

**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**

**REPLY BRIEF OF APPELLANT
MATOSANTOS INTERNATIONAL CORPORATION**

Respectfully submitted,

Matosantos International Corporation,

By its Attorneys,

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ARGUMENT

I. Introduction

By securing a workers compensation insurance policy (the “Policy”), Appellant Matosantos International Corporation (“MIC”) fulfilled its obligation to protect its workers in the event of their injury. The Department of Labor (“DOL”) and Compensation Appeals Board (“CAB”) found MIC to be in violation of its obligation to secure workers compensation coverage. The DOL and CAB made this finding without reviewing the Policy in violation of a plain statutory mandate that they do so. The DOL and the CAB are authorized and mandated by statute to resolve controversies “as to the responsibility of an employer or the employer's insurance carrier for the payment of compensation.” *See* RSA 281-A:43. Because they refused to resolve the controversy as to coverage between MIC and Appellee The Hartford Casualty Insurance Company (the “Hartford”), the rulings of the DOL and CAB in this case must be reversed.

In New Hampshire, employers must “secure compensation to employees” and can do so “[b]y 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 Policy MIC acquired from Hartford provides coverage in New Hampshire. *See* Appendix to Brief of Appellant Matosantos International Corporation (“MIC App.”) 46, 53-54. Despite that fact, the DOL found that MIC “failed to comply with the requirements of RSA 281-A:5 as [MIC] was conducting business in the State of New Hampshire with employee(s)

without workers' compensation coverage on May 31, 2018." MIC App. 6. The DOL made this finding, which the CAB affirmed, again, without reviewing or considering the terms of the Policy or engaging with evidence respecting applicability of the Policy to the claim at issue.

The arguments the Hartford makes in its brief respecting coverage under the Policy are irrelevant. These arguments are not properly before the Court because the DOL and CAB state that they have no jurisdiction to interpret the Policy or apply the facts to the Policy language. Instead, the DOL now argues that it found MIC violated RSA 281-A:5 because MIC did not file evidence of such coverage with the commissioner. *See* MIC App. 6, 15; Brief for the New Hampshire Department of Labor ("DOL Brief"), p. 24-25. The DOL made that finding despite the fact that the DOL's own rules require that the carrier (the Hartford), and not the employer (MIC), make the required filing to the commissioner when coverage exists in New Hampshire, as it does here. *See* Brief of Appellant Matosantos International Corporation ("MIC Brief"). 27-28.

This case is about whether this irrationality within the DOL's interpretation of the New Hampshire workers compensation scheme may stand, and whether an employer who secures workers compensation insurance covering employees in this state can be held both responsible for benefits to an injured employee and liable for civil penalties by a DOL which disclaims jurisdiction to review the policy acquired by the employer. This Court should reject that interpretation of the law and reverse and remand this matter to the DOL to consider the Policy and make appropriate findings consistent with the DOL's statutory mandate.

II. The Hartford and the DOL Fail to Adequately Address the Plain Language of the Statute Mandating that the DOL Engage with the Terms of the Policy to Resolve this Dispute.

The Hartford's and the DOL's briefs misconstrue the statutory scheme which confers jurisdiction on the DOL and CAB to hear the coverage dispute in this case. *See* Brief of Defendant/Appellee The Hartford Insurance Company ("Hartford Brief"), p. 29-30; DOL Brief, p. 7-9, 17, 19-21. Neither adequately addresses the plain language of RSA 281-A:43 which provides that any party in interest may petition the DOL for a hearing and an award in any "controversy as to the responsibility of an employer or the employer's insurance carrier for the payment of compensation."

This Court, which is the final arbiter on the meaning of a statute, is charged with interpreting the statute's plain language in a manner which leads to a logical result when viewing the statutory scheme as a whole. *See Sprague Energy Corp. v. Town of Newington*, 142 N.H. 804, 806 (1998). A dispute as to whether an insurance policy provides coverage in this state is a "controversy as to the responsibility of an employer or the employer's insurance carrier for the payment of compensation." There can be no clearer interpretation or application of this provision than to the dispute at issue in this case.

There being no language which proscribes the DOL from hearing coverage disputes, the Hartford points to a later paragraph of the statute which provides that the DOL may hear disputes respecting whether parties are independent contractors or employees. *See* Hartford Brief p. 30 (citing RSA 281-A:43, (III)). The Hartford argues that this specific grant of

jurisdiction supports its position that the DOL lacks jurisdiction to determine coverage disputes. *Id.* But specifying one potential dispute between carriers and insureds which the DOL may address does not mean that all non-specified disputes are removed from its jurisdiction. *See Landry v. Landry*, 154 N.H. 785, 788 (2007) (Court should not add “limiting language” to a broad statute which the legislature did not include). In fact, granting the DOL jurisdiction over a factual dispute respecting worker status demonstrates the legislature’s intent to vest jurisdiction in the DOL to determine legal and factual disputes between carriers and insureds.

For its part, the DOL likewise cites the lack of “allocation of authority to the NHDOL to review the content of insurance policies” as support for the position that RSA 281-A:43 does not vest the DOL with jurisdiction to hear coverage disputes. *See* DOL Brief, p. 20. However, RSA 281-A:43 vests the DOL with authority to determine disputes between the employer and the carrier as to responsibility for payment of benefits. A dispute between a carrier and insurer as to coverage is, fundamentally, a dispute as responsibility for payment of benefits. Such a dispute cannot be determined without resorting to the Policy. To read the provision otherwise is to torture the language; and to require that the legislature specifically identify the entire universe of disputes between carriers and insureds that the DOL may hear would foist an illogical reading onto the words of the statute. Neither is an acceptable approach to statutory interpretation, and the arguments of the DOL and the Hartford should be rejected by the Court.

III. The Declaratory Judgment Statute and the Historical Role of the Courts in Determining Coverage Disputes are Irrelevant.

MIC does not dispute that it can petition a court of competent jurisdiction for a declaratory judgment and that the DOL and CAB suggested that MIC do so in their orders. The availability of this remedy for MIC has no impact on the statutory jurisdiction of the DOL and CAB to address coverage and the impropriety of these administrative bodies issuing substantive findings against MIC without reviewing the terms of the Policy.

The DOL asserts that MIC has “failed to set forth any reason why the court is not the appropriate or available forum to address the contractual claims raised in this matter or in any disputes in New Hampshire regarding the substance of workers compensation insurance policies.” DOL Brief, p. 23. Both the DOL and the Hartford argue that because courts have jurisdiction to hear declaratory judgment actions, the DOL and CAB lack jurisdiction to review workers’ compensation policies in disputes brought before the commissioner. *Id.*; Hartford Brief, p. 22-23.

Even if jurisdiction over this dispute may concurrently lie with the superior courts, that does not foreclose the DOL from fulfilling its statutory duty to determine disputes as to payment responsibility between carriers and employers. Nothing cited by the DOL or the Hartford suggests otherwise, and *Frost v. Comm’r, New Hampshire Banking Dep’t*, 163 N.H. 365 (2012) (cited by the Hartford) and the line of “primary jurisdiction” cases in this state support MIC’s position. *Frost* stands for the proposition that courts should not exercise jurisdiction over disputes where administrative agencies have specialized competence. *See Frost*, 163 N.H. at 371. *Frost*’s holding that courts are not divested of jurisdiction over

issues involving “purely questions of law” is inapposite here. *See id.* No party in this case is arguing that the Superior Courts of this state do not have jurisdiction over declaratory judgment actions in insurance cases. This matter is not a declaratory judgment action. It is a request for a hearing issued to the DOL respecting a dispute between MIC, the Hartford, and MIC’s employee concerning the responsibility for payment of benefits. Nothing in the statutory scheme surrounding workers compensation benefits or declaratory judgments compels that such disputes be heard in court and not before the DOL.

Moreover, the declaratory judgment statute does not apply only to insurance coverage cases. *See* RSA 491:22. The statute does provide for a shifted burden and potential attorneys’ fees awards specific to insurance coverage cases, making the mechanism a popular claim in insurance coverage disputes. *See* RSA 491:22-a, 491:22-b. But a declaratory judgment is available in all manner of legal disputes. *See, e.g., Skillsoft Corp. v. Harcourt Gen., Inc.*, 146 N.H. 305, 308 (2001) (plaintiffs requested a declaration of rights to hire the defendants’ employees and a finding that they have not breached any duty to defendants). There is nothing that would prevent, for example, a party seeking a judgment in superior court declaring that a worker is an independent contractor or an employee, notwithstanding the DOL’s clear jurisdiction to determine such a dispute. *See* Hartford Brief, p. 30 (citing RSA 281-A:43, III); *Lopez v. Nationwide Mut. Ins. Co.*, No. 2006-0633, 2007 WL 9619486, at *1 (N.H. Sept. 10, 2007) (court determined employee/ independent contractor dispute). Just as the court’s ability to determine independent contractor

status does not divest the DOL of jurisdiction, neither does the declaratory judgment statute divest the DOL of jurisdiction to determine coverage.

Particularly in the specialized area of workers compensation insurance, which is squarely in the realm of the DOL, the DOL should have jurisdiction along with the courts to determine coverage questions.

Importantly, if the DOL is going to issue findings against employers and hold employers liable for not securing compensation, then the DOL must review policies secured by those employers which nominally provide for coverage in this state, and the DOL has the necessary jurisdiction to do so.

IV. MIC Preserved its Constitutional Due Process Argument for Appeal.

If the statutory scheme allows the DOL and CAB to find that MIC failed to obtain workers compensation coverage and to refer MIC for civil and criminal punishment without considering the Policy, then the statutory scheme violates MIC's procedural due process rights.

The Hartford erroneously argues that MIC raised its issues for the first time in its motion for reconsideration and that the issue was not preserved for appeal. *See* Hartford Brief, p. 47. First, even if the issue had been first raised in MIC's motion for reconsideration, that would be sufficient to preserve the issue for appellate review. *See Mortgage Specialists v. Davey*, 153 N.H. 764, 786 (2006) (since raising an issue for the first time in a motion for reconsideration does not deprive the trial court of a full opportunity to correct its error, the issue is preserved).

Moreover, as clearly stated in MIC's brief, MIC raised constitutional due process issues in its Supplemental Memorandum Addressing Issue of Jurisdiction. MIC Brief, p. 4; MIC App. 37, 40 (stating, among other

things, that “[b]asic considerations of due process would direct the Department to evaluate the policy actually secured by the employer to determine if a violation of the statute had occurred instead of simply applying the carrier’s faulty coverage determination,” outlining the due process standard and arguing that MIC was not afforded due process before the DOL). While it is true that the CAB did not address this argument in its November 25, 2020 Decision, that does not result in a waiver of the issue by MIC. *See Vention Med. Advanced Components, Inc. v. Pappas*, 171 N.H. 13, 28, (2018) (where trial court implicitly rejects arguments made, those arguments are preserved for review).

For reasons set forth in MIC’s Brief, the process provided to MIC in this case is unconstitutional. *See* MIC Brief, p. 29-31. Contrary to the DOL’s arguments, MIC does, in fact, claim that it was not provided the opportunity for a meaningful hearing in this case. *See id.*; DOL Brief, p. 25-26. The DOL made a clear finding that MIC “failed to comply with the requirements of RSA 281-A:5 as [MIC] was conducting business in the State of New Hampshire with employee(s) without workers’ compensation coverage on May 31, 2018.” MIC App. 6. It did so without reviewing crucial evidence, the Policy, which MIC acquired to secure workers compensation coverage. If, as the DOL now argues (but is certainly not made clear from in its initial finding quoted above), the finding is based on MIC’s alleged failure to make filings with the commissioner, the Policy is still relevant and coverage must still be determined. Because if there is coverage, then the responsibility for those filings to the commissioner falls on the Hartford, not on MIC. *See* MIC Brief, p. 28-29. In either case, the

findings made without resort to the Policy and the facts of the case deprive MIC of the process to which it is due.

CONCLUSION

For the reasons set forth above and in MIC's principal brief, this Court should reverse the DOL's and CAB's findings and rulings and remand for proceedings consistent with its order.

Dated: November 24, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing reply 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: November 24, 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 Matosantos’ principal brief at App. 1-15.

Dated: November 24, 2021

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

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Michael K. O’Neil, hereby certify that this reply brief contains a total of 2262 words and meets the requirement of 3,000 words or less for Appellant’s Reply Brief.

Dated: November 24, 2021

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