

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

DOCKET NO. 2021-0071 (0072)

APPEAL OF JAVIER VASQUEZ

**On Appeal from the Compensation Appeals Board of the State of New
Hampshire Department of Labor Pursuant to RSA § 541:6**

**BRIEF OF APPELLANT
MATOSANTOS INTERNATIONAL CORPORATION**

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

Did the Compensation Appeals Board err in determining that the Compensation Appeals Board and the Department of Labor do not have jurisdiction to determine a dispute concerning coverage under a workers' compensation insurance policy (the "Policy") between Matosantos International Corporation ("MIC") and The Hartford Casualty Insurance Company ("The Hartford")?

Did the Compensation Appeals Board err in affirming the finding of the Department of Labor that MIC violated of RSA § 281-A:5 and in finding that MIC was subject to penalties under RSA § 281-A:7. I(a)(1), despite not reviewing the Policy to determine whether it provided coverage?

These questions were preserved by MIC's Supplemental Memorandum on Jurisdiction submitted to the Compensation Appeals Board, appended at App. 38-43.¹

¹ Citations to the record refer to the Appendix filed with this brief, using the abbreviation "App." followed by the page or page range of the Appendix.

LAWS AND RULES

New Hampshire Constitution, Part I, Article 15 [Right of Accused.] No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

RSA 281-A:5 Securing Payment of Compensation

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

I. By insuring and keeping insured the payment of such compensation with

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

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.

281-A:43(I) 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.... 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.

[As this provision is lengthy, the remainder of its text is appended at App. 96-97].

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

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

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

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

II. In addition to the assessment of civil penalties, the commissioner may also proceed in the superior court to restrain and prohibit an employer subject to this chapter from conducting business in this state for so long as the employer fails to comply with the provisions of RSA 281-A:5 or any other provision of this chapter or for failure to comply with orders issued by the department under this chapter. If the commissioner seeks a

temporary injunction pending a hearing on the merits, the superior court shall issue such an injunction ex parte upon prima facie evidence offered in support of the petition.

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

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

V. Any agency or political subdivision of the state, before awarding any

contract involving labor to a person who is an employer subject to this chapter, shall require that person to supply satisfactory proof that he or she has secured payment of compensation in accordance with the provisions of RSA 281-A:5 in connection with activities which the person proposes to undertake pursuant to the contract.

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

Department of Labor LAB Rule 304.01- Employers.

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

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

(c) When coverage is available only through the assigned risk plan as discussed in Lab 305, the employer's application for coverage shall constitute a valid application only when accompanied by the required premium payment.

(d) The employer shall demonstrate compliance with the coverage provisions of the statute by posting the “Notice of Compliance” form WCP-1 (4/2014), contained in appendix II in a conspicuous location available to all employees in accordance to RSA 281-A:4.

(e) Employers who have not already done so shall apply immediately to the US Internal Revenue Service for an employer identification number and supply the same to the agent, carrier as well as department of labor on request.

Department of Labor LAB Rule 304.04- Carriers.

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

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

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

- (1) Bind coverage;
- (2) Write new policies;
- (3) Make notice of change of Federal Identification Number;
- (4) Add or delete locations;
- (5) Add endorsements;
- (6) Terminate and reinstate coverage; or
- (7) Any other relevant changes.

(d) The carrier shall complete and file a paper “Exclusion of Executive Officers or Members” form 6WCex (7/2015) contained in appendix II, with

the Department of Labor when applicable as prescribed by Lab 306 and Lab 307.

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

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

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

Department of Labor LAB Rule 306.01- Filing Notice of Coverage.

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

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

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

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

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

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

STATEMENT OF THE CASE

On March 26, 2019, Javier Vasquez requested a hearing before the Department of Labor (the “DOL”) to, among other things, determine a causal relationship of an injury he suffered to his employment, secure payment of workers’ compensation benefits, determine employer coverage status, and review his eligibility for compensation. *See* Agreed-upon Statement of Facts dated August 9, 2021 filed with the Court (“SOF”) ¶ 10; App. 1, 27-28. Following the June 2019 hearing, Mr. Vasquez and his former employer, Matosantos International Corporation (“MIC”) stipulated that there is no dispute that Mr. Vasquez sustained workers’ compensation injuries, and the only issues that remained pertained to the responsibility of MIC’s insurance carrier, The Hartford, for Mr. Vasquez’s workers’ compensation benefits. SOF ¶¶ 12-14; App. 33-34.

On November 19, 2019, a further hearing was held before the Department of Labor (“DOL”) on the issues of RSA 281-A:5- Securing Payment of Compensation and RSA 281-A: 7 III – Employer Coverage Status. SOF ¶ 16; App. 1. A decision was issued by the Hearing Officer on January 3, 2020. App. 1-6. The Hearing Officer found, among other things, that MIC “did not meet their burden in showing that they had workers

compensation coverage” and that a “violation of RSA 281-A:5” occurred. App. 6. The Hearing Officer also found that it was “beyond the jurisdictional powers of this Department” to “review the contract of insurance between [MIC] and The Hartford to ascertain whether the contract provides coverage in New Hampshire.” App. 6. Notwithstanding that ruling, the Hearing Officer was in possession of a copy of the Policy and referred to portions of the Policy in her decision. App. 2-3.

MIC and Mr. Vasquez appealed the Hearing Officer’s decision to the Compensation Appeals Board (“CAB”), which held a hearing on August 25, 2020 on the same two issues. SOF ¶ 17; App. 8. Prior to the hearing, the CAB requested briefing on the issue of the CAB’s jurisdiction to “decide whether[, pursuant to] the terms of the worker’s compensation and employer’s liability policy issued by The Hartford, MIC is entitled to coverage for the claim made” by Mr. Vazquez. SOF ¶ 19; App. 35-36. In response, MIC submitted a brief on the issue of the CAB’s jurisdiction. App. 37-43. Following the hearing, the CAB issued a decision which found, among other things, that, “as a matter of law” it does not have jurisdiction to interpret a workers’ compensation policy. SOF ¶ 21; App. 14. The CAB did not address the evidence presented to it, including the

Policy, and did not address the question of whether coverage existed under the Policy as claimed by MIC and Mr. Vasquez. SOF ¶ 20. The CAB then found that MIC had “failed to prove it had a valid workers’ compensation policy in effect that provided coverage to [Mr. Vasquez] to cover the injuries he suffered on May 31, 2018” and noted that “[a]bsent further evidence of coverage, the Director of the Workers Compensation Division may take further action against [MIC] as appropriate under the statute.” SOF ¶ 22; App. 15.

On December 28, 2020, MIC requested a rehearing from the CAB. App. 16-19. MIC’s request for a rehearing was denied on January 28, 2021. App. 22-26. In its denial, the CAB ruled that its decision (holding that it lacks jurisdiction to decide whether coverage exists under the Policy while ruling that MIC had failed to prove it had a valid policy in effect) was not inherently contradictory because neither the NCCI nor The Hartford filed a completed Notice of Workers’ Compensation Coverage (Form 6WC) with the DOL. App. 22-23.

STATEMENT OF THE FACTS

In May of 2018, Mr. Vasquez was employed by MIC as an auditor. SOF ¶¶ 1, 4. Mr. Vasquez's employment duties with MIC included travelling to stores that sold products distributed by MIC's clients and auditing the stores' compliance with contracts between the stores and MIC's clients. *Id.* at ¶ 3; App. 2. On May 24, 2018, Mr. Vasquez arrived in New Hampshire to perform his duties at stores located in New Hampshire. SOF ¶ 4; App. 2. That was the first time any employee of MIC entered New Hampshire to perform work in 2018. App. 2. On May 31, 2018, Mr. Vasquez was driving from a store he audited in New Hampshire when he was struck head on by a drunk driver and sustained significant injuries. SOF at ¶¶ 4-5; App. 2. Mr. Vasquez sustained serious injuries in the accident. SOF ¶¶ 5-6.

At the time of the accident, MIC held a workers compensation insurance policy with The Hartford. SOF ¶ 7. Part One of the Policy (workers compensation insurance) applies to the Workers Compensation Law of all states listed in Item 3.A of the Information Page and covers all of MIC's workplaces in Item 3.A of the Information Page. App. 46, 50. "Workers Compensation Law" under the Policy is defined as "the workers

or workmen's compensation law and occupational disease law of each state or territory named in Item 3.A of the Information Page." App. 50.

The Policy provides that The Hartford will pay promptly when due the benefits required of MIC by the Workers Compensation Law. *Id.* Part Three of the Policy (Other States Insurance) applies to all states except North Dakota, Ohio, Washington, Wyoming, the US Territories, Florida and New York, as provided in Item 3.C of the Information Page. App. 46, 53. Accordingly, Part Three of the Policy applies to New Hampshire. App. 46, 53. Pursuant to Part Three of the Policy, if MIC begins work in any of the states included by Item 3.C of the Information Page (such as New Hampshire) after the effective date of the policy (January 20, 2018) and is not insured or is not self-insured for such work, all provisions of the Policy will apply as though that state were listed in Item 3.A of the Information Page. App. 46, 53. The Policy provides: "Tell us [The Hartford] at once if you [MIC] begin work in any state listed in Item 3.C of the Information Page." App. 54.

MIC began work in New Hampshire after the effective date of the policy, and The Hartford was promptly notified that MIC had work in New Hampshire. *See* SOF ¶ 8; App. 2. The Hartford nonetheless denied Mr.

Vasquez's claim for workers' compensation benefits under the Policy on the basis that The Hartford claims that the Policy does not cover losses to MIC in the State of New Hampshire. SOF ¶¶ 8-9; App. 2-3.

SUMMARY OF THE ARGUMENT

The DOL and CAB erred in ruling that they lack jurisdiction under the relevant statutory scheme to consider the terms of the Policy in determining responsibility for workers' compensation benefits under New Hampshire law. The DOL and CAB further erred in ruling that the DOL can find MIC in violation of New Hampshire's requirement that it secure workers' compensation insurance, and subject MIC to penalties and potential personal liability, without reviewing the Policy. If these findings and rulings are not errors under the statutory scheme, then the scheme is unconstitutional as violative of MIC's procedural due process rights. The findings and rulings of the CAB should be reversed.

Under RSA 281-A:5, the DOL must determine whether MIC secured payment of compensation by "insuring and keeping insured the payment of such compensation with a company licensed to write workers' compensation insurance in this state." MIC obtained a workers' compensation policy from The Hartford in order to secure workers' compensation coverage in the states where MIC's employees worked, which included New Hampshire. The DOL and CAB have ruled that MIC has violated RSA 281-A:5, but they refuse to consider the Policy.

Accordingly, the CAB's determination as to MIC's compliance is based solely on The Hartford's stated position that no coverage exists under the Policy. If the DOL and CAB were correct that they cannot consider the terms of the Policy, then the DOL could not fulfill its statutory duty to determine whether employers secured workers' compensation coverage in this state.

Similarly, RSA 281-A:43(I)(a) provides that "[i]n a controversy as to the responsibility of an employer or the employer's insurance carrier for the payment of compensation and other benefits under this chapter, any party at interest may petition the commissioner in writing for a hearing and award." The CAB's determination that this provision is not sufficient to confer jurisdiction to consider the Policy is erroneous as a matter of law.

Under RSA 281-A:7, the DOL is authorized to assess penalties against employers, and potentially individuals with decision-making authority within those organizations, who are determined to have violated RSA 281-A:5. The CAB's interpretation of the statutory scheme allows the DOL to do so without considering the terms of a workers' compensation policy secured by an employer, and allows the DOL to base assessment of civil penalties and personal liability solely on an insurance company's self-

serving interpretation of a policy. Basic considerations of due process require the DOL to evaluate the policy prior to assessing such penalties and liabilities.

This case demonstrates a fundamental gap in the DOL's interpretation of the regulatory scheme pursuant to which it determines issues surrounding workers' compensation disputes. The CAB and DOL have both stated that other tribunals have jurisdiction to resolve coverage disputes. However, the DOL has the authority to determine whether a violation of the workers' compensation statute has occurred, and only the DOL has authority to assess civil penalties based on such violations. Accordingly, the DOL must, as a matter of law, have jurisdiction to determine whether a policy provides coverage. A finding for MIC in this appeal would protect MIC, its employees, and other employers and employees in this state from substantial and irreparable injury that arises from a finding of no coverage and a violation of the New Hampshire workers' compensation statute without consideration of a workers' compensation policy secured to protect the workers of this State.

STANDARD OF REVIEW

This Court reviews the legal determinations of the CAB *de novo*. *See Appeal of Doody*, 172 N.H. 802, 805 (2020). In doing so, it should “construe the Workers Compensation Law liberally to give the broadest reasonable effect to its remedial purpose.” *See id.* (citing *Appeal of Kelly*, 167 N.H. 489, 491 (2015)). Accordingly, “all doubts in statutory interpretation” should be resolved in a manner that would most favor the injured worker. *Id.* (citing *Appeal of Lalime*, 141 N.H. 534, 537-38 (1996)).

ARGUMENT

I. The New Hampshire workers' compensation statutory scheme requires that the DOL and CAB determine whether the Policy provides coverage for benefits due to Mr. Vasquez under New Hampshire law.

The reasoning offered by the CAB for its lack of jurisdiction to review the Policy in this case is circular and contrary to the plain language of the statutory scheme governing workers' compensation disputes at the DOL. This scheme requires, as a matter of law and basic statutory interpretation, that the DOL and CAB review and interpret terms of insurance policies secured by employers if they are going to find violations and assess penalties, as they have or apparently intend to do in this case.

As relevant to this case, the statutory scheme begins with RSA 281-A:5, which requires MIC to secure the payment of compensation “[b]y insuring and keeping insured the payment of such compensation with a company licensed to write workers’ compensation insurance in this state....” It continues with RSA 281-A:7, I(a)(1) which provides that an employer (and any individual responsible for the employer’s decisions) may be assessed civil penalties for failing “to comply with the provisions of RSA 281-A:5 by not securing payment of compensation.” Finally, RSA § 281-A:43(I) provides that “[i]n a controversy as to the responsibility of an employer or the employer’s insurance carrier for the payment of compensation under this chapter, any party at interest may petition the commissioner in writing for a hearing and award.” That section goes on to provide that “the person conducting the hearing shall give full consideration

to all the evidence presented” prior to “determin[ing] the merits of the matter.”

In order to give effect to this statutory scheme, it is necessary that the DOL and CAB review the terms of an insurance policy secured by an employer. This Court is the final arbiter of the legislature’s intent, and it should consider the plain meaning of the statute as a whole in order to give effect to that intent. *See In re Malouin*, 155 N.H. 545, 547, 926 A.2d 295, 297 (2007) (Court should “keep in mind the intent of the legislation, which is determined by examining construction of the statute as a whole, and not simply by examining isolated words and phrases found therein”).

Here, the intent is clear: the legislature acted to protect the workers of this state by requiring employers to secure insurance to cover injuries to their employees. Where disputes arise as to the responsibility of the employer or the carrier for benefits, the DOL (and CAB on appeal) are tasked with considering all of the evidence presented and reaching a determination. *See RSA 281-A:43(I)*. A workers’ compensation insurance policy secured by an employer is certainly relevant evidence to consider in determining a “controversy as to the responsibility of an employer or the employer’s insurance carrier for the payment of” workers’ compensation benefits. *See id.* The legislature cannot have intended to grant to the DOL the authority to resolve these disputes while depriving it of the ability to consider (perhaps) the most important piece of evidence to that dispute. *See Petition of State of N.H. (State v. Milner)*, 159 N.H. 456, 457 (2009) (“We must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words”).

The rulings of the DOL and CAB do not comport with the plain language or legislative intent of the statute as a whole. They determine that MIC violated RSA 281-A:5 while determining that they could not review the terms of the Policy. The Wisconsin Supreme Court in *NW Cas. & Sur. Co. v. Doud*, articulated the reasons that administrative agency which is tasked with protecting the employees of the state by requiring workers' compensation coverage should have jurisdiction to interpret the insurance contract and render a decision on liability:

It will be seen: (1) The employer was required to carry insurance under the Compensation Act. This compulsory insurance is required as a part of the state's public policy, to protect the injured workmen against insolvency of their employers. (2) The insurance company consents to be bound by the Compensation Act when it writes insurance pursuant thereto. (3) As a further public policy to protect the injured workmen, the statute requires every policy so issued to cover all liability of the assured under compensation. (4) In any dispute or controversy before the commission as to compensation, the insurance carrier is made a party. (5) The employee entitled to compensation has the right to recover in his own name, in the manner provided in the act, the liability of any insurance company which may have insured the liability for such compensation. The statutes plainly fix the liability of the insurance carrier beyond a doubt.

See 197 Wis. 237, 221 N.W. 766, 766 (1928); *see also* LARSON' WORKERS' COMPENSATION, *Inapplicability to Employee of Insurer's*

Defenses Against Employer, § 150.02[01], p. 150-12 to 150-13

(“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”).

In refusing to consider the terms of the Policy, the DOL and CAB are avoiding the responsibility placed upon them by the legislature, apparently on the basis that there are other jurisdictions available to MIC to have its claims heard. In certain cases, this approach could be disastrous for New Hampshire employees. For example, in the case of an absent or insolvent employer, an injured employee out of privity with the carrier may be left without a remedy if the carrier determines no coverage exists. *See, e.g. Appeal of Holloran*, 147 N.H. 177 (2001) (where insolvent employer was directly responsible for certain benefits, the Court ordered that a carrier pay those benefits); *Motorists Mut. Ins. Co. v. Terry*, 536 SW2d 472 (Ky 1976) (ruling that an injured worker, who may not have the means to fund declaratory judgment litigation, should be permitted a ruling on coverage from the state’s administrative agency).

In order to give effect to the workers’ compensation statute in this State, the DOL and the CAB must necessarily interpret the terms of a policy which an employer alleges covers the injuries at issue. The DOL cannot simply accept the view of the carrier and claim it has no jurisdiction to interpret the contract. By doing so, the DOL is, in fact, interpreting the Policy and authorizing The Hartford to deny coverage and subject the employer to indemnity and medical payments, penalties and fines. The rulings and findings of the DOL and CAB that they lack jurisdiction to

review the Policy in determining whether MIC fulfilled its statutory duties must be reversed.

II. If the DOL and CAB do not have jurisdiction to consider the Policy, then their findings that MIC violated RSA § 281-A:5 are unconstitutional, not authorized by the statute, and must be reversed.

The DOL and CAB's findings that MIC violated RSA 281-A:5 are not authorized under the statutory scheme and they infringe on MIC's procedural due process rights.

Without considering the terms of the Policy or the facts of this case, the DOL and CAB made multiple findings that MIC violated its obligation to secure coverage. First, a DOL Hearing Officer ruled that “[w]ith 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.” App. 30. At a subsequent hearing, a separate DOL Hearing Officer decided that, because MIC did not meet its burden in showing it had coverage, a violation of RSA 281-A:5 occurred and the matter would be referred to the director “for review of potential civil penalty for the employer failing to maintain workers’ compensation insurance.” App. 6. The CAB, for its part, determined that “[a]bsent further evidence of coverage, the Director of the Workers’ Compensation Division may take further action against [MIC] as appropriate under the statute.” App. 15. It further ruled that “[b]ecause neither the 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." App. 23.

These rulings and findings cannot stand. The DOL is not authorized under RSA 281-A:7 to find that an employer violated of RSA 281-A:5 for a failure to file evidence of coverage with the commissioner. While RSA 281-A:5 requires the employer to secure coverage and to file evidence of coverage with the commissioner, RSA 281-A:7 provides that penalties may be assessed against employers only if they violate RSA 281-A:5 "**by not securing payment of compensation.**" See RSA 281-A:7 (I)(a)(1) (emphasis added). Accordingly, the DOL may not assess penalties on an employer for failing to file evidence of coverage, and arguably may not even find that an employer violated RSA 281-A:5 by failing to file evidence of coverage.

This conclusion is supported by the very next subsection of the statute, which provides that "[a]n insurance carrier which insures an employer and fails to file with the commissioner a notice of coverage . . . shall be assessed a civil penalty of up to \$50 for each day of noncompliance." See RSA 281-A:7, I(b). Under the statutory scheme, it is the insurance carrier who faces consequences for failing to file evidence of coverage with the commissioner. See *id.* Moreover, the DOL LAB Rules indicate that the reporting of coverage to the NCCI and the commissioner is the responsibility of the carrier. See generally DOL LAB Rules 304.01, 306.01(b) (providing that the notices shall be completed and filed with the NCCI by or on behalf of **a carrier**, not an insured employer); DOL LAB

Rule 304.01 (imposing no similar requirement on an employer); DOL LAB Rule 306.01(b) (stating that “[i]nsufficient information provided to NCCI shall render the filing invalid but **shall not affect the insurance coverage of the employer**”) (emphasis added). The DOL’s and CAB’s rulings that MIC violated RSA 281-A:5 and is subject to penalties by failing to provide evidence that a notice of coverage was filed with the commissioner are erroneous as a matter of law under the statutory scheme and must be reversed.

Second, the DOL’s and CAB’s rulings cannot stand because a finding of no coverage and a referral to the “director” for assessment of penalties, without having reviewed the Policy, constitutes a deprivation of MIC’s property without due process of law.

“No subject shall be ... deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land” N.H. CONST. pt. I, art 15. To address procedural due process concerns, courts engage in a two-part analysis by, first, determining whether the claimant has an interest that entitles him to due process protection and, second, by determining what process is due. *Gantert v. City of Rochester*, 168 N.H. 640, 647 (2016).

MIC and its officers have significant interests which entitle them to adequate process here. RSA 281-A:7 provides that any employer who fails to secure the payment of compensation can be assessed civil penalties, and that corporate officers may be found guilty of a class B felony for purposeful failure to secure such payment. RSA 281-A:7(I), (VI). MIC’s interest in its property (both in the benefits it has been ordered to pay and in

the potential civil penalties it faces), and MIC's officers' interest in avoiding potential criminal prosecution are significant interests entitled to due process protections.

In order to determine the process due, courts balance “(1) the private interest that is affected; (2) the risk of erroneous deprivation of that interest through the procedure used and the probable value of any additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens brought about by additional procedural requirements.” *Appeal of Mullen*, 169 N.H. 392, 397 (2016). “The ultimate standard for judging a due process claim is the notion of fundamental fairness.” *Saviano v. Dir., N.H. Div. of Motor Vehicles*, 151 N.H. 315, 320 (2004).

The process provided in this case amounts to a determination that no coverage exists under the Policy on the basis that The Hartford claims that no coverage exists under the Policy. Because The Hartford apparently believed (wrongly) that the Policy did not cover injuries in New Hampshire, it apparently did not file evidence of such coverage with the commissioner or with NCCI as required. Based on The Hartford's failure to comply with its obligations, and with no review of or engagement with the Policy or facts of this case, the DOL and CAB found that no coverage existed and that MIC had violated a statute and was subject to penalties and fines.

If this is the appropriate procedure to be followed by the DOL under the statute, then the risk of erroneous deprivation of MIC's property (and that of other employers with employees who travel to New Hampshire) is extremely high. Where such an employer believes that its travelling

employees are covered by a policy in this state, but the carrier neglects to file evidence of that coverage and later determines that an injury here is not covered, the carrier's unilateral determination would control and deprive the employer of its property by subjecting the employer to a coverage determination and penalties regardless of what the policy provides. Against that risk, the burden on the government is low. It would merely require that the DOL and CAB review the terms of a policy in these circumstances and decide on coverage. The DOL is already presented with all the relevant facts of the case. Application of those facts to the terms of the policy to make a coverage determination is logical and an efficient use of the parties' and the government's resources.

Fundamental fairness requires that MIC's contractual rights be evaluated before it is deprived of its property. Absent such a process, a finding of no coverage and a referral to the DOL commissioner for the imposition of penalties is a clear deprivation of MIC's due process rights. If that is the appropriate process to be followed under New Hampshire's workers' compensation statutory scheme, then that scheme is unconstitutional and the DOL's and CAB's findings based on that scheme should be reversed.

CONCLUSION

For the reasons set forth above, this Court should reverse the DOL's and CAB's findings and rulings and remand for proceedings consistent with its order. Counsel requests oral argument in this matter before a full panel of the Court, given the importance of the issues raised in this appeal.

Dated: September 8, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has been served electronically via the court's e-file system to Jared P. O'Connor, Esq. (Javier Vasquez), Tracy L. McGraw, Esq. (The Hartford), and Stacie M. Moeser, Esq., (N.H. Attorney General/Department of Labor).

Dated: September 8, 2021

/s/ Michael K. O'Neil
Michael K. O'Neil, Esquire

CERTIFICATION PURSUANT TO SUPREME COURT RULE 16(3)

I, Michael K. O’Neil, hereby certify that the appealed decisions are in writing and are appended to this brief at App. 1-15.

Dated: September 8, 2021

/s/ Michael K. O’Neil
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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Michael K. O’Neil, hereby certify that this brief contains a total of 6750 words and meets the requirement of 9,500 words or less for Appellant’s Opening Brief.

Dated: September 8, 2021

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