Michael Touchette v. Vermont Recycled Slate and Roofing
Michael Touchette v. Telescope Casual Furniture Co. (January 11, 2012)

STATE OF VERMONT
DEPARTMENT OF LABOR

Michael Touchette

v.

Vermont Recycled Slate
and Roofing

Michael Touchette

v.

Telescope Casual Furniture Co.

Opinion No. 01-12WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File Nos. Z-01489 and BB-56358

RULING ON DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

James Dingley, Esq., for Claimant
Keith Kasper, Esq., for Defendant Vermont Recycled Slate and Roofing
James O'Sullivan, Esq., for Defendant Telescope Casual Furniture Co.

ISSUES PRESENTED:

1. Does the Vermont Department of Labor have personal and subject matter jurisdiction over Defendant Telescope Casual Furniture Co. ("Telescope") relative to Claimant's claim for workers' compensation benefits?

2. If yes, is Claimant's claim against Defendant Telescope barred by any of the jurisdictional and/or full faith and credit defenses raised in its August 4, 2010 denial?

3. If yes, did Defendant Telescope waive these defenses?

EXHIBITS:

Joint Exhibit I: Reserved Decision, *In regard to Michael Touchette, WCB Case #G005 8816*, State of New York Workers' Compensation Board, October 29, 2009

Joint Exhibit II: Deposition of Michael Touchette, April 19, 2011

Joint Exhibit III: Deposition of Katherine Juckett, October 7, 2011

Joint Exhibit IV: State of New York Workers' Compensation Board hearing transcript, July 15, 2009

FINDINGS OF FACT:

The following facts are undisputed:

1. On November 11, 2007 Claimant was an employee of Defendant Vermont Recycled Slate and Roofing Co. ("Vermont Recycled Slate") and Defendant Vermont Recycled Slate was his employer as those terms are defined in Vermont's Workers' Compensation Act (the "Act").

2. On November 11, 2007 Claimant suffered a compensable work-related injury to his lower back arising out of and in the course of his employment with Vermont Recycled Slate.

3. Claimant was paid all workers' compensation benefits to which he was entitled under the Act relative to this claim (State File No. Z-1489) up until his 2009 incident.

4. Defendant Telescope is a New York corporation located in Granville, New York, a town that borders Vermont. From that location, it manufactures summer furniture, which it distributes by way of a network of independent sales representatives to retailers throughout the country. It also publishes a catalog for retailers and maintains a website. Retail customers can view its products on the website, but cannot purchase items directly.

5. Defendant Telescope has a registered agent located in Vermont. It registered to do business as a foreign corporation in Vermont on April 19, 2010. One of its corporate directors resides in Vermont, as do approximately 50 of its 280 employees.

6. Through its network of independent sales representatives, Defendant Telescope sells its products to four or five Vermont businesses. Payment for these sales comes directly to Defendant Telescope, not through the independent sales representatives. Vermont businesses that carry Telescope products actively market them in Vermont, but with no advertising input or assistance from Defendant Telescope.

7. Since April 2010 Defendant Telescope also has sold and delivered products directly from its company store in New York to Vermont customers. Prior to this time the company store was leased to and operated by an independent retailer.

8. Defendant Telescope's sales volume in Vermont is estimated to be in the range of $200,000 to $300,000 annually.

9. Defendant Telescope occasionally purchases lumber and other materials from R.K. Miles, a Vermont supplier.

10. In 2008 and 2009 Defendant Telescope maintained a policy of workers' compensation insurance with a rider that provided coverage in all but two states, New Jersey and Wisconsin. The policy thus provided coverage in Vermont.

11. Claimant began working for Defendant Telescope on May 27, 2008. During this employment, he alleged that he suffered a work-related injury to his lower back on February 23, 2009.

12. Claimant's employment for Defendant Telescope terminated on March 11, 2009.

13. Claimant filed a claim for workers' compensation benefits relative to the February 23, 2009 incident with the New York State Workers' Compensation Board (the "New York Board").

14. On July 15, 2009 the New York Board held a hearing on Claimant's claim for benefits arising out of his alleged February 23, 2009 injury.

15. On October 29, 2009 the New York Board issued a decision denying Claimant's claim for workers' compensation benefits pursuant to New York's Workers' Compensation Law. This decision held in part:

> The description of onset of pain and initial report to the employer clearly supports an exacerbation of the original Vermont industrial accident as Claimant described an onset or pop while bending down but never picking up anything.
>
> . . .
>
> It is clear that if the original injury was a New York state claim and the onset of pathology in the identical site under identical circumstances had occurred at home while bending down that the recurrence would be regarded as a compensable exacerbation wholly related to the industrial accident. The only fair analogous application of the law dictates the instant determination that the treatment and lost time relates to the Vermont industrial injury.

16. Claimant did not appeal the New York Board's decision. The decision became a full and final decision on Claimant's claim in New York.

17. On December 18, 2009 a First Report of Injury was filed on Claimant's behalf with the Vermont Department of Labor (the "Department"). The First Report (State File No. BB-56358) noticed a February 23, 2009 lower back injury and listed Defendant Telescope as the employer.

18. Having been notified by Claimant's attorney that the New York Board had denied Claimant's claim for workers' compensation benefits against Defendant Telescope in New York, on January 7, 2010 the workers' compensation insurance adjuster for Defendant Vermont Recycled Slate filed a Denial of Workers' Compensation Benefits (Form 2) with the Department (State File No. Z-1489).

19. On June 14, 2010 Defendant Vermont Recycled Slate filed a Notice and Application for Hearing (Form 6) in which it raised the issue whether Claimant's current condition was an aggravation for which Defendant Telescope should be held liable.

20. On August 4, 2010 Defendant Telescope's attorney entered his appearance. By separate correspondence on that same date, Defendant Telescope's workers' compensation insurance adjuster filed a Form 2 Denial with the Department (State File No. BB-56358). The reason for the denial was stated to be "no jurisdiction, no hazard created by workplace." The adjuster's accompanying cover letter further clarified the grounds for denial, with specific reference to all of the jurisdictional issues currently being litigated in the context of the parties' cross motions for summary judgment.

21. The parties agree that any issues relative to the aggravation versus recurrence litigation arising from the two injurious events referenced above will be stayed until the jurisdictional issues raised by the pending cross-motions for summary judgment have been resolved.

DISCUSSION:

1. At its core, this case is essentially one of aggravation versus recurrence. Claimant suffered an initial injury, clearly work-related, in November 2007, while employed by Defendant Vermont Recycled Slate. In February 2009, while employed by Defendant Telescope, he suffered a renewed onset of pain, leading to renewed treatment and additional disability. The substantive workers' compensation question presented is whether the February 2009 event is properly characterized as a recurrence, for which Defendant Vermont Recycled Slate remains responsible, or an aggravation, for which, under Vermont law at least, Defendant Telescope might be liable.

2. The complicating factor is that Defendant Telescope is a New York employer, not a Vermont one, and at the time of the February 2009 event Claimant, who was hired, worked and resided in New York, was a New York employee. Under these circumstances, the legal question raised by Defendants' cross-motions is whether Vermont properly can assert personal and subject matter jurisdiction over Defendant Telescope so as to hold it liable for any aggravation referable to the February 2009 event. Even if the Commissioner has jurisdiction, the further legal question is whether principles of full faith and credit and/or collateral estoppel preclude her from assessing liability for an aggravation against Defendant Telescope when the New York Board has determined that the facts do not support such a determination under New York law.

Personal Jurisdiction Over Defendant Telescope in Vermont

3. As a preliminary matter, Defendant Vermont Recycled Slate asserts that because Defendant Telescope's attorney entered a general rather than a limited appearance in the current litigation, it has thereby submitted to the Commissioner's jurisdiction and waived its right to assert the lack of personal jurisdiction as a defense. *See* V.R.C.P. 12(h)(1); *Batchelder v. Mantak*, 136 Vt. 456, 462 (1978).

4. Were this a court proceeding, Defendant Vermont Recycled Slate's argument likely would be more convincing. It is less persuasive in this forum. Here, as is typical in most workers' compensation claims, Defendant Telescope's defenses, jurisdictional and otherwise, were first raised in the context of the claim denial that its insurance adjuster, not its attorney, filed. The informal nature of the proceedings at that point in the claim does not readily accommodate an adjuster's "limited appearance." To impose such a procedural requirement would encourage attorney involvement, a result contrary to what the Department long has envisioned to be a relatively informal adjudication process. *See Workers' Compensation Rule 7.1000.* Under these circumstances, I decline to impose the strict requirements of Rule 12(h) here. I choose instead to consider the merits of Defendant Telescope's lack of personal jurisdiction defense.

5. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution operates to limit a state's power to assert personal jurisdiction over a non-resident defendant. *Pennoyer v. Neff*, 95 U.S. 714 (1878). Due process is satisfied when personal jurisdiction is asserted over a non-resident corporate defendant who has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 413-414 (1984), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks and citation omitted).

6. Personal jurisdiction can be based on either specific or general contacts between the defendant and the forum state. "Specific jurisdiction" is exercised when a state asserts personal jurisdiction over a non-resident defendant in a lawsuit specifically arising out of or related to the defendant's contacts with the forum. *Helicopteros Nacionales, supra* at 414 and n.8; *Brown v. Cal Dykstra Equipment Co.*, 169 Vt. 636 (1999). In contrast, "general jurisdiction" relies instead on a foreign corporation's "continuous and systematic general business contacts" within the forum state as a basis for asserting personal jurisdiction. *Helicopteros Nacionales, supra* at 414, n.9 and 415-416. Phrased alternatively, specific jurisdiction is case-linked; general jurisdiction is "all-purpose." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, ___ U.S. ___, 131 S.Ct. 2846, 2851 (2011).

7. I do not find an appropriate basis for asserting specific jurisdiction over Defendant Telescope here. The injurious event that Claimant suffered in February 2009 arose out of Defendant Telescope's manufacturing activities in New York, not its sales activities in Vermont. The specific connection between Claimant's alleged aggravation and Defendant's contacts in Vermont is lacking, therefore. *See, e.g., Vezina v. White Mountain Cable Construction Corp.*, Opinion No. 16SJ-00WC (June 29, 2000) (no basis for specific jurisdiction where claimant's injury occurred in Massachusetts, and therefore did not arise out of or relate to employer's contacts with Vermont).

8. Has Defendant Telescope maintained "continuous and systematic general business contacts" sufficient to justify a finding of general jurisdiction in Vermont? The U.S. Supreme Court recently considered the requirements for such a finding in *Goodyear, supra.* There, the Court strongly admonished against confusing factors relevant to a specific jurisdiction analysis – most notably those relating to "stream of commerce" activities – with those necessary for a finding of general jurisdiction. "Flow of a manufacturer's products into the forum . . . may bolster an affiliation germane to *specific* jurisdiction," the Court stated. *Id.* at 2855 (internal citations omitted) (emphasis in original). "But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." *Id.* (emphasis in original). To justify the latter, a non-resident defendant's affiliations with the forum state must be so "continuous and systematic as to render them essentially at home" there. *Id.* at 2851 (internal quotation marks and citation omitted).

9. The U.S. Supreme Court's decision in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), represents the "textbook case" of appropriately exercised general jurisdiction over a non-resident corporation. *Goodyear, supra* at 2856 (internal quotation marks and citation omitted). Sued in Ohio, the defendant in *Perkins* was a Philippine mining corporation that had ceased activities in that country during World War II. To the extent that the company was conducting any business at all during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio – the corporation's president maintained his office there, kept the company's files there and supervised its limited wartime activities from there. Ohio thus became the corporation's "principal, if temporary, place of business." *Goodyear, supra*, quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-780, n.11 (1984). On those grounds, even though it lacked specific jurisdiction the court in Ohio still could adjudicate the controversy by virtue of its general jurisdiction over the defendant.

10. In the current claim, most of Defendant Telescope's ties to Vermont are of a type that might support specific jurisdiction in an action arising directly from its activities here – it regularly distributes its products to Vermont businesses, it markets to Vermont consumers through its website, it purchases various raw materials here, its annual sales here are not insignificant. As the *Goodyear* court clarified, however, these ties alone are insufficient to establish general jurisdiction in Vermont. There must be evidence showing that Defendant Telescope was essentially "at home" here.

11. I find the evidence on that point lacking. Although Defendant Telescope is registered as a foreign corporation in Vermont, this did not occur until April 2010, more than a year after Claimant's February 2009 injury occurred and also well after his employment with Defendant Telescope terminated. Although it maintained a policy of workers' compensation insurance that included coverage in Vermont, this was part of a rider covering all states, not an indication of substantial corporate activities here. Although some of its employees live here, there is no evidence that it actively recruits here. There is nothing from which I can determine that Defendant Telescope is any more "at home" here than it would be in any other state, aside of course, from New York.

12. For a corporation, the "paradigm bases" for what is fairly regarded as "at home" are domicile, place of incorporation and principal place of business. *Goodyear, supra* at 2854 (internal citation omitted). None of these bases exist in Vermont. There are no grounds, therefore, for exercising general jurisdiction over Defendant Telescope in this forum.

Subject Matter Jurisdiction Over Claimant's February 2009 Injury

13. Subject matter jurisdiction refers to the power of a court "to hear and determine a general class or category of cases." *Lamell Lumber Corp. v. Newstress Int'l, Inc.*, 2007 VT 83, ¶6. True subject matter jurisdiction, which refers to a court's authority to adjudicate the type of controversy before it, is to be distinguished from territorial jurisdiction, which depends on the court's relationship to the thing or status at issue. *In re B.C.*, 169 Vt. 1, 7 (1999), citing *Restatement (Second) of Judgments* §11 (1982).

14. Vermont's workers' compensation statute vests broad power in the commissioner to interpret and administer its provisions. 21 V.S.A. §606; *Letourneau v. A.N. Deringer*, 2008 VT 106 ¶8; *DeGray v. Miller Brothers Construction Co.*, 106 Vt. 259, (1934). Here, that power extends to determining the extent, if any, to which an employer governed by the Act is liable for additional workers' compensation benefits when a claimant suffers renewed symptoms, requires further treatment and/or incurs additional disability following an initially compensable work-related injury. Simply put, the commissioner has subject matter jurisdiction over aggravation-versus-recurrence disputes.

Jurisdiction under 21 V.S.A. §§616, 619 and/or 620

15. The question whether it is appropriate to exercise subject matter jurisdiction over the particular aggravation-versus-recurrence dispute at issue here depends on the proper application of 21 V.S.A. §§616, 619 and 620. Section 616 vests jurisdiction in the commissioner to apply Vermont's workers' compensation law to "all employment in this state." Under this language, jurisdiction in Vermont attaches as soon as a worker "renders services for his employer" here, regardless of where he or she was hired. *Martin v. Furman Lumber Co.*, 134 Vt. 1, 4-5 (1975). It is by virtue of this section that Claimant's November 2007 injury claim was administered here, as that injury occurred in the course of his employment here for Defendant Vermont Recycled Slate.

16. Section 619 vests jurisdiction in the commissioner to award workers' compensation benefits *under Vermont law* to an employee who is hired in Vermont but injured elsewhere:

> If a worker who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he or she shall be entitled to compensation according to the law of this state even though such injury was received outside of this state.

17. As for an employee who is hired in a foreign state, Section 620 vests jurisdiction in the commissioner to award workers' compensation benefits *under the foreign state's law* in limited situations:

> If a worker who has been hired outside of this state is injured while engaged in his or her employer's business and is entitled to compensation for such injury under the law of the state where he or she was hired, he or she shall be entitled to enforce against his or her employer his or her rights in this state, if his or her rights are such that they can be reasonably determined and dealt with by the commissioner and the court in this state.

18. For the commissioner to exercise jurisdiction under §620 over a claim involving an employee who was hired in a foreign state, therefore, the following conditions must be met: (1) the worker must be entitled to benefits under the foreign state's workers' compensation law; and (2) the worker's rights must be such that they can be "reasonably determined and dealt with" here. *Letourneau v. A.N. Deringer*, 2008 VT 106.

19. To determine the application of §§616, 619 and 620 to the facts of this claim, it is necessary first to determine where and when the "injury" for which Claimant now seeks benefits legally will be deemed to have occurred. Unraveling that thread requires an understanding of the difference in Vermont law between a recurrence and an aggravation. A "recurrence" signifies "the return of symptoms following a temporary remission." *Workers' Compensation Rule 2.1312.* An "aggravation" is "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." *Workers' Compensation Rule 2.1110.* Both terms presuppose an original injury, with symptoms that either resolve or plateau, and then subsequently worsen.

20. Although the case law interpreting the terms "aggravation" and "recurrence" is complex and confusing, *Ethan Allen, Inc. v. Bressette-Roberge*, 147 Vt. 518, 520 (2002) (mem.), the legal ramifications of finding one or the other are clear. A finding of recurrence relates any renewed symptoms back to the original injury, and imposes liability against the original employer for any additional benefits determined to be due. In contrast, a finding of aggravation operates to break the causal link back to the original injury. It is considered in all respects equivalent to a new injury, for which the subsequent employer becomes fully responsible. *Farris v. Bryant Grinder Corp.*, 2005 VT 5 ¶4, citing *Pacher v. Fairdale Farms*, 166 Vt. 626 (1997) (mem.).

21. Putting the legal consequences of an aggravation-versus-recurrence determination together with the jurisdictional triggers contained in §§616, 619 and 620, if the renewed symptoms Claimant experienced in February 2009 are deemed a recurrence of his original 2007 injury, then jurisdiction attaches under §616. Services that Claimant rendered for his employer in Vermont gave rise to an injury that occurred here. Having accepted responsibility for the initial injury, Defendant Vermont Recycled Slate remains liable when that injury recurs.

22. On the other hand, if the February 2009 event is deemed an aggravation, then jurisdiction must attach, if at all, under §620. With respect to this "new injury," Claimant had been hired in a foreign state (thus eliminating §619 as a jurisdictional basis), and was working there at the time the injurious event occurred (thus eliminating §616 from consideration).

23. As noted above, the commissioner's jurisdiction under §620 is limited. Section 620 requires the commissioner to apply New York's workers' compensation law, not Vermont's, in determining Claimant's right to benefits from his New York employer. *Letourneau, supra*. The New York Board having already concluded that Claimant's New York employer is not responsible for any benefits flowing from the February 2009 event, however, there is nothing to enforce in Vermont and no basis to assert jurisdiction under §620.

24. I conclude, therefore, that while I have jurisdiction under §616 to determine whether Claimant's renewed symptoms in February 2009 constitute a recurrence for which Defendant Vermont Recycled Slate remains liable, I lack the necessary jurisdiction to hold Defendant Telescope responsible for any aggravation or new injury.

Full Faith and Credit

25. The Full Faith and Credit Clause of the United States Constitution addresses each state's duty to respect "the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. Art. IV, §1. With respect to legislation, the Full Faith and Credit Clause generally "imposes on the courts of one state the duty so to enforce the laws of another." *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532, 544 (1935). With respect to judicial proceedings, its purpose is to ensure that decisions lawfully rendered by a court in one state are recognized and honored in every other state. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935).

26. In the current claim, the Full Faith and Credit Clause is implicated by virtue of the fact that the test for determining whether a prior or subsequent employer should be deemed responsible for an injured worker's renewed symptoms may be different in New York than it is in Vermont. As a result, the facts upon which the New York Board relied in concluding that under New York law Defendant Telescope was not responsible for Claimant's February 2009 injury may not have shielded it from liability if Vermont law was applied instead.[1] Defendant Telescope asserts that Vermont should accord full faith and credit to the New York Board's determination absolving it from responsibility. Both Claimant and Defendant Vermont Recycled Slate argue that Vermont is under no obligation to do so.

[1] The New York Board appeared to find it significant that Claimant's February 2009 injury occurred as he was bending down to pick something up but before he actually did so. Finding of Fact No. 15, *supra*. Under Vermont law, this might not preclude a finding of aggravation or new injury. *See Pacher, supra* at 627-628.

27. A state need not always give full faith and credit to another state's judgment if doing so would contravene its own statutes or policy. *Alaska Packers Association, supra* at 546. Rather, any state with a legitimate public interest in applying its own law to claims arising within its jurisdiction can do so, without offending the Full Faith and Credit Clause. *Carroll v. Lanza*, 349 U.S. 408, 412 (1955); *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493, 502 (1939); *Martin, supra* at 5-8, cited with approval in *Letourneau, supra* at ¶4.

28. In the workers' compensation context, a forum state's legitimate public interest in applying its own statute and policies to a claim over which it has jurisdiction can arise from a number of factors, including (1) whether the injury occurred there; (2) whether the employment contract was made there; (3) whether the employment relationship existed or was carried out there; (4) whether the employee resided there; (5) whether the employer's business was localized there; and (6) whether the parties agreed by contract to be bound there. 9 Lex K. Larson, *Larson's Workers' Compensation* §§142.01 *et seq.* and cases cited therein (Matthew Bender, Rev. Ed.).

29. Here, the proper application of the Full Faith and Credit Clause means that Vermont can apply its own aggravation-versus-recurrence analysis to determine whether Claimant's February 2009 injury was a recurrence of his original 2007 injury, for which Defendant Vermont Recycled Slate remains liable, or not. Vermont has a legitimate public interest in adjudicating any dispute that arises from the 2007 injury, and is not bound by any other state's determination either imposing responsibility on Vermont Recycled Slate or absolving it.

30. Vermont has no such legitimate public interest in applying its own law to an aggravation or new injury occurring in New York, however. Even though the facts may warrant a finding of aggravation as to the February 2009 event under Vermont law, no basis exists for trumping New York's determination to the contrary under New York law – the injury occurred in New York, pursuant to an employment relationship created and maintained in New York between a New York employer and a New York resident. None of the factors necessary to tie this injury to Vermont exist.[2]

31. I conclude, therefore, that although I am not bound by the New York Board's determination that Claimant's February 2009 injury constituted a recurrence for which Defendant Vermont Recycled Slate is liable, nor can I impose responsibility on Defendant Telescope for any aggravation or new injury I might find instead. Under the circumstances presented by this case, full faith and credit demands that each state's determination must "prevail over the other at home, although given no extraterritorial effect in the state of the other." *Alaska Packers Association, supra* at 548.

[2] Indeed, it is as a consequence of these same factors that Vermont lacks personal jurisdiction over Defendant Telescope. *See* Discussion at ¶¶ 5-12 *supra*. Even apart from full faith and credit considerations, that fact alone precludes me from issuing an order against Defendant Telescope to pay benefits for any aggravation or new injury I might find.

32. In reaching this conclusion, I acknowledge the possibility that Claimant might be caught between the two jurisdictions, with neither employer owning his February 2009 claim. This is the unfortunate consequence of a state-specific workers' compensation system, where each state's law reflects its own public policy with respect to coverage for work-related injuries. An injury that is compensable in one state may not be so in another. Over this result I have no control.

Collateral Estoppel

33. Citing to the New York Board's determination that it was not liable for Claimant's February 2009 injury, Defendant Telescope raises the doctrine of collateral estoppel as a further bar to any attempt to impose liability against it in Vermont.

34. The doctrine of collateral estoppel, or issue preclusion, prevents a party from relitigating an issue that was "necessarily and essentially determined" in a prior action between the same parties. *American Trucking Associations, Inc. v. Conway*, 152 Vt. 363, 369 (1989) (internal quotation marks and citation omitted). For the doctrine to be applied, the following criteria must be met: (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair. *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 265 (1990).

35. I conclude here that the third criterion has not been satisfied. The issue that the New York Board resolved was whether Defendant Telescope was liable for Claimant's February 2009 injury *under New York law*. The issue before me now is whether Defendant Telescope can be held liable for that injury *under Vermont law*. Collateral estoppel poses no bar to the current action, therefore. As discussed in detail above, however, I am nevertheless precluded by the operation of 21 V.S.A. §620 and by application of the Full Faith and Credit Clause from imposing liability against Defendant Telescope under Vermont law.

Waiver

36. Finally, Defendant Vermont Recycled Slate asserts that because Defendant Telescope failed to file an answer to its Notice and Application for Hearing within 21 days, it should be deemed to have waived its defenses to an aggravation claim.

37. Workers' Compensation Rule 4.1300 requires that when a Notice and Application for Hearing is filed, the opposing party must serve an answer stating its defenses within 21 days. Failure to do so "*may* be treated as an unreasonable denial subject to an order to pay compensation . . ." (emphasis supplied). This latter provision "shall not be construed to bar the timely assertion of additional defenses when justice requires." By its plain language, Rule 4.1300 thus vests in the commissioner broad discretion either to bar or to allow defenses that are not raised within the 21-day time limit specified.

38. Here, Defendant Telescope first specified its defenses to an aggravation claim in its adjuster's August 4, 2010 letter. While admittedly this was beyond the 21-day time limit mandated by Rule 4.1300, neither Claimant nor Defendant Vermont Recycled Slate has alleged any prejudice as a consequence of the delay, nor can I discern any. I will not bar Defendant Telescope from asserting its defenses on these grounds.

Summary

39. In sum, I conclude as follows:

- There is no basis for asserting personal jurisdiction over Defendant Telescope in this forum;
- There is subject matter jurisdiction in this forum over the type of aggravation-versus-recurrence disputes presented by the current claim;
- Jurisdiction over Defendant Vermont Recycled Slate lies in this claim under 21 V.S.A. §616;
- Jurisdiction over Defendant Telescope lies, if at all, under 21 V.S.A. §620; however, as jurisdiction under this section is limited to enforcing Claimant's rights under New York law, and the New York Board having determined that Claimant has no rights as against Defendant Telescope, there is nothing to enforce in this forum;
- Full faith and credit considerations do not preclude a finding of recurrence, for which Defendant Vermont Recycled Slate can be held liable, in this forum;
- Full faith and credit considerations do preclude the imposition of liability on account of a finding of aggravation against Defendant Telescope in this forum;
- Collateral estoppel is not an appropriate defense against Claimant's aggravation claim in this forum; and
- Defendant Telescope has not waived its defenses by virtue of its failure to respond to Defendant Vermont Recycled Slate's Notice and Application for Hearing in a timely manner.

ORDER:

Defendant Telescope's Motion for Summary Judgment is hereby **GRANTED**. Defendant Vermont Recycled Slate's Motion for Summary Judgment is hereby **DENIED**.

DATED at Montpelier, Vermont this 11th day of January 2012.

_____
Anne M. Noonan
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§670, 672.