Michigan Bureau of Workers' Disability Compensation – Worldwide Jurisdiction?

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When Kenneth Karaczewski started working for Farbman Stein & Company, he was a Michigan resident working for a Michigan resident employer. Sometime later he transferred to Farbman Stein & Company's Florida facility and he took up residency in Florida. While working there he sustained a compensable work related injury and sought Michigan benefits.

Karaczewski's request was heard by a magistrate who agreed that Michigan had jurisdiction. The Michigan Workers' Compensation Agency agreed, as did the Court of Appeals, basing its opinion on *Boyd v W G Wade Shows,*[1] which held that an employee need not be a resident of Michigan as long as the contract of hire was made in Michigan. However, the Michigan Supreme Court did not agree.

In *Karaczewski v Farbman Stein & Co,*[2] the Supreme Court said that the law should be interpreted by its simple reading and that the conjunctive word "and" in the statute required that *both* the contract of hire *and* the worker's residency be in Michigan for jurisdiction to apply:

> The bureau shall have jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a resident of this state at the time of injury **and** the contract of hire was made in this state. Such employee or his dependents shall be entitled to the compensation and other benefits provided by this act.[3]

Since there had been varying appellate interpretations before *Karaczewski*, the Legislature sought to add clarification to the existing law showing its intent to protect residents of Michigan or those hired in Michigan no matter where they worked. The problem is that the cure may end up killing the patient and the doctor.

The legislative change substituted the word "or" for the word "and," thereby making the employee's residence and the location of the contract of hire separate and independent bases for the attachment of jurisdiction. The revised statute continued to include the existing requirement that the employer must be subject to the act.

> The worker's compensation agency shall have jurisdiction over all controversies arising out of injuries suffered outside this state if the injured employee is employed by an employer subject to this act and if either the employee is a resident of this state at the time of injury or the contract of hire was made in this state. The employee or his or her dependents shall be entitled to the compensation and other benefits provided by this act.[4]

The *Karaczewski* ruling also established the revised code as a "new rule" and not a mere clarification. A clarification would have allowed retroactive application to ongoing cases.

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So what's the problem? Oddly enough it's not just residency or contract of hire. It's all about interpreting the portion of the statute that states "if the injured employee is employed by an employer subject to this act." Simple? Not really.

By substituting the word "or" for "and," every employer in every part of the world who meets the Bureau's definition of an employer and hires a resident of the State of Michigan or enters into an employment contract in Michigan must provide the employee Michigan Workers Compensation Benefits. Why?

The statute's definition of an "employer" does not contain any geographical component; it does not specify where that employer must be located in order to be subject to the act. The statute defines employers subject to act (outside of those identified in section (a)), as follows:

> (b) Every person, firm, limited liability company, limited liability partnership, and private corporation, including any public service corporation, who has any person in service under any contract of hire, express or implied, oral or written, unless those employees excluded according to the provisions of section 161(5) comprise all of the employees of the person, firm, limited liability company, limited liability partnership, or corporation.[5]

The author has been involved with two separate cases where employees received medical treatment for their injuries

in Indiana but requested disability benefits in Michigan where they resided. In both cases the employers were in close proximity to the state line and their employees commuted daily to work returning home to Michigan after work.

The employers were also domiciled in Indiana and had no presence in Michigan. In addition, the employees were hired (contract of hire) in Indiana, worked only in Indiana, and were injured on their jobs in Indiana. The nature of their injuries and relationship to work were not disputed.

In each case, the only connection with Michigan was that the employees at the time of injury were residents of the State of Michigan. The employers had no connection to this state.

The first case involved an employer with an Indiana assigned risk workers compensation insurance policy that did not include Michigan as a covered state. The injured worker had been treating in Indiana but sought Michigan disability benefits since Michigan benefits are higher than Indiana. He cited eligibility based on the revised language of MCL 418.845 and that by virtue of his residency alone was entitled to Michigan benefits. When the insurer refused to provide Michigan benefits the worker filed for a hearing. About the same time, the Michigan Workers Compensation Agency sent notice to the employer stating that they were in violation of the Michigan Workers Compensation Disability Act (section 418.615) and subject to a fine and criminal prosecution.

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However, before the issue could be heard by the magistrate, the employee sought additional treatment for his injuries in Indiana. For this reason his counsel withdrew the hearing request. Since the employee is still treating it is unclear whether or when the request for Michigan disability benefits will surface again.

The second case is currently ongoing and also involves an injured worker seeking Michigan disability benefits. However, in this ongoing case the attorney for the insurance carrier is refusing to fight the new code, citing a long history of cases favoring the employee when residency is not in dispute. In addition, the carrier is pointing to the extremely broad interpretation of what constitutes an employer and that having a location is Michigan is not required.

The attorney for the insurer reports that he spoke with other attorneys in similar situations and they also cited the broad interpretation of employers subject to the act. The insurer's attorney also spoke with the division manager of the Compliance & Employer Records Division of the Michigan Workers Compensation Agency. The division manager is also the person who assisted with the language of the new code.

The division manager's response was that it was not the intent of the Department to expand its jurisdiction into other states, but rather to clarify the law due to the long history of its misapplication. But the effect of the statute is determined by the actual text, and that text has led to expansion of the scope of Michigan's act, and uncertainty as to how it will be applied.

Practitioners in this area are becoming aware of the change in the act and until there is a clarification issued by the Michigan Workers Compensation Agency or case law giving guidance under this loophole, employees will continue to seek Michigan benefits.

The Indiana Compensation Rating Bureau (ICRB) is closely monitoring the developments involving Indiana employers of Michigan residents. They in turn have the ear of the Indiana Workers Compensation Bureau and the Indiana Department of Insurance. To date the officials at the ICRB and Compliance & Employer Records Division of the Michigan Workers Compensation Agency are unaware of any related cases that have gone to a magistrate or to trial. However, when the time is right the amicus briefs are likely to fly.

For now, however it appears that insurance companies do not have the appetite for challenging the revised code. They seem willing to entertain claims when Michigan is included as a covered state under Item 3A Workers Compensation Insurance or Item 3C Other States Insurance of a workers compensation insurance policy. Otherwise, they deny the claim as occurring in a state not covered by the insurance policy.

Meanwhile, problems are developing in the world of insurance, litigation and politics. Several insurance companies have already indicated their intent to automatically add Michigan and related classification codes to the workers compensation policies of employers who employ Michigan residents. However, the problem goes way beyond the resulting premium increases.

Employers with no Michigan presence often purchase workers compensation insurance from companies who are not filed to write business in Michigan. This is commonplace in Indiana and other states. As it now stands, employers using companies not filed to write in Michigan appear to be violation of Michigan Law just for hiring Michigan residents. Will employers faced with violations start suing their insurance agents, insurance companies or both for failure to inform or advise? While the law has been on the books since 2009, these complications are just surfacing and there are too many of them to cover in the span of just one article.

As an example, Michigan's workers compensation rates are typically higher than Indiana's and this will increase workers compensation premiums for affected employers. The differ-

ence can be substantial: $2.64 per $100[6] of payroll in Indiana versus $5.26 per $100 in Michigan.[7] Disability benefit levels are also higher. The higher benefits when claimed could affect an employer's workers compensation experience modification factor, even though Michigan is not a member of the National Council on Compensation Insurance (NCCI) and promulgates its own factors. The net result will be the same - higher premiums.

When faced with higher costs of doing business, Indiana employers may very well seek to employ Indiana residents, effectively locking out Michigan residents from employment. Extreme? Not if you are an employer and insurance premium is one expense totally within your control.

As Indiana employers (and employers in other states) discover the ramifications of employing Michigan residents will job offers start to dwindle? Will employers put pressure on their elected officials to retaliate against Michigan? Will insurers refuse to insure employers who employ Michigan residents if they do not readily write business in Michigan? Will insurers who are licensed in Michigan just pay Michigan benefits when requested or will there be challenges?

Hopefully Michigan will figure out a way to rein in its worker compensation jurisdiction to a manageable level. ■

About the Author

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Endnotes

1 443 Mich 515; 505 NW2d 544 (1993)

2 478 Mich 28; 732 NW2d 56 (2007)

3 MCL 418.845 - Out-of-state injuries; jurisdiction; benefits.

4 MCL 418.845 - Out-of-state injuries; jurisdiction; benefits, amended 2008, Act 499, Imd. Eff. Jan. 13, 2009 .

5 MCL 418.151.

6 See: *http://www.icrb.net/rate_pages/1_1_2014_RatePages.pdf*

7 See: *http://www.caom.com/rates/rates%20index/rates.html* - 2014 - Data Collection Agency Workers' Compensation Insurance Statewide Average Pure Premium Michigan - [*Codes 0005 - 9620*]