COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 009573-97**
Robert A. Hillman	Employee
Consolidated Freightways, Inc.	Employer
Consolidated Freightways, Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Levine, and Carroll)

APPEARANCES
Thomas J. Donoghue, Esq., for the employee
Douglas F. Boyd, Esq., for the self-insurer

MCCARTHY, J. The employee appeals the decision of an administrative judge denying his claim for benefits in Massachusetts on the grounds of lack of jurisdiction. Finding that the judge erred as a matter of law, we reverse the decision, and recommit the case to the administrative judge for findings regarding extent of incapacity.

Robert Hillman, who was forty-six years old at the time of hearing, had worked as a truck driver since the early 1980's. In 1989, he began work for Consolidated Freightways, Inc., at its location in Chicopee, Massachusetts. Six years later, in 1995, he was involuntarily transferred to Buffalo, New York. (Dec. 2.) He continued to live in Massachusetts, however, and hoped he might be able to return to the Chicopee location. (Dec. 2-3.) His health and welfare benefits were still paid by his employer to his union in Chicopee. All his routes were bid out of Buffalo, but they included runs into and through Massachusetts.[1] His paychecks were issued from Oregon, (Dec. 3), which was

[1] The judge found that the runs to Massachusetts were incidental. (Dec. 3.) However, the employee's uncontradicted testimony was that he chose to be transferred to Buffalo, rather than to another of the employer's locations, because it was "the only terminal that would run back to New England. So two days a week I would stop at home coming into New England." (Tr. 19.)

the home office. (Tr. 20.)

On March 28, 1997, as he was nearing Buffalo, his truck hit a large bump which broke the truck seat. He was treated for back pain and has not returned to work since. (Dec. 2.) Mr. Hillman has been paid compensation under the New York workers' compensation act since the injury, and, shortly before the hearing, was awarded additional physical therapy treatments there. At the time of the hearing, he was restricted to light duty. (Dec. 2.)

The threshold issue before the administrative judge was whether Massachusetts has jurisdiction over the employee's claim. In holding that, even though the contract of hire was originally made in Massachusetts, there is no jurisdiction here, the judge reasoned as follows:

> By virtue of his two-year employment at the Buffalo, New York site . . ., the situs of the contract for hire was changed. I do not find on the facts stated that this change was temporary in nature, despite the hopes of the employee that at some point he might be reasssigned back to Chicopee. Nor was it only a temporary contract for employment such as that in Conte [v. P.A.N. Construction Co., 9 Mass. Workers' Comp. Rep. 495, (1995)], and Conant['s Case, 33 Mass. App. Ct. 695, 697 (1992)], where the employee was hurt only a few weeks after the contract for hire was made, thereby not acquiring a 'fixed and non-temporary employment situs' in the foreign state. Mr. Hillman had been in the new situs for nearly two years. He had, in effect, entered into a new contract of hire that required him to work in a different state, thereby subjecting him to those laws.

(Dec. 4.) Citing Lavoie's Case, 334 Mass. 403 (1956), the judge went on to find that even if there was concurrent jurisdiction in Massachusetts, the employee was precluded from seeking benefits here because he pursued and was awarded benefits in New York. (Dec. 4.) We disagree with both conclusions, and address them in reverse order.

First, it is well-established that receipt of compensation in a foreign state does not bar a supplemental award of compensation in Massachusetts, provided there is a basis for jurisdiction here. See L. Locke, Workmen's Compensation, § 48 (2d ed. 1981). Neither Massachusetts law, see McLaughlin's Case, 274 Mass. 217 (1931), and Migues' Case, 281 Mass. 373 (1933), nor the full faith and credit Clause of the U.S. Constitution

prohibits Massachusetts from awarding compensation where there has been a prior award. Locke, supra at § 48, citing Pacific Employers' Ins. Co. v. Industrial Accident Comm'n of California, 306 U.S. 493 (1939), and Carroll v. Lanza, 349 U.S. 408 (1955). The administrative judge's citation to Lavoie's Case, supra, for the proposition that the employee is barred from receiving benefits in Massachusetts because he was awarded benefits in New York, misinterprets that decision. Following Industrial Comm'n of Wisconsin v. McCartin, 330 U.S. 622 (1947),[2] the court in Lavoie's Case held that a Rhode Island decision awarding an employee compensation did not bar a supplemental award in Massachusetts, where the injury occurred, provided there was no statutory provision or judicial decision in Rhode Island precluding such an award. 334 Mass. at 411. The impact of the federal and state cases on this issue has been to allow the application of Massachusetts law if there is jurisdiction in Massachusetts, based on either place of injury or contract of hire, even though the employee has received compensation benefits and medical payments elsewhere. Locke, supra at § 48; see also Conant's Case, 33 Mass. App. Ct. 695 (1992) (where injury was in Vermont and contract of hire was in Massachusetts, Vermont and Massachusetts have dual jurisdiction). See also 9 Larson's Workers' Compensation Law, §§ 141.02-141.06 and 142.04 (2000). Of course, the employee may not receive double compensation, but must deduct the amount received in the foreign state from the award in Massachusetts. Lavoie's Case, supra at 411; McLaughlin's Case, supra at 222.

We turn now to the question of whether Massachusetts, in fact, has jurisdiction over the employee's claim. We begin by noting that:

> The statute has been described as "a humanitarian measure designed to provide adequate financial protection to the victims of industrial accidents. LaClair v. Silberline Mfg. Co., 379 Mass. 21, 27 (1979). General Laws, c. 152, § 26 . . .

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[2] Rather than Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943), reh'g denied, 321 U.S. 801 (1944), as the administrative judge indicated. (Dec. 4.) McCartin has effectively negated Magnolia Petroleum. Locke, supra at § 48, n. 39.

> clearly provides that an employee may be compensated for an injury received "within or without the commonwealth." Underlying that provision is the State's legitimate interest in avoiding the undesirable consequence to a resident worker injured in another State of being unable to travel to seek benefits and possibly becoming a public charge. See Alaska Packers Assn. v. Industrial Acc. Commn., 294 U.S. 532, 542 . . . (1935). Compare Lavoie's Case, 334 Mass. at 407. . . . Consideration of the policies underlying the statute, therefore, suggests a broad scope for Massachusetts jurisdiction.

Conant's Case, 33 Mass. App. Ct. 695, 697 (1992). See also Conte v. P.A.N. Constr. Co., 9 Mass. Workers' Comp. Rep. 497, 499 (1995) ("The underlying policies of G.L. c. 152 suggest a broad scope for Massachusetts jurisdiction").

As mentioned above, the fact that the contract of hire is made in Massachusetts is alone sufficient to confer jurisdiction in Massachusetts, even where the work contracted for is performed out of state. Conant's Case, 33 Mass. App. Ct. 695 (1992); Lavoie's Case, supra at 406, and cases cited therein;[3] Conte, supra at 499; Locke, supra at § 45. In Conant's Case, supra, the Appeals Court decided the issue of "whether Conant, a Massachusetts resident, entered into an employment contract in Massachusetts. If so, Massachusetts would have dual jurisdiction with Vermont [where the injury occurred] over his workers' compensation claim." Id. at 695-696. Noting that, "[a]lthough residence alone may be an insufficient basis for the exercise of jurisdiction, cases from other States support a broad interpretation of compensation statutes to protect workers

[3] In Lavoie's Case, the court stated that "it has uniformly been held that an employee working under a Massachusetts contract of hire may receive compensation here for an injury sustained while temporarily employed in another state." Id. at 406. (Emphasis added.) However, that statement was merely dicta since the issue in that case was whether an employee who is injured in Massachusetts while performing work under a contract of hire made in another state can recover compensation under the Massachusetts act. In addition, none of the cases cited in Lavoie's Case specifically limits the award of compensation to situations where the employee was working only temporarily in another state. See McLaughlin's Case, supra; Migues' Case, supra, Pederzoli's Case, 269 Mass. 5510 (1930); Wright's Case, 291 Mass. 334 (1935); Bauer's Case, 314 Mass. 4 (1943). Only in Pederzoli's Case, supra, does the court even mention the length of time the employee was to work out of state, characterizing it as "for the time being." Id. at 552. In Bauer's Case, the employee was hired to work at a summer camp in New Hampshire, so presumably that also was a temporary job, though all its performance was apparently out of state.

injured outside their borders," id. at 697, the court reversed the reviewing board's holding that the contract of hire had not been formed in Massachusetts. The court concluded that:

> At least where an injured worker seeking compensation in Massachusetts is a resident and the employer carries workers' compensation insurance here, compare Hancock's Case, 355 Mass. 523, 526 . . . (1969), we would regard a local union to whom a request for union workers is relayed by another local branch of the same union as a sub-agent of the employer for purposes of transmitting an offer of employment.

Id. at 700 (emphasis added). Thus, the court stated non-categorically that the making of the contract of hire in Massachusetts was sufficient to confer Massachusetts jurisdiction, even though none of the work was to be performed in Massachusetts; it nevertheless seemed to use the fact of the employee's residence in Massachusetts and the existence of a policy of workers' compensation insurance in Massachusetts to bolster its holding that Massachusetts had jurisdiction in this particular case.

In the instant case, the judge relied on Carlin v. Kinney Shoes, 3 Mass. Workers' Comp. Rep. 41 (1989), to find that a new employment contract was entered into when Mr. Hillman was transferred to Buffalo. In Carlin, we relied on the following passage from Larson, quoted by the administrative judge:

> "The making of the contract within the state is usually deemed to create the relation within the state. [Citation omitted.] The relation 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, [citation omitted] or the employee acquires in the foreign state a fixed and non-temporary employment situs. [Citation omitted.]"

Dec. 4, quoting Carlin, supra at 42 (citations omitted in decision; emphasis added in decision), quoting 2A Larson, Workmen's Compensation § 87.40 (1983).[4] In Carlin, the employee had been hired in Rhode Island and, after a management training program in Connecticut, was sent to Massachusetts as store manager for the employer, where he

[4] This quotation currently can be found in 9 Larson's Workers' Compensation Law,

worked for eighteen months before the injury in New York which led to his death. The administrative judge found that a new contract of hire was created when the employee assumed the position of store manager in Massachusetts, and that therefore Massachusetts had jurisdiction of his claim. The reviewing board held that there was insufficient evidence to warrant the finding that a new employment contract was formed as a result of the transfer. However, we found that the employee was nevertheless entitled to benefits in Massachusetts because he had acquired a "fixed and non-temporary employment situs" here by virtue of his eighteen-month tenure as store manager in West Springfield, the issuance of his pay checks from there, and his residence in Massachusetts. Id. at 42. We concluded that "[t]hese together are sufficient contacts with the state to give Massachusetts a legitimate interest in this case." Id.

A contract of employment is formed when the worker "accepts the offer and undertakes to travel to the job site." Conant's Case, supra at 699; Conte, supra at 499. In the instant case, as in Carlin, there was no testimony or other evidence introduced from which it could be found that the employee entered into a new contract of hire in New York merely because he was transferred there. Id. at 42.[5] The judge's finding on this issue, because unsupported by the evidence, thus cannot stand. See Judkins' Case, 315 Mass. 226, 228 (1943) (findings must be adequately supported by the evidence); Emde v. Chapman Waterproofing Co., 12 Mass. Workers' Comp. Rep. 238, 242(1998).

Though we are inclined to hold that there was not a "fixed and non-temporary employment situs" created in New York by virtue of the employee, an interstate truck driver, being assigned to drive out of New York, we need not decide that issue. This jurisdictional test (place of employment relation), which was cited in Carlin, supra, is an

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§ 143.04[2][b] (2000).

[5] Contrast Hancock's Case, 355 Mass. 523 (1969)(an employee of a Massachusetts auto sales company went to New Hampshire with the company's treasurer, who then installed the employee as manager of another New Hampshire auto company; the court upheld the board's finding that the employee had become the employee of the New Hampshire corporation, that there was no

alternative test for determining jurisdiction in addition to the two standard tests of place of injury or place of hire. The National Commission on State Workmen's Compensation Laws has recommended that an employee be given the choice of filing a claim in the state where the injury occurred, or where the employment was localized, or where the employee was hired. In the majority of states, jurisdiction will be found if one of these alternatives is satisfied. 9 Larson, § 143.01 (2000). In Massachusetts, it is settled law that either the place of injury or the place of hire will confer jurisdiction. Lavoie's Case, supra; Conte, supra. In Carlin, where Massachusetts was neither the place of injury nor the place of hire, we used this alternative test to find that the place of employment relation was in Massachusetts, and thus to broaden, rather than narrow, Massachusetts jurisdiction. In the instant case, the employee maintained his residence here in hopes of being transferred back to Massachusetts (Dec. 2-3); his employer continued to pay health and welfare benefits to his union in Massachusetts; and he continued to make runs into Massachusetts. While there may be situations in which a transfer to another state might warrant a denial of Massachusetts jurisdiction,[6] such is not the case here. Consistent with the decisions in Conant's Case, supra, and Carlin, supra, we hold that, in the circumstances of this case, where the contract of hire was made here and where the employee maintained sufficient contacts with the state, including residency, Massachusetts has jurisdiction as a matter of law.

Accordingly, we reverse the judge's holding denying jurisdiction and recommit this case to the administrative judge for further findings regarding extent of incapacity.

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finding that the contract of employment was made in Massachusetts, so that Massachusetts had no jurisdiction over a subsequent injury in New Hampshire).

[6] Compare Carroll v. Industrial Comm'n of Illinois, 563 N.E. 2d 890 (Ill. 1990)(though the original contract of hire was made in Illinois, there was no Illinois jurisdiction for an injury occurring in Washington, where the transfer of the employee, a truck driver, to Idaho was involuntary, where there was 18 years between the first transfer and the date of injury, and where the employee had not maintained significant contacts in Illinois, but was a resident, property owner, and taxpayer in Idaho).

Due to the passage of time, the judge may take additional testimony as he deems necessary.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **February 20, 2001**

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge