STATE OF NEW HAMPSHIRE

SUPREME COURT

2021-0071

Appeal of Javier Vasquez

and

Appeal of Matosantos International Corporation

APPEAL FROM THE NEW HAMPSHIRE COMPENSATION APPEALS BOARD PURSUANT TO SUPREME COURT RULE 10

BRIEF OF DEFENDANT/APPELLEE THE HARTFORD INSURANCE COMPANY

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II. WHETHER, AFTER DETERMINING THAT THE EMPLOYER FAILED TO COMPLY WITH ITS OBLIGATIONS UNDER THE APPLICABLE STATUTES AND REGULATIONS TO PROCURE AND REPORT COVERAGE FOR ITS EMPLOYEE IN NEW HAMPSHIRE, THE COMPENSATION APPEALS BOARD CORRECTLY ORDERED THE EMPLOYER TO PROVIDE WORKER'S COMPENSATION BENEFITS PENDING RESOLUTION OF THE COVERAGE ISSUES?

III. WHETHER THE COMPENSATION APPEALS BOARD PROPERLY AFFIRMED THE DEPARTMENT OF LABOR'S FINDING THAT THE EMPLOYER VIOLATED R.S.A. 281-A:5 BY FAILING TO PROCURE AND REPORT COVERAGE FOR ITS EMPLOYEE IN NEW HAMPSHIRE AS REQUIRED UNDER THE APPLICABLE LAW AND, THEREFORE, THE EMPLOYER WAS SUBJECT TO PENALTIES UNDER R.S.A. 281-A:7, I(a)(1)?

RELEVANT STATUTES AND REGULATIONS

Statutes:

281-A:5. Securing Payment of Compensation

An employer, or group or association of homogeneous employers, subject to this chapter shall secure compensation to employees in one of the following ways:

I. By insuring and keeping insured the payment of such compensation with a company licensed to write workers' compensation insurance in this state and filing with the commissioner, in a form prescribed by the commissioner, evidence of such coverage as the commissioner deems appropriate.

281-A:5-f. Application of Chapter to Nonresident Employees and Employers

Notwithstanding any provision of law to the contrary, the provisions of this chapter shall apply to nonresident employees and employers doing business in New Hampshire.

281-A:7. Liability of Employer Failing to Comply

I.

(a)

(1) An employer subject to this chapter who fails to comply with the provisions of RSA 281-A:5 by not securing payment of compensation may be assessed a civil penalty of up to $2,500; in addition, such an employer may be assessed a civil penalty of up to $100 per employee for each day of noncompliance. The penalties shall be assessed from the first day of the infraction not to exceed one year. Notwithstanding any provision of law to the contrary, any person with control or responsibility over decisions to disburse funds and salaries and who knowingly failed to secure payment of workers' compensation under this chapter shall be held personally liable for the payment of penalties under this chapter.

(2) All funds collected under subparagraph I(a)(1) shall be deposited into the department of labor restricted fund established in RSA 273:1-b.

(b) An insurance carrier which insures an employer and fails to file with the commissioner a notice of coverage within a reasonable period of time as prescribed by rule shall be assessed a civil penalty of up to $50 for each day of noncompliance. The commissioner shall deposit all moneys collected under this subparagraph with the state treasurer for deposit into the general fund.

II. In addition to the assessment of civil penalties, the commissioner may also proceed in the superior court to restrain and prohibit an employer subject to this chapter from conducting business in this state for so long as the employer fails to comply with the provisions of RSA 281-A:5 or any other provision of this chapter or for failure to comply with orders issued by the department under this chapter. If the commissioner seeks a temporary injunction pending a hearing on the merits, the superior court shall issue such an injunction ex parte upon prima facie evidence offered in support of the petition.

III. An employee of an employer failing without sufficient cause as determined by the commissioner to comply with the provisions of RSA 281-A:5, or dependents of such employee if death ensues, may file an application with the commissioner for compensation in accordance with the terms of this chapter. The commissioner shall hear and determine such application for compensation in like manner as other claims. The employer shall pay the compensation so determined to the person entitled to it no later than 10 days, excluding Sundays and holidays, after receiving notice of the amount of compensation as fixed and determined by the commissioner. The commissioner shall file an abstract of the award in the office of the clerk of the superior court in any county in the state. The clerk of that court shall docket such abstract in the judgment docket of that court, and such abstract shall be a lien upon the property of the employer situated in the county for a period of 8 years from the date of the award. The commissioner shall instruct the sheriff of the county to levy execution as soon as possible thereafter, but no later than 8 years, in the same manner and with like effect as if the award were a judgment of the superior court.

IV. As an alternative to the procedure afforded in paragraph III, an employee of an employer failing to comply with the provisions of RSA 281-A:5, or dependents of that employee if death ensues, may pursue any available remedy at law, free of the waivers and immunities conferred by RSA 281-A:8.

V. Any agency or political subdivision of the state, before awarding any contract involving labor to a person who is an employer subject to this chapter, shall require that person to supply satisfactory proof that he or she

has secured payment of compensation in accordance with the provisions of RSA 281-A:5 in connection with activities which the person proposes to undertake pursuant to the contract.

VI. Any employer, individual, or corporate officer required to secure payment of compensation under this chapter who purposely, as defined in RSA 626:2, II(a), fails to secure such payment shall be guilty of a class B felony.

R.S.A. 281-A:43. Hearings and Awards.

I.

(a) In a controversy as to the responsibility of an employer or the employer's insurance carrier for the payment of compensation and other benefits under this chapter, any party at interest may petition the commissioner in writing for a hearing and award. The petition shall be sent to the commissioner at the department's offices in Concord and shall set forth the reasons for requesting the hearing and the questions in dispute which the applicant expects to be resolved.

…

(b) An appeal from a decision of the commissioner or the commissioner's authorized representative shall be taken to the board no later than 30 days from the date of such decision.

…

(c) Any party in interest aggrieved by any order or decision of the board may appeal to the supreme court pursuant to RSA 541.

R.S.A. 491:22. Declaratory Judgments.

I. Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive. The taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced. The preceding sentence shall not be

deemed to convey standing to any person (a) to challenge a decision of any state court if the person was not a party to the action in which the decision was rendered, or (b) to challenge the decision of any board, commission, agency, or other authority of the state or any municipality, school district, village district, or county if there exists a right to appeal the decision under RSA 541 or any other statute and the person seeking to challenge the decision is not entitled to appeal under the applicable statute. The existence of an adequate remedy at law or in equity shall not preclude any person from obtaining such declaratory relief. However, the provisions of this paragraph shall not affect the burden of proof under RSA 491:22-a or permit awards of costs and attorney's fees under RSA 491:22-b in declaratory judgment actions that are not for the purpose of determining insurance coverage.

II. The district court shall have concurrent jurisdiction over such claims arising under its subject matter jurisdiction authority in RSA 502-A except that the defendant shall have the right to remove said declaratory judgment action to the superior court, subject to conditions established by rule of court, if the claim exceeds $1,500. The court of probate shall have exclusive jurisdiction over such claims arising under its subject matter jurisdiction authority in RSA 547 and RSA 552:7.

III. No petition shall be maintained under this section to determine coverage of an insurance policy unless it is filed within 6 months after the filing of the writ, complaint, or other pleading initiating the action which gives rise to the question; provided, however, that the foregoing prohibition shall not apply where the facts giving rise to such coverage dispute are not known to, or reasonably discoverable by, the insurer until after expiration of such 6-month period; and provided, further, that the superior court may permit the filing of such a petition after such period upon a finding that the failure to file such petition was the result of accident, mistake or misfortune and not due to neglect. A petition for declaratory judgment to determine coverage of an insurance policy may be instituted as long as the court has personal jurisdiction over the parties to the matter, even though the action giving rise to the coverage question is brought in a federal court or another state court.

R.S.A. 541:3

Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

R.S.A. 541:13

Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

Administrative Regulations:

Lab 302.01 Policy. It is the policy of this department to require every employer who is subject to the statute to secure payment of benefits in accordance with RSA 281-A:5. Accordingly, employers and the insurance industry shall comply with the applicable provisions of RSA 281-A and this chapter and in providing the department with the necessary information.

PART Lab 304 COVERAGE RESPONSIBILITY

Lab 304.01 Employers.

(a) The primary responsibility for coverage shall rest upon the employer. Such responsibility shall be exercised by applying for coverage as required by RSA 281-A:5, I, or II or by furnishing proof of financial ability to pay compensation and receiving permission from the labor commissioner to self-insure pursuant to RSA 281-A:5, III as specified in Lab 400.

(b) The employer's responsibility to obtain coverage shall begin before hiring any employee. An employer's responsibility to obtain coverage shall also begin when a valid termination notice canceling existing coverage is received from the carrier, and the employer shall answer the department's inquiry about the reason(s) for termination of coverage as discussed in Lab 307.03….

Lab 304.02 Agencies and Employers.

(a) Agents and employers shall share coverage responsibility by making clear the status of coverage by providing accurate information to carriers beginning upon receipt by the agent of a complete application for coverage from the employer. This shall include the information necessary to complete or change the "Exclusion of Executive Officers or Members" form 6WCex (7/2015), contained in appendix II if applicable, and also include the necessary information to complete all other coverage forms.

(b) If the agent is not successful in obtaining coverage for the employer through the voluntary market, the agent is further responsible for advising the employer of the availability of coverage under the existing assigned risk plan of the NCCI, for providing the proper application form, and for advising the employer that the application is complete only when accompanied by payment of the required premium.

(c) The agent's responsibilities delineated above shall pertain solely to workers' compensation insurance.

Lab 304.03 Agencies and Carriers.

(a) Agents and carriers shall share in coverage responsibility by processing the necessary paperwork and advising each other and the employer of the status of an application for coverage beginning upon the agent's receipt of a completed application for coverage, and extending until the carrier accepts the risk voluntarily or the risk is assigned to a carrier through the assigned risk plan. Agencies shall provide to the carrier the necessary information for the carrier to complete the "Exclusion of Executive Officers or Members" form 6WCex (7/2015) contained in appendix II and send it to the department. Only those specific executive officers on file with the department shall be excluded.

…

Lab 304.04 Carriers.

(a) Carriers shall provide access to all prescribed coverage and claims forms. Supplies of these forms shall not be provided by the department.

(b) Carriers shall furnish covered businesses with a sufficient number of posters, Notice of Compliance form WCP-1, and provide access to claims forms as required by Lab 500.

(c) The carrier shall electronically provide to the NCCI all necessary information to:

(1) Bind coverage;

(2) Write new policies;

(3) Make notice of change of Federal Identification Number;

(4) Add or delete locations;

(5) Add endorsements;

(6) Terminate and reinstate coverage; or

(7) Any other relevant changes.

(d) The carrier shall complete and file a paper "Exclusion of Executive Officers or Members" form 6WCex (7/2015) contained in appendix II, with the Department of Labor when applicable as prescribed by Lab 306 and Lab 307.

(e) The carrier shall forward by certified mail a copy of the "Exclusion of Executive Officers or Members" form 6WCex (7/2015) contained in appendix II to each of the executive officers or members listed on the form.

(f) Carriers shall contact the department to be assigned a carrier identification number prior to underwriting coverage in New Hampshire.

(g) The carrier's responsibilities delineated above shall pertain solely to workers' compensation insurance.

Lab 306.01 Filing Notice of Coverage.

(a) As explained in this part, to show any changes in coverage, the appropriate party shall complete and file with the department the appropriate "Notice of Workers Compensation Insurance Coverage" form 6WC (4/2008).

(b) Each "Notice of Workers Compensation Insurance Coverage" form 6WC (4/2008) contained in appendix II shall be completed and filed either directly by a carrier, self-insured employer, homogenous self-insured group, or third party administrator, or the form shall be completed and filed on their behalf by that party providing sufficient information to NCCI so that NCCI can complete and file the form with the department to show any changes in coverage.

(c) "Notice of Workers Compensation Insurance Coverage" form 6WC (4/2008) contained in appendix II shall be filed as soon as possible after completion of arrangements to provide coverage, but no later than 10 calendar days after the date binder is issued.

(d) Insufficient information provided to NCCI shall render the filing invalid but shall not affect the insurance coverage of the employer.

(e) Insufficient information provided to NCCI shall constitute noncompliance and shall subject the carrier to the civil penalty as prescribed by RSA 281-A: 7, I and Lab 309. The penalty shall be applied for each day of noncompliance following the carrier's notification by the department and continuing until the properly completed form is filed with the department.

(f) Notice of coverage shall be given in terms of coverage, not individual contract policy. Notice of coverage shall not be filed annually at the time of policy renewal. Once notice of coverage has been filed coverage shall remain in force until a valid termination notice has been filed with the department or until a new notice of coverage is filed.

Lab 306.02 Filing Notice of Voluntary Coverage.

(a) The appropriate party, as explained in Lab 306.01 (b) shall complete and file a "Notice of Coverage" form 6WC (4/2008) contained in appendix II in the following circumstances:

(1) When insuring an employer's business having no prior coverage in this state;

(2) When insuring a business previously insured by a company outside the carrier's group or fleet of companies;

(3) When renewing a business' coverage with the same carrier group or fleet following a lapse in the business' coverage confirmed by the department's records;

(4) When requested by the department to show proof of New Hampshire coverage for an injury that has occurred in New Hampshire;

(5) When one group or fleet of carriers is acquired by another group or fleet of carriers and coverage is transferred to the acquiring company; and

(6) When the department is notified of coverage but the NCCI records do not indicate New Hampshire coverage.

(b) The appropriate party, as explained in Lab 306.01(b), shall complete and file a "Notice of Workers Compensation Insurance Coverage" form 6WC (4/2008) contained in appendix II as notice of coverage for the employer's primary location. If the employer has 2 or more establishments, locations or job sites operating under different federal identification numbers, a separate "Notice of Workers Compensation Insurance Coverage" form 6WC (4/2008) contained in appendix II shall be completed and filed for each.

Lab 206.02 Motion for Rehearing.

Within 30 calendar days after a final order or any decision issued by the panel, any party to the action or proceeding before the panel may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the grounds. Objections to the motion for rehearing shall be filed within 5 working days of the request for the rehearing. The requests and objections shall be sent with an original and 3 copies to the department of labor.

Lab 206.04 Action on Motion.

(a) Upon the filing of such motion for rehearing, the panel shall within 10 calendar days either grant or deny the same, or suspend the order or decision complained of pending further consideration.

(b) A motion for rehearing shall be granted only if:

(1) Evidence is presented with the motion for rehearing which was not available at the time of hearing which the panel determines would change the decision rendered;

(2) The party making the motion for rehearing demonstrates the panel was in error concerning the interpretation or application of the applicable state statue or administrative rule; or

(3) The party making the motion for rehearing demonstrates the decision is contrary to controlling law.

STATEMENT OF THE CASE

The Claimant, Appellant Javier Vasquez ("Vasquez") and the Employer, Appellant Matosantos International Corporation ("MIC") appeal from the November 25, 2020 decision of the Compensation Appeals Board (CAB) and the CAB's January 28, 2021 Order denying Claimant's and Employer's Motion for Rehearing. In those decisions, a unanimous panel of the CAB ruled that: (1) the CAB did not have authority under R.S.A. 281-A to interpret workers' compensation insurance policy language; (2) MIC failed to prove that it had a valid worker's compensation policy in effect to provide coverage for injuries sustained by an employee working in New Hampshire; and (3) unless and until the insurance coverage issue is addressed in the appropriate forum, the employer has the legal obligation to pay all mandated benefits to the claimant. The procedural history of the case is set forth below.

On March 25, 2019, Vasquez filed a Notice of Accidental Injury or Occupational Disease seeking worker's compensation benefits arising out of a May 31, 2018 motor vehicle accident which occurred while he was working in New Hampshire in the course of his employment with MIC. [Vasquez Add. 16][1] He also requested a hearing in which he asked the Department of Labor (DOL) to determine whether The Hartford had coverage for MIC at the time of his injury. [Vasquez Add. 14-15] Notably, Vasquez did not pursue his claim until ten months after the accident. The Hartford had previously denied coverage for Vasquez's claim based on the absence of coverage in New Hampshire. [Vasquez Add.17]

A formal hearing was held at the DOL on June 18, 2019. [MIC App. 27-32][2] Vasquez participated electronically. MIC did not appear and was defaulted. The Hartford appeared and contended that it did not provide coverage for MIC in New Hampshire at the time of Vasquez's injury.

[1] Addendum to Brief of Appellant Vasquez.
[2] Appendix to Brief of Appellant MIC.

[MIC App. 30] The Hearing Officer issued a decision on August 6, 2019 finding that neither Vasquez nor MIC had presented any evidence that would support an order regarding the obligations of The Hartford since there had been no reporting of coverage in New Hampshire and The Hartford was not deemed a carrier. [MIC App. 30] The Hearing Officer found that MIC violated R.S.A. 281-A:5 by conducting business in New Hampshire with at least one employee "without having secured and properly reported active workers' compensation insurance coverage." [MIC App. 30] The Hearing Officer also ruled that the DOL did not have jurisdiction to issue a ruling regarding any obligations of The Hartford under its policy. [MIC App. 31] Instead, that determination lies in a court of equity that does have jurisdiction to provide a declaratory judgment on the matter. [MIC App. 31] The Hearing Officer determined that Vasquez had sustained an injury arising out of and in the course of his employment and awarded him temporary total disability benefits. [MIC App. 31]

MIC later appeared and petitioned to strike the default. [MIC App. 33] The DOL granted MIC's motion and rescheduled the case for a new hearing on October 28, 2019. [MIC App. 33]

Subsequently, MIC and Vasquez entered into an agreement under which they stipulated that Vasquez sustained worker's compensation injuries that left him temporarily totally disabled and that the Hearing Officer's August 6, 2019 decision may stand as to R.S.A. 281-A:2 – Causal Relationship of Injury to Employment, R.S.A. 281-A:23 – Medical, Hospital and Remedial Care and R.S.A. 281-A:48 – Review of Eligibility for Compensation. [MIC App. 31-34] MIC began making temporary total disability payments to Vasquez.

Due to the stipulation, the only remaining issues for rehearing were R.S.A. 281-A:5 – Securing Payment of Compensation and R.S.A. 281-A:7, III – Employer Coverage Status. On November 19, 2019, a DOL hearing

was held before a different Hearing Officer to address the two remaining issues. The Hartford submitted its written closing on December 6, 2019. [Hartford App. 3-9] In a decision issued on January 3, 2020, the Hearing Officer found as a matter of fact that Vasquez had performed audits in numerous states before arriving in New Hampshire to do the same on May 24, 2018. [MIC App. 2] In the past, Vasquez had visited New Hampshire stores in 2016 and 2017. [MIC App. 2] On May 31, 2018, Vasquez had audited his final store in New Hampshire when he was involved in a motor vehicle accident. [MIC App. 2] The Hearing Officer noted that the employer had the burden of showing that it had secured workers' compensation coverage. [MIC App. 3] MIC was conducting business in New Hampshire with employees on May 31, 2018 and failed to provide any evidence that it had secured coverage in New Hampshire in the manner prescribed by the DOL rules. [MIC App. 6] The Hearing Officer ruled that interpretation of the contract of insurance between MIC and The Hartford was beyond the jurisdictional powers of the DOL. [MIC App. 6] The Hearing Officer concluded that the employer violated R.S.A. 281-A:5 and referred the matter to the Director of Workers' Compensation for review of potential civil penalty for failing to maintain workers' compensation insurance. [MIC App. 6]

Vasquez and MIC appealed to the CAB. On August 25, 2020, a *de novo* hearing was held before the CAB via WebEx. Vasquez and MIC directors, Carlos Rivera and Geronimo Matosantos testified during the hearing. [MIC App. 8] The parties filed written closings following the hearing. [Hartford App. 10-29, 50-56; 57-60]

On October 5, 2020, prior to issuing its decision, the CAB invited the parties to submit legal memoranda addressing whether the DOL and CAB have jurisdiction to decide if the terms of the policy issued by The Hartford provides coverage to MIC for Vasquez's claims or whether that

issue should be decided in another forum. [MIC App. 35-36] The parties subsequently submitted the requested legal memoranda. [MIC App. 37-43; Vasquez NOA P21-25; Hartford App. 30-31]

On November 25, 2020, a unanimous panel of the CAB issued its decision. [MIC App. 8-15] The CAB recognized that "[o]n its face, The Hartford policy did not cover the employee while he was in New Hampshire," but also noted that the parties disputed how to interpret and apply the policy. [MIC App. 10-11] The CAB recognized that an agency's jurisdiction is limited to that conferred on it by statute and did not find any statute authorizing it to interpret insurance policies. [MIC App. 11] It also observed that "the Department has not, at least in the memory of the panel going back several decades of service, ever exercised jurisdiction and interpreted insurance policy language to decide issues of insurance coverage." [MIC App. 13] The panel explained that the DOL "is responsible for setting standards and procedures for worker's compensation claims handling, reviewing applications for self-insurance, monitoring changes in employers' coverage status and adjudicating disputes arising under RSA 281-A." [MIC App. 14] The superior court, on the other hand, "regularly hears and decides insurance coverage cases for a wide range of insurance policies", often as a declaratory judgment action under R.S.A. 491:22, and has "a large body of case law with which it is familiar" and upon which it relies in resolving coverage disputes. [MIC App. 14] The CAB found that the superior court is the appropriate forum for addressing issues of insurance coverage. [MIC App. 14] The CAB expressly rejected the argument that it should "put the cart before the horse" by ignoring the jurisdictional issue and simply ordering The Hartford to pay benefits to Vasquez and let MIC and The Hartford resolve the matter between themselves. [MIC App. 14] The panel concluded that MIC failed to prove that it had a worker's compensation policy in effect that provided coverage

to Vasquez for the injuries he sustained while working in New Hampshire and, therefore, the Director of the Workers' Compensation Division "may take further action against it as appropriate under the statute." [MIC App. 15]

On December 23, 2020, Vasquez filed a Motion for Reconsideration/Rehearing. [Vasquez NOA P6-P12] MIC filed its Motion for Rehearing on December 28, 2020. [MIC App. 16-19] The Hartford filed a Response to the Motions for Rehearing/Reconsideration on December 28, 2020. [MIC App. 20-21]

On January 28, 2021, a unanimous panel of the CAB issued its decision denying the Motions for Rehearing. [MIC App. 22-26] The CAB ruled that R.S.A. 281-A:5, I and LAB 304.01(a) "make clear that the employer has the primary responsibility to obtain and prove New Hampshire Coverage." [MIC App. 23] Filing notice of coverage is the act that establishes the carrier/employer relationship under R.S.A. 281-A and triggers the DOL's jurisdiction over the carrier on claims related to that employer. [MIC App. 25] In this case, no notice of coverage was filed and the DOL did not acquire jurisdiction over the policy at issue. [MIC App. 25-26] As a result, the appropriate remedy is to file a declaratory judgment or breach of contract action in the superior court. [MIC App. 26] "[I]n the absence of a workers' compensation carrier, the employer itself has the obligation to pay all benefits due an injured employee." [MIC App. 23] The CAB ruled that unless and until the insurance coverage issue is resolved, MIC has the legal obligation to pay all mandated benefits. [MIC App. 23]

Vasquez filed his Notice of Appeal on February 26, 2021. That appeal was assigned docket number 2021-0071. MIC also filed its Notice of Appeal on February 26, 2021. MIC's appeal was assigned docket number 2021-0072.

By Order dated April 15, 2021, the two appeals were consolidated under docket number 2021-0071. Due to overlapping facts and legal issues presented in the two appeals and in the interest of judicial economy, The Hartford submits a single brief addressing the issues raised by both Appellants.

STATEMENT OF FACTS

Except as otherwise indicated by citation to the record, the following facts have been stipulated to by the parties in their "Agreed Upon Statement of Facts."[3]

I. AT THE TIME OF THE ACCIDENT VASQUEZ WAS WORKING WITHIN THE STATE OF NEW HAMPSHIRE WHERE MIC CONDUCTED BUSINESS

At the time of his injury, Vasquez was working as a traveling auditor for MIC. [SOF ¶ 1] Vasquez had worked for MIC since July of 2014. [MIC App. 9] MIC performs auditing services for a company that distributes consumer products throughout the United States in retail stores such as Wal-Mart. [SOF ¶ 2] Vasquez's job for MIC was to visit stores that sold MIC's client's products and ensure compliance with product placement and advertising requirements. [SOF ¶ 3] His territory included multiple states along the east and gulf coasts of the United States. [MIC App. 10]

On May 24, 2018, Vasquez arrived in New Hampshire to visit various Wal-Mart stores in the state to perform his assigned duties. [MIC App. 10] Vasquez had visited New Hampshire stores on behalf of MIC twice before May of 2018 – once in 2016 and again in 2017. [MIC App. 2]

On May 31, 2018, Vasquez had completed a compliance check at Wal-Mart and was traveling back to his hotel in Laconia when he was the

[3] Referred to as "SOF".

victim of a head-on drunk driving accident. [SOF ¶ 4] He was med-flighted to Dartmouth-Hitchcock Medical Center in Lebanon, where he remained in intensive care for three weeks. [SOF ¶ 5] He was treated for open femur and ankle fractures, severe rupture of the left flank, and multiple spine fractures. [SOF ¶ 5] His injuries left him with limited lower extremity mobility, and he has remained totally disabled from employment to the present date. [SOF ¶ 6]

At the time of Vasquez's injury, MIC held a workers' compensation policy with The Hartford (the "Policy"). [SOF ¶ 7] The Hartford was notified of the injury while Vasquez was still in intensive care at Dartmouth-Hitchcock. [SOF ¶ 8]

II. THE HARTFORD DENIED COVERAGE FOR VASQUEZ'S CLAIM BASED ON ITS POSITION THAT MIC DID NOT COMPLY WITH THE POLICY'S "OTHER STATES INSURANCE" REQUIREMENTS

MIC and Vasquez have both submitted The Hartford Policy as part of the record on appeal. [MIC App. 44-95; Vasquez NOA P44-P57] Under "General Section", The Hartford Policy clearly states that it is a contract between "you" (the insured employer - MIC) and "us" (the insurer - The Hartford):

> **A. The Policy**
>
> This policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in Item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.
>
> **B. Who Is Insured**

You are insured if you are an employer named in Item 1 of the Information Page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.

[MIC App. 50]

The relevant sections of the Policy consist of PART ONE – WORKERS COMPENSATION INSURANCE and PART THREE – OTHER STATES INSURANCE. The Policy's Information Page contains the following descriptions of coverage under Item 3:

3. A. Workers Compensation Insurance: Part one of the policy applies to the Workers Compensation Law of the states listed here: FL, NY

...

C. Other States Insurance: Part Three of the policy applies to the states, if any, listed here: ALL STATES EXCEPT ND, OH, WA, WY, US TERRITORIES, AND STATES DESIGNATED IN ITEM 3.A. OF THE INFORMATION PAGE

[MIC App. 46]

As a result, PART ONE – WORKERS COMPENSATION applies only to injuries occurring in Florida and New York. PART THREE – OTHER STATES INSURANCE applies to determine whether coverage is afforded to New Hampshire claims.

Under PART THREE – OTHER STATES INSURANCE the policy provides as follows:

A. How This Insurance Applies

1. This other states insurance applies only if one or more states are shown in Item 3.C. of the Information Page.

2. If you begin work in any one of those states after the effective date of this policy and are not insured or are not self-insured for such work, all provisions of the policy will apply as though that state were listed in Item 3.A. of the Information Page.
3. We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them.
4. If you have work on the effective date of the policy in any state not listed in Item 3.A. of the Information Page, coverage will not be afforded for that state unless we are notified within thirty days.

B. Notice

Tell us at once if you begin work in any state listed in Item 3.C. of the Information Page.

[MIC App. 53-54]

Based on the foregoing policy provisions, The Hartford took the position that the Policy only applied to MIC employees who sustained injuries in Florida or New York, with coverage extended to "Other States" only in factual circumstances not present in Vasquez's case. [SOF ¶ 8] The Hartford therefore denied Vasquez's claim for benefits. [SOF ¶ 9]

In response, Vasquez requested a hearing at the DOL to establish the work-related nature and extent of his injury and to request that an order issue for weekly indemnity benefits. [SOF ¶ 10]

SUMMARY OF ARGUMENT

The DOL and CAB correctly ruled that they did not have the expertise or the jurisdictional authority to interpret and apply insurance

policies. Administrative agencies are granted only limited and special subject matter jurisdiction that is expressly conferred on them by statute. Nothing in the Workers Compensation Act grants the DOL and CAB the authority to address substantive insurance coverage issues. Contract interpretation is a matter of law for the judicial system and the responsibility for resolving insurance policy disputes is vested in the courts under New Hampshire's declaratory judgment statute.

This Court should also affirm the decision to require MIC rather than The Hartford to provide benefits to Vasquez pending resolution of the insurance coverage issues in the proper forum. MIC failed to prove that it met its obligation as the employer to both procure a policy affording coverage to employees in New Hampshire and to make the required filings under the applicable statute and regulations. The Hartford was entitled to rely on MIC to provide it with complete and accurate information regarding the states in which it conducted business. MIC is the entity that should bear the consequences of its failure to meet its statutory obligations.

Finally, the CAB properly determined that MIC violated RSA 281-A:5 when it failed to make the required filings proving the existence of coverage in New Hampshire and is therefore subject to the statutory penalties. MIC's due process arguments should be rejected because they were not properly preserved for appeal. Furthermore, even if this Court decides to address the due process arguments it should rule that there was no violation because MIC had an adequate remedy available to it through the filing of a declaratory judgment or breach of contract action.

ARGUMENT

I. STANDARD OF REVIEW

This Court "will not disturb the board's decision absent an error of law, or unless, by a clear preponderance of the evidence, [the Court] find[s] it to be unjust or unreasonable." Appeal of Fay, 150 N.H. 321, 324, 837 A.2d 329 (2003). This Court will consider the board's factual findings to be "*prima facie* lawful and reasonable." Appeal of Currin, 149 N.H. 303, 305, 821 A.2d 1025 (2003). As the appealing parties, Appellants have the burden of demonstrating that the board's decision was erroneous. Id. at 305-306. *See, also,* R.S.A. 541:13 ("the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful").

In reviewing the CAB's findings, this Court's task is not to determine whether it "would have found differently than did the board, or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record." Appeal of Sutton, 141 N.H. 348, 350, 684 A.2d 1346 (1996) (quotation omitted). "The board's findings of fact will not be disturbed if they are supported by competent evidence in the record, upon which the board's decision reasonably could have been made." Appeal of Anheuser-Busch Co., 156 N.H. 677, 679, 940 A.2d 1147 (2008) (quotation omitted).

While the Court reviews the CAB's factual findings with deference, its statutory interpretation is subject to *de novo* review. Appeal of Desmarais, 170 N.H. 134, 136, 166 A.3d 217 (2017). "This court is the final arbiter of the meaning of a statute, as expressed in the words of the statute itself." Appeal of Holloran, 147 N.H. 177, 179, 784 A.2d 1201 (2001). This Court will "interpret statutes not in isolation, but in the context of the overall statutory scheme." Id. The Court must "give undefined language its plain and ordinary meaning", keeping in mind "the intent of the legislation, which is determined by examining the construction

of the statute as a whole, and not simply by examining isolated words and phrases found therein." Id.

II. THE DOL AND CAB DO NOT HAVE JURISDICTION TO INTERPRET INSURANCE POLICIES AND RESOLVE INSURANCE COVERAGE DISPUTES BETWEEN THE EMPLOYER AND CARRIER

Appellants Vasquez and MIC both argue that the CAB erred when it ruled that it did not have jurisdiction to interpret insurance policy language and instead deferred the matter for resolution by the judicial system. For the reasons set forth below, this Court should affirm the CAB's decision.

"Administrative agencies are granted only limited and special subject matter jurisdiction … ." Appeal of Campaign for Ratepayers' Rights, 162 N.H. 245, 250, 27 A.3d 726 (2011), *quoting* Appeal of Amalgamated Transit Union, 144 N.H. 325, 327, 741 A.2d 66 (1999) (quotation and brackets omitted). "That jurisdiction 'is dependent entirely upon the statutes vesting [the agency] with power and [the agency] cannot confer jurisdiction upon [itself]." Id. at 327, *quoting* Fullerton v. Administrator, 280 Conn. 745, 911 A.2d 736, 742 (Conn. 2006) (quotation and ellipsis omitted). "Furthermore, a tribunal that 'exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation.'" Id. at 327, *quoting* Figueroa v. C and S Ball Bearing, 237 Conn. 1, 675 A.2d 845, 847 (Conn. 1996) (quotation omitted).

The applicable statute vesting jurisdiction in the DOL provides that "[i]n a controversy as to the responsibility of an employer or the employer's insurance carrier for the payment of compensation and other benefits under this chapter, any party at interest may petition the commissioner in writing for a hearing and award." RSA 281-A:43, I(a). Nothing in the statute indicates that the DOL is expressly authorized to engage in insurance

policy interpretation and issue rulings relative to the rights and obligations between the carrier and the employer under the policy. In fact, while the statute authorizes the commissioner to conduct investigations and hold hearings to resolve disputes between the employer and carrier regarding whether persons engaged by the employer are employees or independent contractors, it is silent regarding insurance coverage disputes between those entities. R.S.A. 281-A:43, III. The DOL and the CAB both recognized their limited jurisdiction and correctly declined to address the coverage issues.

While the DOL is clearly vested with the authority to address controversies related to the employee's entitlement to worker's compensation benefits, such as causal relationship to employment and extent of disability, there was no such controversy at issue due to the stipulation. Rather, the issue was one of insurance contract interpretation involving a question of law which both Hearing Officers and a unanimous panel of the CAB expressly acknowledged a lack of expertise to properly address.

The DOL ruled that "[w]hile RSA 281-A:43 permits the Hearing Officer to rule on controversies as to the responsibility of an employer or an employer's insurance carrier for the payment of compensation and other benefits, it does not permit the Hearing Officer to interpret a contract among parties to determine whether the insurance company is an employer's insurance carrier." [MIC App. 6] "That determination lies in a court of equity that does possess the jurisdiction to provide a declaratory judgment on the matter." [MIC App. 6]

The CAB agreed, explaining that the adjudication of issues as to whether an employee suffered an injury, whether that injury is compensable under the workers' compensation statute, the injured employee's entitlement to indemnity benefits, payment of medical bills, and vocational

rehabilitation and whether an injured employee is entitled to a permanent impairment award all fall within the province of the DOL. Those issues do not involve interpretation of insurance contracts, but instead center on interpretation and application of the workers' compensation statutes and the administrative regulations promulgated pursuant to that statute.

The CAB concluded that issues related to coverage under an insurance policy "are matters of contract law" and that the appropriate venue for adjudication of contract disputes is within the judicial system, which has the experience and expertise to resolve complex insurance coverage issues that the DOL lacks. [MIC App. 13-14]

In fact, this Court has recognized the practice of deferring legal matters to the forum with the experience and expertise required to resolve them. In Frost v. Commissioner, N.H. Banking Dept., 163 N.H. 365, 42 A.3d 738 (2012), this Court addressed the doctrine of primary jurisdiction which "provides that a court will refrain from exercising its concurrent jurisdiction to decide a question until it has first been decided by the specialized administrative agency that also has jurisdiction to decide it." Id. at 371, *quoting* Wisniewski v. Gemmill, 123 N.H. 701, 706, 465 A.2d 875 (1983). This Court explained that:

> [The doctrine] is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. It applies to claims that contain some issue within the special competence of an administrative agency. Thus, under the primary jurisdiction doctrine, courts, even though they could decide, will in fact not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after that tribunal has rendered its decision.

Id. at 371, *quoting* 2 Am. Jur. 2d *Administrative Law* § 480, at 407 (2004).

Significantly, this Court also noted that "[w]here[, however,] the issue or issues involve purely questions of law, the matter will not be referred to an agency." Id. at 371, *quoting* 73 C.J.S. *Public Administrative Law and Procedure* § 77, at 270 (2004). This Court ruled that it was within the sound discretion of the trial judge to exercise jurisdiction over a legal issue requiring statutory analysis. Id. at 372, *citing* 73 C.J.S., *supra* § 77, at 270 (noting no referral to agency where agency lacks jurisdiction over the matter).

Where, as in this case, the issue is one of law, the question is best resolved within the judicial system. In New Hampshire, it is well-established that "[t]he interpretation of insurance policy language is a question of law for [the] court to decide." Exeter Hospital v. Steadfast Ins. Co., 170 N.H. 170, 174, 166 A.3d 1073 (2017), *citing* Bartlett v. Commerce Ins. Co., 167 N.H. 521, 530, 114 A.3d 724 (2015). *See, also,* Progressive Northern Ins. Co. v. Argonaut Ins. Co., 161 N.H. 778, 780, 20 A.3d 977 (2011) ("The interpretation of insurance policy language, like any contract language, is ultimately an issue of law for this court to decide").[4]

In fact, the New Hampshire legislature vested only the courts with jurisdiction over declaratory judgment actions to determine issues related to insurance coverage. New Hampshire's declaratory judgment statute provides that "[a]ny person claiming a present legal or equitable right or

[4] Apparently recognizing that the proper forum for addressing insurance coverage disputes is the judicial system, on April 16, 2021 MIC filed a Complaint in the New Hampshire federal district court asserting claims for declaratory judgment under both R.S.A. 491:22 and the federal declaratory judgment statute, 28 U.S.C. §§ 2201-2202, as well as claims for breach of contract against The Hartford and its affiliate company, Twin City Fire Insurance Company. [Hartford App. 32-49] That litigation is presently pending.

title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the *court's* judgment or decree thereon shall be conclusive." R.S.A. 491:22, I [emphasis added] The statute specifically provides that "[a] petition for declaratory judgment to determine coverage of an insurance policy may be instituted as long as the *court* has personal jurisdiction over the parties to the matter, even though the action giving rise to the coverage question is brought in a federal *court* or another state *court*." R.S.A. 491:22, III. [emphasis added] There is no reference in the declaratory judgment statute to administrative agencies. Most significant, however, is the fact that the statute expressly gives concurrent jurisdiction to the district court over claims arising under its subject matter jurisdiction and exclusive jurisdiction to the probate court over claims arising under its subject matter jurisdiction. R.S.A. 491:22, II. Notably, the statute does not provide that administrative agencies have concurrent jurisdiction to determine issues of insurance coverage.

The interpretation and application of the Hartford policy to the facts of this case involve complex questions of law which are most appropriately addressed by the superior court in a declaratory judgment action. As both the Hearing Officer and CAB recognized, the superior court has the particular expertise and experience in insurance policy interpretation while the DOL does not. *See, e.g.,* King-Jennings v. Liberty Mutual Ins. Co., 144 N.H. 559, 561, 744 A.2d 607 (1999) (declaratory judgment action to determine coverage under worker's compensation policy after insurer's denial of benefits to sole proprietor); Tech-Built 153, Inc. v. Virginia Surety Co., 153 N.H. 371, 376, 898 A.2d 1007 (2006) (declaratory judgment action interpreting worker's compensation policy as limiting coverage exclusively to insured's employees it leased to companies identified in a policy endorsement).

There is no New Hampshire decision addressing this particular issue and there is a split of authority on the issue among courts in other jurisdictions. While some courts have ruled that interpretation of insurance policies is within the ancillary jurisdiction of the administrative agency, others have held that interpretation of insurance policies is a matter of law for the courts rather than the worker's compensation system.

For example, in State Compensation Ins. Fund v. Industrial Commission, 657 P.2d 761 (Utah 1983), an employee of Rolanda was killed in a traffic accident which occurred in the course of his employment. Id. at 761. Rolanda was a Colorado corporation, but it employed the decedent, a Utah resident, to work in Utah, where the accident took place. Id. Rolanda did not file a policy of insurance with the Utah Commission as required by law. Id. at 762. The Utah Commission ruled that Rolanda's insurer, the Colorado Fund, was subject to the jurisdiction of the Utah Commission and that it had insured Rolanda for workmen's compensation liability arising under the laws of Utah. Id. However, the Supreme Court of Utah reversed the decision on appeal, ruling that the Commission did not have the authority to determine coverage under the policy. Id. at 762, *citing* Continental Casualty Co. v. Industrial Comm., 61 Utah 16, 210 P. 127 (1922) (Commission does not have authority to construe and apply a contract of insurance to cover employees not named as an insured on a policy). The Court recognized that "some states have extended the authority of commissions to allow them latitude to consider questions concerning the existence of insurance coverage and liability of the insurance carrier", but held that "authority does not extend that far in this state." Id.

In fact, even when the labor department is found to have concurrent jurisdiction, deferral to the judicial system for resolution of insurance coverage issue has been deemed appropriate. For example, in Employers

Mutual Cos. v. Skilling, 163 Ill.2d 284, 644 N.E.2d 1163 (1994), Skilling filed two workers' compensation claims against his employer, Kirkpatrick Trucking Company, for two accidents which occurred in Illinois. Id. at 1164. Employers Mutual, Kirkpatrick's workers' compensation carrier, contended that since its policy provided coverage only for injuries occurring in Wisconsin, it had no obligation to defend or indemnify Kirkpatrick or to pay workers' compensation benefits to Skilling for injuries occurring in Illinois. Id. Employers Mutual also filed a declaratory judgment action in the circuit court. Id. Skilling moved to dismiss the declaratory judgment complaint, alleging that Employers Mutual had failed to exhaust its administrative remedies before the Industrial Commission. Id. Skilling argued that the Commission, and not the circuit court, was the proper forum to resolve the coverage dispute. Id. The declaratory judgment action was dismissed and Employers Mutual appealed. Id. at 1164-1165. The Illinois Supreme Court held that while the Commission and the circuit court had concurrent jurisdiction, the circuit court should not have declined resolution of the insurance coverage dispute in deference to the Commission. The Court explained:

> It is the particular province of the courts to resolve questions of law such as the one presented in the instant declaratory judgment case. Administrative agencies are given wide latitude in resolving factual issues but not in resolving matters of law. The insurance coverage dispute presented before the circuit court is precisely the type of issue that declaratory judgment suits are intended to address.
>
> …
>
> Here, Employers Mutual seeks to have the circuit court determine whether Illinois is included in the scope of coverage afforded by the specific provisions of its

> insurance contract with Kirkpatrick. This is a question of law and, thus, a question which the circuit court, and not the Commission, is in the best position to address. A ruling in favor of Employers Mutual on this issue could foreclose needless litigation, expense and delay and advance a goal underlying declaratory judgment actions.
>
> Therefore, although we conclude that the Commission had concurrent jurisdiction to hear the disputed insurance coverage issue presented in this case, when the question of law was presented to the circuit court in the declaratory judgment suit, the jurisdiction of the circuit court became paramount.

Id. at 1166.

Applying Skilling, the appellate court in Continental Western Ins. Co. v. Knox County EMS, Inc., 2016 IL App. (1st) 14308, 52 N.E.3d 558 (Ill. 2016), addressed the jurisdictional issue under facts somewhat similar to those at issue in this case. Knox was a provider of ambulance services. Its regular place of business was Indiana, but its drivers would also make trips into Illinois to pick up patients and take them to Indiana for treatment. Id. at 561. While in Illinois to pick up a patient, a Knox emergency medical technician was seriously injured in a motor vehicle accident. Id. She filed workers compensation claims in both Indiana and Illinois. Id. Knox held a workers' compensation insurance policy issued to it by Continental in Indiana that contained an endorsement addressing when coverage applied in other states. Id. at 561-562. Continental filed a declaratory judgment action in circuit court seeking a ruling that it had no duty to pay any benefits due on the Illinois workers' compensation claim. Id. at 561. The case involved both substantive coverage issues and statutory interpretation. On appeal, Knox argued in part that the circuit court's decision should be

vacated because the dispute should have been decided by the workers' compensation commission rather than the court. Id. at 563. The appellate court ruled that the declaratory judgment action solely concerned the scope of coverage afforded in a workers' compensation insurance policy and presented "a collateral issue governed by principles of contract construction." Id. at 564. "As such, … the declaratory judgment action present[ed] a question of law for the circuit court, not the commission, to decide." Id. The Court concluded that "the circuit court's jurisdiction was primary." Id. at 566.

In Thomas v. Omega Re-Bar, Inc., 234 Neb. 449, 451 N.W.2d 396 (1990), the plaintiff was injured in Nebraska while working in the course of his employment as an ironworker for Omega. Id. at 397. Omega's worker's compensation insurer, Texas Employers, denied coverage claiming that the policy only covered employees who were hired, working and living in Texas. Id. The Worker's Compensation Court held that it had jurisdiction to determine whether Texas Employers or a second insurer, Employers Casualty, was required to provide worker's compensation coverage for the Nebraska accident. It concluded that neither policy provided coverage and ordered Omega to provide the benefits. Id. at 398. In their cross-appeal, Texas Employers and Employers Casualty challenged whether the Workers' Compensation Court had subject matter jurisdiction to resolve a workers' compensation insurance coverage dispute. Id. They argued that the Workers' Compensation Act only addresses workers' entitlement to benefits and employers' liability for those benefits. Id. Omega argued that because the question relating to insurance coverage was ancillary to the employee's right to compensation, the Workers' Compensation Court had jurisdiction to resolve the coverage dispute. Id. The Court explained that parties "cannot confer subject matter jurisdiction upon a judicial tribunal by either consent or acquiescence" and "[t]he Workers' Compensation Court is a tribunal of

limited and special jurisdiction and has only such authority as has been conferred on it by statute." The Court concluded that the Workers' Compensation Court did not have jurisdiction to decide the insurance coverage question because no statute conferred such jurisdiction to do so:

> Each of the statutes upon which Omega relies shares the same infirmity. None of them explicitly provide the compensation court with subject matter jurisdiction to hear insurance coverage disputes. When the right of an employee to an award is not at stake, many tribunals disavow jurisdiction, and this may occur when the insured and the insurer have some dispute entirely between themselves about the validity or coverage of the policy. 4 A. Larson, The Law of Workmen's Compensation § 92.42 (1989). Since there is no express grant of statutory authority, we hold that the Nebraska Workers' Compensation Court does not possess subject matter jurisdiction to resolve insurance coverage disputes.

Id. at 399.

Shortly thereafter, the Nebraska legislature amended its worker's compensation statute to provide that the Compensation Court "shall have jurisdiction to decide any issue ancillary to the resolution of an employee's right to workers' compensation benefits." R.R.S. Neb. § 48-161. As a result, Thomas has been superseded but only due to the amended statute. *See,* Burnham v. Pacesetter Corp., 280 Neb. 707, 789 N.W.2d 913, 917 (2010) ("After our decision in *Thomas v. Omega Re-Bar, Inc.,* the Legislature amended § 48-161 to invest the compensation court with ancillary jurisdiction 'to determine insurance coverage disputes in the claims before it, including the existence of coverage, and the extent of an

insurer's liability'"), *quoting* Schweitzer v. American National Red Cross, 256 Neb. 350, 591 N.W.2d 524, 530 (1999).

Like the pre-amendment Nebraska statute which provided only that "[a]ll disputed claims for workers' compensation shall be submitted to the Nebraska Workers' Compensation Court for a finding, award, order, or judgment" without any reference to ancillary claims, New Hampshire's worker's compensation statute gives the labor department jurisdiction over controversies over "the payment of compensation and other benefits under this chapter." R.S.A. 281-A:43, I(a). The statute does not expressly confer jurisdiction on the labor department to address ancillary issues, such as insurance coverage disputes. To the contrary, jurisdiction over insurance coverage disputes has been given exclusively to the courts by RSA 491:22.

See, also, Jordan v. Ferro, 67 N.J. Super. 188, 170 A.2d 69, 73 (1961) ("The law appears well settled that the question of coverage of the policy is not within the jurisdiction of the Workmen's Compensation Bureau and any finding on that point by the deputy director is not valid against the carrier"); Smith v. Desautels, 183 Vt. 255, 953 A.2d 620 (2008) (ruling that the doctrine of primary jurisdiction was applicable and supported the superior court determining a pure question of law arising out of a workers' compensation claim).

For the foregoing reasons, this Court should affirm the CAB's decision to defer resolution of questions of law involving insurance contract interpretation to the judicial system.

III. THE CAB CORRECTLY RULED THAT AS THE EMPLOYER, MIC WAS THE ENTITY RESPONSIBLE FOR PAYING WORKER'S COMPENSATION BENEFITS TO VASQUEZ PENDING RESOLUTION OF THE COVERAGE ISSUES

Vasquez argues that even if the CAB was correct in its determination that it did not have jurisdiction to resolve the coverage issues, it nonetheless should have ordered The Hartford to pay worker's compensation benefits to him pending a coverage decision in the proper forum. Vasquez claims that even if MIC failed to notify The Hartford that it had employees working in New Hampshire, The Hartford should bear responsibility for payment of benefits.[5] In short, Vasquez argues that the terms of the contract between employer and carrier can be simply disregarded even though doing so would enable the employer to reap a benefit that it was not entitled to. This Court should affirm the CAB's decision to require MIC to provide the interim benefits for the following reasons.

First, Vasquez ignores the fact that he is not a party to the insurance contract. The General Section of the policy unambiguously states that it "is a contract of insurance between you (the employer named in Item 1 of the Information Page) and us (the insurer named on the Information Page)." [MIC App. 50] The policy also unequivocally states that the "employer named in Item 1 of the Information Page" is the insured. [MIC App. 50] The Hartford is only required to provide coverage to MIC and to pay benefits under circumstances specifically covered under the policy terms, including the jurisdictional limits with respect to the states in which MIC has notified The Hartford that it has work.

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[5] In support of his position, Vasquez relies heavily on Larson's *Workers' Compensation Law*, however, opinions expressed in that treatise are not binding on this Court. In fact, this Court has expressly declined to follow Larson and its reliance on the majority rule adopted by other jurisdiction when, as in this case, there are applicable New Hampshire statutes and regulations that govern the issue before it. *See,* Rooney v. Fireman's Fund Ins. Co., 138 N.H. 637, 639-640, 645 A.2d 52 (1994) (acknowledging the majority rule as identified in Larson, but finding it unpersuasive since the decisions in other jurisdictions were based on other state statutes).

The CAB does not have the authority to order an insurer to pay benefits to an employee if in fact there is no coverage under the employer's workers compensation policy. The CAB found that on its face the policy only provided coverage for employees in New York and Florida – the two states listed in Item 3.A. of the Information Page. [MIC App. 10] The Hartford has taken the position that MIC did not comply with the requirements of the "other states" provision with respect to its employees working in New Hampshire. Until and unless that issue is decided against The Hartford, it cannot be ordered to provide benefits.

Furthermore, nothing in the applicable statutes mandates that the carrier provide benefits under circumstances not covered under its policy. To the contrary, requiring the insurer to pay benefits when, as in this case, there is a significant question regarding the availability of coverage due to the employer's conduct is inconsistent with New Hampshire's worker's compensation system. The Workers Compensation Act and administrative regulations implementing the statute unequivocally place the responsibility for procuring worker's compensation insurance on the employer, not the carrier. In attempting to allocate the primary responsibility to the carrier regardless of the employer's potential non-compliance with the policy provisions, Vasquez ignores the unambiguous statutory and regulatory language.

RSA 281-A:5 provides in pertinent part that the "*employer* … shall secure compensation to employees … [by] insuring and keeping insured the payment of such compensation with a company licensed to write workers' compensation insurance in this state and by filing with the commissioner, in a form prescribed by the commissioner, evidence of such coverage as the commissioner deems appropriate." [emphasis added] RSA 281-A:5, I. This statute clearly imposes the obligation to both procure the required policy *and* file evidence of coverage with the department of labor on the

employer. The employer's obligation to procure worker's compensation coverage extends to "nonresident employees and employers doing business in New Hampshire." RSA 281-A:5-f. When an employer benefits from doing business in New Hampshire through the presence of its employees here, it must do whatever is necessary to ensure that it has complied with the applicable state laws.

This Court's decision in Appeal of Holloran, 147 N.H. 177, 784 A.2d 1201 (2001) does nothing to support the Appellants' position because in that case there was no question as to whether the employer had insurance coverage that applied to the injured employee under its policy at the time of the injury. In fact, the carrier had paid temporary total disability benefits to the employee while he was unable to work. Id. at 178. This Court ruled only that under the facts of that case, where the employer subsequently became insolvent and unable to pay the weekly wage benefits to which the former employee was entitled because he was not reinstated, the DOL had authority to order the carrier to pay the benefits due under R.S.A. 281-A:25-a, IV. The case did not involve interpretation of insurance policy language.

Furthermore, the New Hampshire administrative regulations implementing the worker's compensation statute make it very clear that it is the employer's responsibility to ensure that it has obtained the required worker's compensation coverage for its employees. In fact, the policy statement expressly provides that "[i]t is the policy of this department to require every *employer* who is subject to the statute to secure payment of benefits in accordance with RSA 281-A:5." [emphasis added] N.H. Lab. 302.01.

Under "Coverage Responsibility" the Labor Department regulations clearly state that it is the employer who must ensure that coverage is

procured for all of its employees by applying for coverage prior to hiring any employee:

> Lab. 304.01 Employers.
>
> (a) The primary responsibility for coverage shall rest upon the employer. Such responsibility shall be exercised by applying for coverage as required by RSA 281-A:5, I or II …
>
> (b) The employer's responsibility to obtain coverage shall begin before hiring any employee….

N.H. Lab. 304.01.

In obtaining the required coverage, the employer is charged with ensuring that the information it provides to the carrier or its agent is accurate and complete:

> Lab. 304.02 Agencies and Employers.
>
> (a) Agents and employers shall share coverage responsibility by making clear the status of coverage by providing accurate information to carriers beginning upon receipt by the agent of a complete application for coverage from the employer. This shall include … the necessary information to complete all other coverage forms.

N.H. Lab. 304.02(a).

Based on the information provided to it by the employer, the carrier is then responsible for electronically providing to the NCCI all information necessary to bind coverage, write new policies, add endorsements, add or delete locations and made any other relevant changes. N.H. Lab. 304.04(c). To show any changes in coverage, the carrier must complete and file with the DOL the appropriate "Notice of Workers Compensation Insurance Coverage" form 6WC (4/2008). N.H. Lab. 306.01(a). Circumstances requiring the carrier to file Form 6WC (4/2008) include when "[w]hen

insuring an employer's business having no prior coverage in this state." N.H. Lab. 306.02(a)(1).

However, the carrier is entitled to rely on the employer complying with its obligation to provide it with complete and accurate information, including notifying the carrier that it has employees working within the State of New Hampshire. *See,* Lab. 304.02(a) (employer required to make clear the status of coverage by providing accurate information to carriers). When the employer does not inform the carrier that it has employees working in New Hampshire, the carrier has no reason to notify the NCCI or file form 6WC. In fact, that is precisely what happened in this case. Since MIC did not inform The Hartford that it was doing business in New Hampshire and that it periodically sent employees into the state to conduct audits on its behalf, the DOL was never notified of coverage within New Hampshire.

Further evidence of the legislature's intent to place responsibility on the employer rather than the carrier is found in R.S.A. 281-A:7. Under that statute, when an employer fails to comply with the requirements of RSA 281-A:5, the injured employee may file an application for compensation and "[t]he *employer* shall pay the compensation so determined." R.S.A. 281-A:7, III. In the alternative, the employee "may pursue any available remedy at law" against the employer "free of the waivers and immunities conferred by RSA 281-A:8." R.S.A. 281-A:7, IV.

If the employer does not provide the carrier with accurate information regarding the states in which it is conducting business through the physical presence of its employees, the carrier cannot fairly be charged with the obligation to afford coverage under the laws of the various states in which the employees could sustain a work-related injury. The employer is the entity that is in the position of easily avoiding the burden of paying the employee's benefits directly by simply providing complete and accurate

information to the carrier and paying the corresponding premiums associated with the risk of conducting business in multiple jurisdictions. If the employer fails to comply with its obligations under the statutes and regulations, then it is the entity that should accept the consequences of its noncompliance. To hold otherwise would allow employers such as MIC to conduct business through the use of employees in multiple jurisdictions over the course of sequential policy periods without paying a premium for coverage within those jurisdictions and still reap the benefit of a multi-state policy by notifying the insurer only after its employees are injured. This is exactly what occurred in this case.

Notably, Vasquez is not without a remedy in this case because his recourse is against MIC.

IV. THE CAB PROPERLY EXERCISED ITS AUTHORITY IN RULING THAT MIC VIOLATED RSA §281-A:5

MIC arguments that the DOL and CAB's findings that MIC violated RSA 281-A:5 are not authorized under the worker's compensation statutes and also violate its procedural due process rights should also be rejected by this Court for the following reasons.

As previously noted, RSA 281-A:5 places responsibility on the employer to secure compensation for its employees by: (1) procuring and maintaining a policy insuring the payment of such compensation; *and* (2) filing with the labor department the required form evidencing such coverage. Regardless of whether or not MIC procured the appropriate policy in light of the nature and scope of its business, it did not meet its obligation to ensure that proof of coverage was filed with the labor department. Since MIC failed to comply with the filing requirement, it was in violation of RSA 281-A:5. It was not necessary for the CAB to engage in insurance policy interpretation in order to arrive at this determination and, therefore, there is no inconsistency with the decision to defer

resolution of the substantive coverage issues to the judicial system. The fact is that if MIC had requested proof of coverage within New Hampshire from The Hartford before Vasquez conducted his first audit in 2016, this entire controversy could have been avoided.

The Hearing Officer found that MIC "failed to provide any evidence that they had secured coverage in New Hampshire in the manner prescribed in the Department of Labor Lab Rules" because there was no evidence of the required electronic filing. [MIC App. 6] As a result, The Hartford was "not deemed a carrier under the regulations of the State of New Hampshire." [MIC App. 6] The Hearing Officer concluded that MIC did not meet its burden of showing that it had worker's compensation coverage and, therefore, violated RSA 281-A:5. [MIC App. 6] Due to the statutory violation, the Hearing Officer referred the matter to the Director of Worker's Compensation for review of a potential civil penalty. [MIC App. 6]

Likewise, the CAB noted that "[u]nder RSA 281-A:5, I, the employer is obligated to obtain a workers' compensation policy from an insurer licensed to write compensation insurance in New Hampshire and then have evidence of such coverage filed with the Department of Labor." [MIC App. 22-23] The panel ruled that "filing notice of coverage is the act that establishes a carrier/employer relationship under RSA 281-A…" [MIC App. 25] Because there was no such filing, MIC was in violation of its obligations under RSA 281-A:5.

Vasquez and MIC's position that it is the insurer rather than the employer that should be penalized for failing to file notice of coverage is simply wrong for the following reasons.

In applying a statute, the Court must construe all parts of the statute together "to effectuate its overall purpose and avoid an absurd or unjust result." In re Alexis O., 157 N.H. 781, 785, 959 A.2d 176 (2008). The

insurer has no reason to file notice of coverage until such time as the employer submits a request for coverage in New Hampshire. The Hartford did not receive notice that MIC had an employee working in New Hampshire until after Vasquez was injured. RSA 281-A:7, I(b) provides that "[a]n insurance carrier which insures an employer and fails to file with the commissioner a notice of coverage within a reasonable period of time *as prescribed by rule* shall be assessed a civil penalty of up to $50 for each day of noncompliance." [emphasis added] Under the regulations, the employer is required to make its coverage requirements clear by providing accurate information to the carrier in its application for coverage. Lab. 304.02(a). The carrier's responsibility only "begin[s] upon the agent's receipt of a completed application for coverage." Lab. 304.03(a). The rules do not authorize penalizing the insurer for the employer's failure to provide it with complete and accurate information. It is only after the carrier is informed of the employer's need for coverage in New Hampshire that the carrier's obligation to file notice of coverage is triggered under Lab. 306. Penalizing the carrier for the employer's lack of diligence is precisely the type of unjust and absurd result that must be avoided in interpreting and applying the applicable statutes and regulations particularly in light of the fact that the statutes provide the employee with direct remedies against the employer.

MIC also argues that if the DOL and CAB do not have jurisdiction to interpret the policy, then the basis for assessing the penalty was not clear and its due process rights were violated. [MIC App. 18] As a preliminary matter, this Court should rule that MIC's due process arguments were not properly preserved for appeal and must be disregarded. MIC raised these arguments for the first time in its Motion for Reconsideration of the CAB's decision. [MIC App. 18; MIC App. 26] A party may apply for rehearing as to "any matter determined in the action or proceeding, or covered or

included in the order." R.S.A. 541:3; Lab. 206.02. Since MIC did not raise due process arguments during the CAB hearing or in either of its post-hearing filings, and the issue was not addressed in the CAB's decision, it was not properly raised in the motion for rehearing and was not preserved for appeal. [Hartford App. 50-56; 57-60] *See*, Appeal of Campaign for Ratepayers' Rights, 133 N.H. 480, 484, 577 A.2d 1230 (1990) ("Since this due process argument was not addressed during the course of the hearing or in the committee's order, it was improperly included in the motion for rehearing and was therefore not properly raised on appeal").

However, in the event that this Court finds that the issue was properly preserved, it should still reject MICs due process arguments for the following reasons.

To determine what process is due, the Court will "balance three factors: (1) the private interest that is affected; (2) the risk of erroneous deprivation of that interest through the procedure used and the probable value of any additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens resulting from additional procedural requirements." Gantert v. City of Rochester, 168 N.H. 640, 647-648, 135 A.3d 112 (2016). "The requirements of due process are flexible and call for such procedural protections as the particular situation demands." Doe v. State of N.H., 167 N.H. 382, 414, 111 A.3d 1077 (2015). "The ultimate standard for judging a due process claim is the notion of fundamental fairness." Saviano v. Director, N.H. Div. of Motor Vehicles, 151 N.H. 315, 320, 855 A.2d 1278 (2004). "Fundamental fairness requires that government conduct conform to the community's sense of justice, decency and fair play." Id.

After providing MIC with an adequate opportunity to be heard, the DOL and CAB ruled that MIC failed to prove that it had met its obligations under RSA 281-A:5. Regardless of MIC's subjective belief as to whether

or not it had coverage for employees traveling to New Hampshire, it did not see to it that The Hartford was aware of its coverage needs nor did it ensure that the required filings were submitted. As the CAB ruled in denying MIC's motion, both the DOL and CAB recommended that the parties seek a determination of the coverage issues by filing the appropriate declaratory judgment action or contract action in superior court. [MIC App. 26] There were "additional or substitute procedural safeguards" in place within the judicial system which preclude a finding of a due process violation. MIC had an adequate remedy in the judicial system where it could have expeditiously sought a determination of its rights under the policy but elected not to do so until it finally filed its federal court Complaint for declaratory judgment and breach of contract on April 16, 2021. [Hartford App. 32-49] There is nothing fundamentally unfair about requiring MIC to meet its statutory obligation to provide worker's compensation benefits to its employee pending a coverage determination in the proper forum.

CONCLUSION

For the foregoing reasons, The Hartford respectfully requests that this Honorable Court affirm the findings and rulings of the DOL and CAB.

REQUEST FOR ORAL ARGUMENT

Defendant/Appellee respectfully requests the opportunity to present a fifteen minute oral argument before a full panel of the Supreme Court. Oral argument will be presented by Tracy L. McGraw, Esq.

RULE 16(11) CERTIFICATION

I hereby certify that the Brief of Defendant/Appellee complies with the 9,500 word limit under Supreme Court Rule 16(11).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Defendant/Appellee will be served electronically via the Court's e-file system to Michael K. O'Neil, Esq., Jared P. O'Connor, Esq. and Stacie M. Moeser, Esq. (N.H. Attorney General/Department of Labor).

Dated: November 4, 2021

By: */s/ Tracy L. McGraw*

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