers' compensation coverage applies.

II. Specific Applications of the General Rule

In applying the general rule over the years, a number of principles have evolved for dealing with specific situations. These principles are contained in statutory and administrative law, case law, Industrial Commission and BWC policies, and opinions issued by the Legal Department. The principles also serve as examples of the types of Ohio contacts needed for an employment relationship to be considered localized in this state. Among the principles are the following.

(1) Employee hired to work specifically in Ohio: Ohio coverage applies.

"Employees hired to work specifically in Ohio must be reported for workers' compensation insurance under the Ohio fund, regardless of where the contracts of hire were entered." Rule 4123-17-23(D). This principle is often relevant to construction workers coming into Ohio to work on a project. They sometimes enter a new contract of hire for each construction project even though employed by their usual employers.

(2) Employee hired in Ohio, working both in Ohio and other states, and the employer's supervising office is in Ohio: Ohio coverage applies. But if the employer obtains an other-states' policy for Ohio employees working temporarily in another state, the employer pays premiums to BWC on the payroll of those employees for only work they perform in Ohio and any other work not covered by the other-states' policy.

"The entire remuneration of employees, whose contracts of hire have been consummated within the borders of Ohio, whose employment involves activities both within and without the borders of Ohio, and where the supervising office of the employer is located in Ohio, shall be included in the payroll report. However, if the employer elects to obtain other-states' coverage under section 4123.292 of the Revised Code, the employer shall include in the payroll report only the remuneration for work the employees perform in Ohio and other work not covered by the other-states' policy." Rule 4123-17-23(A). The term "supervising office," as used in this rule, has been said to be the place where "the exercise of control over the day-to-day activities of employees" occurs. *Direct Transit Inc. v. BWC* (Dec. 19, 2000), Franklin App. No. 96AP-1400. For information on determining where an employee was hired, see section II.(8)(a) below. For more information on other-states' coverage, see section II.(3)(d) below.

(3) Ohio employee working temporarily outside of this state: Ohio coverage generally applies.

An Ohio employee who is required to perform temporary duties outside the state has the full protection of the Ohio workers' compensation system without regard to where those duties are performed, foreign countries included. Young, *Workmen's Compensation Law of Ohio* (2 Ed. 1971) 63, Section 4.10. As stated in *Indus. Comm. v. Gardinio* (1929), 119 Ohio St. 539, 542: "The legislative intent is quite manifest that the provisions of the [workers' compensation laws] shall apply to all those employed within the state, and also where, as incident to their employment, and in the discharge of the duties thereof, they are sent beyond the borders of the state."

(a) Form C-110 not required for employees working temporarily outside of Ohio

Completion of form C-110 is not needed for coverage to apply to Ohio employees who are temporarily working outside of this state. Ohio coverage applies to them regardless of whether the form is completed. In fact, because one of the statutory requirements for C-110

agreements is that the contract of employment must have been entered outside of Ohio, the C-110 option is technically not available for Ohio employees whose contracts of employment were entered in this state. (See section II.(8)(a) below.)

(b) How long Ohio coverage applies to workers temporarily outside of Ohio

As to the length of time Ohio coverage applies to employees working out of state, the determination is made on a case-by-case basis and depends on factors indicating whether the employee's absence from Ohio continues to be temporary. (One factor, for example, is whether the employee's main residence is still in Ohio.) As the *Gardinio* court stated, coverage applies where the out-of-state work is "incident to their employment" in Ohio. In some situations, coverage has been viewed by the Legal Department as applying to employees working outside of this state for a year or longer, because the evidence showed that their absence from Ohio was still temporary and the work being performed was incident to their Ohio employment.

(c) Other jurisdictions' requirements should be checked

Even when Ohio coverage applies to an employee working in another state or a foreign country, and in fact whenever an Ohio employer has employees working in another jurisdiction, it is advisable for the employer to become aware of the workers' compensation requirements of those jurisdictions in order to be prepared for the possibility of an injured worker seeking benefits there.

(d) Segregation of reportable payroll for Ohio employers that obtain an other-states' policy

If an Ohio employer is required to obtain or chooses to obtain workers' compensation insurance under the laws of another state for Ohio employees working temporarily in that state, the employer can avoid paying premiums to more than one state on the same payroll by filing form U-131 "Notice of Election to Obtain Coverage from Other States for Employees Working Outside of Ohio." R.C. 4123.292(A); Rule 4123-17-14(E). Once the employer has filed the form and a copy of the other-states' policy with BWC, the employer reports remuneration on its BWC payroll reports for only the work performed in Ohio by its Ohio employees and any other work they perform that is not covered by the other-states' policy. R.C. 4123.29(A)(2)(b); Rule 4123-17-14(A). On a separate form and for information purposes only, the employer reports its Ohio employees' payroll that was reported to the other-states' insurer for work performed outside of Ohio. R.C. 4123.26(C); Rule 4123-17-14(A),(E); Rule 4123-17-17(A). In calculating premiums for the other-states' policy, the other-states' insurer can use only payroll for work performed outside of Ohio and not payroll for work performed in Ohio. R.C. 4123.292(E). The segregation of payroll reporting between Ohio and another state shall not be presumed to indicate the law under which an employee is eligible to receive compensation and benefits. R.C. 4123.26(C)(2). The employer can cancel the U-131 by filing a form U-117 "Notification of Policy Update" with BWC.

(d) Coverage exception for federal contractors and subcontractors working outside the U.S.

For employees of employers working outside the U.S. as contractors or subcontractors for the federal government, coverage for work-related injuries usually must be obtained under the federal Defense Base Act. 42 U.S.C.A. §§1651-54. This coverage is exclusive and in place of all liability under the workers' compensation laws of any state. 42 U.S.C.A. §1651(c). A few categories of employees are exempt from the coverage, such as casual workers, employees working in agriculture or domestic service, and employees working for contractors that are engaged exclusively in furnishing materials or supplies for a public work. 42 U.S.C.A. §1654; 1651(a)(3). The Defense Base Act is administered by the U.S. Department of Labor, Office of Workers' Compensation Programs. Employees of these contractors and subcontractors may also be covered by the War Hazards Compensation Act for injuries arising from a hazard of war, regardless of whether the injury occurred in the course of employment. 42 U.S.C.A. §§1701-1717. If an injury is not covered by the Defense Base Act but is covered by both the War Hazards Compensation Act and state workers' compensation laws, benefits will not be paid under the War Hazards Compensation Act if benefits are paid under the state laws. 42 U.S.C.A. §1705. But if a hazard of war causes an injury to an employee while outside the course of employment, and the employee is therefore not entitled to benefits under the Defense Base Act and state workers' compensation laws, the employee may be entitled to benefits under the War Hazards Compensation Act.

(4) Employment contract entered either in Ohio or another state and all work to be performed in the other state: Ohio coverage does not apply.

In *Indus. Comm. v. Gardinio* (1929), 119 Ohio St. 539, 545, the court said that even though a contract of employment was entered in Ohio, "the Ohio workmen's compensation fund is not available to an employee injured while engaged in the performance of a contract to do specified work in another state, no part whereof is to be performed in Ohio." The holding in *Gardinio* was approved in the more recent cases of *State ex rel. Stanadyne v. Indus. Comm.* (1984), 12 Ohio St.3d 199, 202, and *Bridges v. Natl. Engineering & Contracting Co.* (1990), 49 Ohio St.3d 108, 113. Thus, the Ohio workers' compensation laws do not apply to an employment relationship where the contract of hire was entered in Ohio and all the work is to be performed in another state. Ohio coverage also would not apply to a worker hired in another state to work exclusively in that state, because the contacts with Ohio are even less in that situation. *See Gardinio* at 544. *See also Spohn v. Indus. Comm.* (1941), 138 Ohio St. 42, 49 ("[A] citizen of Ohio is not protected by the workmen's compensation law when injured while performing work of a purely local character in another state.").

(5) Employee hired by an Ohio employer to perform transitory work in a number of states other than Ohio: Ohio coverage may apply if the employee receives work instructions from, sends reports to, and is paid from the employer's facility in Ohio.

There is language in *Prendergast v. Indus. Comm.* (1940), 136 Ohio St. 535 indicating Ohio coverage can sometimes apply to an employee who works in a number of states but never in

Ohio. The court in *Prendergast* was not faced with that situation, because the employee had occasionally worked in Ohio for short periods. But the court said that in situations where an Ohio employer enters into an employment contract with a person to perform transitory work outside of the state, and without specification as to the exact location of the work, there is no good reason why Ohio coverage should not apply. *Id.* at 541-542. (Also see section II.(7)(b) below.) The court's discussion further indicates, however, that in order for such employment to be considered "localized" in this state, the employee may need to receive work instructions from, send reports to, and be paid from the employer's facility in Ohio. *Id.* at 537, 541-543, and 545. Thus, even though none of an employee's work is performed in Ohio, this state's coverage may apply to the employment relationship if the employee works in a number of states such that the contacts with those states are weak and the contacts with Ohio are relatively strong. Issues involving these situations should be referred to the Legal Department for review.

(6) If an employee is a resident of another state, is covered by the workers' compensation laws of the other state, and is working temporarily in Ohio, the employee can be exempt from the Ohio workers' compensation laws for up to 90 days if the other state exempts Ohio employees working temporarily in that state.

R.C. 4123.54(H)(3) states that "if an employee is a resident of a state other than this state and is insured under the workers' compensation law or similar laws of a state other than this state, the employee and his dependents are not entitled to receive compensation or benefits under this chapter, on account of injury, disease, or death arising out of or in the course of employment while temporarily within this state and the rights of the employee and his dependents under the laws of the other state are the exclusive remedy against the employer on account of the injury, disease, or death." Whether this exemption applies depends in part on the length of time the injured worker has been in Ohio or was expected to be in Ohio at the time of injury. *Villasana v. BWC* (April 20, 2004), Tuscarawas App. No. 2003 AP 09 0070. For purposes of applying the exemption, the term "temporarily within this state" is defined at Rule 4123-17-23(C) as "a temporary period not to exceed ninety days."

SB 334 provides that the exemption applies only if the other state exempts Ohio employers and employees working temporarily in that state. R.C. 4123.54(H)(4); R.C. 4123.01(A)(1)(d); Rule 4123-17-23(C). This means Ohio will extend to employers from another state the same exemption the other state extends to Ohio employers working temporarily there, up to a maximum of 90 days. For example, if another state exempts Ohio employers from coverage for 30 days, Ohio will exempt that state's employers from Ohio coverage for 30 days. But if a state does not exempt Ohio employers working temporarily there, Ohio does not exempt that state's employers working temporarily in Ohio.

(a) Calculating the 90 days

The courts have not specifically ruled on whether the 90 days should be consecutive or cumulative for the exemption to apply. But in interpreting the term "temporarily" as used in R.C. 4123.54(B), and without reference to Rule 4123-17-23(C), courts have held that the

word should be given its ordinary meaning of "for a brief period: during a limited time: briefly. . . ." *Davis v. BWC* (March 27, 1996), Hamilton App. No. C-950150; *Fowler v. Paschall Truck Lines Inc.* (July 27, 1995), Franklin App. No. 94APE11-1654. The court in *Davis* looked at the days cumulatively rather than consecutively, and held that an employee who worked as a door repair helper in Ohio for a total of 113 days was covered for an injury sustained in this state. Even though the worker was a Kentucky resident who drove to his employer's Kentucky office each work day to receive assignments, a majority of the assignments were in Ohio. The court in *Fowler* also examined the cumulative time an employee worked in Ohio. But that court denied benefits to the widow of an interstate truck driver who was an Illinois resident killed while unloading his truck in Ohio. The employer was a Kentucky corporation, had no facility in Ohio, and was engaged solely in interstate commerce in this state. Only a small portion of the employee's work was performed in Ohio. Although his job required him to regularly return to Ohio for short periods, the court said this did not alter the temporary nature of his presence there. These cases indicate that two factors should be considered in determining the amount of time worked in Ohio: (1) the cumulative number of days worked or expected to be worked in this state; and (2) whether the nature of the work is such that it occurs only "briefly" and for "a limited period" in Ohio. Under this standard, cumulative days exceeding 90 would mean Ohio coverage applies unless the circumstances show that the work is done only briefly in Ohio. As the amount of time needed to work more than 90 cumulative days increases, so does the likelihood of finding that the work is done only briefly in Ohio. The *Davis* and *Fowler* cases also indicate that whether the work is performed in interstate commerce can be an important consideration in these determinations. (See section II.(7) below.)

(b) Form C-112 can extend the 90-day exemption

In regard to an employee hired outside of Ohio, performing some work outside of this state, and covered by the workers' compensation laws of another state in which some of the work is performed, the employer and employee can extend the 90-day exemption by using form C-112 to agree that the other state's coverage will be the exclusive remedy in the event of an injury. (See section II.(8) below.) R.C. 4123.54(H(1) provides that the agreement "shall remain in force until terminated or modified by agreement of the parties similarly filed."

(c) *Exemption does not apply where any of the statutory requirements are not met*

In *Wartman v. Anchor Motor Freight Co.* (1991), 75 Ohio App.3d 177, 181, the court interpreted the "temporarily within this state" exemption in what is now R.C. 4123.54(H)(3) to mean that "an employee is not entitled to receive compensation or benefits for an injury when that employee (1) is a resident of a state other than Ohio, (2) is insured in a state other than Ohio, and (3) is only temporarily in Ohio. All three conditions must exist to preclude compensation; the absence of one condition will result in the general entitlement, under R.C. 4123.54, of every employee to compensation or benefits." In applying this rule, the court held that Ohio coverage applied to a non-Ohio resident who was injured while working temporarily in this state for a non-Ohio employer, because the worker was not covered by the workers' compensation laws of another state at the time of injury. The

exemption can apply, though, even if an injured worker has been denied benefits in the other state, provided that the state had jurisdiction over the claim. The court explained that "an employee is not 'insured' in another state when, although his employer has secured a policy of insurance in that other state, he is precluded by that other state from entitlement to compensation on a jurisdictional or quasi-jurisdictional basis...." *Id.* at 183. *Accord Villasana v. BWC* (April 20, 2004), Tuscarawas App. No. 2003 AP 09 0070.

(d) Exemption does not apply to residents of foreign countries working temporarily in Ohio

As for residents of other countries working temporarily in Ohio, BWC's coverage apparently applies to them regardless of how long they are working in this state. Under R.C. 4123.54(H)(3), residents of a "state" other than Ohio are excluded from coverage while temporarily in this state. R.C. 1.59 defines "state" as used in Ohio law as "any state, district, commonwealth, territory, insular possession thereof, and any area subject to the legislative authority of the United States...." In *Savage v. Correlated Health Service* (Oct. 17, 1990), Summit App. Nos. 14491, 14498, the court said that a physician licensed in the Canadian province of Ontario is not licensed by a "state" within the definition at R.C. 1.59. As a result, the Legal Department has not viewed the exemption from Ohio workers' compensation coverage contained in R.C. 4123.54(H)(3) as applying to residents of a foreign country working temporarily in Ohio. Although the suggestion has been made that the failure to apply R.C. 4123.54 to Canadian and Mexican residents may violate the North American Free Trade Agreement (NAFTA), no such finding has been made by the federal government despite being notified of the possible problem a number of years ago. In the absence of such a finding, BWC is obligated to enforce the law as written. *See* 19 U.S.C.A. §3312(b)(2) ("No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with [NAFTA], except in an action brought by the United States for the purpose of declaring such law or application invalid.").

(7) Employee hired outside of Ohio by a non-Ohio employer, performing some work outside of Ohio, and entering Ohio to perform transitory services in interstate commerce: Ohio coverage generally does not apply.

"The remuneration of employees of other than Ohio employers, who have entered into a contract of employment outside of Ohio to perform transitory services in interstate commerce only, both within and outside of the boundaries of Ohio, shall not be included in the payroll report." Rule 4123-17-23(B). The Ohio Supreme Court has ruled that to apply the Ohio workers' compensation laws to an employer in that situation would be unconstitutional. *Spohn v. Indus. Comm.* (1941), 138 Ohio St. 42. The rule is often relevant to interstate truck drivers and applies even if the employee is an Ohio resident. *Id.* However, Ohio coverage applies to an employee who was injured in Ohio while not subject to the jurisdiction of another state's workers' compensation laws. *Wartman v. Anchor Motor Freight Co.* (1991), 75 Ohio App.3d 177, 181. (See section II.(6)(c) above.)

(a) Ohio coverage may apply where there are intrastate aspects to the work

Where there are intrastate aspects to a truck driver's work in Ohio, this state's coverage may apply if the jurisdictional contacts with Ohio are sufficient. In *Holly v. Indus. Comm.* (1943), 142 Ohio St. 79, 88, the court held that Ohio coverage applied to a truck driver performing services indiscriminately in interstate and intrastate commerce in Ohio, even though he was a non-Ohio resident, was hired in Pennsylvania by a Pennsylvania company, and was killed while engaged in interstate commerce in Ohio. (In addition to the intrastate aspects of the employee's work in Ohio, it was also significant that the employer, although based in Pennsylvania, had three terminals in Ohio and had obtained Ohio workers' compensation coverage.)

(b) Where the employment contract was entered can be important

Also relating to trucking, it has been said that when the work is not confined to a single state, but is to be performed in interstate commerce, the location where the employment contract was entered becomes an important consideration in determining which state's workers' compensation jurisdiction applies. *Spohn* at 47-48. Additionally, as mentioned in section II.(5) above, the court in *Prendergast* said that where an Ohio employer enters into an employment contract with a person to perform transitory work outside of this state, and without specification as to the exact location of the work, there is no good reason why Ohio coverage should not apply. The court also indicated that other important considerations in such circumstances are whether another state's coverage applies to the employee and whether the employee receives work instructions from, provides reports to, and is paid from the employer's facility in Ohio. (For more information on determining where a contract of employment was entered, see section II.(8)(a) below.)

(c) *The home-terminal consideration*

It has often been said that jurisdiction over interstate truckers is generally determined by their terminal of "domicile," the industry term for home terminal. Courts have described a "home terminal" as the place where the driver customarily receives work assignments. *Cincinnati Ins. Co. v. Haack* (1997), 125 Ohio App.3d 183, 208. The court in *Dotson v. Com Trans, Inc.* (1991), 76 Ohio App.3d 98, 104-105, however, held that although a truck driver's contract of hire was entered outside of Ohio with a non-Ohio employer, and the injury occurred outside of this state, Ohio's coverage applied because the driver, an Ohio resident, paid Ohio taxes and performed a significant part of his work in Ohio each day. In an analogous situation involving a technician who was hired in Michigan and regularly worked in Ohio and four other states, a court ruled that even though the injury occurred in New Jersey and the injured worker received benefits under the workers' compensation laws of that state, Ohio jurisdiction also applied because the worker was an Ohio resident, paid Ohio taxes, and performed at least 70% of his work in this state. *Turner v. BWC* (May 9, 2003), Miami App. No. 2002-CA-50. Further, the court in *McBride v. Coble Express, Inc.* (1993), 92 Ohio App.3d 505, 507 ruled that even though the employer was an Indiana company, Ohio coverage applied to a truck driver who was a resident of Ohio, worked

primarily in Ohio, and was injured in Ohio. Thus, the "home terminal" rule is not without exceptions, particularly where a worker has other significant contacts with this state.

(8) Where there is a possibility of conflict with the workers' compensation laws of another state, the contract of employment was entered outside of Ohio, and all or some portion of the work is to be performed outside of Ohio: Form C-110 can be used to choose Ohio law as the exclusive remedy and Form C-112 can be used to choose the law of another state as the exclusive remedy.

R.C. 4123.54 provides that if there is a possibility of conflict with respect to the application of workers' compensation laws because the contract of employment was entered into and all or some portion of the work is to be performed in a state or states other than Ohio, the employer and employee may agree in writing to be bound by the workers' compensation laws of Ohio or the laws of some other state in which all or some portion of the work is to be performed. Under Rule 4123-17-23(E), form C-110 is used to choose Ohio coverage and form C-112 is used to choose the laws of another state in which all or some of the work is to be performed. SB 334 did not affect the ability of employers to continue using these forms in the same manner.

(a) Determining where the contract of employment was entered

In order for a form C-112 to be valid, the contract of employment must have been entered into in a state other than Ohio. *Watson v. Toledo Labor Service, Inc.* (1988), 46 Ohio App.3d 141, 143. The language of R.C. 4123.54(H)(1) indicates that the same requirement applies to form C-110. A contract is "entered into" at the place where it is executed. *Lanier v. Northern Steel Transport Co.* (Dec. 16, 1994), Lucas App. No. L 94-100. In regard to entering contracts, "execute" means to sign or otherwise bring a contract into its final, legally enforceable form. *Black's Law Dictionary* (7th Ed. 1999) 589. Thus, when the parties are in different states, the contract is generally considered entered into at the place where the last act occurs that makes it binding and enforceable, which is usually where the acceptance occurs. As stated at 16 O Jur 3d, Conflict of Laws §10: "[A] bilateral contract is made where the second promise is made, and if the acceptance is mailed from one state to another, the contract is made where the letter of acceptance is posted (if use of the mail is authorized)." Likewise, 16 Am Jur 2d, Conflict of Laws §99 explains: "Where an acceptance of an offer is given by telephone, the place of contracting generally is where the acceptor speaks his or her acceptance."

(b) Employer must have active coverage and form must be filed within 10 days of execution

A form C-110 or C-112 must be filed with BWC within ten days of its execution to be valid. R.C. 4123.54(H)(1); *Dotson v. Com Trans, Inc.* (1991), 76 Ohio App.3d 98, 102. Moreover, the agreements are invalid on their face if the employer is noncomplying. An employer must, therefore, maintain an active BWC policy in order for the agreement to be valid, regardless of whether payroll is reportable to Ohio.

(c) There must be a possibility of dual jurisdiction for the forms to be used

R.C. 4123.54(H)(1) permits a choice of laws when there is a "possibility of conflict" between the workers' compensation laws of different states. A form C-110 or C-112 cannot by itself "create" jurisdiction; it merely clarifies which state's laws will apply in the event of a possible conflict. In other words, if Ohio does not otherwise have jurisdiction over a workers' compensation matter, completion of form C-110 will not by itself create jurisdiction in Ohio. Similarly, if Ohio has jurisdiction over a workers' compensation matter and another state does not, completion of form C-112 will not by itself divest Ohio of jurisdiction. There are three important situations in which these principles apply:

(i) Employment relationship where the only contact with Ohio is that the employer has an office or other facility in this state: Form C-110 should not be used.

In the situation where a company has an office or other facility in Ohio and an operation in another state, Ohio does not have jurisdiction over persons who are hired at the out-of-state facility, reside in the other state, are supervised and controlled there, perform all their work there, and sustain an injury there. (*See Indus. Comm. v. Gardinio*, discussed in section II.(4) above.) Thus, form C-110 should not be used for employment relationships where the *only* contact with this state is that the employer has an office or other facility in Ohio. Rather, coverage should be obtained for the employees in the state where they are supervised and working. Even if the worker resides in Ohio, this state's jurisdiction may not apply in the absence of additional jurisdictional contacts.

Nevertheless, if the employment relationship has additional contacts with this state (such as the employee receives work directions from Ohio), or the contacts with the other state are somewhat weaker (such as the employee is working out of his or her home rather than in a branch facility of the employer), Ohio's jurisdiction may or may not be invoked, depending on the nature of the jurisdictional contacts with Ohio. These types of C-110 issues involving marginal contacts with Ohio should be referred to the Legal Department for review.

(ii) Truck driver hired outside of Ohio by a non-Ohio employer and entering Ohio to perform transitory services in interstate commerce only: Form C-110 generally should not be used.

Form C-110 should not be used to attempt to obtain Ohio coverage for truck drivers who are hired outside of this state by non-Ohio employers, come into Ohio only to perform transitory services in interstate commerce, and are covered by another state's workers' compensation jurisdiction when in Ohio. As explained in section II.(7) above, Rule 4123-17-23(B) directs that the remuneration of such workers not be included in Ohio payroll reports.

But if the interstate truck drivers are covered by an all-states rider issued by a private insurer in another state, and that policy excludes coverage for injuries occurring in a monopolistic state such as Ohio, the employer needs Ohio coverage for injuries that may occur in Ohio.

(iii) Non-Ohio resident hired outside of Ohio, covered by the workers' compensation laws of another state, and working in Ohio for a temporary period not to exceed 90 days: Form C-110 should not be used.

Form C-110 should not be used to attempt to obtain coverage for a non-Ohio resident who was hired outside of Ohio, is covered by the workers' compensation laws of another state, and is working in Ohio for a temporary period not to exceed 90 days. R.C. 4123.54(H)(3) and Rule 4123-17-23(C) provide that Ohio jurisdiction does not apply to such workers if they are from a state that reciprocally exempts Ohio employers from that state's coverage for work performed temporarily there. Moreover, if the exemption from Ohio coverage does not apply because the employer is from a state that does not reciprocally exempt Ohio employers from coverage, a C-110 is not needed because Ohio coverage applies to the employees by operation of law. R.C. 4123.01(A)(2)(d); 4123.54(H)(4); Rule 4123-17-23(C) (See section II.(6) above.).

III. Additional Considerations

In dealing with interstate jurisdiction issues, the following considerations should also be kept in mind.

(1) For injuries occurring before September 11, 2008, if compensation or benefits have been awarded in another state having jurisdiction over an injury, and a claim for the same injury is also filed with BWC: Ohio's jurisdiction may apply but amounts awarded in the other state are credited against amounts awarded in Ohio.

Before SB 334 took effect on September 11, 2008, what is now R.C. 4123.54(H)(2) provided: "If any employee or his dependents are awarded workers' compensation benefits or recover damages from the employer under the laws of another state, the amount awarded or recovered, whether paid or to be paid in future installments, shall be credited on the amount of any award of compensation or benefits made to the employee or his dependents by the bureau." Thus, for claims arising before the effective date of SB 334, the fact that a claimant received workers' compensation benefits in another state does not preclude the Ohio workers' compensation laws from applying to the same injury. *McBride v. Coble Express, Inc.* (1993), 92 Ohio App.3d 505, 510. The normal jurisdictional analysis must be conducted for those claims to determine whether Ohio workers' compensation coverage also applies to the injury. The amount awarded in the other state is credited against any award in Ohio. For claims arising before September 22, 2008, the credit also applies to benefits an injured worker received under the federal Longshore and Harbor Workers' Compensation Act. *State ex rel. Pittsburgh & Conneaut Dock Co. v. Indus. Comm.* (May 5, 2005), Franklin App. No. 04-AP-616. (See section III.(6) below.)

(2) For injuries occurring on or after September 11, 2008, an employee or dependents of a deceased employee may not have an Ohio claim if a claim for the same injury, occupational disease, or death has been decided on the merits in another state.

Under SB 334, an employee or dependents who receive a decision on the merits of an Ohio claim shall not file a claim for the same injury, occupational disease, or death in another state. R.C. 4123.542. Those persons have waived their right to receive benefits under the laws of another state. R.C. 4123.54(H)(5); R.C. 4123.51. An employee or dependents who receive a decision on the merits of a workers' compensation claim in another state shall not file an Ohio claim for the same injury, occupational disease, or death. A decision on the merits is "a decision determined or adjudicated for compensability of a claim and not on jurisdictional grounds." R.C. 4123.542.

If an employee or dependents pursue or receive benefits in an Ohio claim for the same injury, occupational disease, or death for which they pursued workers' compensation benefits and either received a decision on the merits or recovered damages under the laws of another state, BWC or any employer may, by any lawful means, collect the amount of benefits paid in the Ohio claim. If the employer participates in the State Insurance Fund, the amount of benefits BWC collects shall not be charged to the employer's experience. The benefits collected by a self-insuring employer shall be deducted from the compensation the employer reports to BWC. BWC or the employer may also collect from the employee or dependents any costs and attorney fees BWC or the employer incurs in collecting the Ohio benefits. BWC or the employer may further collect from the employee or dependents any attorney's fees, penalties, interest, awards, and costs incurred by an employer in contesting or responding to the Ohio claim. R.C. 4123.54(H)(2).

(3) Out-of-state insurer provides benefits for an injury that is later found to be covered by the Ohio workers' compensation laws and is also found to not be covered by the workers' compensation laws of the state where benefits were paid: BWC must reimburse the insurer for benefits paid.

Where an injury occurs in another state and an out-of-state insurer provides interim benefits to the claimant while the facts of the case are being developed and it is unclear who is responsible for paying benefits, BWC must reimburse the insurer for amounts paid if the facts later show that Ohio had jurisdiction over the claim and the other state did not. *Liberty Mut. Ins. Co. v. Indus. Comm.* (1988), 40 Ohio St.3d 109, 111.

(4) Railroad employees: Ohio jurisdiction generally does not apply.

The Federal Employers' Liability Act (FELA) imposes liability on interstate railroads for negligence resulting in the injury or death of their employees. 45 U.S.C.A. §51 et seq. This law provides an exclusive source of recovery for railroad employees injured or killed while working in interstate commerce. *New York Central Railroad Company v. Winfield* (1917), 244 U.S. 147, 153-154.

Nonetheless, R.C. 4123.04 provides that if employees are engaged in intrastate commerce and also in interstate or foreign commerce, and Congress has established a rule of liability or method of compensation for them, Ohio workers' compensation coverage can apply if

certain conditions are met. The conditions are: (1) the intrastate work must be "clearly separable and distinguishable" from interstate or foreign commerce; (2) the "separable" work, for its duration, must be exclusively in Ohio; (3) the employer and the worker must voluntarily accept Ohio coverage in a writing filed with BWC; (4) BWC must approve the coverage; and (5) no act of Congress forbids the coverage. *See* Nackley, *Ohio Workers' Compensation Claims* (1994) 55, Section 5.1. The statute also provides that BWC's approval of the filing "irrevocably" subjects the parties to Ohio's coverage during the period for which premiums were paid.

(5) Admiralty jurisdiction: Ohio jurisdiction does not apply.

The Merchant Marine Act of 1920, popularly known as the Jones Act, provides seamen with a right of action against their employers for negligence. 46 U.S.C.A. §30104 (formerly at 46 U.S.C.A. §688). In *Chandis, Inc. v. Latsis* (1995), 115 S. Ct. 2172, 2190, the U.S. Supreme Court said an employee qualifies as a "seaman" when two elements are met: (1) the worker's duties must contribute to the function of a vessel or to the accomplishment of its mission; and (2) the worker must have a connection to a vessel in navigation (or an identifiable group of such vessels) that is substantial in terms of both its duration and nature. The court said the purpose of the second element is to "separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." The Court also noted that seamen "do not lose ... protection automatically when on shore and may recover under the Jones Act whenever they are injured in the service of a vessel regardless of whether the injury occurs on or off the ship."

It has been held that a seaman who suffers injury on the navigable waters of the U.S. cannot constitutionally be provided a remedy under state workers' compensation laws. *Bearden v. Leon C. Breaux Towing Co., Inc.* (3rd Cir. 1978), 365 So.2d 1192, 1195. Moreover, an "agreement between [an] employer and employee to submit themselves to the provisions of the Workmen's Compensation Act cannot confer jurisdiction upon the Industrial Commission in case of injury occurring in a purely maritime employment, the admiralty courts having in such case exclusive jurisdiction." *Faulhaber v. Indus. Comm.* (1940), 64 Ohio App. 405, 406. Thus, an Ohio workers' compensation claim cannot be allowed for an injury covered by the Jones Act.

(6) Longshore and Harbor Workers: concurrent federal and state jurisdiction can apply to claims arising before September 22, 2008. For claims arising on or after that date, BWC coverage does not apply to work covered by the federal Longshore and Harbor Workers' Act.

For work-related injuries sustained by land-based maritime workers, Congress provided a remedy in the Longshore and Harbor Workers' Compensation Act. 33 U.S.C.A. §901 et seq. A maritime employee is defined by that Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring

operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker...." 33 U.S.C.A. §902(3). In construing this definition, the U.S. Supreme Court in *Herb's Welding, Inc. v. Gray* (1985), 470 U.S. 414, 423-424 said that although the term "maritime employment" is not limited to the occupations specifically mentioned in the statute, an occupation must have a connection with the loading, construction, or repair of ships in order to come within the definition. Federal jurisdiction applies to such employees "if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C.A. §903(a).

For claims arising before September 22, 2008, the Longshore and Harbor Workers' Compensation Act and the Ohio workers' compensation system may have concurrent jurisdiction. In *Hahn v. Ross Island Sand & Gravel Co.* (1958), 358 U.S. 272, 273, the U.S. Supreme Court recognized that certain employment relationships, although maritime in nature, are so "local" that state workers' compensation laws may apply to them. Also, in *Sun Ship, Inc. v. Pennsylvania* (1980), 447 U.S. 715, 716, the U.S. Supreme Court held that state workers' compensation programs may exercise concurrent jurisdiction over "land-based" injuries sustained by maritime employees. In such cases, amounts paid under the federal law are credited to amounts awarded under the Ohio workers' compensation system. (See section III.(1) above.) Further, in regard to a work-related death that occurred on navigable waters but was not covered by federal admiralty or maritime jurisdiction, an Ohio court ruled that Ohio workers' compensation coverage applied. *Edwards v. Stringer* (1978), 56 Ohio App.2d 283, 286.

Effective September 22, 2008, House Bill 562 provides that if an injury, occupational disease, or death is subject to the jurisdiction of the Longshore and Harbor Workers' Act, the employee or dependents are not entitled to benefits under the Ohio workers' compensation laws. The federal law provides the exclusive remedy against the employer. R.C. 4123.54(I). HB 562 also states that if an Ohio employer has employees who are covered by the Longshore and Harbor Workers' Act, the employer shall be assessed premiums on only the payroll attributable to services the employees perform while not covered by the federal law. R.C. 4123.32(D); Rule 4123-17-14(A). For information purposes only and not for purposes of paying premiums, the employer shall provide BWC with written notice of the identity of the insurer providing coverage under the federal law and report to BWC the amount of payroll that was reported to the insurer for work covered by the federal law. R.C. 4123.26(C)(1); Rule 4123-17-14(A),(F). The segregation of payroll shall not be presumed to indicate the law under which an employee is entitled to benefits. R.C. 4123.26(C)(2).

(7) Situations where Ohio workers' compensation coverage does not appear to apply but reasonable minds might disagree: Employer may obtain an Ohio policy by paying the minimum administrative fee and security deposit to protect against possible noncompliance claims.

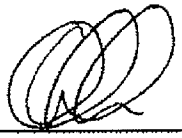
In situations where BWC and an employer believe that the Ohio workers' compensation laws probably do not apply to an employment relationship, but there is concern about possible noncompliance liability of the employer if the Industrial Commission or a court ever reached a different conclusion, the employer may protect itself from such liability by keeping an account open at BWC. This can be done by paying the minimum administrative fee set forth in Rule 4123-17-26 for each six months of coverage. The court in *Bridges v. Natl. Engineering & Contracting Co.* (1990), 49 Ohio St.3d 108, 117 said: "For purposes of this and any other civil action, we hold that once the Industrial Commission has certified that an employer has established industrial coverage and paid its premium, the employer is a complying employer as a matter of law. Such employer's failure to have included a particular injured employee in a required payroll report does not deprive the employer of its statutory immunity from a civil action brought by the employee." Although BWC rather than the Industrial Commission is now responsible for certifying that an employer has obtained coverage and paid premiums, the same principle applies.

Thus, while an employer's account is active at BWC, the employer is not susceptible to being declared a noncomplying employer and held liable for the costs of a claim allowed against it in Ohio. But if a claim is allowed for an employee whose pay was not included on the employer's payroll reports submitted to BWC, the employer can be liable for back payment of premiums and certain penalties for failure to correctly report payroll.

Conclusion

In dealing with interstate jurisdiction issues, the general rule is to examine and weigh the factors listed in section I of this memorandum, unless the employment relationship is addressed by a more specific guideline in sections II or III. The application of these principles will in many cases reveal whether Ohio's jurisdiction covers an employment relationship. In applying the general rule, however, it is not always clear how much weight to give the factors present in a particular situation. Moreover, in some cases uncertainties are encountered in deciding whether an employment relationship is covered by one of the specific guidelines. When difficulties arise in dealing with interstate jurisdiction issues, the Legal Department is available to assist.

I trust that this information is useful to you. If you have questions or comments on this matter, please do not hesitate to contact the Legal Department.



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D. Multistate Workers' Compensation claims: How to maximize your recovery with consideration of subrogation laws when there is also a third-party case arising out of the work accident

MULTISTATE WORKERS' COMPENSATION CLAIMS: HOW TO MAXIMIZE YOUR RECOVERY WITH CONSIDERATION OF SUBROGATION LAWS WHEN THERE IS ALSO A THIRD-PARTY CASE ARISING OUT OF THE WORK ACCIDENT

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Each state has its own workers' compensation laws. Most attorneys representing injured workers only handle claims within their home state. As a result, it is generally the practice for workers' compensation attorneys to think primarily of pursuing claims on behalf of claimants within their home state. However, there may be circumstances under which other states should also be considered for filing claims on behalf of injured workers.

It is very possible that a workers' compensation claimant actually has the option of filing claims for one accident in multiple states. This topic was discussed at length in the author's previous article. The premise of that article was very simply that injured workers' total recovery can be maximized by consideration of filing claims in more than one state.[1] That article involved only consideration of workers' compensation benefits, how they vary from state to state, and how under some circumstances one state's workers' compensation laws might be preferable to another.

The purpose of this paper is to discuss why we should consider other jurisdictions for filing workers' compensation claims when an accident gives rise to both a workers' compensation and a personal injury third-party claim because of the potential impact of workers' compensation subrogation laws on the total recovery between the two cases. As will be discussed below, the amount of money that may have to be paid back to the workers' compensation carrier out of a third-party recovery might vary from state to state. The election of the state for pursuing the workers' compensation claim might impact the procedure for or the amount of reimbursement. It might determine whether the reimbursement to the workers' compensation insurance carrier can be adjusted due to employer fault or other special circumstances, whether the carrier's lien is reduced for attorney's fees and expenses, or whether the carrier is entitled to reimbursement for a

[1] Andrew Reinhardt, *Conflicts of Law: Maximizing Your Recovery When Handling Workers' Compensation Cases Involving Multiple Jurisdictions*, WORKERS FIRST WATCH (Fall 2007).

third-party recovery that includes pain and suffering, consortium, or punitive damages. The choice of forum for filing might decide whether the carrier would be entitled to the proceeds of a collateral third-party claim, like a medical malpractice or a wrongful death claim. It will certainly decide the statutes of limitation or procedural rules that limit the workers' compensation carrier's right of subrogation and the types of defenses that can be raised to third-party claims under the statutory employer doctrines or laws of exclusivity. The underlying premise of all these questions being asked prior to choosing a particular state is that these questions will be resolved by the law of the state where the workers' compensation claim is filed and benefits are awarded. As will be discussed herein, these questions are a matter of state workers' compensation law and not personal injury law. With that in mind, let us discuss each of these questions with a few case examples.

I. Do Some States Have More Favorable Reimbursement Formulas Than Others?

Yes. For instance, in Arkansas, when an employee commences an action against a third party, any amount recovered from the third party is to be applied first to the reasonable costs of collection. "Then, in every case, one-third (1/3) of the remainder shall belong to the injured employee or his or her dependents, as the case may be."[2] The remainder, "or so much as is necessary to discharge the actual amount of the liability of the employer and the carrier" is applied next, and "any excess shall belong to the injured employee or his or her dependents."[3] "In no event shall the compensation beneficiary be entitled to less than one-third of the amount recovered from the third party, after deducting the reasonable cost of collection."[4]

Likewise, in Wisconsin, after deducting the reasonable cost of collection,

> [O]ne-third of the remainder shall in any event be paid to the injured employee or the employee's personal representative or other person entitled to bring action. Out of the balance remaining, the employer, insurance carrier, or, if applicable, uninsured employers fund shall be reimbursed for all payments made by it, or which it may be obligated to make in the future, under this chapter, except that it shall not be reimbursed for any payments made or to be made under Wis. Stat. Ann. §§ 102.18(1)(bp), 102.22, 102.35(3), 102.57, or 102.60. Any balance

[2]ARK CODE ANN. § 11-9-410(B) (2009).

[3]ARK CODE ANN. § 11-9-410(C), (D) (2009).

[4]ARK CODE ANN. § 11-9-410(B) (2009).

> remaining shall be paid to the employee or the employee's personal representative or other person entitled to bring action.[5]

In Texas, the "net amount" recovered by a worker in an action against a third party is to be used to reimburse the carrier, and any amount recovered that exceeds the amount of reimbursement is to be treated as an advance against future benefits, including medical benefits, to which the claimant is entitled.[6] The compensation carrier gets the first money a worker receives from a third-party tortfeasor.[7]

Also, in Montana, if the injured worker institutes the third-party action, he or she is entitled to at least one-third of the recovery and the employer is entitled to recover its workers' compensation liability. Thereafter, the injured worker is entitled to the excess.[8] However, if the employer institutes the action, the injured worker is only entitled to the excess recovery beyond the employer's subrogation lien.[9]

In North Dakota, the employer is entitled to recover up to the amount of its workers' compensation liability. However, the employer is entitled to no more than 50 percent of the total third-party recovery.[10]

II. Do Some States Adjust Reimbursement Based on Fault?

Yes. For instance, in Utah, the employer is to be reimbursed for its workers' compensation liability out of a third-party recovery after the deduction of litigation costs.[11] The lien may be

[5]WIS. STAT. ANN. § 102.29 (2009); Nelson v. Rothering, 174 Wis. 2d 296, 306, 496 N.W.2d 87, 92 (Wis. 1993) (application of the reimbursement statute "does not require a determination of the equities involved but rather a mathematical application of the legislative formula for apportioning the settlement proceeds."); Threshermens Mut. Ins. Co. v. Page, 217 Wis. 2d 451, 461, 577 N.W.2d 335, 339 (Wis. 1998) ("[T]he statutory formula ensures that the employee receives at least one-third of any third-party proceeds after costs of collection" and that "the compensation insurer be reimbursed as fully as possible from the remainder of the sum collected, with any balance going to the employee.").

[6]TEX. LAB. CODE ANN. § 417.002 (a) and (b) (Vernon 2009).

[7]Tex. Mut. Ins. Co. v. Ledbetter, 251 S.W.3d 31, 35 (Tex. 2008).

[8]MONT. CODE ANN. § 39-71-414(2)(d) (2009).

[9]MONT. CODE ANN. § 39-71-414(2)(d)(3) (2009). Note that § 39-71-416 of the Montana Code provides that the employer may reduce workers' compensation benefits by 30 percent in the event of a third-party recovery.

[10]N.D. CENT. CODE § 65-01-09 (2009).

[11]UTAH CODE ANN. § 34A-2-106(5) (West 2009).

reduced proportionately if the courts determine that the employer's fault constitutes more than 40 percent of the total fault.[12] Any excess is paid to the injured worker and the employer takes an offset for any future workers' compensation liability it may incur.[13]

In Delaware, in the case of *Delaware v. Foley*,[14] the court found that the amount due to the employer under the subrogation statute should be reduced by 50 percent because of the jury's finding of the worker's comparative negligence in the worker's cause of action against a third party. The court reasoned that if the employer had pursued the litigation, it would have been permitted to recover only half of the worker's damages because the employer could have only collected any amount which the employee would have been entitled to recover in an action in tort. Permitting the employer to recover the full lien, when the worker's own award was substantially reduced, would have been inequitable and contrary to Delaware law.[15]

In *South Central Arkansas Electric Cooperative. v. Buck*,[16] an injured employee was struck by a car while attempting to remove a tree that had fallen across electrical lines. He received workers' compensation benefits and then brought an action against the driver of the car. The employee was found to be 40 percent negligent in the third-party action. The court held that the employee had not been made whole, as the jury awarded the employee $80,000, but he actually received a judgment of $48,000, from which $21,973.22 was deducted for court costs and attorney's fees. Accordingly, there was no lien in favor of the employer.

III. Do Some States Totally Prevent Reimbursement in Special Circumstances?

Yes. In *CGU Insurance Co. v. Sabel Industries, Inc*.,[17] the court held that the employer was required to show that the employee was fully and completely compensated before it was entitled to recover on a subrogation lien. The court also held that under Georgia's statute, the employer was not entitled to recover for benefits not yet paid.

[12]UTAH CODE ANN. § 34A-2-106 (2009).

[13]UTAH CODE ANN. § 34A-2-106(5)(c) (2009).

[14]No. 07C0889, 2007 WL 4577626 (Del. Super. Ct. 2007).

[15]*Id*. at *1-2.

[16]117 S.W.3d 591, 354 Ark. 11 (Ark. 2003).

[17]564 S.E.2d 836, 838, 255 Ga. App. 236, 239 (Ga. Ct. App. 2002)

In *Brunet v. Liberty Mutual Insurance Group*,[18] the Vermont Supreme Court held that a workers' compensation insurer was entitled to "first dollar" reimbursement from any recovery that an employee received from a third party, regardless of whether the recovery represented economic or noneconomic damages. Later, however, Vermont's legislature amended its reimbursement statute[19] to prevent reimbursement, except to prevent double recovery, which reduces the benefits of a plan privately purchased by the injured employee, including uninsured motorists' coverage. Interpreting the amendment to § 624 (e), the Vermont Supreme Court held in *Travelers Insurance Co. v. Henry*,[20] that when an injured employee recovers under any first-party insurance policy, the court must apportion the award between economic and noneconomic damages to determine the existence of a potential "double recovery." The court reasoned that "[w]orkers' compensation benefits reflect . . . economic losses[,] . . . includ[ing] . . . lost wages, diminished earning capacity, medical expenses, vocational rehabilitative services, and in the case of the employee's death, burial and funeral expenses, and wage replacement paid to a surviving spouse, dependent children, or other dependents,"[21] and if the employee recovers such damages and has already been compensated for those losses by the insurer, the insurer is entitled to reimbursement to prevent a double recovery. On the other hand, compensation for pain and suffering and other related nonmonetary injuries are noneconomic damages, and the insurer is not entitled to reimbursement from this portion of the employee's award.[22]

IV. Do States Vary on Whether or How the Employer Must Share in the Attorney's Fees and Expenses Incurred in Obtaining the Third-Party Recovery?

Yes. In Alabama, where the employer is required to pay part of the employee's attorney's fee in a third-party action, the employer's intervention in the employee's third-party action does not relieve it from the obligation of paying a portion of the employee's attorney's fees.[23]

In Tennessee, an attorney representing an injured worker who recovers from a third party is entitled to a first lien for the fees against the recovery. If the employer engaged an attorney to represent the employer in effecting the recovery against the third party, the court is required to

[18]682 A.2d 487, 488, 165 Vt. 315, 317 (Vt. 1996)

[19]VT. STAT. ANN. tit. 21 § 624(e) (2009).

[20]178 Vt. 287, 882 A.2d 1133 (Vt. 2005).

[21]*Id*. at 298-99, 882 A.2d at 1142.

[22]*See* Progressive Cas. Ins. Co. v. Estate of Keenan, 2007 VT 86, ¶ 6, 182 Vt. 298, 937 A.2d 630 (Vt. 2007) (UIM award was required to be allocated between economic and noneconomic damages in accordance with *Henry*).

[23]Ayers v. Duo-Fast Corp., 779 So. 2d 210 (Ala. 2000).

apportion the reasonable fee between the attorney for the worker and the attorney for the employer, in "proportion to the services rendered."[24]

In Georgia, the court in *Commercial Union Ins. Co. v. Scott*,[25] held that a workers' compensation carrier was not required to share in the worker's attorney's fee, as the attorney's motive for suing the tortfeasor was to obtain an adequate recovery for his own client and, thereby, an attorney's fee for himself, rather than to obtain reimbursement for the insurer.[26] Since *Scott* and *Johnson* were decided, the Georgia legislature enacted Section 34-9-11.1(d) of the Official Code of Georgia Annotated, which states that the attorney representing an injured employee is entitled to a reasonable fee for services from the recovery from a third person, provided that where the employer or insurer has engaged another attorney to represent it in effecting a recovery against a third party, the court shall, upon application, apportion a reasonable attorney's fee between the attorney for the injured person and the attorney for the employer or insurer.[27]

V. Do States Vary on How the Third-Party Recovery Affects Future Workers' Compensation Benefits?

Yes. In Alabama, any recovery obtained by a carrier or employer on a subrogated third-party claim in excess of the compensation paid to the injured worker after the subtraction of attorney's fees is held in trust for the benefit of the injured worker.[28] In Idaho, the employer receives reimbursement of the amount it already paid on workers' compensation benefits and an offset against future liability. Any excess realized as a result of a third-party action beyond what the employer already paid in compensation is paid to the injured worker.[29] In Louisiana, the injured worker is entitled to any amount recovered from a third party over the amount of compensation previously collected, and the employer receives a credit for any future compensation for which it

[24]TENN. CODE. ANN. § 50-6-112(b); Hickman v. Cont'l Baking Co., 143 S.W.3d 72, 79 (Tenn. 2004) (where the employer chooses not to participate in the prosecution of the suit against the third party, the employee's attorney's fee is charged against the entire recovery and the employer incurs a pro-rate reduction of its subrogation claim).

[25]116 Ga. App. 633, 635-36, 158 S.E.2d 295, 297 (Ga. Ct. App. 1967).

[26]*See* Johnson v. Lee, 460 F.2d 1053, 1055 (5th Cir. 1972) ("As indicated by Commercial Union Ins. Co. v. Scott, the compensation benefit payor is not required to bear any pro rata share of attorneys fees except to the extent that the amount recovered is insufficient to satisfy both liens in full.") (citations omitted).

[27]GA. CODE ANN. § 34-9-11.1(d) (2009).

[28]ALA. CODE § 25-5-11(d) (2009).

[29]IDAHO CODE ANN. § 72-223(5) (2009).

may become liable.[30] Employers in Massachusetts, Missouri, and Nebraska are also entitled to a credit or offset against future workers' compensation liability by statute.[31] In Virginia, future workers' compensation benefits are payable at the same ratio that the third-party attorneys fees and expenses bear to the third-party recovery.[32]

VI. Do States Vary on What Items are Reimbursable?

1. Pain and Suffering

Yes. In *Southern Quarries & Contracting Co. v. Hensley*,[33] the employee argued that a portion of the judgment against the third party was attributable to pain and suffering and that the employer was not entitled to a credit for that amount since pain and suffering is not compensable under the workers' compensation statute. The court disagreed on the basis that the jury's verdict made no specific allocation for pain and suffering.

In *Tobin v. Department of Labor & Industries*,[34] the court held that the Department of Labor and Industries was not entitled to reimbursement with respect to the claimant's third-party recovery for pain and suffering because the department did not pay the claimant for pain and suffering.

In *Gapusan v. Jay,*[35] the plaintiffs and the employer settled the third-party case for the tortfeasor's liability insurance policy limits. The employees argued that they were entitled to an apportionment of funds that compensated them for pain and suffering. The court held that under California law, the employer's right of reimbursement takes first and full priority after the payment of expenses and fees.

> The unavailability of apportionment when a case proceeds to judgment further shows the Legislature did not intend to dilute an employer's right of reimbursement through the application of common law equity principles. A judgment,

[30]LA. REV. STAT. ANN. § 23:1103A1 (2009).

[31]MASS. GEN. LAWS ANN. ch. 152, § 15 (West 2009); MO. ANN. STAT. § 287.150 (West 2009); NEB. REV. STAT. ANN. § 48-118 (2009).

[32]VA. CODE ANN. § 65.2-313 (2009).

[33]313 Ky. 640, 644, 232 S.W.2d 999, 1001-02 (Ky. Ct. App. 1950).

[34]145 Wash. App. 607, 613, 187 P.3d 780, 782 (Wash. Ct. App. 2008).

[35]66 Cal. App. 4th 734, 741, 78 Cal. Rptr. 2d 250, 255 (Cal. Ct. App. 1998).

> just as a settlement, may be insufficient to reimburse the employer and compensate the employee for pain and suffering or other damages not fully covered by workers' compensation. Yet, after the payment of attorney fees and other costs, the employer is entitled to reimbursement from the entire amount of the judgment.[36]

"A non-negligent employer is not reimbursed solely from economic damages; rather, the 'reimbursement payment is deducted from the entire judgment.'"[37]

2. Consortium

In *Correll v. E.I. DuPont de Nemours & Co*.,[38] the court held that the employer was not entitled to a setoff against the benefits paid pursuant to workers' compensation for the loss-of-consortium damages recovered by the employee's widow against third parties. Likewise, in *Glenn v. Johnson*,[39] the court held that the amount recovered by a wife for loss of consortium in a wrongful death action is for her exclusive benefit and is not subject to the workers' compensation lien of the decedent's employer.[40]

Courts in Arizona and Wisconsin have held otherwise. The court in *Martinez v. Industrial Commission of Arizona*,[41] held that "the carrier's lien for compensation payments made extends to the entire third-party recovery received by the worker and his dependents, including proceeds attributable to a spouse's loss of consortium claim.''[42] Also, in *Brewer v. Auto-Owners Insurance Co.,*[43] the court held that it was improper to deduct the full value of a widow-plaintiff's loss of consortium claim before allocation of the remainder of the damages received.

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[36]*Id*. at 741 n.5, 78 Cal. Rptr. 2d at 255 n.5.

[37]*Id*. (citing Scalice v. Performance Cleaning Sys., 50 Cal. App. 4th 221, 237, 57 Cal. Rptr. 2d 711 (Cal. Ct. App. 1996)).

[38]207 S.W.3d 751 (Tenn. 2006).

[39]198 Ill. 2d 575, 764 N.E.2d 47 (Ill. 2002).

[40]*Id*. at 583, 764 N.E.2d at 52 (citing Page v. Hibbard, 119 Ill. 2d 41, 47-48, 518 N.E.2d 69 (Ill. 1987)).

[41]168 Ariz. 307, 812 P.2d 1125 (Az. Ct. App. 1991).

[42]*Id.* at 307-08, 812 P.2d at 1125-26.

[43]142 Wis. 2d 864, 418 N.W.2d 841 (Wis. Ct. App. 1987).

3. Punitive Damages

In Mississippi, punitive damages may be reached by the employer's subrogation action, according to the court in *Mississippi Power Co. v. Jones*.[44] By statute, the employer was entitled to recovery out of the "net proceeds" of the tort actions. The court stated that punitive damages were included in the "net proceeds" which were subject to subrogation.

In Illinois, however, where the plaintiff in *McDaniel v. Hoge*,[45] sued individually for injuries under the Public Utilities Act, including punitive damages, the Court observed that the injures were not employment-related and not incurred by an employee, and were therefore not subject to a workers' compensation lien.

VII. Do States Vary on the Issue of Rights of Subrogation Against the Proceeds of an Underinsured or Uninsured Motorist Policy?

Yes. In *Travelers Insurance Co. v. Joseph*,[46] the court held that the employer was entitled to reimbursement out of the uninsured or underinsured benefits payable to an employee where the UM/UIM benefits were provided by the employer, but not where the benefits sought were pursuant to the employee's UM/UIM policy.[47] Also, Alabama does not allow employers a right of subrogation against the proceeds of an uninsured or underinsured motorist policy.[48] In Virginia, a workers' compensation carrier's lien only extends to the proceeds of an uninsured or underinsured policy when the policy in question was purchased "by and at the expense of the employer."[49]

On the other hand, in New Jersey, "any proceeds, whether recovered from the direct third-person tortfeasor or from a functionally equivalent source, uninsured motorist insurance proceeds or legal malpractice proceeds are subject to [workers' compensation] liens . . . . Recoveries that are

[44]369 So. 2d 1381 (Miss. 1979).

[45]120 Ill. App. 3d 913, 916, 458 N.E.2d 1063, 1065 (Ill. App. Ct. 1983).

[46]656 So. 2d 1000 (La. 1995).

[47]*See* Travelers Ins. Co. v. Liberty Mut. Ins. Co., 164 Vt. 368, 670 A.2d 827 (Vt. 1995); Martinez v. Lovette, 121 N.C. App. 712, 468 S.E.2d 251 (N.C. Ct. App. 1996) (subrogation improper from employee's UM benefits).

[48]River Gas Corp. v. Sutton, 701 So. 2d 35 (Ala. Civ. App. 1997).

[49]VA. CODE ANN. § 65.2-309.1 (2004).

not directly from the tortfeasor are subject to a lien even when the employee is not fully compensated." [50]

VIII. Do States Vary on the Right of Subrogation from the Proceeds of a Collateral Third-Party Claim, Like a Medical Malpractice Claim or a Wrongful Death Claim?

Yes. In Minnesota, the court in *Illg v. Forum Insurance Co.*,[51] held that an insurer that had made a special fund payment was not entitled to reimbursement from the proceeds of a wrongful death settlement entered into between the deceased employee's heirs and the negligent third party's liability insurer. The court reasoned that the special fund payment was not compensation within the meaning of the statute giving the insurer indemnity rights for compensation paid to an employee injured as a result of a third-party's negligence.

In Florida, the proceeds of a medical malpractice claim which arose after the industrial accident were subject to the employer's workers' compensation lien in *Liberty Mutual Insurance Co. v. Chambers*.[52] The court held that nothing in the state statute regulating collateral sources of benefits in malpractice litigation prohibited the employer from asserting the lien.

IX. Do State Laws Vary on the Statutes of Limitations for Filing a Subrogation Claim or the Procedural Rules and Hurdles for Protecting the Carrier's Right of Subrogation?

Yes. In Maryland, an employer, which is subrogated to an injured employee's cause of action by virtue of having paid workers' compensation to the employee, has no greater rights than its subrogor and is bound by the same statute of limitations which governs the employee's action.[53] Likewise, in Texas, an employer's subrogation action against a third party responsible for the injury or death of an employee is subject to the same statute of limitations that would have been applicable if the action were brought by the employee.[54]

[50]Frazier v. N.J. Mfrs. Ins. Co., 142 N.J. 590, 605, 667 A.2d 670, 678 (N.J. 1995).

[51]435 N.W.2d 803 (Minn. 1989).

[52]526 So. 2d 66, 67 (Fla. 1988).

[53]Anne Arundel County v. McCormick, 323 Md. 688, 693, 594 A.2d 1138, 1141 (Md. 1991).

[54]Guillot v. Hix, 838 S.W.2d 230 (Tex. 1992).

Notably, the Supreme Court of Illinois, in *Wilson-Raymond Constructors Co. v. Industrial Commission,*[55] held that the time within which an employer was required to file a third-party action for reimbursement was measured from the date the employer's right to reimbursement arose, and not from the date of the underlying injury.

In Alabama, a workers' compensation insurer's cause of action against the third-party tortfeasor accrues at the expiration of the applicable statute of limitations (one year for personal injuries). If the injured employee does not sue within the time required by statute, the employer has six additional months within which to bring the action against the tortfeasor.[56]

X. Do State Laws Vary on Defenses to Third-Party Claims Such As Under the "Exclusive Remedy" or "Statutory Employer" Doctrines?

Yes. In Kentucky, if a claim is made for the payment of workers' compensation or any other benefit provided by the workers' compensation law, all rights to sue the employer for damages on account of such injury or death shall be waived as to all persons.[57]

In Montana, an employee suffering an injury arising out of and in the course of employment while working for an uninsured employer may pursue all remedies concurrently, including a claim for benefits from the uninsured employers' fund, a damage or independent action or any other civil remedy provided by law.[58]

Neither New Jersey nor Wisconsin recognize the statutory employer doctrine. Section 34:15-3 of the New Jersey Statutes Annotated provides as follows:

> If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract, written or verbal, with a subcontractor to do all or any part of such work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injury caused to an employee of such contractor or subcontractor by any defect in the condition of the ways, works, machinery or plant if the defect arose or had not been discovered and

[55]79 Ill. 2d 45, 402 N.E.2d 584 (Ill. 1980).

[56]Liberty Mut. Ins. Co. v. Lockwood Greene Eng'rs, Inc., 273 Ala. 403, 140 So. 2d 821 (Ala. 1962).

[57]KY. REV. STAT. ANN. § 342.610 (West 2009).

[58]MONT. CODE ANN. § 39-71-508 (2009).

> remedied through the negligence of the employer or some one intrusted by him with the duty of seeing that they were in proper condition.[59]

Section 102.07(8m) of the Wisconsin Statutes provides that "[a]n employer who is subject to this chapter is not an employer of another employer for whom the first employer performs work or service in the course of the other employer's trade, business, profession or occupation."[60]

XI. Conclusion

As you can see from the above discussion, there are quite a number of issues that may need to be considered before filing or receiving workers' compensation benefits in a particular state when there is a third-party case arising out of the work accident. Each of these issues could have a significant impact on the total recovery received by an injured worker from the personal injury and workers' compensation cases combined. In appropriate cases, research should be done on these issues. Counsel for an injured worker or personal injury claimant should also have ready access to a directory of lawyers around the country who have expertise in the laws of all the various states to assist in making these decisions.[61]

[59]N.J. STAT. ANN. § 34:15-3 (West 2009).

[60]WIS. STAT. § 102.07(8m) (2009).

[61]Workers' Injury Law & Advocacy Group, a national organization of attorneys representing injured workers, is one source for capable workers' compensation attorneys around the country. *See* the Workers' Injury Law & Advocacy Group (WILG) Web site, http://www.wilg.org./