COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 008775-10**

Mark Mendes	Employee
Franklin Logistics, Inc.	Employer
Fidelity & Guaranty Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Levine)

The case was heard by Administrative Judge Sullivan.

APPEARANCES
John M. Sahady, Esq., for the employee at hearing
Michael S. Sahady, Esq., for the employee at hearing and on appeal
William F. Burke, Esq., for the insurer at hearing and on appeal
John F.X. Lawler, Esq., Erica Mecler Caron, Esq., for the insurer on appeal

HARPIN, J. The employee appeals from a decision denying and dismissing his claim on jurisdictional grounds. We reverse and recommit the case for further findings.

The employee was forty-seven years old at the time of the hearing, married, with six children. He had a limited education, having left school at the age of sixteen. He never learned to read or write with any proficiency, and never obtained a GED. (Dec. 6.) He attended New England Tractor-Trailer Training School, where he obtained his Massachusetts Commercial Drivers' License (CDL). The majority of his work experience thereafter was as a tractor-trailer operator. (Dec. 7.) He commenced work with the employer, Franklin Logistics, in January 2009. (Dec. 8.)

Franklin Logistics was operated as an Indiana company, with its principal place of business in Remington, Indiana. It was a subsidiary of Smith Transport Inc., a Pennsylvania corporation providing general freight transportation services,

with its headquarters located in Roaring Springs, Pennsylvania. (Dec. 8.) The terms "Smith Transport" and "Franklin Logistics" were used interchangeably throughout the testimony at hearing. (Dec. 9.)

The hiring process for employees was quite involved. Positions were advertised via national media, such as magazines, and through information displayed on the employer's trucks. Upon contacting the company, individuals were directed to complete an online application. If an individual met threshold qualifications, and after verification, he/she was invited to attend a three-day orientation program in Roaring Springs, Pennsylvania. Although the company provided transportation and lodging, attendance at and participation in the orientation process was not considered employment, and no job offer was extended before the end of the program. (Dec. 8-11.) Various documents were executed during orientation, including an "Agreement to Select a State Other than Ohio as the State of Exclusive Remedy for Workers' Compensation Claims" (Agreement). (Dec. 11; Ex. 8.) Prospective employees were encouraged to ask any questions they might have about this document, in order to be satisfied they were aware of what it meant. (Dec. 11.) Additionally, applicants were given a physical exam, a drug test and various other tests, including a road test. Upon successful completion of the program, the Safety Compliance Officer made the final decision on hiring, and at that point the applicant became an employee and received an orientation stipend of $100.00. The change in profile from applicant to employee would be clearly communicated to the individual. (Dec. 11.)

The employee learned of an available job through an advertisement in the Standard-Times, a New Bedford newspaper. He completed the online application, and, after a short delay, attended the orientation program in Roaring Springs, for which the employer provided a bus ticket. The employee was given a physical examination, watched videos, took written tests, performed a road test, and executed the workers' compensation jurisdiction selection agreement. (Ex. 8; Dec. 13.) Upon completion of the orientation program in Pennsylvania, the

employee was hired and was assigned a company truck. His first trip was from Roaring Springs to Lock Haven, Pennsylvania, to pick up and deliver a load to a specific destination in Massachusetts. (Dec. 14.)

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

On January 18, 2010, while in the course of his employment in Rumford, Maine, the employee sustained an injury to his low back. (Dec. 14.) The dispatcher directed the employee to return to Pennsylvania. Due to pain, the employee declined and instead traveled to St. Luke's Hospital in New Bedford. (Dec. 14.) The employee has not returned to work.

The employee filed a claim for benefits with the department, which the insurer denied, raising, in addition to liability and disability, the lack of Massachusetts jurisdiction. Following a § 10A conference, the employee was awarded § 34 benefits for a closed period and § 35 benefits for an additional closed period. Both parties appealed the order. (Dec. 1-2.)

In his hearing decision, the judge, while finding the employee suffered a work-related back injury that was medically partially disabling and totally vocationally incapacitating, nevertheless ruled there was no Massachusetts jurisdiction, and denied and dismissed the claim. (Dec. 20-21.)

On appeal, the employee argues Massachusetts jurisdiction is proper, for two reasons. He first alleges that Massachusetts was the place of hire. (Employee br. 8.) It is well settled that to convey jurisdiction, the contract for hire must be completed in Massachusetts, even if the accident occurred out of state. Lavoie's Case, 334 Mass. 403 (1956); Conant's Case, 33 Mass.App.Ct. 695 (1992). A contract for hire is concluded when the offeror of the contract (usually the

employer) makes an offer to the offeree (usually the employee) and the offeree accepts the offer. Conte v. P.A.N. Constr. Co., Inc., 9 Mass. Worker's Comp. Rep. 497, 499 (1995). The location of the formation of the contract for hire is the place where the offeree was located when he accepted the offer. Id.; Camuso v. Westinghouse Elec. Co. 11 Mass. Workers' Comp. Rep. 479, 483 (1997).

The employee claims that the facts of Conant, supra, are on all fours with those of the present case. (Employee br. 8-14.) He asserts that after his application was e-mailed from Massachusetts, the employer made a "conditional" offer of employment and paid for the employee to travel to Pennsylvania to go through the orientation process, and the employee "accepted" the conditional offer by traveling to the orientation program. Therefore, the employee argues the contract for hire was made in Massachusetts. (Employee br. 11-12.)

The employee has misapplied Conant. In that case the court held that an offer had been made to the employee by a union hiring person in Worcester, who had implied authority to extend offers; the offer was accepted by the employee while in Massachusetts; and he then traveled to the job site in Vermont. Conant, supra, at 698-699. The fact that the employer in Vermont had the option of rejecting the employee was not a bar to the Massachusetts contract, in the absence of evidence of the common exercise of that right by the employer. In addition, the "routine filling out of forms upon arrival at the job site is more properly regarded as an administrative detail than as an application for employment." Id. at 699.

In the present case, no offer was conveyed to the employee in Massachusetts; he was merely told to come to the Pennsylvania location, at the employer's expense, where he would then go through the orientation process. The judge found the employee's employment was conditioned on his satisfactory completion of the tests given him and his signature on the Agreement to select a state for workers' compensation insurance coverage. (Dec. 11). This was not the "routine filling out of forms," but was a substantive process that had to be completed. It was only at the end of the three day process that an offer was made

for employment by the Safety Compliance Officer. Id. The judge correctly determined that the employee's contract for hire did not take place in Massachusetts, but in Pennsylvania.

The second argument raised by the employee is based on the theory of localization of employment. (Employee br. 14.) In Hillman v. Consolidated Freightways, Inc., 15 Mass. Workers' Comp. Rep. 67, 74 (2001), we held that the "place of employment relation" cited in Carlin v. Kinney Shoes, 3 Mass. Workers' Comp. Rep. 41 (1989), is an alternative test for determining jurisdiction. In Carlin, we stated:

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

Id. at 42, quoting 2 A. Larson, Worker's Compensation § 87.40 (1983). In that case, a claim brought by the widow of a Massachusetts resident employee who sustained a fatal injury in New York was considered as properly filed in Massachusetts, as the employee had attained a fixed and non-temporary employment situs in this Commonwealth. Massachusetts thus had a legitimate basis upon which to assert jurisdiction. Carlin, supra, at 42.

The judge here found only "that the Carlin test is not applicable to the facts in this case," (Dec. 18), without making any explanatory findings. The employee contends he was constantly transporting goods in and out of Massachusetts on behalf of the employer. Additionally, the employee argues he routinely utilized the employer's three terminals in Massachusetts. The employee also asserts Exhibit 9 ("Detail Report / Driver Movement, period: January 28, 2009 through December 31, 2010") demonstrates "Massachusetts had a very substantial, crucial,

and inextricable nexus to the employee's performance of his work." (Employee br. 15.)

There is evidence the employee made approximately 150 trips to or from Massachusetts during the time of his employment, in contrast to seven or so trips he made to Indiana. (Tr. II, 64;[1] Exhibit 9; Employee br. 16.) The employee is a Massachusetts resident, returned to his home in Massachusetts after each trip taken on his employer's behalf, and frequently parked his employer's vehicle overnight in Massachusetts. (Dec. 14; Tr. II, 65, 71). Moreover, the employer utilized terminals in three locations in Massachusetts (Leominster, Weymouth, and Bondsville) for its drivers to drop off and pick up loads. (Dec. 14; Tr. I, 63; Tr. II, 68.) Finally, there is evidence the insurer does business in Massachusetts. (Tr. II, 83; Employee br. 16.) In light of the foregoing, it is appropriate to recommit this case for further findings of fact regarding the employee's contentions, and to address whether the facts found are sufficient to confer jurisdiction in Massachusetts under the theory of localization, consistent with our decisions in Hillman and Carlin.

Such a recommittal would not be appropriate, however, if the Agreement signed by the employee is enforceable in Massachusetts. That document states:

> Under Ohio revised Code Section 4123.54, the employer and employee agree to be bound exclusively by the workers' compensation laws of IN[diana] (not Ohio) as the state of coverage and have attached a certificate of coverage. *Regardless of where a work-related injury or death occurs or where an employee contracts an occupational disease, the workers' compensation laws of that state and not the laws of Ohio will govern the rights of the employee and his or her dependents.*

(Exhibit 8, emphasis added)

The insurer argues that a forum selection clause, such as that contained in Exhibit 8, is presumed to be valid and enforceable, citing Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972). It notes that such clauses are to be enforced

[1] The transcript of the testimony taken on June 29, 2011, is designated as Tr. I. The transcript for testimony taken on September 16, 2011, is designated as Tr. II.

"unless there is a clear showing that enforcement would be unjust and unreasonable." (Insurer br. 16.) The employee argues the agreement is against public policy and should not be enforced. (Employee br. 20.)

The insurer is correct that, as a rule, forum selection clauses in contracts are enforceable in Massachusetts, as long as it is not unfair or unreasonable to do so. Jacobson v. Mailboxes Etc. U.S.A., Inc., 419 Mass. 572, 575 (1995). Barring "any substantial Massachusetts public policy reason to the contrary," the law of the state set out in the agreement will be controlling. Id. A party opposing a forum selection clause bears the "substantial burden" of showing that enforcement of a forum selection clause would be unfair and unreasonable. Cambridge Biotech Corp. v. Pasteur Sanofi Diagnostics, 433 Mass. 122, 133 (2000).

However, the question whether forum selection clauses are enforceable in the specific workers' compensation context does not appear to have been decided in Massachusetts. Under the Massachusetts Workers' Compensation Act, "No agreement by any employee to waive his right to compensation shall be valid." G. L. c. 152, § 46; McLaughlin's Case, 274 Mass. 217, 222 (1931). The only exceptions are: notice by the employee at the time of hire that he retained his common law rights to sue his employer in the general courts, G. L. c. 152, § 24, McLaughlin, supra, at 220, and the waiver of future benefits as part of an approved lump sum settlement. G. L. c. 152, § 48; Conlon v. City of Lawrence, 299 Mass. 528, 532 (1938). Neither exception applies here. Nor can the right of an employee to compensation under Chapter 152 be narrowed by a contract between him and the employer, Cox's Case, 225 Mass. 220, 225 (1916); Aufiero v. City of Brockton, 22 Mass. Workers' Comp. Rep. 205, 208 n. 6 (2008), aff'd, Aufiero's Case, 75 Mass.App.Ct. 1114 (2009) (Memorandum and Order Rule 1:28). Nor are the courts of Massachusetts or the department bound by the acts of other jurisdictions in regard to those rights. Migues' Case, 281 Mass. 373, 374 (1933).

Although some states allow for forum selection clauses in the workers' compensation context, Woodward v. J.J. Grier, Co., 270 S.W. 2d 155, 159-160

(Missouri, 1954)[2], the general rule appears to be that such clauses are not to be enforced, because of a strong public policy against the waiver of workers' compensation rights by contract.

> Express agreement between employer and employee that the statute of a named state shall apply is ineffective either to enlarge the applicability of that state's statute or to diminish the applicability of the statutes of the other states. . . . [T]he rule in worker's compensation is dictated by the overriding consideration that compensation is not a private matter to be arranged between two parties; the public has a profound interest in the matter which cannot be altered by any individual agreements. . . . [P]ractically every statute has emphatic prohibitions against cutting down rights or benefits by contract. The only exception occurs under several statutes which explicitly permit the parties to agree that the local statute shall not apply to out-of-state injuries.

12 Larson, Workers' Compensation, § 143.07[1] (2013).

The prohibition in Massachusetts against the contractual waiver of the right to compensation is in accord with Larson's recitation of the general rule. The prohibition amounts to the "substantial Massachusetts public policy reason," Jacobson, supra, for not enforcing the forum selection clause in this case, for to do so would unreasonably deprive the employee of the protections and benefits of the Massachusetts Act.

The employee raises an additional reason for non-enforcement of the clause; namely, the uneven economic power in the job offer made to him during the application process. The judge found that employees were presented with the Agreement to Select Indiana as the state of "exclusive remedy" on the basis that if

[2] The Missouri statute, then and now, provides:

> This chapter shall apply to all injuries received and occupational diseases contracted in this state, regardless of where the contract of employment was made, and also to all injuries received and occupational diseases contracted outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide . . . .

Revised Statutes of Missouri, § 287.110(2)(emphasis added).

they did not sign it, they would not be hired. (Dec. 11.) While the employees were given the opportunity to ask questions about the form and what they were signing, at no time was this document ever subject to negotiation. (Dec. 11.)

This situation is a classic example of unequal economic power between the parties. In such a case the choice of law provision will not be enforced in Massachusetts, as the party against whom the provision is applied did not have a meaningful choice at the time of negotiation. "A factor which the forum may consider is whether the choice of law provision is contained in an 'adhesion contract,' namely one that is drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave' basis to the weaker party who had no real opportunity to bargain about its terms." Taylor v. Eastern Connection Operating, Inc., 465 Mass. 191, 195 n. 8(2013). The agreement in issue clearly meets those requirements; thus the bar to enforcement contained in the doctrine applies in this case.[3]

The case is recommitted to the administrative judge for findings as to whether jurisdiction is proper in Massachusetts under the theory of localization. Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7). If such fee is sought, employee's counsel is directed to submit to this board, for review, a duly executed fee agreement between counsel and the

[3] We are aware of the ruling in Melia v. Zenhire, Inc., 462 Mass. 164, 171 (2012), where the Supreme Judicial Court upheld a forum selection clause in a Wage Act case. The court noted that the Wage Act proscribed "special contracts" that exempted employers from its provisions, which it termed an "antiwaiver" provision that protected fundamental public policy. However, it also noted that the state chosen (New York) would have applied Massachusetts law to the litigation, thus obviating the argument that the plaintiff would be deprived of his rights under the Massachusetts Act by being forced to litigate his claim in New York. Id. at 174. Melia is not on point with the present case, for the Agreement (Exhibit 8) specifically states that the "employer and the employee agree to be bound exclusively by the workers' compensation laws of IN[diana] . . . as the state of coverage . . ." (Ex. 8). It is thus not just that the parties agree to bring any claim in Indiana, but that Indiana law will govern. This is precisely the waiver of Massachusetts law that § 46 was meant to prevent. "A forum selection clause that, in operation, would deprive an employee of substantive rights guaranteed by the Wage Act violates public policy and is unenforceable." Melia, supra, at 173.

employee. No fee shall be due and collected from the employee unless and until that fee agreement is reviewed and approved by this board. Conley v. Deerfield Academy, 26 Mass. Workers' Comp. Rep. 261, 267-268 (2012).

So ordered.

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William C. Harpin
Administrative Law Judge

Filed: **November 17, 2014**

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Frederick E. Levine
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge