THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0071

Appeal of Javier Vasquez[1]

Rule 10 Appeal from the N.H. Compensation Appeals Board

BRIEF OF APPELLANT JAVIER VASQUEZ

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[1] By order dated 4/15/21, this case was consolidated with the appeal in case no. 2021-0072, Appeal of Matosantos International Corporation.

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QUESTIONS PRESENTED

1. A resident of Puerto Rico employed by a Florida-based corporation suffered serious injuries while working in New Hampshire. Where the New Hampshire Department of Labor has confirmed the injured worker as entitled to New Hampshire workers' compensation benefits and ordered benefits payable, does the Compensation Appeals Board have jurisdiction pursuant to RSA 281-A:43,I to determine whether coverage for payment of those benefits exists under the employer's workers' compensation policy?

PRESERVED: *Claimant's Mot. for Rehearing, CERTIFIED RECORD (C.R.) 12*.

2. If jurisdiction to interpret the policy does not exist, does the Compensation Appeals Board nevertheless have authority to order the employer's workers' compensation carrier to pay the benefits to which the injured worker is statutorily entitled?

PRESERVED: *Claimant's Mot. for Rehearing, CERTIFIED RECORD (C.R.) 14*.

GOVERNING STATUTES

RSA 281-A:2,VIII (2019) – Definitions. -

(c) Except where the context specifically indicates otherwise, the term employer as used in paragraph VIII [defining "private employment"] shall be deemed to include the employer's insurance carrier or any association or group providing self-insurance to a number of employers.

[Paragraphs (a) - (b)-III elided as irrelevant to this appeal.]

RSA 281-A:5 (1994) 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.

II. By insuring and keeping insured the payment of compensation to domestic employees with a company providing workers' compensation insurance in accordance with RSA 281-A:6.

III. By furnishing to the commissioner satisfactory proof of financial ability to pay compensation directly to an employee when due in the amounts and manner as provided in this chapter.

IV. In the case of employees of the state, compensation shall be made as provided in RSA 21-I:24 and RSA 21-I:25-a.

RSA 281-A:5-f (2006) 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.

RSA 281-A:7 (2011) 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.

RSA 281-A:43 (2011) - 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. The commissioner or the commissioner's authorized representative shall schedule a hearing, either in Concord or at a location nearest the employee as determined by the commissioner, by fixing its time and place and giving notice at least 14 days prior to the date for which it is scheduled. The hearing date shall be set for a time not to exceed 6 weeks from the date the petition was received. In those instances where an expedited hearing is requested, the petition for hearing shall set forth the facts in sufficient detail to support the request for an expedited hearing. The commissioner, or his or her authorized agent shall, in his or her discretion, determine whether the need exists for an expedited hearing. Any requests for an expedited hearing shall be periodically reviewed by the commissioner to determine whether such requests are given proper attention. The commissioner shall also identify any overutilization by the requesting parties and responses given to such requests by the commissioner. An annual report of the expedited requests, responses, the number of continuances, the reasons for such continuances, the

number of requests for hearing, and the time within which the hearings were held shall be made annually to the advisory council established in RSA 281-A:62. The notice may be given in hand or by certified mail, return receipt requested. Continuances of any hearing are discouraged; however, should a continuance be necessary, the parties requesting such continuance shall file with the department a written petition for such continuance at least 7 days prior to the hearing. Failure to file such a petition shall bar any right to a continuance. Thereafter, a continuance may only be granted upon the commissioner's finding that a compelling need exists so as to require a continuance. At such hearing, it shall be incumbent upon all parties to present all available evidence and the person conducting the hearing shall give full consideration to all evidence presented. In addition, the person conducting the hearing shall freely and comprehensively examine all witnesses to determine the merits of the matter. Also, the person conducting the hearing may recess the hearing to a date certain and direct the parties, or either of them, to provide such further information that may be necessary to decide the matter. No later than 30 days after the hearing, the commissioner or the commissioner's authorized representative shall render a decision and shall forthwith notify the parties of it. When appropriate, the commissioner, or his or her authorized representative, may render a decision at the hearing. Unless excused for good cause shown, failure of any or all parties at interest to appear at a duly scheduled hearing or to petition for a continuance shall bar such parties from any further action concerning an adverse decision, a decision by default, or a dismissal of a petition for hearing and award.

[Paragraphs I(b)-III elided as irrelevant to this appeal.]

Lab Rule 203.06 Stay of Proceedings.

(a) When the parties to a matter pending before the department are also parties to another proceeding brought in a Court of the United States, Court of the State of New Hampshire or of a sister state dealing with the same issues pending before the department, either party may request a stay of the proceedings before the department until the court proceedings have been concluded.

(b) A party requesting a stay shall:

(1) File the request for stay in writing with copies to all parties of record;

(2) State the court where the case has been filed giving the full name of the case and the docket number assigned to the case by the court;

(3) State the issues in the case that would warrant a stay of the proceedings pending before the department;

(4) State that concurrence to the request has been sought from all the other parties;

(5) State the response of the other parties to the request;

(6) If the requesting party has been unable to contact one or more of the parties, state the attempts that were made to contact that party or those parties and

(7) Inform the department of the outcome of the court proceedings whether the result is a judgment, settlement, or other court approved disposition.

(c) Upon receipt of a request for a stay in accordance with Lab 203.06(a) the commissioner or the commissioner's representative shall review the request and determine if a compelling need exists to stay the matter pending before the department by considering:

(1) Whether the issues in the court proceeding are identical or substantially similar to the issues in the matter pending before the department;

(2) Whether the resolution of the proceedings in the court will have a substantial effect on the resolution of the proceedings before the department or render the proceedings before the department moot and

(3) Whether requiring the issue to be heard in two forums at the same time would result in an inefficient use of governmental resources or unduly burden the parties.

(d) The commissioner or commissioner's representative shall notify the parties of the decision to grant or deny the stay no later than 20 days from the date the request is filed.

STATEMENT OF THE FACTS AND THE CASE

Except as otherwise cited, the following background facts are drawn verbatim from the parties' agreed-upon Statement of Facts filed August 10, 2021.

1. May 2018: Mr. Vasquez suffers a catastrophic work injury in New Hampshire.

At the time of his injury, the claimant Javier Vasquez was working as a travelling auditor for Matosantos International Corporation (MIC). MIC performs auditing services for a company that distributes consumer products throughout the U.S. to retail stores such as Wal-Mart. Mr. 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.

In May of 2018, Mr. Vasquez had completed a compliance check at Wal-Mart and was travelling back to his hotel in Laconia when he was the victim of a head-on drunk driving accident. He was med-flighted to Dartmouth-Hitchcock Medical Center in Lebanon, where he remained in intensive care for three weeks. He was treated for open femur and ankle fractures, severe rupture of the left flank, and multiple spine fractures. His injuries left him with limited

lower extremity mobility, and he has remained totally disabled from employment to the present date.

At the time of Mr. Vasquez's injury, MIC held a workers' compensation insurance policy with The Hartford (the Policy"). The Hartford was notified of the injury while Mr. Vasquez was still in intensive care at Dartmouth-Hitchcock. However, no formal written denial was presented to Mr. Vasquez or ever filed with the New Hampshire Department of Labor. *See Addendum to Brief (Add.) at 14.*

Mr. Vasquez remained hospitalized and in a rehabilitation facility through the summer of 2018, when he was discharged and went to Florida to further recuperate. *Certified Record (C.R.) at 41*. As no benefits of any kind were being paid, he ultimately sought counsel for his workers' compensation claim in January 2019. *Add. at 14*.

2. February 2019: The Hartford finally provides written confirmation of its position to counsel, and Mr. Vasquez formally initiates a workers compensation proceeding to secure benefits.

It was now eight months since his accident, and Mr. Vasquez remained without weekly indemnity benefits or medical coverage. *Add. At 14.* Having been told by his employer that workers' compensation benefits were secured through The Hartford, Mr. Vasquez reached out via counsel to

inquire about the status of those benefits. *Id.* The Hartford confirmed the existence of a workers compensation policy with Mr. Vasquez's employer, but declined coverage, stating as follows:

> The Hartford does not have coverage for New Hampshire for the insured for the date of loss. The claim is closed as there is no coverage and the insured is aware of the fact that this claim was denied based on no coverage.
>
> *Add. at 17.*

The Hartford also declined to provide counsel any evidence to support its position. *Add. at 14.* Accordingly, the claimant initiated a formal workers compensation proceeding by filing a Notice of Accidental Injury with the New Hampshire Department of Labor and petitioned for a hearing to establish his right to receive and the carrier's obligation to pay benefits. *Add. at 14-16.*

3. June 2019 – The Department of Labor declined to rule on the coverage question, but a stipulation was entered confirming Mr. Vasquez's right to benefits.

A hearing was held in June 2019. *Add. at 19*. Both Mr. Vasquez and The Hartford appeared for hearing; the former to litigate the issues of causal relationship of injury to

employment and the extent of his disability, the latter to contest coverage for same.

Thereafter, a stipulation was entered between Mr. Vasquez and MIC regarding the work-connected nature of his injury and entitlement to total disability benefits. *See also Add. at 26.* The Department of Labor in October 2019 approved a Memo of Payment ordering same, *Add. at 25*, so the only remaining dispute was a question of policy interpretation and whether The Hartford would be responsible for payment of the benefits to which Mr. Vasquez is entitled.

Notably, this includes the cost of Mr. Vasquez's medical care, which exceeds $700,000 to date and which remains outstanding.

All parties then appeared at hearing held before the Department of Labor on the coverage question in November 2019. A de novo appeal to the Compensation Appeals Board was taken from the resulting decision, and hearing held in August 2020. The issues noticed for hearing were RSA 281-A:5, "Securing Payment of Compensation", and RSA 281-A:7, "Employer Coverage Status". *C.R. at 20*.

The Policy was entered into evidence. 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" (including New Hampshire) only in factual circumstances not present in Mr. Vasquez's case.

Testimony was taken by the claimant and representatives of MIC regarding when Mr. Vasquez begin working in New Hampshire and how soon thereafter The Hartford was given notice of the injury.

Following the close of evidence, the Compensation Appeals Board solicited briefing from the parties on the question whether it had jurisdiction to address the coverage dispute. Upon review of those memoranda, the Board issued an order that expressly did not address the testimonial or written evidence presented on the question whether coverage was triggered under the "Other States" provisions of the Policy, finding that "it is not relevant given the panel's resolution of the case." *Add. at 3*.

Instead, the Board held that it did not have "authority under RSA 281-A to interpret workers compensation policy language in order to decide whether The Hartford is obligated to pay benefits to an injured worker whose injuries were suffered in New Hampshire." *Add. at 7*. The Board then concluded that the employer "failed to prove that it had a valid worker's compensation policy in effect that provided coverage to the claimant to cover the injuries that he suffered on May 31, 2018. Absent further evidence of coverage, the Director of the Workers' Compensation Division may take further action against it as appropriate under the statute." *Add. at 8*.

The Board further held in the alternative that it did not have the authority to order The Hartford to pay benefits pending a coverage determination in an alternative forum. *Add. at 7*.

Timely motions for rehearing were submitted by both Mr. Vasquez and MIC, and both were denied by order dated January 28, 2021. *Add. at 9*, *C.R. at 20*. This appeal timely followed.

SUMMARY OF ARGUMENT

A full ten months after a work-related car accident in Laconia left him totally disabled, the claimant in this case had still not received workers compensation benefits of any kind, whether medical or indemnity, from his employer or its insurance carrier. Although his employer carried workers' compensation insurance, the carrier claimed without providing proof that the policy would not extend to cover his accident in New Hampshire. In an effort to quickly secure his right to receive both weekly indemnity and medical benefits, as well as identify the party ultimately responsible for his present needs and future care, the claimant sought administrative relief at the New Hampshire Labor Department. He filed a notice of injury and requested that the Department simultaneously rule on the compensability of his claim, resolve the coverage question, and order all benefits paid.

Workers injured and treated in New Hampshire have a right to speedy and inexpensive resolution of their entire claims, and RSA 281-A:43 grants the Department of Labor the power to give it to them. The Board's narrow interpretation of its own jurisdiction to review the evidence presented and decide whether coverage exists under the terms of the policy has left the claimant with an incomplete

remedy and facing future uncertainty and unnecessary litigation. Where "[t]he purpose of the workers' compensation law is to afford employees a sure remedy when they are injured on the job and to provide for a fair resolution of disputed claims", this court "will not interpret a remedial statute in a mechanistic fashion when doing so would defeat the statute's purpose." Buyer v. Abundant Life Farm, Inc., 127 N.H. 345, 348 (1985). The most efficient way to effectuate the remedial purpose of RSA 281-A in the manner intended by the legislature is to require the Department of Labor to resolve the scope of policy coverage concurrently with the questions of causal relationship, extent of disability and entitlement to medical care.

Alternatively, this court should recognize that workers' compensation is something more than an independent contractual matter between the insurer and insured, and remand with instructions to order the employer's insurance carrier to pay the statutory benefits to which the claimant is entitled in the first instance while the policy dispute is litigated between the claimant's employer and insurer.

ARGUMENT

I. Standard of Review

This appeal presents pure questions of law ruled upon by the Compensation Appeals Board. This Court shows no deference to the Board on questions of law, and specifically when interpreting the Workers' Compensation Law, this Court construes any ambiguities in the statute in favor of the injured worker:

> "Our standard of review is set forth by statute: [A]ll findings of the [Board] 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. RSA 541:13 (2007). Thus, we review the factual findings of the CAB deferentially. Appeal of N.H. Dep't of Corrections, 162 N.H. 750, 753 (2011). We review its statutory interpretation *de novo.* Id.
>
> On questions of statutory interpretation, we are the final arbiters of the intent of the legislature as expressed in the words of a statute considered as a whole. Id. We first examine the language of

the statute and ascribe the plain and ordinary meanings to the words used. Id. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Appeal of Gamas, 158 N.H. 646, 648 (2009). We construe the Workers' Compensation Law liberally to give the broadest reasonable effect to its remedial purpose. Id. Thus, when construing it, we resolve all reasonable doubts in favor of the injured worker. Id."

Appeal of Phillips, 165 N.H. 226, 229-230 (2013).

II. The Board too narrowly interprets RSA 281-A:43's grant of jurisdiction to resolve any controversy regarding payment of workers compensation benefits, which may be fairly read to include coverage disputes.

A. The Board is authorized to resolve any "controversy" regarding payment of benefits.

Because the statutory workers' compensation scheme is remedial it is to be liberally construed, and the Legislature's grant of jurisdiction to the Department of Labor to resolve among parties any disputes arising in the context of workers' compensation is deliberately broad: "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." RSA 281-A:43,I(a).

The statute goes on to describe procedural requirements for such hearings, but does not purport to limit the commissioner's subject matter jurisdiction to disputes over the causal relationship of injury to employment, extent of disability, job reinstatement, or indeed describe any of the other myriad of issues that arise in workers' compensation cases. It simply, and broadly, provides that "any party in interest" may petition for a hearing where "a controversy" arises as to the responsibility of an employer or its insurer to "pay[] compensation and other benefits under this chapter". *Id.*

The Board's literal interpretation of this language to mean that "the subject of the hearing is limited to the issues of entitlement to and payment of compensation or other benefits", *C.R. at 24*, fails to acknowledge that the threshold question in this case is exactly what the statute indicates: the question whether the employer or its insurer bears responsibility to pay those benefits under RSA 281-A. To resolve the controversy, the Board must determine whether coverage exists under the policy at issue.

Searching as the Board does for more explicit statutory authorization to decide the policy question in the same manner as it would a routine question of causal relationship (§A:2), extent of disability (§A:48), or reasonableness of medical care (§A:23) – none of which are explicitly called out as subjects of attention in §A:43 either - ignores the fact that determining the threshold question of whether coverage exists under the policy is precisely what will decide the issue of the claimant's entitlement to benefits under that policy. Because the claimant, as a worker injured in the course of his employment while in New Hampshire, is entitled to avail himself of the benefits afforded by RSA 281-A, see RSA 281-A:5-f ("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"), the question of coverage is the "controversy as to the responsibility of…the employer's insurance carrier for the payment of compensation." RSA 281-A:43,I(a).

B. The Board's finding that the employer did not have coverage is irreconcilable with its finding that the Board is powerless to determine whether coverage exists.

By concluding that the employer "failed to prove that it had a valid worker's compensation policy" and suggesting

sanctions are appropriate, the Board relied on RSA 281-A:7 ("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…"). *C.R. at 1-2*. However, the power of the Department to assess a penalty is dependent on the substantive failing of an employer to actually "secur[e] payment of compensation". RSA 281-A:7. The employer in this case did "secure payment" of compensation by obtaining a workers' compensation policy with The Hartford, covering employees in Florida and New York generally, and with "Other States" coverage available to travelling employees if certain notice provisions were met. *"Workers' Compensation and Employer's Liability Business Insurance Policy"*, at 2/28/21 NOTICE OF APPEAL OF MATOSANTOS INTERNATIONAL CORPORATION, Case No. 2021-0071 *Addendum 20, 27-28*.

These contingent facts as applied to the policy to determine whether coverage would be available here was the basis of testimony at hearing before the Board, and the purpose of the hearing.

The Board excused its self-contradictory findings (that on the one hand, it had no jurisdiction to determine whether the employer had insurance coverage under The Hartford's policy, but then held that sanctions against the employer were appropriate because it had no insurance coverage) by

saying that it meant only that no certificate of insurance was filed pursuant to §A:5. *C.R. at 1-2*. But this, too, dodges the Board's obligation to address the merits.

RSA 281-A:5 provides that a private employer who does not self-insure "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 filing with the commissioner, in a form prescribed by the commissioner, evidence of such coverage as the commissioner deems appropriate." RSA 281-A:5,I. The "form" referenced is Form 6WC.

Because no such form was on file at the Labor Department, the Board evidently took this to mean that the employer was not insured, and the inquiry ended there despite the employee and employer's insistence that coverage exists by the terms of the policy under the facts of this case.

But even the statute itself recognizes that mere failure to file Form 6WC may be a failure of the *carrier*, not the employer. "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." RSA 281-A:7,I(b).

The Hartford does not dispute that it issued a workers' compensation policy to the employer that was in effect on the date of Mr. Vasquez's injury, but refuses to pay the benefits to which it concedes the claimant is entitled under the provisions of RSA 281-A, relying specifically on its policy language to avoid that obligation in this circumstance. The claimant invoked the statutory authority of the Board to resolve that controversy as to the responsibility of an insurance carrier to pay compensation under RSA 281-A:43,I(a) by reviewing the circumstances of the case and how they apply to the policy language at issue, and the Board erred by declining to exercise it.

The Board further noted that it "does not have exclusive jurisdiction over all aspects of workers' compensation insurance and policies." *C.R. at 24.* But Appellant has not argued that the Board has exclusive jurisdiction; rather, it has concurrent jurisdiction to resolve the coverage dispute. The Board's narrow reading of RSA 281-A:43 redrafts the statute to include jurisdictional restraints where they do not exist.

C. Other states with statutes similar to §A:43 have found implicit authority for the state agency charged with administering workers' compensation benefits to resolve coverage disputes.

The issues raised in this case have not been directly addressed by this court, but courts in sister states interpreting similarly broad statutory grants of jurisdiction such as that found in RSA 281-A:43,I(a) have concluded that the administrative agency of their state may adjudicate disputes like the one here.

"The general rule appears to be that, *when it is ancillary to the determination of the employee's right, the compensation commission has authority to pass upon a question relating to the insurance policy, including . . . coverage of the policy at the time of injury*[.]" (emphasis added). Arthur Larson, LARSON'S WORKERS' COMPENSATION LAW §150.04, *"Jurisdiction of Insurance Questions"* (2010). Larson has described this general rule as "of course, in harmony with the conception of compensation insurance as being something more than an independent contractual matter between [the] insurer and insured." Id., §92.41 at 17-44 (1990).

The Wisconsin Supreme Court determined that Section 102.17 of the state's workers compensation act as then-written (allowing "any party in interest" to request a hearing regarding "any dispute or controversy") granted jurisdiction to the Industrial Commission to "hear all disputes or controversies affecting compensation, and by section 102.18 to make its finding and award." NW Cas. & Sur. Co. v. Doud, 221 N.W. 766, 766 (1928)(commission has jurisdiction to

construe workmen's compensation insurance policy and determine whether insurer insured risk). This language is materially identical to RSA 281-A:43,I(a)'s grant of jurisdiction to the Board to hear any "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."

More modern examinations of the law have reached the same conclusion. In a 1976 Kentucky case, while a workers' compensation claim was pending before the administrative agency, the carrier brought a declaratory judgment in civil court on an insurance coverage issue. The civil court dismissed the suit and left the dispute to be resolved by the administrative Board on the grounds that there was no compelling reason to hear it, and that the injured worker should not be forced to seek compensation on two fronts when "it is not necessary to a proper resolution of the insurance company's rights." Motorists Mut. Ins. Co. v. Terry, 536 S.W.2d 472 (Ky 1976). The Kentucky court reasoned that workers' compensation is for the benefit of workmen who do not often have the financial means to fund litigation, and if the Board were to be found to have erred, the carrier had recourse to appellate courts for a remedy. Id. In so finding, the court also relied upon the case of Lawrence Coal Company v. Boggs, 218 S.W.2d 670 (1949) for the

proposition that just as the Board can determine whether an employment relationship existed between the claimant and the alleged employer, so also may it determine an insurance company's rights in a compensation proceeding.

Minnesota's workers' compensation statute broadly grants the state's administrative agency, the Workers' Compensation Court of Appeals (WCCA), the jurisdiction to hear and determine "all questions of law and fact arising under the workers' compensation laws of [Minnesota]." Minn. Stat. § 175A.01, subd. 5 (2010). The WCCA has construed this grant of authority "to permit it to decide questions related to workers' compensation insurance coverage when such questions are ancillary to the adjudication of an employee's claim for compensation." Giersdorf v. A&M Construction, Inc., 820 N.W.2d 16, 20 (Minn. 2012); see also Peterson v. Vern Donnay Constr. Co., 48 Minn. Workers' Comp. Dec. 664, 669 (WCCA), *aff'd without opinion*, 503 N.W.2d 792 (Minn.1993); Smith v. Integrity Plus, Inc., 61 Minn. Workers' Comp. Dec. 192, 205 (WCCA 2000) ("The [compensation] judge certainly had sufficient jurisdiction to review and interpret the contract to determine whether the contract provided coverage insuring the employer's risk under the Minnesota workers' compensation law."), *aff'd without opinion*, 625 N.W.2d 142, 143 (Minn.2001).

In such cases, the Minnesota Supreme Court has not only "routinely affirmed the WCAA without questioning its authority to decide questions of insurance jurisdiction," but has explicitly acknowledged that "the workers' compensation courts, as a 'general rule,' have the authority to decide insurance coverage questions." Giersdorf, 820 N.W.2d 16 at 21 (citing Martin v. Morrison Trucking, Inc., 803 N.W.2d 365, 370–71 (Minn.2011).

Georgia has also taken this approach. Georgia's Worker's Compensation Act provides that the State Board of Workers' Compensation "shall exercise all powers and perform all the duties relating to the enforcement of" [the state's workers' compensation laws codified at Ga. Code Ann. § 34-9-1 et seq.]." Ga. Code Ann. § 34–9–58. In interpreting this provision, the Georgia Court of Appeals determined that the Board's "ancillary authority to resolve policy coverage issues when determining an employee's compensation rights" is implicit in the state's Workers' Compensation Act. Builders Ins. Group, Inc. v. 3 Enterprises, Inc., 618 S.E.2d 160, 162-163 (Ga. Ct. App. 2005) (stating that "[a] complete and exclusive system for the resolution of disputes" between employers, their workers' compensation insurers, and their employees does, of necessity, include the power to resolve workers' compensation insurance coverage issues that bear

upon the payment of benefits to an injured employee claimant.").

The court reasoned that "[v]esting the power to resolve these ancillary coverage issues with the Board and its administrative law judges protects the interests of the insurer, the employer, and the employee and furthers the goal of providing complete relief within the workers' compensation forum." Id. at 163 (emphasis added). A parallel can be drawn between the Georgia court's reasoning and "one of the more important aims" of the New Hampshire Workers' Compensation Act, which is "to secure to the injured [employee] . . . compensation by direct payments under certain fixed rules without a law-suit and without friction . . . by a procedure at once simple and inexpensive." McKay v. New Hampshire Compensation Appeals Bd., 143 N.H. 722 (1999) (quoting Mulhall v. Nashua Mfg. Company, 80 N.H. 194, 200, 115 A. 449, 453 (1921)).

New Jersey provides yet another example of a state that has aligned itself with Larson's general rule on the matter. New Jersey's Workers' Compensation Act grants the Compensation Division jurisdiction over "all claims for workers' compensation benefits." N.J. Stat. Ann. § 34:15-49. New Jersey courts have interpreted this provision to mean that "the Compensation Division can resolve coverage disputes that are related to the underlying claim." Sentinel

Ins. Co., Ltd. v. Earthworks Landscape Const., LLC, 24 A.3d 823, 827 (N.J. App. Div. 2011); Frappier v. Eastern Logistics, Inc., 947 A.2d 693 (N.J. App. Div. 2008) ("The Division's authority to decide questions of coverage is the authority 'to decide whether the carrier covers the claim.'") (quoting Williams v. Bituminous Casualty Corp., 238 A.2d 177 (1968)).

In addition to the above-mentioned states, several other states[2] have taken a similar approach in determining whether their workers' compensation agencies have authority to make coverage determinations based on a review of the policy. Given the New Hampshire Legislature's general grant of authority to the Department of Labor under RSA 281-A:43,I(a) to resolve "a controversy as to the responsibility of an employer or the employer's insurance carrier for the payment of compensation and other benefits" and the New Hampshire Supreme Court's practice of construing the state's "Workers' Compensation Law liberally to give the broadest reasonable effect to its remedial purpose," Phillips, 165 N.H. at 229-230, the state should align itself with Larson's general rule and acknowledge the Department's jurisdiction to make coverage

[2] See also Southern Farm Bureau Casualty Ins. Co. v. Tuggle, 603 S.W.2d 452 (Ark. App. 1980) (Arkansas) (quoting Larson's Treatise, the court held that the commission had jurisdiction over questions of the existence and extent of coverage of a policy); Spivey v. Oakley's Gen. Contractors, 232 S.E.2d 454 (N.C. App. 1977) (North Carolina).

determinations. Particularly where, as here, over $700,000 in medical benefits remain unpaid, and the claimant faces the future prospect of lifelong medical care to be furnished by the party ultimately held responsible. See RSA 281-A:23.

D. Both NH's declaratory judgment statute and labor regulations can be read in harmony with the result urged here.

Closer to home, the New Hampshire Department of Labor regulations themselves contemplate that collateral matters like declaratory judgment actions may be filed elsewhere, and upon the filing of a request to stay the administrative proceeding, permit, rather than require, the Department to relinquish jurisdiction:

> Upon receipt of a request for a stay in accordance with Lab 203.06(a) the commissioner or the commissioner's representative shall review the request and determine if a compelling need exists to stay the matter pending before the department by considering:
>
> (1) Whether the issues in the court proceeding are identical or substantially similar to the issues in the matter pending before the department;
>
> (2) Whether the resolution of the proceedings in the court will have a substantial effect on the resolution of the proceedings before the

department or render the proceedings before the department moot and

(3) Whether requiring the issue to be heard in two forums at the same time would result in an inefficient use of governmental resources or unduly burden the parties.

Lab Rule 203.06(c) (emphasis added).

The rule is conjunctive. With an issue like the one presented by this appeal that is in the nature of a declaratory judgment action, the Department would be required to consider whether the issues are "identical or substantially similar" (they are); whether resolving that declaratory judgment action would render the proceedings before the Department moot (it would); and whether it is burdensome or inefficient to allow both to proceed in two forums simultaneously.

It follows, therefore, that both actions *could* proceed simultaneously – it simply might be burdensome to allow it. Appellant does not suggest that the Department of Labor can create jurisdiction where it has not been granted by statute, but the fact that jurisdiction is allowable in principle is the point, because the rule can be read harmoniously with an interpretation of RSA 281-A:43 that vests jurisdiction in the Department to hear the matter in the first place. Notably, the rule does not say – and could have – that upon the filing of a

declaratory judgment action, the Department is automatically divested of jurisdiction, or that no such action could lie at all. Rather, the rule gives to the commissioner the discretion to either stay the case or allow it to proceed.

New Hampshire's declaratory judgment statute itself uses similarly permissive, rather than mandatory, language. RSA 491:22, "Declaratory Judgments", provides that "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." (Emphasis added.) The only exclusive subject matter jurisdiction assigned anywhere in §22 is directed to the Probate Court, "over such claims arising under its subject matter jurisdiction authority in RSA 547 and RSA 552:7." RSA 491:22,II. No specific prohibition or carve-out for cases arising under RSA 281-A exists.

III. Alternatively, the Board has authority to order benefits paid by the employer's insurance carrier pending a further coverage determination in another forum.

In focusing on the question of its jurisdiction to interpret the carrier's policy, the Board wrongly concluded it also had no jurisdiction over The Hartford (which concededly writes workers' compensation insurance in New Hampshire, *C.R. at 2*) that would allow the Board to order benefits paid to

the claimant pending the outcome of any policy dispute between the carrier and the employer.

The Board asserts that the claimant's argument "puts the cart before the horse, ignoring the jurisdiction issue. The cases put forward by the parties as support of their position all involve policies issued to insure an employer in that state, so that the agency administering the workers' compensation benefits already had jurisdiction over the parties and the policy." *C.R. at 26*. This return to the question of subject matter jurisdiction over the policy misses the point of claimant's argument, which is that interpretation of the policy is not strictly required. On this theory, a claimant injured in New Hampshire asserts the right to payment of the benefits to which he is entitled by RSA 281-A (a reality that no party disputes) from his employer's workers compensation insurance carrier (a relationship which again, no party here disputes).

There is a critical distinction between obligations and limitations set forth in insurance policies that parties seek to enforce between themselves, and the rights and obligations imposed by the state through enacted statutory language – a principle familiar to any auto insurer that tries in its policy to limit underinsured motorist coverage to less than that required by RSA 264:15. It is well-established that a party cannot circumvent its statutory obligations via contract. See

Gastronomical Workers Union Loc. 610 & Metro. Hotel Ass'n Pension Fund v. Dorado Beach Hotel Corp., 617 F.3d 54, 62 (1st Cir. 2010) (holding ERISA's statutory pension funding obligations are independent of whatever arrangements private collective bargaining agreements may contemplate). Allowing such would be unjust to third-party beneficiaries, who such statutes seek to protect.

In the workers' compensation context, this principle is best expressed in Professor Larson's treatise:

> Compensation insurance, however, has come to be an integral part of the compensation system; and the ultimate object of that system is the assurance of appropriate benefits to employees. *The insurance carrier therefore stands in two relations: to the employer, to protect it from the burden of its compensation liability, and to the employee, to ensure that he or she gets the benefits called for by the statute. The former relation is governed largely by the insurance contract; the latter is governed by the statute.*

LARSON'S, *Inapplicability to Employee of Insurer's Defenses Against Employer*, § 150.02[01], p. 150-12 to 150-13.

Thus, it is the statute that governs the relationship between the carrier and the injured worker, and policy

language seeking to curtail what the Legislature provides may be held inapplicable.

For example, consider what a carrier must pay if an employer underreports wages to its carrier, but after hearing it is determined that additional weekly benefits are payable. It is the claimant's average weekly wage as defined by RSA 281-A:15 that defines the indemnity rate and the carrier's obligation to pay, regardless of what the policy may say. See, e.g., Urbano v. Bletsas Plumbing & Heating Corp., 124 A.D.3d 1025 (N.Y. 3rd Dep't 2015) (employer's fraudulent underreporting of payroll to obtain coverage at a more favorable rate does not implicate the carrier's obligation to pay benefits to an injured employee; carrier's remedy is to seek sanctions against employer).

Similarly, a Florida court held that despite the fact an injury occurred after a policy's own termination date, the policy nevertheless remained in effect and benefits were payable because the carrier did not cancel the policy in compliance with statutory requirements. Even though the employer had notice the policy was cancelled and elected not to procure new coverage, the defense of estoppel was not available to the carrier when the *employee* brought a claim. Peninsular Fire Ins. Co. v. King, 282 So. 2d 672, 674 (Fla. Dist. Ct. App. 1973).

Larson recognizes an exception to these principles where there simply is no policy at all. LARSON'S, *Exception if Insurance is Void Ab Initio*, § 150.02[04], p. 150-1. But that is not this case. There is no dispute that The Hartford insures MIC for workers' compensation benefits.

The problem in the present case may be that MIC did not properly describe or timely report to The Hartford the full nature of its employees' activity in New Hampshire. The Board heard evidence on these issues, but ultimately did not make any factual findings in light of its opinion that the Board has no power to even consider the question.

But "as between the insurer and the employee, then, defenses based upon the misconduct or omissions of the employer are of no relevance. Fraudulent statements by the employer preceding and inducing the issuance of the policy are no defenses <u>against the employee</u>, nor does failure by the employer to report all of claimant's wages for compensation premium purposes affect claimant's right to full benefits." LARSON'S, *What Carrier Defenses Are Inapplicable to Employee*, § 150.02[02], p. 150-13 to 150-14 (emphasis added).

Therefore, the consequence of an employer's failure to properly describe the scope of exposure to its carrier who may be ordered to pay benefits in the first instance should not fall on the claimant. These principles are not merely academic – they are recognized in positive statutory law in New

Hampshire. The statute controls, not the policy. Just as in the Florida case cited above, the termination of a policy in New Hampshire is not effective unless and until the carrier files notice with the commissioner, RSA 281-A:9, and then regardless what the policy may state, revocation is only effective 30 days later. RSA 281-A:10.

In one prominent New Hampshire example of this principle in action, this court has recognized the independent obligation of an insurance carrier to pay statutory benefits where an employer, otherwise directly responsible for them, has become insolvent. Appeal of Holloran, 147 N.H. 177 (2001). In ruling that a carrier is liable to pay the retroactive wages assessed directly against an insolvent employer for the employer's violation of the reinstatement provisions of RSA 281-A:25-a,IV, this court reasoned:

> While the respondent is correct that RSA 281–A:25–a, IV does not explicitly mention insurance carriers, RSA 281–A:2, VIII (1999) defines "employer" under the Workers' Compensation Law, with respect to private employment, to "include the employer's insurance carrier" except where the context specifically indicates otherwise. See RSA 281–A:2, VIII(c). Upon examination of RSA 281–A:25–a, IV, in the context of the overall statutory scheme and the facts of this case, we believe the

> context does not suggest this section is intended to be limited to employers to the exclusion of insurance carriers. Indeed, to interpret the section to exclude insurance carriers would be to find a right without a remedy.

Id. at 1204-05.

If MIC did not have a workers' compensation policy with an insurer, there would be a different result. But here, it is undisputed that the employer *is* insured for workers' compensation for its employees on the date of injury in question; it is only that the carrier seeks to limit coverage based on the information it argues it failed to receive from the employer about its employee's work itinerary: information that can only come from the employer.

On that point, most applicable here is RSA 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." Here, MIC, a nonresident employer, was doing business in New Hampshire. RSA 281-A is therefore applicable. And RSA 281-A further provides that "[a]n employer subject to this chapter, *or the employer's insurance carrier*, shall furnish or cause to be furnished to an injured employee reasonable medical, surgical, and hospital

services…" RSA 281-A:23 (emphasis added). And of course, "[a]n employer subject to this chapter, or the employer's insurance carrier, shall pay workers' compensation to an employee sustaining a personal injury which is totally disabling, but temporary in nature, and the employee is unable to return to work." RSA 281-A:28. Both are true here; therefore The Hartford, unquestionably the employer's insurance carrier, may be ordered to pay those benefits. See American Mut. Ins. Co. v. Duvall, 117 N.H. 221, 225-27 (1977) (where uninsured subcontractor's employee was injured in New Hampshire and filed a workers' compensation claim in New Hampshire, carrier for general contractor was held liable pursuant to RSA 281:4-a (now RSA 281-A:18), despite the fact that the contract of hire was executed in Massachusetts and carrier's policy purported to limit coverage to workers who claim benefits in Massachusetts alone).

It is Mr. Vasquez's position that MIC and The Hartford can write their policy and claim to limit coverage however they like, but that can have no effect on their independent statutory obligations. Therefore, the real effect of these policy limitations is not actually to *restrict* the benefits payable to individuals like Mr. Vasquez who work and are injured in New Hampshire, but – from the carrier's perspective – to help define risk and appropriately set premium levels. If, for example, MIC's employees were genuinely only routinely

working in Florida and New York, which may be what The Hartford believed, then the price of the premium charged to Matosantos may have been appropriate. But as it turns out, that was not the reality.

Mr. Vasquez had no duty, statutory, contractual, or otherwise, to notify The Hartford about the scope and range of MIC's work activity – that was MIC's obligation. But if that obligation was not met through MIC's negligence or even active fraud, the burden of that failure should not fall on Mr. Vasquez. Rather, The Hartford can seek to recoup directly from MIC whatever benefits it must pay, or retroactively reassess MIC's premiums. See Gise v. Fidelity, 206 P. 624 (Cal. Sup. Ct. 1922)(carrier can seek reimbursement from employer for injuries occurring outside the scope of the policy; here, for injury to a child laborer that employer promised in the contract not to hire, necessarily implying further that the carrier paid for workers compensation benefits in the first instance and that the violation of the contract language was no bar to same.)

Finally, it is important to note that both parties to the policy, MIC and The Hartford, understood that adjustment to premiums after the fact based on new information following an audit by The Hartford is always a possibility: by its own terms, the policy was

> "…subject to audit. This policy is being issued on an estimated basis for the policy period shown, and your final premium will be determined when your coverage period expires. The final audit may result in either a return premium to you or an additional premium due The Hartford."

"Workers' Compensation and Employer's Liability Business Insurance Policy", at 2/28/21 NOTICE OF APPEAL OF MATOSANTOS INTERNATIONAL CORPORATION, Case No. 2021-0071 *Addendum 68*.

Because there is no dispute about Mr. Vasquez's right to receive benefits under RSA 281-A despite the carrier's position that its policy insuring MIC's employees does not apply in his particular case, he has been receiving weekly indemnity benefits directly from the employer pending this appeal. However, he has incurred over $700,000 in medical bills due to his lengthy hospitalization and post-surgical rehabilitation, and those bills remain unpaid by either the employer or its' workers' compensation carrier. If the employer is now or in the future unable to shoulder the cost of that past treatment and the lifelong future medical care he will require and which New Hampshire law guarantees pursuant to RSA 281-A:23, Mr. Vasquez should have recourse.

In sum, this is the authority the Board should have exercised here, and ordered The Hartford to pay Mr. Vasquez the full indemnity and medical benefits to which no party disputes he is entitled. To the extent those payments may exceed what The Hartford thought it may have been insuring when it issued its policy to MIC, that is a matter to be separately fought out between The Hartford and MIC. Mr. Vasquez need not be a party to that quarrel; but in the meantime, New Hampshire has an interest in seeing that workers injured in this state, and treated by medical providers in this state, have a speedy and inexpensive remedy. "[W]orkmen's compensation may constitutionally be sought in any of the States with a legitimate interest in the employment relationship (State of employment contract, State of employment injury, or State of employee's residence)." LaBounty v. American Ins. Co., 122 N.H. 738 (1982)(citing Pacific Ins. Co. v. Comm'n., 306 U.S. 493, 500 (1939), Alaska Packers Assn. v. Comm'n., 294 U.S. 532, 549-50 (1935)).

CONCLUSION

At bottom, the claimant's action is not an action to collect under, or enforce, the policy between MIC and The Hartford. Rather, it is an action brought to quickly secure the medical and indemnity benefits to which no party disputes he

is entitled under RSA 281-A, and which for over three years have remain unsatisfied. While requiring the Board to rule on the policy dispute is a means to that end, it is not the exclusive or even necessarily the preferred means.

"The purpose of the workers' compensation law is to afford employees a sure remedy when they are injured on the job and to provide for a fair resolution of disputed claims", and this court "will not interpret a remedial statute in a mechanistic fashion when doing so would defeat the statute's purpose." Buyer v. Abundant Life Farm, Inc., 127 N.H. 345, 348 (1985). The most efficient way to effectuate the remedial purpose of RSA 281-A in the manner intended by the legislature is to require the Board to resolve the scope of policy coverage concurrently with the questions of causal relationship, extent of disability and entitlement to medical care, or order the employer's carrier to pay the latter while the former is litigated elsewhere.

Respectfully submitted by:

Javier Vasquez
By his attorney
SHAHEEN & GORDON, P.A.

Dated: September 8, 2021 By: /s/ Jared P. O'Connor
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STATEMENT REGARDING ORAL ARGUMENT

By order dated April 15, 2021, this appeal was assigned for argument before the full court. Mr. Vasquez's argument will be presented by Attorney Jared O'Connor.

RULE 16(3)(i) CERTIFICATION

The written decision appealed from begins at page 19 of the Certified Record, and the order on Motion for Rehearing begins at page 1 of the Certified Record. Both are also appended to this brief.

RULE 16(11) STATEMENT OF COMPLIANCE

The within brief does not exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, pertinent text of statutes and regulations, and any addendum. (Approximately 7,000 words of relevant text.)

RULE 26(7) STATEMENT OF COMPLIANCE

I hereby certify that the within brief has been served electronically via the court's e-file system to Michael K. O'Neil, Esq. (Matosantos), Tracy L. McGraw, Esq. (The Hartford), and

Stacie M. Moeser, Esq., (N.H. Attorney General/Department of Labor).

Dated: September 8, 2021 By: /s/*Jared P. O'Connor*

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State of New Hampshire

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November 25, 2020

DECISION OF THE COMPENSATION APPEALS BOARD

2020-B-0243

JAVIER VASQUEZ

v.

MATOSANTOS INTERNATIONAL CORP.

APPEARANCES: The interests of the claimant were represented by Jared O'Connor, Esquire.

The interests of the employer, Matosantos International Corp., were represented by Richard W. Head, Esquire.

The interests of The Hartford were represented by Tracy L. McGraw, Esquire.

DATE OF INJURY: May 31, 2018.

ISSUES: RSA 281-A:5 – Securing Payment of Compensation.
RSA 281-A:7, III – Employer Coverage Status.

WITNESSES: The hearing was conducted by WebEx. Testimony was heard from the claimant, Javier Vasquez. Also testifying were Carlos Rivera and Geronimo Matosantos, directors of the employer.

HEARING: A *de novo* appeal hearing was held at the New Hampshire Department of Labor, Concord, New Hampshire on August 25, 2020. The parties filed written closings on September 10, 2020. The panel then requested supplemental briefing on the issue of the Department/CAB jurisdiction to decide the coverage issue, and the parties filed memoranda on October 21, 2020.

PANEL: The panel was comprised of Christopher T. Regan, Esq. (Chair), Anne C. Eaton and Thomas F. Parks.

BACKGROUND

The claimant, while on a short-duration work assignment in the State of New Hampshire, was involved an automobile accident while driving home from his job site one evening and suffered extensive injuries. The employer had a workers' compensation policy through The Hartford. In its declaration sheet, the policy stated that it provided workers compensation coverage for the states of Florida and New York. Certain other states were excluded from the policy. Except for those excluded states, coverage in one or more of the remaining states, according to the policy, could be provided if certain actions were taken by the employer in a timely manner.

The insurer has denied coverage. The claimant and his employer reached an agreement about compensation benefits that was filed with the Department. The employer is currently paying the claimant temporary total disability benefits. The Department ruled that the employer had an employee working within the State of New Hampshire and did not have a valid workers compensation policy covering that employee and referred the matter to the Director of the Workers' Compensation Division for further action.

Following a hearing, the Department of Labor declined to rule on whether The Hartford's workers' compensation insurance policy provided coverage to the employer and claimant under the circumstances of the case because it believed that it did not have the jurisdiction to adjudicate the insurance coverage question. It consequently found that the employer failed to have a valid workers' compensation policy in effect covering the claimant and found that a violation of RSA 281-A:5 had occurred and referred the matter to the Director of Workers Compensation for potential civil penalty.

The claimant and the employer appealed.

FINDINGS OF FACT

The claimant had worked for the Matosantos International Corp. (MIC) as an auditor since July, 2014. His primary duty was to visit various stores that sold certain food products that the employer had contracted to supervise. The claimant's responsibilities in the stores included auditing contract compliance, training store personnel, and, as appropriate, stocking shelves and putting up

displays. His territory apparently could take him anywhere on the East or Gulf Coasts of the United States.

The claimant arrived in New Hampshire on May 24, 2018 to visit various Wal-Mart stores in the state in order to perform his assigned duties. The claimant was returning from his final New Hampshire store on May 31, 2018, when he struck head on by a drunk driver. He suffered extensive multiple injuries and was medevac'd to the Dartmouth Hitchcock Medical Center in Lebanon where he remained hospitalized for 3 weeks. Following his hospital discharge, he entered a rehabilitation facility. After his discharge from rehabilitation, he returned to Florida. At the time of the CAB hearing, he testified remotely from Columbia. His recovery has been slow and he remains out-of-work.

MIC had a workers' compensation and employers liability policy issued by The Hartford covering a period from January 20, 2018 through January 20, 2019. Section 3 of the policy stated that the states covered were Florida and New York, where MIC said it had its primary offices. A provision of the declaration sheet (3.C. - Other States Insurance) indicated that all states except for certain enumerated states and a few territories were excluded. Finally, Part Three C. - Other States Insurance of the policy set out certain condition that had to be met and notifications that had to be made before The Hartford would extend coverage the state in question.

Much of the testimony centered on the facts giving rise to the claims for New Hampshire workers' compensation coverage. One interesting fact is that the employer's main operations may no longer be in New York or Florida. The testimony is not summarized here as it is not relevant given the panel's resolution of this case.

DISCUSSION

The first issue that has to be decided is whether the Department of Labor has the jurisdiction to decide whether Matosantos International Corp had a workers' compensation policy that covered the claimant during the time that he was working in New Hampshire, that is to resolve an insurance coverage issue. On its face, The Hartford policy did not cover the employee while he was in New Hampshire. The parties dispute how to interpret the policy and whether, against the factual

background presented, the coverage was appropriately triggered so that New Hampshire coverage was in effect at the time of the accident, or applied retroactively, so as to cover the claimant's injuries arising from the May 31, 2018 accident and injuries.

The panel starts with the proposition that an agency has jurisdiction only as set out in its authorizing statutes. The carrier's attorney filed a short memorandum concluding that it could not find "statutory support or caselaw that gives jurisdiction to an agency relative to policy interpretation for coverage." The claimant and the employer advance various arguments as to why the Department should decide whether The Hartford's worker's compensation insurance policy covered the claimant and the employer for the accident that occurred on May 31, 2018 in New Hampshire. (Because the claimant and employer seem to endorse and to supplement each other's arguments, their arguments will, for the most part, be treated as consolidated.)

The first section of the statute to examine would be under the issues noticed for hearing. RSA 281-A:5 is a provision entitled **Securing Payment of Compensation** that requires an employer, either individually or through a group, to either secure payment of workers' compensation insurance "in a form prescribed by the Commissioner" (RSA 281-A:5, I) or to become self-insured in a manner that complies with the workers' compensation statute and regulation.

The next section of the statute to examine is RSA 281-A:7 (**Liability of Employer Failing to Comply**), which sets up penalties that can be imposed if an employer fails to have mandated workers' compensation coverage in place. Sub-section III further provides that an employer failing to do so maybe itself liable for payment of all benefits due an injured employee. Neither section authorizes the Department of Labor to determine a dispute regarding whether an insurer, who has issued a policy elsewhere, might be obligated to pay workers compensation benefits to an employee who was working in New Hampshire. Neither noticed statute establishes the authority of the Department to interpret the terms of a workers' compensation insurance policy or to decide insurance coverage issues.

The claimant and employer advocate finding that RSA 281-A:43, I (a) constitutes a broad grant of authority to the Department to decide disputes "arising from the universe of workers' compensation." That section of the statute states "in a controversy as to the responsibility of an

employer or an 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". While the claimant and employer emphasize the fact that the sentence addresses the Department's authority to decide the responsibility of an employer or insurance carrier for payment of compensation, they do not directly address the issue (also a part of that sentence) that the subject of the hearing is limited to the issues of entitlement to and payment of compensation or other benefits. A literal reading of that section would empower the Department to adjudicate issues specifically defined in the chapter such as casual connection of injury to employment, extent of disability, issues regarding medical benefits, permanent impairment awards and other benefits specifically set out in different sections of the workers' compensation statute. The language, as written, does not address the authority of the Department to adjudicate whether an insurer's claim that its policy is not subject to the jurisdiction of the State of New Hampshire and to decide, in this case, whether The Hartford, based upon the policy language and the facts of the case, is liable for payment of compensation.

The claimant cites several cases from various jurisdictions (Wisconsin, New York, Kentucky, Florida and Nebraska). At the outset, the panel notes that, except for Nebraska case, the other cases cited by the claimant all deal with workers' compensation insurance policies issued to an employer with coverage within the state where the dispute occurred. Further, the claimant's analysis does not address the substance of each state's "jurisdictional" statutes so that they may be compared with the New Hampshire workers' compensation statute. The panel does note that the one State where the decision quotes its relevant statute, *Lawrence Coal Co. v. Boggs*, 309 Ky. 646, 650, 218 S.W. 2d 670, 672 (1949), the language at issue there is particularly robust and likely exceeds the authority granted to the New Hampshire Department of Labor under RSA ch. 281-A. A subsequent Kentucky case, *Motorist Mut. Ins. Co v. Terry*, 536 S.W.2d 472 (1976), also cited by the claimant, relies on the *Lawrence Coal Co.* case as its basis for decision.

Of particular note is the Nebraska decision, *Thomas v. Omega Re-Bar, Inc.*, 234 Neb. 449, 451 N.W.2d 396 (1990). In a dispute over whether Nebraska's Workers' Compensation Court had jurisdiction to decide insurance coverage issues between employers and insurers, the Nebraska

Supreme Court held that "[t]he Workers' Compensation Court is a tribunal of limited jurisdiction and has only such authority as has been conferred on it by statute." *Id.*, at 452, 451 N.W. 2d at 398. After reviewing the Nebraska statue, it held that its Workers' Compensation Court lacked subject matter jurisdiction to decide insurance coverage issues. *Id.*, at 453, 451 N.W. 2d at 399. The claimant states that the Nebraska legislature subsequently passed an amendment to the statute to permit its Workers' Compensation Court to decide insurance coverage issues, and, in the claimant's view, "overruling" the Court. It is likely a difference in perspective, but the legislative action also can be seen as the legislature perceiving a deficiency in its workers' compensation statute and legislatively supplementing the Workers' Compensation Court's jurisdiction.

The parties cite *Appeal of Cover*, 168 N.H. 614 (2016), where the New Hampshire Supreme Court held that the Department had the authority to adjudicate the validity of one of its rules. The Court held that Department's jurisdiction existed concurrently with the ability of an aggrieved party to bring a declaratory judgment action in the Merrimack County Superior Court. *Id.*, at 618. The issue in *Cover*, the ability of an agency to determine the validity and application of one of its rules, differs from adjudication of an insurance coverage issue. Furthermore, to have concurrent jurisdiction with another tribunal, the Department still must have the jurisdiction to decide an issue in the first place.

The parties also cite LAB Rule 203.06(c), which allows the Department to order a discretionary stay of an administrative proceeding in deference to a parallel court proceeding, setting forth standards for doing so. Agency rules and regulations cannot by themselves create jurisdiction. Although LAB Rule 203.06(c) indicates there can be concurrent jurisdiction between the Superior Court and the Labor Department, it does not spell out situations where it could be exercised.

Another factor is 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. Under LAB Rule 304.04, it is the carrier's responsibility to electronically provide to the National Council on Compensation Insurance all necessary information to bind workers' compensation coverage and to add or delete locations, among others actions. Also of importance is the fact that, in New Hampshire, the regulation of workers' compensation insurance

is divided between two agencies. The New Hampshire Department of Insurance has jurisdiction over some aspects of workers' compensation insurance such as rate setting and licensure of workers' compensation carriers and adjusters doing business in the state. The New Hampshire Department of Labor is responsible for setting standards and procedures for workers' compensation claims handling, reviewing applications for self-insurance, monitoring changes in employers' coverage status, and adjudicating disputes arising under RSA 281-A.

As an alternative, there is a New Hampshire tribunal that regularly hears and decides insurance coverage cases for a wide range of insurance policies, and where there is also a large body of case law with which it is familiar. The Superior Court has jurisdiction to decide insurance coverage issues, often as declaratory judgment actions under RSA 491:22, or through a contract action between the parties. Disputes about issues of insurance coverage, interpretation of policy language, and resolution of factual issues affecting coverage regularly come before that Court. The dispute at hand would be much better handled in that forum. (Of note here is the fact that parties did not cite any of the New Hampshire case law regarding interpretation of insurance contracts in their extensive closing arguments and memoranda filed with the panel.)

As an alternate argument, the claimant suggests that, since The Hartford has issued a workers' compensation policy, the Department should simply assert jurisdiction over the case and order the insurer to pay benefits to the claimant. The workers' compensation carrier and the employer could then resolve the matter between themselves and the insurer has the ability to audit and surcharge the employer. That argument puts the cart before the horse, ignoring the jurisdiction issue. The cases put forward by the parties as support of their position all involve policies issued to insure an employer in that state, so that the agency administering the workers' compensation benefits already had jurisdiction over the parties and the policy.

Based on the foregoing, the panel has not been convinced that, as a matter of law, it has the authority under RSA 281-A to interpret workers' compensation insurance policy language in order to decide whether The Hartford is obligated to pay benefits to an injured worker whose injuries were suffered in New Hampshire.

DECISION

The employer, Matosantos International Corporation, has failed to prove that it had a valid worker's compensation policy in effect that provided coverage to the claimant to cover the injuries that he suffered on May 31, 2018. Absent further evidence of coverage, the Director of the Workers' Compensation Division may take further action against it as appropriate under the statue.

This is a unanimous decision of the panel.

Christopher T. Regan, Esq., Chair

State of New Hampshire

COMPENSATION APPEALS BOARD

Hugh J. Gallen
State Office Park
Spaulding Building
95 Pleasant Street
Concord, NH 03301
603/271-3176
TDD Access: Relay NH
1-800-735-2964
FAX: 603/271-5015
http://www.nh.gov/labor

January 28, 2021

DOCKET #2020-L-0243

JAVIER VASQUEZ

v.

MATOSANTOS INTERNATIONAL CORPORATION

ORDER ON CLAIMANT'S AND EMPLOYER'S MOTIONS FOR REHEARING

Both the employer (Matosantos International Corporation) and the claimant (Javier Vasquez) filed timely *Motions for Rehearing* after this panel of the Compensation Appeals Board ruled that it had no jurisdiction to interpret the language of the workers' compensation insurance policy, as requested by both the claimant and the employer. The workers' compensation insurance carrier filed an Objection.

The grounds for a motion for rehearing are when:

> (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 statute or administrative rule; or (3) The party making the motion for rehearing demonstrates the decision is contrary to controlling law.

LAB 206.04(b).

The claimant's attorney claims the panel's decision to be inherently contradictory because, while holding that it lacks jurisdiction to decide whether the workers' compensation insurance policy provided coverage, at the same time it held that the employer had failed to prove that it had a valid workers' compensation policy in effect covering the claimant's injuries.

The confusion may be due to a misunderstanding of how an employer provides proof that it is able to secure compensation to its employees. Under RSA 281-A:5, I, the employer is

obligated to obtain a workers' compensation policy from an insurer licensed to write workers' compensation insurance in New Hampshire and then have evidence of such coverage filed with the Department of Labor. There is no dispute that the The Hartford is licensed to write workers' compensation polices in New Hampshire. There is a further step, however, set out in the Labor Department regulations (LAB 304, *et seq.*). Evidence of coverage is accomplished when NCCI has filed a completed Notice of Workers' Compensation Coverage (Form 6WC) with the Department based on information provided to NCCI by the employer, insurance agent, and/or insurance carrier. Further, the regulation also says notice of coverage is given in terms that coverage is in place, but the individual insurance policy is not filed with the Department. See LAB 306.01(f). Additionally, the Department is only provided a Notice of Coverage when the policy coverage is instituted and is notified again only on termination of coverage, and it is not notified of policy renewals. *Id.*

Because neither NCCI nor the insurance carrier filed a 6WC with the Department of Labor demonstrating that Matosantos had obtained New Hampshire workers' compensation coverage at the time of its employee's injury, Matosantos was then in violation of RSA 281-A:5 and was subject to the liability provisions when it failed to comply with the provisions of the statute under RSA 281-A:7. RSA 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.

Under New Hampshire's workers' compensation statute, the obligation to pay benefits to an injured employee falls first on the employer and then its carrier, if there is one. (See, *e.g.*, RSA 281-A: 23, 25, 28, 31, and 31-a (the employer, or the employer's insurance carrier, shall pay. . . .)). As the parties here are aware, in the absence of a workers' compensation carrier, the employer itself has the obligation to pay all benefits due an injured employee. Unless and until the insurance coverage issue is resolved, Matosantos has been and continues to have the legal obligation to pay all mandated benefits to the claimant.

Contrary to the apparent belief and assertions by the claimant and employer, the New Hampshire Department of Labor does not have exclusive jurisdiction over all aspects of workers' compensation insurance and policies. Among other issues related to worker' compensation insurance, the Insurance Department is responsible for licensing insurance carriers and insurance adjusters, and for rate setting. After initial involvement and inspection by NCCI, the Insurance

Department also is involved with resolving disputes about workers' compensation classification of policy holders and experience ratings when the issue cannot be resolved with NCCI.

The Department of Labor adjudicates issues as to whether an employee has 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 might be entitled to a permanent impairment award. None of that work deals with interpretation of insurance contracts. Instead, it centers on interpretation and application of the workers' compensation statutes and the regulations promulgated by the Department pursuant to that statute. To the knowledge of this panel, two of whom have lengthy tenures, the CAB and the Department have never previously adjudicated the interpretation of the language of a workers' compensation policy to determine coverage.

The employer and claimant argue that the Department of Labor and, on appeal the Compensation Appeals Board, should undertake to interpret provisions of the insurance policy and, in accordance with the terms of the policy, make certain findings of fact and apply those facts against the policy language in order to determine that the carrier should provide workers' compensation insurance coverage for the injury at issue. This is a workers' compensation policy issued to an employer in its home state of Florida. According to the parties and a reading of the Information Sheets of the insurance policy provided, the policy covers operations in Florida and New York. There is a general provision about coverage in other states, along with requirements about what actions need to occur in order to obligate the carrier to provide insurance coverage for those additional states. It is unknown whether there might be an All States endorsement to this policy.

The carrier asserts that the policy requires that it be notified within thirty days of the date of the policy renewal if a company is doing business in another state or "at once" if the employer begins work in another state during the policy period. One argument advanced against the carrier's coverage denial is that it received an email from a hospital social worker following the claimant's injuries and that action constituted sufficient notification to trigger coverage under the policy. The parties have not provided any case law or other adjudicative decisions aiding in interpretation of the policy as applied to those facts.

The above issues are matters of contract law. The appropriate venue for adjudicating a contract case, especially one involving interpretation of a contract by the application of specific facts to the contract language, is the New Hampshire Superior Court. Further, there is a well-developed body of law regarding interpretation of insurance policies that the Superior Court regularly applies.

Further, the policy was issued in the State of Florida, written through an insurance agency in Texas. The policy states that states that it provides coverage in the states of Florida and New York. Consequently, there may be additional jurisdictions available to the parties.

The claimant and the employer reiterated an array of cases from other jurisdictions, all but one case decided in jurisdictions other than New Hampshire. *Appeal of Cover, 168 N.H. 614 (2016)*, holds that the Department of Labor has the ability to decide the validity of its own rules. The subject of the dispute, whether a workers' compensation insurance policy was appropriately terminated, is an issue directly addressed by LAB 307, *et seq.* The panel is insufficiently convinced that any of cases offered as persuasive authority occurred in states that had regulatory schemes for the administration of the workers' compensation systems that are similar to New Hampshire's.

The claimant then urges the panel to simply presume that there is jurisdiction over The Hartford insurance policy and require The Hartford to provide the claimant benefits under its policy, citing Professor Larson's treatise on workers' compensation and cases from other jurisdictions. The citations from Professor Larson's treatise do not address the jurisdictional issue.

At its basis, the claimant's argument is that, because The Hartford issued a workers' compensation policy to the employer and because The Hartford provides workers' compensation coverage to other employers in New Hampshire, then the panel has the power simply to order The Hartford to pay benefits, leaving the carrier and employer to settle their differences afterwards. This argument disregards the fact that The Hartford never filed notice of coverage for Matosantos in New Hampshire in accordance with the provisions of RSA 281-A:5 and LAB 304, *et seq.*, as described above. In New Hampshire, filing notice of coverage is the act that establishes a carrier/employer relationship under RSA 281-A and triggers the Department of Labor's jurisdiction over the carrier on coverage and claims matters related to that employer. In

each of the cases cited by the claimant, the carrier had provided the employer a workers' compensation policy effective in the state adjudicating the claim. Therefore, unlike the case before this panel, those insurance carriers were already subject to the jurisdiction of the appropriate agency in the state and thus could be required by that agency to provide workers' compensation benefits. As stated before, the cases from other jurisdictions have failed to persuade the panel that the Department of Labor has jurisdiction over the policy at issue so that it could order the carrier to provide benefits to the claimant.

The employer, for the first time, raises due process arguments based on the panel's decision that it lacked jurisdiction to decide the insurance question presented by the parties. As set forth above, however, the employer does have a forum available to adjudicate its claim. Having failed to demonstrate that the carrier, through NCCI, provided evidence of coverage with the New Hampshire Department of Labor, any of the parties could file the appropriate declaratory judgment or contract action in a Superior Court of New Hampshire and seek a determination in that venue. Both the Department of Labor and this panel have recommended that the parties follow this course. It is up to the parties to decide whether they will to do so.

Because the claimant and the employer failed to demonstrate that the panel's decision is contrary to the controlling law, both *Motions for Rehearing* are DENIED.

This is a unanimous decision of the panel.

Christopher T. Regan, Esq., Chair

cc: Jared P. O'Conner, Esq.
Tracy L. McGraw, Esq.
Michael K. O'Neil, Esq.

SHAHEEN & GORDON, P.A.
ATTORNEYS AT LAW
Tenacity. Creativity. Results.

Jared P. O'Connor
Attorney at Law

March 25, 2019

Edward Sisson, Director
Department of Labor
95 Pleasant Street
Concord, NH 03301-3836

sent via facsimile and U.S. Mail
271-6149; 888-459-1618; 787-793-0454

Re: Javier Vasquez v. Matosantos International Corporation
Date of Injury: 5/31/18
#86829
Notice of Representation and Request for Hearing RSA 281-A:5-f, A:7

Dear Director Sisson:

Please let this letter serve as my notice of representation of the claimant in the above-captioned case.

On the date of injury, Mr. Vasquez was employed as a sales representative for the employer on a business trip in New Hampshire. While traveling in the course of his employment, he was the victim of a motor vehicle accident in Laconia that left him hospitalized at Dartmouth Hitchcock Medical Center-Lebanon, and requiring inpatient rehabilitation due to substantial and life threatening injuries.

Having been told by his employer that workers' compensation benefits were secured through The Hartford, my office reached out to The Hartford to inquire as to the status of those benefits. The Hartford, having been made aware of this injury, confirmed that they do have a workers' compensation policy with the employer in effect for its employees on the date in question. However, they claim that this coverage does not extend to injuries sustained by Matosantos employees while working in New Hampshire. (Please see attached a copy of this statement by The Hartford.) My subsequent request of The Hartford for evidence to support its legal conclusion has been met with silence.

Attached is a formal notice of accidental injury that is copied to The Hartford and the employer. Because we already know that The Hartford is taking the position that there is no coverage in this case, I would ask that the attached notice be construed as a denial and a hearing promptly scheduled in response.

It is the claimant's position that The Hartford is the responsible party to pay for Mr. Vasquez's workers' compensation benefits. To the extent that the active policy in question may contain geographic exclusions, that defense is available only to the employer, and is inapplicable to the claimant. LARSON'S WORKERS' COMPENSATION, §150.02[2]. In other words, if the employer has

failed to accurately describe to its carrier the nature of travel its employees routinely engage in so as to appropriately protect them under the policy, that omission may give rise to claims between the carrier and its insured, but does not supersede the carrier's statutory obligations to the claimant, or defeat an injured worker's rights under RSA 281-A:5-f.

Alternatively, and in the event the Department were to find a lack of coverage, the employer should be noticed as a party and ordered to pay benefits directly pursuant to RSA 281-A:7,III.

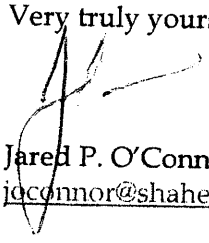
Given the nature of the claimant's injury, I do not anticipate that a genuine dispute exists under RSA 281-A:2, nor (given the severe nature of the claimant's injuries: he is still recuperating, and remains in a walker) that he remains temporarily totally disabled. Rather, the dispute appears to center on the identity of the party responsible for payment of the claimant's workers compensation benefits. Of course, the claimant reserves the right to add RSA 281-A:48 or other issues as necessary as the claim develops.

Accordingly, and in light of the foregoing, the claimant requests that the Labor Department schedule at its earliest convenience a hearing on the issues of **RSA 281-A:5-f, and A:7, with both The Hartford and the employer separately noticed as parties of interest.**

The medical records in this case are substantial, and will be filed under separate cover.

Thank you for your anticipated attention in this matter. A copy of this hearing request has been sent to The Hartford, and to Matosantos International Corporation.

Very truly yours,



Jared P. O'Connor
joconnor@shaheengordon.com

Enclosure
cc: Javier Vasquez
Deborah Torkelson, The Hartford (via U.S. Mail and facsimile: 888-459-1618)
Matosantos International Corporation (via U.S. Mail and facsimile: 787-793-0454)

LAB 500

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
SPAULDING BUILDING
95 PLEASANT STREET
CONCORD, NEW HAMPSHIRE 03301

NOTICE OF ACCIDENTAL INJURY OR OCCUPATIONAL DISEASE 8aWCA

(Please print or type)

To Matosantos International Corporation Phone # (787) 793-6900
(Name of **Employer**)

13920 Alvarez Road, Jacksonville FL 32218
(Business Name and Address)

IN ACCORDANCE WITH RSA 281-A:20, This is to notify you that an injury occurred.

Javier Vasquez SS # 267-37-4770
(Name of Injured **Employee**)

6410 Ave Isla Verde, Apt. 7-1, Carolina, PR 00979 Daytime Phone # 781-661-9100
(Address of Injured Employee)

5/31/2018
(Date of Accident or First Treatment)

Laconia, NH
(Place Accident Happened)

Describe your injury or disease, and how it happened. Identify the body part(s) affected.

While driving on a business trip, another car crossed the center line into my lane, causing a head-on collision. I suffered multiple fractures to my lower extremities, fractured vertebrae and loss of consciousness, among other significant injuries.

I have been unable to work since my injury. ☑ Yes ☐ No

I have incurred the following medical bills.

Lakes Regional	May 2018	~$20,000
Name of Doctor	Dates of Service	Amount
DHMC	May-June 2018	~$450,000
Name of Hospital	Dates of Service	Amount
Mt. Ascutney	June-July 2018	unknown
Other	Dates of Service	Amount

(Employer's Signature)

(Date)

(Employee's Signature)

3/21/2019
(Date)

This form can be returned to DOL with or without employer's signature.

NOTICE TO EMPLOYER

YOU MUST FILE AN EMPLOYER'S FIRST REPORT, Form No. 8WC, WITH THE LABOR COMMISSIONER AND THE NEAREST CLAIMS OFFICE OF YOUR INSURANCE CARRIER, AS SOON AS POSSIBLE AFTER ACQUIRING KNOWLEDGE OF THE OCCURRENCE OF AN OCCUPATIONAL INJURY OR DISEASE TO ONE OF YOUR EMPLOYEES OR UPON PRESENTATION OF THIS NOTICE BY HIM, BUT NO LATER THAN FIVE DAYS THEREAFTER. FAILURE TO COMPLY CARRIES AN AUTOMATIC CIVIL PENALTY OF UP TO $2500. (RSA 281-A:53)

8aWCA (7/2014)

The Hartford
FAX COVER PAGE

To:

From: The Hartford

Date: 02/12/19 08:52:00 AM

Re: Re; Javier Vasquez [HIGHLY RESTRICTED]

Total Pages: 2 including cover page

Notes:

Attorney O'Connor,

Per our conversation regarding the workers compensation claim for Javier Vasquez. The Hartford does not have coverage for New Hampshire for the insured for the date of loss. The claim is closed as there is no coverage and the insured is aware of the fact that this claim was denied based on no coverage.

Thank you,
Deb

Debbie (Sanchioni) Torkelson
Claims Consultant
Workers' Compensation Claims
Eastern WC Claim Center

The Hartford Financial Services Group, Inc.
Mailing Address: P.O. Box 14773
Lexington, KY 40512
W: 315-233-1165
F: 888-459-1629
www.thehartford.com
www.facebook.com/thehartford

Business Insurance
Employee Benefits
Auto
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NOTICE OF HEARING

Hearing Scheduled Pursuant to RSA 281-A Workers' Compensation Statute

The State of New Hampshire
Department of Labor – Workers' Compensation
95 Pleasant Street
Concord, New Hampshire 03301
Telephone: (603) 271-3176

May 6, 2019

JAVIER VASQUEZ
6410 AVE ISIA VERDE #7-1
CAROLINA PR 00979

PLEASE SEE INSTRUCTIONS ON REVERSE SIDE

HEARING INFORMATION

DATE: 06/18/2019
TIME: 01:00 pm to 03:00 pm
PLACE: HUGH J GALLEN
STATE OFFICE PARK
SPAULDING BUILDING
95 PLEASANT STREET
CONCORD, NH 03301

CLAIMANT: VASQUEZ, JAVIER
CASE: 000086829

Employer
MATOSANTOS INTERNATIONAL CORP

Date of Injury
05/31/2018

Hearing Requested by
CLAIMANT

Date Requested
03/26/2019

Issue(s):

RSA 281-A:2XI,XIII Causal Relationship of Injury to Employment
RSA 281-A:5,7III Employer Coverage Status
RSA 281-A:23 Medical, Hospital & Remedial Care
RSA 281-A:48 Review of Eligibility for Compensation

Hearing Notice Copies sent to:

JAVIER VASQUEZ
HARTFORD
MATOSANTOS INTERNATIONAL CORP
ATTY JARED O'CONNOR
ATTY TRACY MCGRAW

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

JAVIER VASQUEZ
v.
MATOSANTOS INTERNATIONAL CORP
CASE #86829

DECISION OF THE HEARING OFFICER

APPEARANCES: Attorney Jared O'Connor on behalf of Javier Vasquez, claimant.
Attorney Tracy McGraw on behalf of The Hartford, solely for the issue of coverage.
The Employer, Matosantos International Corporation—did not appear.

NATURE OF DISPUTE: RSA 281-A: 2XI, XIII - Causal Relationship of Injury to Employment.
RSA 281-A: 5 - Securing Payment of Compensation.
RSA 281-A: 7III – Employer Coverage Status.
RSA 281-A: 23 - Medical, Hospital and Remedial Care.
RSA 281-A: 48 - Review of Eligibility for Compensation.

DATE OF INJURY: May 31, 2018

DATE OF HEARING: June 18, 2019

BACKGROUND AND STATEMENT OF THE ISSUES

A Notice of Accidental Injury or Occupational Disease received on March 25, 2019 provides a date of injury of May 31, 2018. The injury is described as multiple fractures of the lower extremities due to a motor vehicle accident. The Hartford has denied that they had workers' compensation insurance coverage in place for this employer in New Hampshire on the date of the accident; therefore, The Hartford has provided neither a First Report of Injury nor a Memo of Denial. The claimant requested this hearing and is asking the Department to determine whether or not The Hartford had active coverage for this employer on the date of injury. This hearing was scheduled accordingly.

The claimant's hearing request was received by the Department on March 26, 2019. A formal hearing was held at the New Hampshire Department of Labor in Concord, New Hampshire on June 18, 2019. The claimant, Javier Vasquez, participated telephonically. The employer, Matosantos International Corporation did not appear. The hearing notice was sent to the employer via first class mail and also via certified mail. The certified mail was unclaimed. The first class mail was not returned to the Department; the employer is found to have had proper notice of the scheduled hearing. After waiting the 15 minutes as required by the administrative rules, the hearing proceeded in the employer's absence and Attorney O'Connor provided an Offer of Proof with respect to the issues of RSA 281-A: 2XI, XIII, :23, and :48.

With respect to the issues of RSA 281-A:5 - Securing Payment of Compensation and RSA 281-A:7 III- Employer Coverage Status, Attorney O'Connor and Attorney McGraw were asked to submit briefs outlining their client's arguments and legal support for their positions. The record was held open through July 19, 2019 to allow for these submissions which were received by each party timely.

FINDINGS OF FACT

The claimant was hired by Matosantos International Corporation on or about July 2014 in a retail sales position. The claimant supervised Compote Verde Frozen Fruit and served as an auditor. The employer has a contract with Wal-Mart which dictates the amount of shelving and advertising space the products get and how much inventory is readily available. The claimant is the vice president of Matosantos' South East region and spends most of his work time on the road, traveling throughout his assigned territory conducting audits for contract compliance. That territory includes South Carolina, North Carolina, Georgia, Florida, Alabama, Louisiana and Mississippi, though his travels are not limited to these states.

While auditing the Wal-Mart stores, the claimant spends time in the freezers, up on ladders, and ensures perfect compliance before moving on to the next store.

From April 1-April 15, 2018, the claimant was in Mississippi. He then drove to Jamaica, Queens to audit Price Rite stores in New Jersey. On April 28, 2018 he moved on to audit stores in Rhode Island, Connecticut, Vermont, Maine and New Hampshire. He performed audits in New Hampshire through May 31, 2018. After leaving the final store in New Hampshire, the claimant was driving to his hotel in the Lakes Region when he was struck head-on by a drunk driver in Laconia.

The claimant was transported from the scene to Lakes Region General Hospital where his primary initial diagnosis was left femur fracture. The records

at page 20 show gross deformities of both lower extremities. A CT showed transverse process fractures at L2-L4 and at L5. His left lung collapsed and he was found to have a cervical spine fracture. The claimant was med-flighted to Dartmouth-Hitchcock Medical Center (D-HMC) where he remained in the ICU for weeks. The claimant was unconscious for two weeks following the accident and has no memory of the accident.

The claimant was discharged from D-HMC on June 28, 2018 and went to Mt. Ascutney Rehab in Vermont where he was able to ambulate with a wheelchair. He underwent rehabilitation through the end of August when he was discharged in a walking boot. He drove back to Florida and then flew home to Puerto Rico where he continues to reside. He continues to have difficulty with his right ankle and receives lymphatic therapy weekly. He remains unable to work.

The claimant had visited the New Hampshire stores twice before May 2018; once in 2016 and again in 2017. He was in New Hampshire to perform audits at Shaw's.

An evidentiary medical packet was provided for review in addition to the police report detailing the accident and recent photographs showing, among other things, the current condition of the claimant's right ankle.

DISCUSSION AND CONCLUSIONS

The claimant has the burden of showing that his injuries arose out of and in the course of his employment.

Based on the Offer of Proof and the evidence provided, the evidence supports that the claimant sustained significant injuries resulting from a May 31, 2018 car accident that arose out of and in the course of his employment. No evidence was presented to controvert this. There is also no controverting evidence to support that the claimant's ongoing disability is not due to the injuries sustained as a result of the May 31, 2018 work injury. The evidence supports that the work injuries are the basis of the ongoing disability.

With respect to the remaining issues, ***RSA 281-A:5 -Securing Payment of Compensation***, reads in relevant part, – 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.

II. By insuring and keeping insured the payment of compensation to domestic employees with a company providing workers' compensation insurance in accordance with RSA 281-A:6.

III. By furnishing to the commissioner satisfactory proof of financial ability to pay compensation directly to an employee when due in the amounts and manner as provided in this chapter.

Lab Rule 304.04 articulates how the commissioner prescribes coverage to be reported to the State of New Hampshire. Lab 304.04 states as follows:

> 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

Lab rule 303.06 provides that "coverage" means New Hampshire workers' compensation insurance.

With respect to RSA 281-A:5, it is found that a violation has occurred in such that the employer was conducting business in the State of New Hampshire with at least one employee on May 31, 2018 without having secured and properly reported active workers' compensation insurance coverage for New Hampshire. Even if the employer had obtained workers' compensation insurance coverage for May 31, 2018, no evidence was presented to indicate that a carrier had properly reported coverage for this employer for this date of injury.

Finally, the alleged insurance carrier, The Hartford, is contending that they did not provide coverage for the employer in New Hampshire at the time of the claimant's injury. The claimant disagrees and is asking the Department to interpret a contract between the employer and The Hartford and require The Hartford to indemnify the employer in this matter. The Department finds there is no evidence presented by the claimant and/or the employer to allow the Department to make orders pertaining to the obligation of The Hartford in this matter.

Fundamentally, the Department is allowed to adjudicate compensation benefits/responsibilities of an employer or the employer's insurance carrier. An insurance carrier is requires to comply with Lab 304.04. There is no compliance in this case. The Hartford is not deemed a carrier under the regulations of the State of New Hampshire. Although the claimant requests that the Department review the contract of insurance between the employer and The Hartford to ascertain whether the contract provides coverage in New Hampshire, that request is beyond the jurisdictional powers of this Department. While 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. That determination lies in a court of equity that does possess the jurisdiction to provide a declaratory judgment on the matter.

As a violation of RSA 281-A: 5 has found to have occurred, this matter will be referred to the Director of Workers' Compensation for review of potential civil penalty for the employer failing to maintain workers' compensation insurance.

DECISION

Based on the evidence presented, it is determined that the claimant proved by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment on May 31, 2018.

The claimant is awarded temporary total disability benefits from May 31, 2018 and on-going. Pursuant to RSA 281-A: 7III, ***the claimant shall submit a wage schedule to the Department of Labor no later than 14 days from the date of this Decision***. Upon receipt of the wage schedule, the Department shall fix the compensation rate and order the employer to pay the compensation no later than 10 days after receiving notice of the amount of compensation as fixed and determined by the commissioner.

As causation was the threshold issue and all denials were based on causation, there is no finding on RSA 281-A: 23 at this time. In accordance with this decision the medical bills shall be re-evaluated and accepted and/or denied in accordance with the law.

Legal counsel for the claimant shall submit for approval all fees charged for professional legal services rendered in connection with this claim pursuant to RSA 281-A: 44.

In accordance with RSA 281-A: 43 and Lab Rule 203.04, should the employer be aggrieved by the outcome of this Decision, the employer may request reconsideration by filing a written request with the Director of Workers'

Compensation within thirty (30) days of the date of the Decision. That request must (1) show cause as to the reason(s) for the failure to attend the hearing and (2) petition for a re-hearing of the original hearing request. Upon receipt of such a request for re-hearing, the Director of Workers' Compensation shall determine whether or not a re-hearing shall be granted. This Decision will be within the Director's sole discretion.

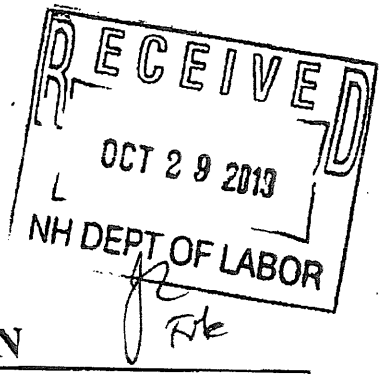
August 6, 2019
Date of Decision

Tahra White
Tahra White, Hearing Officer

TW/cb

cc: Edward Sisson, Esq.
Director of Workers' Compensation
New Hampshire Department of Labor
95 Pleasant Street
Concord, NH 03301

LAB 500



THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NH 03301

MEMO OF PAYMENT OF DISABILITY COMPENSATION

File

You are required to pay total disability compensation and to file, with the department, copy to employee, memorandum of payment in accordance with RSA 281-A:40, 41 and 42 **as soon as possible after date of knowledge of disability of four or more days, but no later than seven days thereafter.** Filing shall also be made upon making provisional payment, upon adjusting such payment, upon making last payment, and upon making payment resulting from departmental hearing. **Failure to pay and to file memorandum promptly, in the absence of a legitimate denial of benefit, shall render a carrier liable to a civil penalty of up to $2,500.**

Employee Javier Vasquez (Name) 267-37-4770 (Soc. Sec. No.)

Employer Matosantos International Corporation (Name) 46-4354174 (Federal Identification No.)

Carrier _____ (Name) _____ (Carrier Number Assigned by DOL)

Date of: DF

Injury	Disability/Recurrence*	First or Sup. Rep. R'cd	First Payment	Last Payment
5/31/2018	5/31/2018	5/31/2018	10/31/2019	

*Recurrence refers to subsequent periods of disability

1

Compensation at the rate of $1,386.92 per week
Beginning 5/31/2018 Avg. WKly. Wage of $2,311.53

Check box if compensation payment results from department hearing decision ☐
Chck box if memo indicating provision payment already filed ☐
Check box if memo indicating adjustment in total disability – RSA 281-A:29 ☐
SEE ATTACHED WAGE SCHEDULE, EXCEPT IF DISABILITY OF LESS THAN FOURTEEN DAYS

2

Missing Wage Schedule

When Expected _____

Provisional Payment of $ _____ Subject to Later Adjustment

3

Total Compensation Paid $ 102,632.08 (74 wks retro) Ending Date *TTD ongoing from 10/31/19 per Atty Agreement 11

Date of Return to Work N/A Earning after R.T.W. _____

Name of Employer (New or same) _____

_____ (Date) _____ (Signature)

Dept. Approval Accepted by DOL 11/4/2019
Pat Goulet

9 WCA (6/1994)

Jared P. O'Connor
Attorney at Law

Admitted in NH

October 8, 2019

Via email only
Edward.Sisson@dol.nh.gov
tmcgraw@gssp-lawyers.com
rwh@rathlaw.com

Edward Sisson, Esq.
NH Department of Labor
Workers' Compensation Div.
95 Pleasant Street
Concord, NH 03301-3836

Re: Javier Vasquez v. Matosantos International Corporation
Date of Injury: 5/31/18
DOL Case No. 86829

Claimant's Notice of No Objection,
Withdrawal of Appeal and Stipulation re: Rehearing

Dear Director Sisson:

As you know, a hearing in the above-captioned matter was held on 6/18/19 at which time the employer failed to appear. The employer was defaulted and an order entered on 8/6/19.

Subsequently, the employer appeared and timely filed a petition to strike the default on 9/3/19. The Department granted the employer's motion on 9/13/19 and a new notice of hearing issued, rescheduling the case for hearing on 10/28/19.

In the interim, the Department granted the claimant's motion to enlarge time to file a motion for reconsideration by 10/4/19.

Upon further evaluation of the case and discussion with employer's counsel, the claimant has no objection to the rehearing proceeding as scheduled on 10/28/19. This would appear to make the claimant's appeal to the CAB of the 8/6/19 order moot, though claimant's counsel will file a formal notice of withdrawal under separate cover in the interest in completeness.

By agreement of claimant's counsel and counsel for the employer, the hearing on 10/28/19 need only notice RSA 281-A:5 and A:7. The employer and claimant agree that the Department's order on 8/6/19 may stand as to A:2, A:23 and A:48.

That is, there is no dispute that the claimant sustained workers compensation injuries as described in that decision which leave him temporarily totally disabled; the issues to be reheard pertain only to the responsibility of The Hartford for Mr. Vasquez's worker's compensation benefits. No assent from the Hartford was sought regarding the above stipulation as to A:2, A:23 and A:48, as the Hartford has filed only a limited appearance for the purpose of contesting coverage.

Thank you for your attention. A copy of this notice and stipulation has been sent simultaneously to Attorney Tracy McGraw for the carrier and Attorney Richard Head for the employer.

Very truly yours,

Jared P. O'Connor
joconnor@shaheengordon.com

Enclosure
cc: Javier Vasquez
Tracy McGraw, Esq.
Richard Head, Esq.