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 Fabricant, Koziol and Harpin)

The case was heard by Administrative Judge Braithwaite.

APPEARANCES
John M. Sahady, Esq., for the employee at hearing
Michael S. Sahady, Esq., for the employee on appeal
John F. X. Lawlor, Esq., for the insurer at hearing
Richard L. Neumeier, Esq., for the insurer on appeal

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

We recount the facts pertinent to the appeal. The employee, a Massachusetts resident and tractor-trailer operator, entered into a contract for hire with the employer in Pennsylvania, after the completion of a driver orientation program. (Dec. II, 5, 6; Tr. I, June 29, 2011, at 28-31; Tr. I, September 16, 2011, at 28-31, 114-15.)[1] The hiring process was quite involved. Positions were advertised via national media, such as magazines, and through information displayed on the employer's trucks. Upon contacting the company, individuals

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

were directed to complete an online application. If an individual met threshold qualifications, and after verification, he/she was invited to attend a three-day orientation program in Roaring Springs, Pennsylvania. Although the company provided transportation and lodging, attendance at, and participation in the orientation process was not considered employment, and no job offer was extended before the end of the program. (Dec. I, 8-11.) The employee was hired in Pennsylvania at the conclusion of the program, and no offer of hire was conveyed to the employee in Massachusetts. (Dec. II, 6; Tr. I, September 16, 2011, at 28-29.)

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

On January 18, 2010, while in Rumford, Maine, and in the course of his employment, the employee sustained an injury to his lower back. (Dec. I, 14.) In his original hearing decision, filed on October 31, 2012, the judge found that the employee suffered a work-related injury, although there was no Massachusetts jurisdiction. Thus, he denied and dismissed the claim. (Dec. I, 20-21.) Without making any explanatory findings, the administrative judge found only that the jurisdiction test in Carlin v. Kinney Shoes, 3 Mass. Workers' Comp. Rep. 41 (1989), is not applicable to the facts of this case. (Dec. I, 18.) The employee appealed, and after determining that the employee was not bound by the contractual forum selection clause, we recommitted the case for the judge to address whether the facts found are sufficient to confer jurisdiction in Massachusetts under the theory of localization, consistent with our decisions in Hillman v. Consolidated Freightways, Inc., 15 Mass. Workers' Comp. Rep. 67 (2001) and Carlin, supra. See Mendes v. Franklin Logistics, Inc., 28 Mass. Workers' Comp. Rep. 209, 217-218 (2014).

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

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

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

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

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

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

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

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

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

Furthermore, the employee contends he was transporting goods in and out of Massachusetts constantly on behalf of the employer, and he points out the routine use of the employer's three terminals in Massachusetts. Finally, he asserts that Exhibit 4, ("Detail Report / Driver Movement, period: January 28, 2009 through December 31, 2010"), demonstrates "Massachusetts had a very substantial, crucial, and inextricable nexus to the employee's performance of his work." (Employee br. 15.) This may or may

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

not be the case, but this profile does not support a finding of jurisdiction by "localization" as a matter of law.[4] Without some change in the employment, subsequent to the original contract, clearly showing the employee acquires a fixed and non-temporary employment status in Massachusetts, jurisdiction cannot be found under the theory of localization.[5]

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

So ordered.

_____
Bernard W. Fabricant
Administrative Law Judge

_____
Catherine W. Koziol
Administrative Law Judge

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

[5] As stated by Larson,

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

9 A. Larson & L. Larson, Workers' Compensation Law § 87.42(a), (b) (1998).

_____
William C. Harpin
Administrative Law Judge

Filed: **May 28, 2019**