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

REPLY BRIEF OF APPELLANT JAVIER VASQUEZ

Counsel for Javier Vasquez,
and oral argument by:

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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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I. The declaratory judgment statute does not provide an exclusive remedy; pointing out that contract interpretation is a matter of law does not prove otherwise.

In the Appellees' view, the coverage question in this case cannot be decided by the Department of Labor for two reasons: because RSA 281-A:43,I does not expressly authorize it, and because coverage disputes are the exclusive province of the judicial (contrasted with the administrative) system. This is wrong on both counts.

Regarding the Legislature's specific grant of jurisdiction to the Department of Labor in RSA 281-A;43,I to resolve 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", that language is broad enough, when appropriately liberally construed, to permit the ancillary determination of coverage sought here. Appellant's arguments on this point were set forth in detail at pages 24-37 of his brief and will not be rehashed here.

But as for the supposedly unique ability of the courts to interpret the law, both the carrier's and the Department of Labor's brief misread this court's perfectly ordinary observation that interpretation of policy language is "a question of law for this court to decide" as if it were a

declaration of subject matter jurisdiction. HARTFORD BRIEF at 32, DEP'T. OF LABOR BRIEF at 21. In reality, it is merely a uncontroversial description of the scope of judicial review. The court routinely employs this phrase in appeals from rulings on summary judgment to distinguish questions of law that it reviews de novo from the deference it affords to factual findings. See, e.g., Progressive Northern Ins. Co. v. Argonaut Ins. Co., 161 N.H. 778, 70 (2011), Pro Con Constr., Inc. v. Acadia Ins. Co., 147 N.H. 470, 472 (2002); Brouillard v. Prudential Property and Cas. Ins. Co., 141 N.H. 710, 711-12 (1997).

It should hardly need saying that administrative agencies are also perfectly free to decide questions of law—subject, of course, to the same judicial review. For the present appeal, one particularly pertinent example is Appeal of Cover, 168 N.H. 614 (2016). In Cover, the claimant challenged the authority of the Department of Labor to enforce its regulation which prohibited part-time workers from asserting a right to reinstatement under RSA 281-A:25-a. The carrier in that case argued that the Compensation Appeals Board did not have jurisdiction to rule on the controversy because the sole avenue for such a dispute was a declaratory judgment action in superior court as provided by RSA 541-A:24. As with the general declaratory judgment statute under RSA 491:22, this too is framed in permissive

language: “The validity or applicability of a rule may be determined in an action for declaratory judgment in the Merrimack county superior court…” Id.

The Cover court held that this language described an alternative procedure, not an exclusive one. “[T]he word “may” in the statute indicates that a declaratory judgment action is *one possible mechanism* by which Cover could have challenged Lab 504.05(b)(3)'s validity.” 168 N.H. at 618 (emphasis added). Accordingly, an administrative appeal to the Compensation Appeals Board was held to have been an appropriate, alternative procedure to a declaratory judgment action in Superior Court – a pure question of law that the Board was perfectly competent to entertain. This same logic and manner of statutory interpretation refutes the Appellee’s argument that declaratory judgment is the exclusive method to determine insurance coverage. See also Marcotte v. Timberlane/Hampstead Sch. Dist., 143 N.H. 331, 334 (1999) (“The statutory procedure, however, for obtaining a declaratory judgment does not impose a mandatory duty to use that procedure.”)

II. On the facts presented, judicial economy and the animating purpose of workers compensation law point toward an interpretation of RSA 281-A:43 that permits single-venue administrative resolution of all issues in dispute.

The Department of Labor's brief suggests that granting Mr. Vasquez the relief he seeks would "deluge the CAB" with coverage disputes and cause "unnecessary delays in [employees'] receiving compensation to which they are deemed entitled." DEP'T OF LABOR BRIEF at 21. But Mr. Vasquez does not argue that coverage disputes must be heard exclusively at the Department; only that the option of resolving such questions in a single forum should be available. That is particularly true in cases such as this one, where the injured worker was not receiving benefits of any kind and neither the insurer nor the employer had independently taken any action to clarify the issue of coverage – not ten months after Mr. Vasquez's accident in 2018, not immediately after the first Department of Labor decision establishing the work-related compensability of his claim in 2019, and not even after the Compensation Appeals Board's decision in 2020. It was not until April 16, 2021 that the employer first sought declaratory relief. HARTFORD BRIEF at 32 n.4.

Indeed, it is far from clear whether an injured worker, who *is not the insured* under a workers' compensation policy,

would even have standing to petition for declaratory judgment at all. The Hartford acknowledges as much, complaining that "Vasquez ignores the fact that he is not a party to the insurance contract." HARTFORD BRIEF at 32. In counsel's review of the cases cited by The Hartford or even brought generally under RSA 491:22, it is the carrier, Tech-Built 153, Inc. v. Virginia Surety Co., 153 N.H. 371 (2006), or the employer/sole proprietor/policyholder, King-Jennings v. Liberty Mutual Ins. Co., 144 N.H. 559 (1999) that initiates the petition for declaratory judgment. See also Gen. Linen Serv. Co. v. Charter Oak Fire Ins. Co., 951 F. Supp. 15, 17 (D.N.H. 1995)(*policyholders* regularly file declaratory judgment petitions to determine whether an insurance policy covers a given loss).

Rather than cause "unnecessary delay", as the Department of Labor predicts, DEP'T OF LABOR BRIEF at 21, Mr. Vasquez's reading of RSA 281-A:43,I simplifies and expedites the process for the rare injured worker who finds themselves in his unfortunate position. Which is faster: a single administrative hearing to resolve causal relationship of the claimant's injury, extent of his disability, appropriate rate of indemnity benefit, payment of medical bills *and* identification of the party responsible to pay him those benefits under the policy? Or that same hearing placed on hold or its outcome

rendered uncertain pending a separate declaratory judgment petition in Superior Court?

Eight months after Mr. Vasquez's catastrophic injury on May 31, 2018, wheelchair bound and still recuperating, neither his employer or its workers' compensation insurance carrier had accepted his claim for workers' compensation benefits. Not only was Mr. Vasquez not receiving benefits of any kind, neither his employer or its insurance carrier had even formally denied his claim in a way that would permit adjudication at the Department of Labor.

Mr. Vasquez needed an order, and quickly, requiring the payment of benefits. Because his work-related accident happened in New Hampshire and the bulk of his associated medical bills were incurred in New Hampshire, the New Hampshire Department of Labor was the natural authority to which he turned.

It was not until after Mr. Vasquez formally filed a notice of accidental injury with the New Hampshire Department of Labor that his employer's insurance carrier formally denied his claim. Although a declaratory judgment action is a tool to provide parties an opportunity "to determine their legal or equitable rights at an earlier stage than would be possible if the matter were pursued in other established forms of action", Craftsbury Co. v. Assurance Co. of Am., 149 N.H. 717, 719 (2003), *quoting* Radkay v. Confalone, 133 N.H. 294, 297

(1990), it was purely speculative prior to that first hearing in June 2019 whether Mr. Vasquez would qualify for workers' compensation benefits at all. Thus, no declaratory judgment petition could have been filed even if he, as a nonparty to the policy, attempted to be heard. Carlson v. Latvian Lutheran Exile Church of Bos. & Vicinity Patrons, Inc., 170 N.H. 299, 303–04 (2017), as modified on denial of reconsideration (Oct. 20, 2017)(holding that a purely speculative infringement of rights that a petitioner seeks to prevent is insufficient to confer standing under RSA 491:22).

Although the Department of Labor in October 2019 finally approved a Memorandum of Payment establishing the work-related nature of Mr. Vasquez's injury and his employer's payment of indemnity benefits in the first instance pending the outcome of a coverage determination, ADDENDUM TO VASQUEZ BRIEF at 26, there remains over $700,000 in medical expenses which are still unpaid more than two years later. JOINT STATEMENT OF FACTS, ¶15.

This state of affairs fails the promise of the workers' compensation law, the purpose of which "is to afford employees a sure remedy when they are injured on the job and to provide for a fair resolution of disputed claims". 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—or alternatively, for the reasons stated in Mr. Vasquez's opening brief at pages 39-49, remand with instructions to order the employer's insurance carrier to pay the full statutory benefits to which the claimant is entitled in the first instance while the policy dispute between the claimant's employer and insurer is litigated elsewhere.

Respectfully submitted by:

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

Dated: November 24, 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(11) STATEMENT OF COMPLIANCE

The within brief does not exceed 3,000 words exclusive of pages containing the table of contents, tables of citations, pertinent text of statutes and regulations, and any addendum. (Approximately 2,500 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: November 24, 2021 By: /s/*Jared P. O'Connor*

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