MEMORANDUM

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FROM: Tom Sico, Assistant Legal Counsel

SUBJECT: Update on Interstate Jurisdiction

DATE: March 5, 2009

Introduction

This memorandum is an update of the Legal Department's March 12, 2007 memorandum on interstate jurisdiction. The previous memorandum set forth many of the most important principles regarding the interstate jurisdiction of Ohio's workers' compensation laws. This memorandum includes the changes to the laws made by Senate Bill 334, House Bill 562, and the amended administrative rules necessitated by the bills. SB 334 went into effect on September 11, 2008 and applies to all employers covered by the Ohio workers' compensation laws. HB 562 became effective on September 22, 2008 and applies to Ohio employers having employees covered by the federal Longshore and Harbor Workers' Act. For claims arising before the effective dates of the bills, the principles in the March 12, 2007 memorandum continue to apply.

I. The General Rule

The Ohio workers' compensation laws apply to employment relationships that the courts have described as "localized" in Ohio, *Prendergast v. Indus. Comm.* (1940), 136 Ohio St. 535, 543, or as having "sufficient contacts" with this state, *State ex rel. Stanadyne, Inc. v. Indus. Comm.* (1984), 12 Ohio St.3d 199, 202. A totality-of-the-circumstances analysis is used to determine whether an employment relationship has sufficient Ohio contacts to be considered localized in this state. The factors examined and weighed include:

(1) where the contract of employment was entered
(2) where the injury occurred
(3) where the employee performed the work
(4) the residence or domicile of the employee
(5) the employer's places of business
(6) the location from which the employee was supervised and controlled
(7) the state where the employee's payroll was processed
(8) the availability of workers' compensation in other states
(9) whether the work was to be performed solely in another state
(10) whether the work was to be performed exclusively in interstate commerce
(11) the relation of the employee's work to the employer's place of business, or situs of

the industry, and

(12) the state having supreme governmental interest in the employee as affecting his or her social, business, and political life.

The cases in which those factors are mentioned include: *Prendergast* at 538-539; *Stanadyne* at 202; *Bridges v. Natl. Engineering & Contracting Co.* (1990), 49 Ohio St.3d 108, 113; *Dotson v. Com Trans, Inc.* (1991), 76 Ohio App.3d 98, 104; *Lynch v. Mayfield* (1990), 69 Ohio App.3d 229, 233; *Dailey v. Trimble* (Dec. 29, 1995), Franklin App. No. 95APE07-951; *Horsley v. Best Cooling Tower Co.* (Sept. 20, 1990), Pike App. No. 447; and *Turner v. BWC* (May 9, 2003), Miami App. No. 2002-CA-50.

The most important jurisdictional factor has been said to be the place where the contract of hire was entered. *Horsley, supra*; Nackley, *Ohio Workers' Compensation Claims* (1994) 60, Section 5.3. But the mere fact that a worker was hired or injured in this state does not automatically invoke Ohio jurisdiction. Moreover, the fact that the employer is located in Ohio is not determinative of the issue. The law looks to the totality of the employment relationship's contacts with Ohio. The residence of the employee appears to be a comparatively insignificant factor. *Horsley, supra*; Fulton, *Ohio Workers' Compensation Law* (1991) 118, Section 6.18. Further, if an employee was initially hired in Ohio to work in this state, but is later transferred to work in and be supervised in another state, the employment relationship might no longer be localized in Ohio. *Dickerson v. Anchor Motor Freight* (Sept. 25, 1991), Hamilton App. No. C-900714.

BWC employees should be wary in claims where a self-employed claimant, or both the claimant and employer, have an Ohio address that is a post office box. Parties in other states have sometimes attempted to obtain fraudulent coverage. Where there is some legitimate Ohio contact, however, the Industrial Commission has consistently held that employers who have paid Ohio premiums in good faith should not be denied coverage. That practice is also consistent with R.C. 4123.95, which requires the Ohio workers' compensation laws – including the provisions addressing interstate jurisdiction – to be construed liberally in favor of injured workers and their dependents.

In sum, the general rule in addressing interstate jurisdiction issues is to examine and weigh the factors that the courts have identified as determining the strength of Ohio's interest in an employment relationship. If the contacts with Ohio are such that the employment relationship is localized in Ohio, this state's workers' compensation coverage applies.

II. Specific Applications of the General Rule

In applying the general rule over the years, a number of principles have evolved for dealing with specific situations. These principles are contained in statutory and administrative law, case law, Industrial Commission and BWC policies, and opinions issued by the Legal Department. The principles also serve as examples of the types of Ohio contacts needed for an employment relationship to be considered localized in this state. Among the principles are the following.

(1) Employee hired to work specifically in Ohio: Ohio coverage applies.

"Employees hired to work specifically in Ohio must be reported for workers' compensation insurance under the Ohio fund, regardless of where the contracts of hire were entered." Rule 4123-17-23(D). This principle is often relevant to construction workers coming into Ohio to work on a project. They sometimes enter a new contract of hire for each construction project even though employed by their usual employers.

(2) Employee hired in Ohio, working both in Ohio and other states, and the employer's supervising office is in Ohio: Ohio coverage applies. But if the employer obtains an other-states' policy for Ohio employees working temporarily in another state, the employer pays premiums to BWC on the payroll of those employees for only work they perform in Ohio and any other work not covered by the other-states' policy.

"The entire remuneration of employees, whose contracts of hire have been consummated within the borders of Ohio, whose employment involves activities both within and without the borders of Ohio, and where the supervising office of the employer is located in Ohio, shall be included in the payroll report. However, if the employer elects to obtain other-states' coverage under section 4123.292 of the Revised Code, the employer shall include in the payroll report only the remuneration for work the employees perform in Ohio and other work not covered by the other-states' policy." Rule 4123-17-23(A). The term "supervising office," as used in this rule, has been said to be the place where "the exercise of control over the day-to-day activities of employees" occurs. *Direct Transit Inc. v. BWC* (Dec. 19, 2000), Franklin App. No. 96AP-1400. For information on determining where an employee was hired, see section II.(8)(a) below. For more information on other-states' coverage, see section II.(3)(d) below.

(3) Ohio employee working temporarily outside of this state: Ohio coverage generally applies.

An Ohio employee who is required to perform temporary duties outside the state has the full protection of the Ohio workers' compensation system without regard to where those duties are performed, foreign countries included. Young, *Workmen's Compensation Law of Ohio* (2 Ed. 1971) 63, Section 4.10. As stated in *Indus. Comm. v. Gardinio* (1929), 119 Ohio St. 539, 542: "The legislative intent is quite manifest that the provisions of the [workers' compensation laws] shall apply to all those employed within the state, and also where, as incident to their employment, and in the discharge of the duties thereof, they are sent beyond the borders of the state."

(a) Form C-110 not required for employees working temporarily outside of Ohio

Completion of form C-110 is not needed for coverage to apply to Ohio employees who are temporarily working outside of this state. Ohio coverage applies to them regardless of whether the form is completed. In fact, because one of the statutory requirements for C-110

agreements is that the contract of employment must have been entered outside of Ohio, the C-110 option is technically not available for Ohio employees whose contracts of employment were entered in this state. (See section II.(8)(a) below.)

(b) How long Ohio coverage applies to workers temporarily outside of Ohio

As to the length of time Ohio coverage applies to employees working out of state, the determination is made on a case-by-case basis and depends on factors indicating whether the employee's absence from Ohio continues to be temporary. (One factor, for example, is whether the employee's main residence is still in Ohio.) As the *Gardinio* court stated, coverage applies where the out-of-state work is "incident to their employment" in Ohio. In some situations, coverage has been viewed by the Legal Department as applying to employees working outside of this state for a year or longer, because the evidence showed that their absence from Ohio was still temporary and the work being performed was incident to their Ohio employment.

(c) Other jurisdictions' requirements should be checked

Even when Ohio coverage applies to an employee working in another state or a foreign country, and in fact whenever an Ohio employer has employees working in another jurisdiction, it is advisable for the employer to become aware of the workers' compensation requirements of those jurisdictions in order to be prepared for the possibility of an injured worker seeking benefits there.

(d) Segregation of reportable payroll for Ohio employers that obtain an other-states' policy

If an Ohio employer is required to obtain or chooses to obtain workers' compensation insurance under the laws of another state for Ohio employees working temporarily in that state, the employer can avoid paying premiums to more than one state on the same payroll by filing form U-131 "Notice of Election to Obtain Coverage from Other States for Employees Working Outside of Ohio." R.C. 4123.292(A); Rule 4123-17-14(E). Once the employer has filed the form and a copy of the other-states' policy with BWC, the employer reports remuneration on its BWC payroll reports for only the work performed in Ohio by its Ohio employees and any other work they perform that is not covered by the other-states' policy. R.C. 4123.29(A)(2)(b); Rule 4123-17-14(A). On a separate form and for information purposes only, the employer reports its Ohio employees' payroll that was reported to the other-states' insurer for work performed outside of Ohio. R.C. 4123.26(C); Rule 4123-17-14(A),(E); Rule 4123-17-17(A). In calculating premiums for the other-states' policy, the other-states' insurer can use only payroll for work performed outside of Ohio and not payroll for work performed in Ohio. R.C. 4123.292(E). The segregation of payroll reporting between Ohio and another state shall not be presumed to indicate the law under which an employee is eligible to receive compensation and benefits. R.C. 4123.26(C)(2). The employer can cancel the U-131 by filing a form U-117 "Notification of Policy Update" with BWC.

(d) Coverage exception for federal contractors and subcontractors working outside the U.S.

For employees of employers working outside the U.S. as contractors or subcontractors for the federal government, coverage for work-related injuries usually must be obtained under the federal Defense Base Act. 42 U.S.C.A. §§1651-54. This coverage is exclusive and in place of all liability under the workers' compensation laws of any state. 42 U.S.C.A. §1651(c). A few categories of employees are exempt from the coverage, such as casual workers, employees working in agriculture or domestic service, and employees working for contractors that are engaged exclusively in furnishing materials or supplies for a public work. 42 U.S.C.A. §1654; 1651(a)(3). The Defense Base Act is administered by the U.S. Department of Labor, Office of Workers' Compensation Programs. Employees of these contractors and subcontractors may also be covered by the War Hazards Compensation Act for injuries arising from a hazard of war, regardless of whether the injury occurred in the course of employment. 42 U.S.C.A. §§1701-1717. If an injury is not covered by the Defense Base Act but is covered by both the War Hazards Compensation Act and state workers' compensation laws, benefits will not be paid under the War Hazards Compensation Act if benefits are paid under the state laws. 42 U.S.C.A. §1705. But if a hazard of war causes an injury to an employee while outside the course of employment, and the employee is therefore not entitled to benefits under the Defense Base Act and state workers' compensation laws, the employee may be entitled to benefits under the War Hazards Compensation Act.

(4) Employment contract entered either in Ohio or another state and all work to be performed in the other state: Ohio coverage does not apply.

In *Indus. Comm. v. Gardinio* (1929), 119 Ohio St. 539, 545, the court said that even though a contract of employment was entered in Ohio, "the Ohio workmen's compensation fund is not available to an employee injured while engaged in the performance of a contract to do specified work in another state, no part whereof is to be performed in Ohio." The holding in *Gardinio* was approved in the more recent cases of *State ex rel. Stanadyne v. Indus. Comm.* (1984), 12 Ohio St.3d 199, 202, and *Bridges v. Natl. Engineering & Contracting Co.* (1990), 49 Ohio St.3d 108, 113. Thus, the Ohio workers' compensation laws do not apply to an employment relationship where the contract of hire was entered in Ohio and all the work is to be performed in another state. Ohio coverage also would not apply to a worker hired in another state to work exclusively in that state, because the contacts with Ohio are even less in that situation. *See Gardinio* at 544. *See also Spohn v. Indus. Comm.* (1941), 138 Ohio St. 42, 49 ("[A] citizen of Ohio is not protected by the workmen's compensation law when injured while performing work of a purely local character in another state.").

(5) Employee hired by an Ohio employer to perform transitory work in a number of states other than Ohio: Ohio coverage may apply if the employee receives work instructions from, sends reports to, and is paid from the employer's facility in Ohio.

There is language in *Prendergast v. Indus. Comm.* (1940), 136 Ohio St. 535 indicating Ohio coverage can sometimes apply to an employee who works in a number of states but never in

Ohio. The court in *Prendergast* was not faced with that situation, because the employee had occasionally worked in Ohio for short periods. But the court said that in situations where an Ohio employer enters into an employment contract with a person to perform transitory work outside of the state, and without specification as to the exact location of the work, there is no good reason why Ohio coverage should not apply. *Id.* at 541-542. (Also see section II.(7)(b) below.) The court's discussion further indicates, however, that in order for such employment to be considered "localized" in this state, the employee may need to receive work instructions from, send reports to, and be paid from the employer's facility in Ohio. *Id.* at 537, 541-543, and 545. Thus, even though none of an employee's work is performed in Ohio, this state's coverage may apply to the employment relationship if the employee works in a number of states such that the contacts with those states are weak and the contacts with Ohio are relatively strong. Issues involving these situations should be referred to the Legal Department for review.

(6) If an employee is a resident of another state, is covered by the workers' compensation laws of the other state, and is working temporarily in Ohio, the employee can be exempt from the Ohio workers' compensation laws for up to 90 days if the other state exempts Ohio employees working temporarily in that state.

R.C. 4123.54(H)(3) states that "if an employee is a resident of a state other than this state and is insured under the workers' compensation law or similar laws of a state other than this state, the employee and his dependents are not entitled to receive compensation or benefits under this chapter, on account of injury, disease, or death arising out of or in the course of employment while temporarily within this state and the rights of the employee and his dependents under the laws of the other state are the exclusive remedy against the employer on account of the injury, disease, or death." Whether this exemption applies depends in part on the length of time the injured worker has been in Ohio or was expected to be in Ohio at the time of injury. *Villasana v. BWC* (April 20, 2004), Tuscarawas App. No. 2003 AP 09 0070. For purposes of applying the exemption, the term "temporarily within this state" is defined at Rule 4123-17-23(C) as "a temporary period not to exceed ninety days."

SB 334 provides that the exemption applies only if the other state exempts Ohio employers and employees working temporarily in that state. R.C. 4123.54(H)(4); R.C. 4123.01(A)(1)(d); Rule 4123-17-23(C). This means Ohio will extend to employers from another state the same exemption the other state extends to Ohio employers working temporarily there, up to a maximum of 90 days. For example, if another state exempts Ohio employers from coverage for 30 days, Ohio will exempt that state's employers from Ohio coverage for 30 days. But if a state does not exempt Ohio employers working temporarily there, Ohio does not exempt that state's employers working temporarily in Ohio.

(a) Calculating the 90 days

The courts have not specifically ruled on whether the 90 days should be consecutive or cumulative for the exemption to apply. But in interpreting the term "temporarily" as used in R.C. 4123.54(B), and without reference to Rule 4123-17-23(C), courts have held that the

word should be given its ordinary meaning of "for a brief period: during a limited time: briefly. . . ." *Davis v. BWC* (March 27, 1996), Hamilton App. No. C-950150; *Fowler v. Paschall Truck Lines Inc.* (July 27, 1995), Franklin App. No. 94APE11-1654. The court in *Davis* looked at the days cumulatively rather than consecutively, and held that an employee who worked as a door repair helper in Ohio for a total of 113 days was covered for an injury sustained in this state. Even though the worker was a Kentucky resident who drove to his employer's Kentucky office each work day to receive assignments, a majority of the assignments were in Ohio. The court in *Fowler* also examined the cumulative time an employee worked in Ohio. But that court denied benefits to the widow of an interstate truck driver who was an Illinois resident killed while unloading his truck in Ohio. The employer was a Kentucky corporation, had no facility in Ohio, and was engaged solely in interstate commerce in this state. Only a small portion of the employee's work was performed in Ohio. Although his job required him to regularly return to Ohio for short periods, the court said this did not alter the temporary nature of his presence there. These cases indicate that two factors should be considered in determining the amount of time worked in Ohio: (1) the cumulative number of days worked or expected to be worked in this state; and (2) whether the nature of the work is such that it occurs only "briefly" and for "a limited period" in Ohio. Under this standard, cumulative days exceeding 90 would mean Ohio coverage applies unless the circumstances show that the work is done only briefly in Ohio. As the amount of time needed to work more than 90 cumulative days increases, so does the likelihood of finding that the work is done only briefly in Ohio. The *Davis* and *Fowler* cases also indicate that whether the work is performed in interstate commerce can be an important consideration in these determinations. (See section II.(7) below.)

(b) Form C-112 can extend the 90-day exemption

In regard to an employee hired outside of Ohio, performing some work outside of this state, and covered by the workers' compensation laws of another state in which some of the work is performed, the employer and employee can extend the 90-day exemption by using form C-112 to agree that the other state's coverage will be the exclusive remedy in the event of an injury. (See section II.(8) below.) R.C. 4123.54(H(1) provides that the agreement "shall remain in force until terminated or modified by agreement of the parties similarly filed."

(c) *Exemption does not apply where any of the statutory requirements are not met*

In *Wartman v. Anchor Motor Freight Co.* (1991), 75 Ohio App.3d 177, 181, the court interpreted the "temporarily within this state" exemption in what is now R.C. 4123.54(H)(3) to mean that "an employee is not entitled to receive compensation or benefits for an injury when that employee (1) is a resident of a state other than Ohio, (2) is insured in a state other than Ohio, and (3) is only temporarily in Ohio. All three conditions must exist to preclude compensation; the absence of one condition will result in the general entitlement, under R.C. 4123.54, of every employee to compensation or benefits." In applying this rule, the court held that Ohio coverage applied to a non-Ohio resident who was injured while working temporarily in this state for a non-Ohio employer, because the worker was not covered by the workers' compensation laws of another state at the time of injury. The

exemption can apply, though, even if an injured worker has been denied benefits in the other state, provided that the state had jurisdiction over the claim. The court explained that "an employee is not 'insured' in another state when, although his employer has secured a policy of insurance in that other state, he is precluded by that other state from entitlement to compensation on a jurisdictional or quasi-jurisdictional basis...." *Id.* at 183. *Accord Villasana v. BWC* (April 20, 2004), Tuscarawas App. No. 2003 AP 09 0070.

(d) Exemption does not apply to residents of foreign countries working temporarily in Ohio

As for residents of other countries working temporarily in Ohio, BWC's coverage apparently applies to them regardless of how long they are working in this state. Under R.C. 4123.54(H)(3), residents of a "state" other than Ohio are excluded from coverage while temporarily in this state. R.C. 1.59 defines "state" as used in Ohio law as "any state, district, commonwealth, territory, insular possession thereof, and any area subject to the legislative authority of the United States...." In *Savage v. Correlated Health Service* (Oct. 17, 1990), Summit App. Nos. 14491, 14498, the court said that a physician licensed in the Canadian province of Ontario is not licensed by a "state" within the definition at R.C. 1.59. As a result, the Legal Department has not viewed the exemption from Ohio workers' compensation coverage contained in R.C. 4123.54(H)(3) as applying to residents of a foreign country working temporarily in Ohio. Although the suggestion has been made that the failure to apply R.C. 4123.54 to Canadian and Mexican residents may violate the North American Free Trade Agreement (NAFTA), no such finding has been made by the federal government despite being notified of the possible problem a number of years ago. In the absence of such a finding, BWC is obligated to enforce the law as written. *See* 19 U.S.C.A. §3312(b)(2) ("No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with [NAFTA], except in an action brought by the United States for the purpose of declaring such law or application invalid.").

(7) Employee hired outside of Ohio by a non-Ohio employer, performing some work outside of Ohio, and entering Ohio to perform transitory services in interstate commerce: Ohio coverage generally does not apply.

"The remuneration of employees of other than Ohio employers, who have entered into a contract of employment outside of Ohio to perform transitory services in interstate commerce only, both within and outside of the boundaries of Ohio, shall not be included in the payroll report." Rule 4123-17-23(B). The Ohio Supreme Court has ruled that to apply the Ohio workers' compensation laws to an employer in that situation would be unconstitutional. *Spohn v. Indus. Comm.* (1941), 138 Ohio St. 42. The rule is often relevant to interstate truck drivers and applies even if the employee is an Ohio resident. *Id.* However, Ohio coverage applies to an employee who was injured in Ohio while not subject to the jurisdiction of another state's workers' compensation laws. *Wartman v. Anchor Motor Freight Co.* (1991), 75 Ohio App.3d 177, 181. (See section II.(6)(c) above.)

(a) Ohio coverage may apply where there are intrastate aspects to the work

Where there are intrastate aspects to a truck driver's work in Ohio, this state's coverage may apply if the jurisdictional contacts with Ohio are sufficient. In *Holly v. Indus. Comm.* (1943), 142 Ohio St. 79, 88, the court held that Ohio coverage applied to a truck driver performing services indiscriminately in interstate and intrastate commerce in Ohio, even though he was a non-Ohio resident, was hired in Pennsylvania by a Pennsylvania company, and was killed while engaged in interstate commerce in Ohio. (In addition to the intrastate aspects of the employee's work in Ohio, it was also significant that the employer, although based in Pennsylvania, had three terminals in Ohio and had obtained Ohio workers' compensation coverage.)

(b) Where the employment contract was entered can be important

Also relating to trucking, it has been said that when the work is not confined to a single state, but is to be performed in interstate commerce, the location where the employment contract was entered becomes an important consideration in determining which state's workers' compensation jurisdiction applies. *Spohn* at 47-48. Additionally, as mentioned in section II.(5) above, the court in *Prendergast* said that where an Ohio employer enters into an employment contract with a person to perform transitory work outside of this state, and without specification as to the exact location of the work, there is no good reason why Ohio coverage should not apply. The court also indicated that other important considerations in such circumstances are whether another state's coverage applies to the employee and whether the employee receives work instructions from, provides reports to, and is paid from the employer's facility in Ohio. (For more information on determining where a contract of employment was entered, see section II.(8)(a) below.)

(c) *The home-terminal consideration*

It has often been said that jurisdiction over interstate truckers is generally determined by their terminal of "domicile," the industry term for home terminal. Courts have described a "home terminal" as the place where the driver customarily receives work assignments. *Cincinnati Ins. Co. v. Haack* (1997), 125 Ohio App.3d 183, 208. The court in *Dotson v. Com Trans, Inc.* (1991), 76 Ohio App.3d 98, 104-105, however, held that although a truck driver's contract of hire was entered outside of Ohio with a non-Ohio employer, and the injury occurred outside of this state, Ohio's coverage applied because the driver, an Ohio resident, paid Ohio taxes and performed a significant part of his work in Ohio each day. In an analogous situation involving a technician who was hired in Michigan and regularly worked in Ohio and four other states, a court ruled that even though the injury occurred in New Jersey and the injured worker received benefits under the workers' compensation laws of that state, Ohio jurisdiction also applied because the worker was an Ohio resident, paid Ohio taxes, and performed at least 70% of his work in this state. *Turner v. BWC* (May 9, 2003), Miami App. No. 2002-CA-50. Further, the court in *McBride v. Coble Express, Inc.* (1993), 92 Ohio App.3d 505, 507 ruled that even though the employer was an Indiana company, Ohio coverage applied to a truck driver who was a resident of Ohio, worked

primarily in Ohio, and was injured in Ohio. Thus, the "home terminal" rule is not without exceptions, particularly where a worker has other significant contacts with this state.

(8) Where there is a possibility of conflict with the workers' compensation laws of another state, the contract of employment was entered outside of Ohio, and all or some portion of the work is to be performed outside of Ohio: Form C-110 can be used to choose Ohio law as the exclusive remedy and Form C-112 can be used to choose the law of another state as the exclusive remedy.

R.C. 4123.54 provides that if there is a possibility of conflict with respect to the application of workers' compensation laws because the contract of employment was entered into and all or some portion of the work is to be performed in a state or states other than Ohio, the employer and employee may agree in writing to be bound by the workers' compensation laws of Ohio or the laws of some other state in which all or some portion of the work is to be performed. Under Rule 4123-17-23(E), form C-110 is used to choose Ohio coverage and form C-112 is used to choose the laws of another state in which all or some of the work is to be performed. SB 334 did not affect the ability of employers to continue using these forms in the same manner.

(a) Determining where the contract of employment was entered

In order for a form C-112 to be valid, the contract of employment must have been entered into in a state other than Ohio. *Watson v. Toledo Labor Service, Inc.* (1988), 46 Ohio App.3d 141, 143. The language of R.C. 4123.54(H)(1) indicates that the same requirement applies to form C-110. A contract is "entered into" at the place where it is executed. *Lanier v. Northern Steel Transport Co.* (Dec. 16, 1994), Lucas App. No. L 94-100. In regard to entering contracts, "execute" means to sign or otherwise bring a contract into its final, legally enforceable form. *Black's Law Dictionary* (7th Ed. 1999) 589. Thus, when the parties are in different states, the contract is generally considered entered into at the place where the last act occurs that makes it binding and enforceable, which is usually where the acceptance occurs. As stated at 16 O Jur 3d, Conflict of Laws §10: "[A] bilateral contract is made where the second promise is made, and if the acceptance is mailed from one state to another, the contract is made where the letter of acceptance is posted (if use of the mail is authorized)." Likewise, 16 Am Jur 2d, Conflict of Laws §99 explains: "Where an acceptance of an offer is given by telephone, the place of contracting generally is where the acceptor speaks his or her acceptance."

(b) Employer must have active coverage and form must be filed within 10 days of execution

A form C-110 or C-112 must be filed with BWC within ten days of its execution to be valid. R.C. 4123.54(H)(1); *Dotson v. Com Trans, Inc.* (1991), 76 Ohio App.3d 98, 102. Moreover, the agreements are invalid on their face if the employer is noncomplying. An employer must, therefore, maintain an active BWC policy in order for the agreement to be valid, regardless of whether payroll is reportable to Ohio.

(c) There must be a possibility of dual jurisdiction for the forms to be used

R.C. 4123.54(H)(1) permits a choice of laws when there is a "possibility of conflict" between the workers' compensation laws of different states. A form C-110 or C-112 cannot by itself "create" jurisdiction; it merely clarifies which state's laws will apply in the event of a possible conflict. In other words, if Ohio does not otherwise have jurisdiction over a workers' compensation matter, completion of form C-110 will not by itself create jurisdiction in Ohio. Similarly, if Ohio has jurisdiction over a workers' compensation matter and another state does not, completion of form C-112 will not by itself divest Ohio of jurisdiction. There are three important situations in which these principles apply:

(i) Employment relationship where the only contact with Ohio is that the employer has an office or other facility in this state: Form C-110 should not be used.

In the situation where a company has an office or other facility in Ohio and an operation in another state, Ohio does not have jurisdiction over persons who are hired at the out-of-state facility, reside in the other state, are supervised and controlled there, perform all their work there, and sustain an injury there. (*See Indus. Comm. v. Gardinio*, discussed in section II.(4) above.) Thus, form C-110 should not be used for employment relationships where the *only* contact with this state is that the employer has an office or other facility in Ohio. Rather, coverage should be obtained for the employees in the state where they are supervised and working. Even if the worker resides in Ohio, this state's jurisdiction may not apply in the absence of additional jurisdictional contacts.

Nevertheless, if the employment relationship has additional contacts with this state (such as the employee receives work directions from Ohio), or the contacts with the other state are somewhat weaker (such as the employee is working out of his or her home rather than in a branch facility of the employer), Ohio's jurisdiction may or may not be invoked, depending on the nature of the jurisdictional contacts with Ohio. These types of C-110 issues involving marginal contacts with Ohio should be referred to the Legal Department for review.

(ii) Truck driver hired outside of Ohio by a non-Ohio employer and entering Ohio to perform transitory services in interstate commerce only: Form C-110 generally should not be used.

Form C-110 should not be used to attempt to obtain Ohio coverage for truck drivers who are hired outside of this state by non-Ohio employers, come into Ohio only to perform transitory services in interstate commerce, and are covered by another state's workers' compensation jurisdiction when in Ohio. As explained in section II.(7) above, Rule 4123-17-23(B) directs that the remuneration of such workers not be included in Ohio payroll reports.

But if the interstate truck drivers are covered by an all-states rider issued by a private insurer in another state, and that policy excludes coverage for injuries occurring in a monopolistic state such as Ohio, the employer needs Ohio coverage for injuries that may occur in Ohio.

(iii) Non-Ohio resident hired outside of Ohio, covered by the workers' compensation laws of another state, and working in Ohio for a temporary period not to exceed 90 days: Form C-110 should not be used.

Form C-110 should not be used to attempt to obtain coverage for a non-Ohio resident who was hired outside of Ohio, is covered by the workers' compensation laws of another state, and is working in Ohio for a temporary period not to exceed 90 days. R.C. 4123.54(H)(3) and Rule 4123-17-23(C) provide that Ohio jurisdiction does not apply to such workers if they are from a state that reciprocally exempts Ohio employers from that state's coverage for work performed temporarily there. Moreover, if the exemption from Ohio coverage does not apply because the employer is from a state that does not reciprocally exempt Ohio employers from coverage, a C-110 is not needed because Ohio coverage applies to the employees by operation of law. R.C. 4123.01(A)(2)(d); 4123.54(H)(4); Rule 4123-17-23(C) (See section II.(6) above.).

III. Additional Considerations

In dealing with interstate jurisdiction issues, the following considerations should also be kept in mind.

(1) For injuries occurring before September 11, 2008, if compensation or benefits have been awarded in another state having jurisdiction over an injury, and a claim for the same injury is also filed with BWC: Ohio's jurisdiction may apply but amounts awarded in the other state are credited against amounts awarded in Ohio.

Before SB 334 took effect on September 11, 2008, what is now R.C. 4123.54(H)(2) provided: "If any employee or his dependents are awarded workers' compensation benefits or recover damages from the employer under the laws of another state, the amount awarded or recovered, whether paid or to be paid in future installments, shall be credited on the amount of any award of compensation or benefits made to the employee or his dependents by the bureau." Thus, for claims arising before the effective date of SB 334, the fact that a claimant received workers' compensation benefits in another state does not preclude the Ohio workers' compensation laws from applying to the same injury. *McBride v. Coble Express, Inc.* (1993), 92 Ohio App.3d 505, 510. The normal jurisdictional analysis must be conducted for those claims to determine whether Ohio workers' compensation coverage also applies to the injury. The amount awarded in the other state is credited against any award in Ohio. For claims arising before September 22, 2008, the credit also applies to benefits an injured worker received under the federal Longshore and Harbor Workers' Compensation Act. *State ex rel. Pittsburgh & Conneaut Dock Co. v. Indus. Comm.* (May 5, 2005), Franklin App. No. 04-AP-616. (See section III.(6) below.)

(2) For injuries occurring on or after September 11, 2008, an employee or dependents of a deceased employee may not have an Ohio claim if a claim for the same injury, occupational disease, or death has been decided on the merits in another state.

Under SB 334, an employee or dependents who receive a decision on the merits of an Ohio claim shall not file a claim for the same injury, occupational disease, or death in another state. R.C. 4123.542. Those persons have waived their right to receive benefits under the laws of another state. R.C. 4123.54(H)(5); R.C. 4123.51. An employee or dependents who receive a decision on the merits of a workers' compensation claim in another state shall not file an Ohio claim for the same injury, occupational disease, or death. A decision on the merits is "a decision determined or adjudicated for compensability of a claim and not on jurisdictional grounds." R.C. 4123.542.

If an employee or dependents pursue or receive benefits in an Ohio claim for the same injury, occupational disease, or death for which they pursued workers' compensation benefits and either received a decision on the merits or recovered damages under the laws of another state, BWC or any employer may, by any lawful means, collect the amount of benefits paid in the Ohio claim. If the employer participates in the State Insurance Fund, the amount of benefits BWC collects shall not be charged to the employer's experience. The benefits collected by a self-insuring employer shall be deducted from the compensation the employer reports to BWC. BWC or the employer may also collect from the employee or dependents any costs and attorney fees BWC or the employer incurs in collecting the Ohio benefits. BWC or the employer may further collect from the employee or dependents any attorney's fees, penalties, interest, awards, and costs incurred by an employer in contesting or responding to the Ohio claim. R.C. 4123.54(H)(2).

(3) Out-of-state insurer provides benefits for an injury that is later found to be covered by the Ohio workers' compensation laws and is also found to not be covered by the workers' compensation laws of the state where benefits were paid: BWC must reimburse the insurer for benefits paid.

Where an injury occurs in another state and an out-of-state insurer provides interim benefits to the claimant while the facts of the case are being developed and it is unclear who is responsible for paying benefits, BWC must reimburse the insurer for amounts paid if the facts later show that Ohio had jurisdiction over the claim and the other state did not. *Liberty Mut. Ins. Co. v. Indus. Comm.* (1988), 40 Ohio St.3d 109, 111.

(4) Railroad employees: Ohio jurisdiction generally does not apply.

The Federal Employers' Liability Act (FELA) imposes liability on interstate railroads for negligence resulting in the injury or death of their employees. 45 U.S.C.A. §51 et seq. This law provides an exclusive source of recovery for railroad employees injured or killed while working in interstate commerce. *New York Central Railroad Company v. Winfield* (1917), 244 U.S. 147, 153-154.

Nonetheless, R.C. 4123.04 provides that if employees are engaged in intrastate commerce and also in interstate or foreign commerce, and Congress has established a rule of liability or method of compensation for them, Ohio workers' compensation coverage can apply if

certain conditions are met. The conditions are: (1) the intrastate work must be "clearly separable and distinguishable" from interstate or foreign commerce; (2) the "separable" work, for its duration, must be exclusively in Ohio; (3) the employer and the worker must voluntarily accept Ohio coverage in a writing filed with BWC; (4) BWC must approve the coverage; and (5) no act of Congress forbids the coverage. *See* Nackley, *Ohio Workers' Compensation Claims* (1994) 55, Section 5.1. The statute also provides that BWC's approval of the filing "irrevocably" subjects the parties to Ohio's coverage during the period for which premiums were paid.

(5) Admiralty jurisdiction: Ohio jurisdiction does not apply.

The Merchant Marine Act of 1920, popularly known as the Jones Act, provides seamen with a right of action against their employers for negligence. 46 U.S.C.A. §30104 (formerly at 46 U.S.C.A. §688). In *Chandis, Inc. v. Latsis* (1995), 115 S. Ct. 2172, 2190, the U.S. Supreme Court said an employee qualifies as a "seaman" when two elements are met: (1) the worker's duties must contribute to the function of a vessel or to the accomplishment of its mission; and (2) the worker must have a connection to a vessel in navigation (or an identifiable group of such vessels) that is substantial in terms of both its duration and nature. The court said the purpose of the second element is to "separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." The Court also noted that seamen "do not lose ... protection automatically when on shore and may recover under the Jones Act whenever they are injured in the service of a vessel regardless of whether the injury occurs on or off the ship."

It has been held that a seaman who suffers injury on the navigable waters of the U.S. cannot constitutionally be provided a remedy under state workers' compensation laws. *Bearden v. Leon C. Breaux Towing Co., Inc.* (3rd Cir. 1978), 365 So.2d 1192, 1195. Moreover, an "agreement between [an] employer and employee to submit themselves to the provisions of the Workmen's Compensation Act cannot confer jurisdiction upon the Industrial Commission in case of injury occurring in a purely maritime employment, the admiralty courts having in such case exclusive jurisdiction." *Faulhaber v. Indus. Comm.* (1940), 64 Ohio App. 405, 406. Thus, an Ohio workers' compensation claim cannot be allowed for an injury covered by the Jones Act.

(6) Longshore and Harbor Workers: concurrent federal and state jurisdiction can apply to claims arising before September 22, 2008. For claims arising on or after that date, BWC coverage does not apply to work covered by the federal Longshore and Harbor Workers' Act.

For work-related injuries sustained by land-based maritime workers, Congress provided a remedy in the Longshore and Harbor Workers' Compensation Act. 33 U.S.C.A. §901 et seq. A maritime employee is defined by that Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring

operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker...." 33 U.S.C.A. §902(3). In construing this definition, the U.S. Supreme Court in *Herb's Welding, Inc. v. Gray* (1985), 470 U.S. 414, 423-424 said that although the term "maritime employment" is not limited to the occupations specifically mentioned in the statute, an occupation must have a connection with the loading, construction, or repair of ships in order to come within the definition. Federal jurisdiction applies to such employees "if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C.A. §903(a).

For claims arising before September 22, 2008, the Longshore and Harbor Workers' Compensation Act and the Ohio workers' compensation system may have concurrent jurisdiction. In *Hahn v. Ross Island Sand & Gravel Co.* (1958), 358 U.S. 272, 273, the U.S. Supreme Court recognized that certain employment relationships, although maritime in nature, are so "local" that state workers' compensation laws may apply to them. Also, in *Sun Ship, Inc. v. Pennsylvania* (1980), 447 U.S. 715, 716, the U.S. Supreme Court held that state workers' compensation programs may exercise concurrent jurisdiction over "land-based" injuries sustained by maritime employees. In such cases, amounts paid under the federal law are credited to amounts awarded under the Ohio workers' compensation system. (See section III.(1) above.) Further, in regard to a work-related death that occurred on navigable waters but was not covered by federal admiralty or maritime jurisdiction, an Ohio court ruled that Ohio workers' compensation coverage applied. *Edwards v. Stringer* (1978), 56 Ohio App.2d 283, 286.

Effective September 22, 2008, House Bill 562 provides that if an injury, occupational disease, or death is subject to the jurisdiction of the Longshore and Harbor Workers' Act, the employee or dependents are not entitled to benefits under the Ohio workers' compensation laws. The federal law provides the exclusive remedy against the employer. R.C. 4123.54(I). HB 562 also states that if an Ohio employer has employees who are covered by the Longshore and Harbor Workers' Act, the employer shall be assessed premiums on only the payroll attributable to services the employees perform while not covered by the federal law. R.C. 4123.32(D); Rule 4123-17-14(A). For information purposes only and not for purposes of paying premiums, the employer shall provide BWC with written notice of the identity of the insurer providing coverage under the federal law and report to BWC the amount of payroll that was reported to the insurer for work covered by the federal law. R.C. 4123.26(C)(1); Rule 4123-17-14(A),(F). The segregation of payroll shall not be presumed to indicate the law under which an employee is entitled to benefits. R.C. 4123.26(C)(2).

(7) Situations where Ohio workers' compensation coverage does not appear to apply but reasonable minds might disagree: Employer may obtain an Ohio policy by paying the minimum administrative fee and security deposit to protect against possible noncompliance claims.

In situations where BWC and an employer believe that the Ohio workers' compensation laws probably do not apply to an employment relationship, but there is concern about possible noncompliance liability of the employer if the Industrial Commission or a court ever reached a different conclusion, the employer may protect itself from such liability by keeping an account open at BWC. This can be done by paying the minimum administrative fee set forth in Rule 4123-17-26 for each six months of coverage. The court in *Bridges v. Natl. Engineering & Contracting Co.* (1990), 49 Ohio St.3d 108, 117 said: "For purposes of this and any other civil action, we hold that once the Industrial Commission has certified that an employer has established industrial coverage and paid its premium, the employer is a complying employer as a matter of law. Such employer's failure to have included a particular injured employee in a required payroll report does not deprive the employer of its statutory immunity from a civil action brought by the employee." Although BWC rather than the Industrial Commission is now responsible for certifying that an employer has obtained coverage and paid premiums, the same principle applies.

Thus, while an employer's account is active at BWC, the employer is not susceptible to being declared a noncomplying employer and held liable for the costs of a claim allowed against it in Ohio. But if a claim is allowed for an employee whose pay was not included on the employer's payroll reports submitted to BWC, the employer can be liable for back payment of premiums and certain penalties for failure to correctly report payroll.

Conclusion

In dealing with interstate jurisdiction issues, the general rule is to examine and weigh the factors listed in section I of this memorandum, unless the employment relationship is addressed by a more specific guideline in sections II or III. The application of these principles will in many cases reveal whether Ohio's jurisdiction covers an employment relationship. In applying the general rule, however, it is not always clear how much weight to give the factors present in a particular situation. Moreover, in some cases uncertainties are encountered in deciding whether an employment relationship is covered by one of the specific guidelines. When difficulties arise in dealing with interstate jurisdiction issues, the Legal Department is available to assist.

I trust that this information is useful to you. If you have questions or comments on this matter, please do not hesitate to contact the Legal Department.

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