Fernando Flores-Diaz v. Joel Letournea Drywall LLC (July 25, 2014)
Baybutt Construction Corp and
NWS Northern Wall Systems LLC

STATE OF VERMONT
DEPARTMENT OF LABOR

Fernando Flores-Diaz

v.

Joel Letourneau Drywall, LLC,
Baybutt Construction Corp., and
NWS Northern Wall Systems, LLC

Opinion No. 10-14WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. Y-03484

RULING ON DEFENDANTS LETOURNEAU AND BAYBUTT'S MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Cristina Rousseau, Esq., for Claimant
Eric Johnson, Esq., for Defendant Joel Letourneau Drywall, LLC (The Hartford Financial Services Group)
Robert Mabey, Esq., for Defendant Baybutt Construction Corp. (Travelers Insurance Co.)
John Serafino, Esq., for Defendant NWS Northern Wall Systems, LLC (Riverport Insurance Co.)

ISSUES PRESENTED:

1. Does jurisdiction lie in Vermont over Claimant's alleged February 2, 2012 work injury?

2. If yes, should the Commissioner decline to exercise jurisdiction in Vermont under principles of comity and/or *forum non conveniens*?

EXHIBITS:

Claimant's Exhibit 1:	New Hampshire Department of Labor, Employer's First Report of Occupational Injury or Disease, February 3, 2012
Claimant's Exhibit 2:	Accident Report (Baybutt Construction Managers), February 3, 2012
Claimant's Exhibit 3:	Employee's Assented-To Motion to Continue November 1, 2013 Pre-Hearing Conference Date, related correspondence and New Hampshire Department of Labor Appeals fax notification, October 22, 2013

Defendant Hartford's Exhibit A:
State of New Hampshire, 2011 and 2012 Annual Reports, Corporate Division filed documents, Baybutt Construction Corp.

Defendant Hartford's Exhibit B:
Employers' Workers' Compensation Insurance Coverage Verification (Vermont), Baybutt Construction Corp.

Defendant Hartford's Exhibit C:
Agreement between Baybutt Construction Managers and Joel Letourneau Drywall, LLC, November 23, 2010 (page 1 of 13)

Defendant Hartford's Exhibit D:
State of New Hampshire, Corporate Division filed documents, 2011 and 2014 Annual Reports, Joel Letourneau Drywall, LLC

Defendant Hartford's Exhibit E:
Employers' Workers' Compensation Insurance Coverage Verification (New Hampshire and Vermont), Joel Letourneau Drywall, LLC

Defendant Hartford's Exhibit F:
State of New Hampshire, Corporate Division filed documents, 2011 Annual Report, NWS Northern Wall Systems, LLC

Defendant Hartford's Exhibit G:
Brattleboro Memorial Hospital discharge summary, 02/04/2012

Defendant Hartford's Exhibit H:
Lowell General Hospital operative note, 2/23/12

Defendant Hartford's Exhibit I:
New Hampshire Department of Labor, Hearing Officer Decision, *Fernando Flores Diaz v. Aurelio Alcala Infante,* Case No. 70681, June 21, 2012

Defendant Hartford's Exhibit J:
New Hampshire Department of Labor, Hearing Officer Decision, *Fernando Flores Diaz v. Ricardo Lazo/Joel Letourneau Drywall/NWS Northern Wall Systems,* Case No. 72063, April 11, 2013

Defendant Hartford's Exhibit K:
Operative report, 08/23/2012

Defendant Hartford's Exhibit L:
Correspondence from State of New Hampshire Compensation Appeals Board, April 22, 2013; deposition of Ricardo Lazo, January 24, 2014 (excerpted portions); deposition of Fernando Flores-Diaz, January 9, 2014 (excerpted portions)

Defendant Travelers' Exhibit A:
Deposition of Fernando Flores-Diaz, January 9, 2014
Defendant Travelers' Exhibit B:
State of New Hampshire, Corporate Division filed documents, Joel Letourneau Drywall, LLC
Defendant Travelers' Exhibit C:
State of New Hampshire, Corporate Division filed documents, NWS Northern Wall Systems, LLC
Defendant Travelers' Exhibit D:
Agreement between Baybutt Construction Managers and Joel Letourneau Drywall, LLC, November 23, 2010 (pages 1-13 of 13)
Defendant Travelers' Exhibit E:
Deposition of Ricardo Lazo, January 24, 2014
Defendant Travelers' Exhibit F:
New Hampshire Department of Labor, Hearing Officer Decision, *Fernando Flores Diaz v. Aurelio Alcala Infante*, Case No. 70681, June 21, 2012
Defendant Travelers' Exhibit G:
Employee's Notice of Appeal, New Hampshire Dept. of Labor, Case No. 72063, April 17, 2013
Defendant Travelers' Exhibit H:
New Hampshire Department of Labor, Hearing Officer Decision, *Fernando Flores Diaz v. Ricardo Lazo/Joel Letourneau Drywall/NWS Northern Wall Systems*, Case No. 72063, April 11, 2013

FINDINGS OF FACT:

Considering the evidence in the light most favorable to Claimant as the non-moving party, *see, e.g., State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following:

1. At all times relevant to this claim, Baybutt Construction Corporation ("Baybutt") was the general contractor for the redevelopment of the Brattleboro Food Coop plaza (the "Brattleboro project"), located in Brattleboro, Vermont. *Defendant Travelers' Exhibit D*.

2. Baybutt is a New Hampshire corporation with a principle place of business in Keene, New Hampshire. At all times relevant to this claim, Baybutt maintained workers' compensation insurance covering its operations in Vermont. *Defendant Hartford's Exhibit B.*

3. Pursuant to an agreement executed in November 2010, Baybutt subcontracted certain drywall work on the Brattleboro project to Joel Letourneau Drywall, LLC. According to Article 5 of the agreement, prior to commencing work Letourneau was obligated to furnish Baybutt with suitable certificates indicating workers' compensation insurance coverage, for both itself and for any further subcontractors, in accordance with Vermont law. Pursuant to Article 6.4 of the agreement, Letourneau was prohibited from further subcontracting the whole or portions of its subcontract without Baybutt's written consent. *Defendant Travelers' Exhibit D.*

4. Joel Letourneau Drywall, LLC ("Letourneau") is a New Hampshire limited liability company with a principal office in Surry, New Hampshire. At all times relevant to this claim, Letourneau maintained workers' compensation insurance covering its operations in New Hampshire, but not in Vermont. *Defendant Hartford's Exhibit E.*

5. At some point, Letourneau subcontracted certain drywall work on the Brattleboro project to NWS Northern Wall Systems, LLC ("NWS"). At all times relevant to this claim, NWS was a New Hampshire limited liability company with a principal office in Dunbarton, New Hampshire. *Defendant Hartford's Exhibit F*. NWS maintained workers' compensation insurance covering its operations in New Hampshire, but not in Vermont. *Defendant Hartford's Exhibit J* at p. 2.

6. Dwayne Wallace is an owner of NWS. *Lazo deposition at 26:3 (Defendant Travelers' Exhibit E).*

7. At all times relevant to this claim, Claimant's nephew, Ricardo Lazo, has resided in Nashua, New Hampshire. *Lazo deposition at 7:3-8.*

8. Mr. Lazo is a drywall/sheetrock laborer. *Lazo deposition at 29:17-21*. Prior to the Brattleboro project, he had worked for NWS on a job in Rochester, New Hampshire. Initially he had come to work on that job as part of a crew headed by one Luis Martinez. *Lazo deposition at 26:25-27:1-9*. Subsequently, Mr. Wallace's partner, Tim, became dissatisfied with the quality of Mr. Martinez' work and discharged him. Tim was willing to retain Mr. Lazo and another co-worker on the Rochester job, however, provided that Mr. Lazo procured a certificate verifying workers' compensation insurance coverage. *Lazo deposition at 32:12-21*.

9. Rather than pay for and procure insurance coverage himself, Mr. Lazo telephoned his brother-in-law, who also works in the drywall/construction business, "to see if he had an insurance that we could borrow to submit to [Mr. Wallace] . . . ." *Lazo deposition at 33:21-25.* The brother-in-law conveyed Mr. Lazo's request to a relative, Aurelio Infante, a drywall taper. Subsequently, Mr. Infante faxed a copy of his insurance certificate to Mr. Wallace. *Lazo deposition at 33:25-34:2.*

10. Mr. Lazo and his co-worker remained on the Rochester job until its completion approximately a week and a half later. *Lazo deposition at 30:19-21.* Shortly thereafter, Mr. Lazo met Mr. Wallace at a McDonald's parking lot in Manchester, New Hampshire, where Mr. Wallace delivered a check, drawn on an NWS account and made payable to Mr. Infante, for the compensation due Mr. Lazo and his co-worker on the Rochester job. *Lazo deposition at 30:5-11, 32:1-5, 36:1-6.* Mr. Lazo delivered the check to Mr. Infante at his home in Nashua; after cashing it, Mr. Infante retained 15 or 20 percent for himself and gave the rest to Mr. Lazo to be distributed between himself and his co-worker. *Lazo deposition at 36:7-14, 37:23-38:5, 38:24-39:14.*

11. Upon completing the Rochester job, on or about January 30, 2012 Mr. Lazo and his brother, Carlos Lazo, began working with Mr. Wallace's crew at the Brattleboro project. *Lazo deposition at 27:1-4.* However, their first day on the project was aborted, because they had not brought step ladders with them and therefore were unable to accomplish the ceiling work Mr. Wallace wanted done. As they were leaving the jobsite, Mr. Wallace requested that when they returned, they bring two more men with them to fill out the work crew. *Lazo deposition at 44:17-25, 48:24-49:6, 87:14-20.*

12. In order to locate additional workers to join Mr. Wallace's crew, from his home in Nashua Mr. Lazo phoned an acquaintance, Miguel Piña. Mr. Piña was not working and therefore agreed to join the crew. *Lazo deposition at 49:20.* Then Mr. Lazo called Claimant, his uncle, "to see if he knew anybody that was not working." *Lazo deposition at 50:1-4.*

13. At all times relevant to this claim, Claimant has resided in Lowell, Massachusetts. *Flores-Diaz deposition at 7:1-4 (Defendant Travelers' Exhibit A).* He is a native of Mexico, with permanent resident status in the United States. His formal education ended in the 8th grade. He understands some English, but cannot speak it fluently. *Flores-Diaz deposition at 10:17-11:7, 14:25-15:5, 81:24-82:8.*

14. Claimant's prior work experience was as a mechanic; more recently he worked for a cleaning company. He was laid off from that job in 2010. When he received Mr. Lazo's telephone call he was collecting unemployment benefits; these were due to expire within the next week or so. *Flores-Diaz deposition at 10:8-16, 12:20-25, 16:20-25.*

15. Claimant received Mr. Lazo's telephone call at his home in Lowell. He had no prior sheetrock or drywall experience, and had never worked with his nephew before. Nevertheless, upon learning that Mr. Lazo was seeking a laborer to join Mr. Wallace's crew on the Brattleboro project, Claimant told him he would do so. *Flores-Diaz deposition at 26:7-27:4; Lazo deposition at 51:19-25.*

16. Claimant and Mr. Lazo next discussed transportation to and from the jobsite. Neither Mr. Lazo nor his brother had a valid driver's license. *Lazo deposition at 45:1-3, 47:22-24.* Claimant's ability to join Mr. Lazo on the Brattleboro project was in no way conditioned on his status as a legal driver, but because his license was valid he agreed to assume responsibility for driving the crew Mr. Lazo had assembled to Brattleboro. *Flores-Diaz deposition at 37:7-14.*

17. At the time of his telephone conversation with Mr. Lazo, Claimant knew only that work was available on the Brattleboro project. He understood that he would be working for Mr. Lazo's employer, though Mr. Lazo did not identify Mr. Wallace by name until the following day, at the jobsite. *Lazo deposition at 53:10-17.* He did not know whether he would be paid in cash or by check. *Flores-Diaz deposition at 33:19-22.* He "imagined" that the job would be for 40 hours per week, but did not know for how many weeks it was likely to last. *Flores-Diaz deposition at 35:25-36:7.* Until he arrived on the jobsite and met Mr. Wallace, he did not know what his job responsibilities would be, or what specific tasks he would be assigned. *Flores-Diaz deposition at 46:2-23.*

18. Mr. Lazo as well understood that he was acting on Mr. Wallace's behalf when he telephoned Claimant in search of additional workers, and that Mr. Wallace would be Claimant's employer. *Lazo deposition at 53:24-54:8.*

19. Both Claimant and Mr. Lazo credibly testified that for Claimant, securing work was a more important consideration than salary. *Flores-Diaz deposition at 38:4-6; Lazo deposition at 55:6-16.* As the following exchange demonstrates, Claimant's testimony was somewhat ambiguous as to when he first came to understand what his salary would be, whether at the time of his telephone conversation with Mr. Lazo or the following day, after he arrived on the jobsite:

> Q [by Attorney Mabey]: And you said that you were going to be paid $12 an hour?
> A: That's what they told me.
> Q: Is that what [Mr. Lazo] told you?
> A: [Mr. Wallace] told [Mr. Lazo] who passed the orders on.
> Q: Your conversation on the phone was only with [Mr. Lazo], right?
> A: Yes.
> Q: So [Mr. Lazo] told you that you would be paid $12 per hour?
> A: Yes, there were more of us, workers.
> Q: That wasn't my question. [Mr. Lazo] told you that you would be paid $12 an hour for this work in Brattleboro when you spoke with him on the phone a week before your accident; correct?
> A: Yes, that was the salary.

Flores-Diaz deposition at 35:8-24. In contrast, Mr. Lazo's deposition testimony was unambigious:

> Q [by Attorney Mabey]: Okay. So when you had this conversation with [Claimant], did you talk about how much the job would pay?
> A: No that was the next – ah, the first morning when – when we got there, I think, ah, we were in front, waiting for [Mr. Wallace] and his partner – not Tim, some other kid he was working with, his coworker and whatnot. And he said that he was going to pay Carlos and [Claimant] twelve bucks because he was going to use them as laborers.

Lazo deposition at 52:7-17. Considering the evidence in the light most favorable to Claimant as the non-moving party in the pending motions, I accept Mr. Lazo's testimony on this point.

20. On the morning following his telephone conversation with Mr. Lazo, on or about January 31, 2012 Claimant used his personal truck to drive from his home in Lowell to Nashua. From there, he used a vehicle belonging to Mr. Lazo's mother to drive himself, Mr. Lazo and his brother, and Mr. Piña to the jobsite in Brattleboro. *Lazo deposition at 56:9-58:7.* Upon arriving, Mr. Lazo introduced Claimant to Mr. Wallace. At some point, he informed Claimant that Mr. Wallace would be paying him $12.00 per hour for his work. *Lazo deposition at 55:6-12, 88:10-14; Flores-Diaz deposition at 102:9-12.* Also at some point, with Mr. Lazo acting as interpreter, Mr. Wallace began assigning Claimant tasks around the jobsite. *Flores-Diaz deposition at 46:2-23.*

21. Claimant did not complete a job application or fill out any paperwork upon his arrival at the jobsite. He assumed that he would be given the appropriate forms to fill out by the end of the week. *Flores-Diaz deposition at 43:6-13.*

22. At some point during their first day on the job, Mr. Wallace engaged in a conversation with Claimant, Mr. Lazo, Mr. Lazo's brother and another worker. Mr. Wallace informed the group that upon completing the Brattleboro project he was preparing to start another, larger project in Manchester, New Hampshire, which he expected to last for as much as a year. Mr. Lazo understood from that conversation that the crew he had assembled – himself, his brother, Mr. Piña and Claimant – would be working on the Manchester project as well. *Lazo deposition at 58:18-60:11; Flores-Diaz deposition at 36:8-24.*

23. Joel Letourneau was also present at the Brattleboro project worksite during the time that Claimant and Mr. Lazo worked there. He spoke with Mr. Wallace throughout the day, but did not issue orders or otherwise direct Claimant's work at any time. *Flores-Diaz deposition at 109:21-25; Lazo deposition at 80:20-81-11.*

24. Claimant worked on the Brattleboro project for three days. On the third day, Thursday, February 2, 2012, he was standing on some scaffolding to hold a piece of sheetrock in place when the scaffolding shifted and he fell. Claimant suffered various injuries as a consequence of this accident, including a dislocated left rotator cuff and a fractured left heel. *Flores-Diaz deposition at 51:8-18, 53:11-17; Defendant Hartford's Exhibit G.*

25. Following the accident, Claimant was transported to Brattleboro Memorial Hospital, where he received initial medical treatment. Thereafter, he returned to Massachusetts, where all subsequent care has been delivered. *Flores-Diaz deposition at 67:3-23.*

26. At the direction of a Baybutt employee, on the day after Claimant's accident Mr. Lazo completed a New Hampshire First Report of Injury. *Claimant's Exhibit 1*. Because he was "using" Aurelio Infante's workers' compensation insurance policy to cover his work for Mr. Wallace, Mr. Lazo identified Aurelio Infante as Claimant's employer. *Lazo deposition at 86:25-87:13, 96:10-97:4.*

27. Mr. Lazo did not work again for NWS after Claimant's injury. As noted above, he had anticipated that upon completing the Brattleboro project he and the other members of his crew, including Claimant, would be offered work on the upcoming Manchester, New Hampshire job. *Lazo deposition at 58:18-60:11.* However, when he called to inquire, Mr. Wallace responded, "I got no work for you." *Lazo deposition at 109:8-15.*

28. Mr. Wallace paid Claimant, Mr. Piña, Mr. Lazo and his brother by way of a check drawn off an NWS account and made payable to Mr. Infante. Because Mr. Infante was no longer living at his Nashua residence (having apparently returned to Mexico), Mr. Lazo deposited the check into his own account. While waiting for the check to clear, he paid his brother, Mr. Piña and Claimant their wages out of his own funds. When the check cleared, he reimbursed himself. *Lazo deposition at 62:13-68:9; Flores-Diaz deposition at 44:5-23.*

29. The First Report of Injury in which Mr. Infante was identified as the employer was filed with the New Hampshire Department of Labor on March 2, 2012. On March 19, 2012 Mr. Infante's workers' compensation insurance carrier denied the claim, on the grounds that (a) no employer-employee relationship existed, and (b) the policy did not cover injuries occurring outside the state of New Hampshire. Subsequently, on April 10, 2012 a second First Report of Injury was filed, this time naming Baybutt as the employer. On April 27, 2012 Baybutt's workers' compensation insurance carrier denied the claim, on the grounds that no employer-employee relationship existed.

30. Claimant appealed both denials to a hearing before the New Hampshire Department of Labor. On June 21, 2012 the hearing officer determined (a) that Claimant had failed to prove that he was an employee of Mr. Infante at the time of his injury; and (b) that as the general contractor on the project, Baybutt might become obligated to pay benefits, but only if Claimant "is able to determine who was the sub-contractor and then if that entity does not have insurance or coverage." *Defendant Hartford's Exhibit I at pp. 2 and 6.*

31. In December 2012 two new First Reports of Injury were filed with the New Hampshire Department of Labor – one identifying NWS Northern Wall Systems as Claimant's employer, the other implicating Joel Letourneau Drywall, LLC. Through their respective workers' compensation insurance carriers, both employers denied responsibility, on the grounds that no employer-employee relationship existed; NWS' denial also cited the lack of coverage in Vermont.

32. Claimant appealed both denials to a hearing before the New Hampshire Department of Labor.[1] On April 11, 2013 the hearing officer upheld the denials on the grounds that Claimant had failed to satisfy the statutory criteria necessary to establish jurisdiction over his injury in New Hampshire, given that it had occurred in Vermont. In making this determination, the hearing officer relied on the New Hampshire statute governing injuries sustained out of state, RSA 281-A:12. That statute reads as follows:

> §281-A:12. Injuries Outside the State
>
> I. If an employee is injured while employed elsewhere than in this state, and is injured under circumstances that would have entitled the employee or a dependent to workers' compensation under this chapter had such employee been injured in this state, then such employee or dependents of such employee shall be entitled to workers' compensation as provided in this chapter:
>
> (a) If the employee or the employee's dependents release the employer from all liability under any other law;
>
> (b) If the employer is engaged in business in this state;
>
> (c) If the contract of employment was made in this state; and
>
> (d) If the contract of employment was not expressly for service exclusively outside of this state.

33. Specifically, from the evidence presented the hearing officer found that "[w]hile debatable, . . . the final verbal contract of employment was made in Nashua, New Hampshire between Mr. Lazo, probably Dwayne Wallace and the claimant and that verbal contract and agreement for employment was only for the Vermont job." Therefore, because "[Claimant's] only agreement was for the work at the facility in Brattleboro, Vermont," he failed to satisfy the requirements of subsection (d) above. As a consequence, the hearing officer ruled, "the State of New Hampshire does not have jurisdiction in this matter and it is not a New Hampshire workers' compensation case subject to this chapter." *Defendant Hartford's Exhibit J at p. 5.*

[1] Claimant also filed a Notice of Injury against Ricardo Lazo as an employer; Mr. Lazo was uninsured and represented himself at the appeal hearing.

34. Claimant appealed both the June 2012 and April 2013 hearing officer determinations to the New Hampshire Compensation Appeals Board. *Defendant Hartford's Exhibit J at p. 2; Defendant Hartford's Exhibit L.* Subsequently, he filed the pending claim for benefits in Vermont [2] and moved to continue the pre-hearing conference in the New Hampshire appeals. All parties assented to the motion, which the New Hampshire Department of Labor granted pending a hearing and decision on the claim in Vermont. *Claimant's Exhibit 3.*

CONCLUSIONS OF LAW:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).

2. On behalf of their respective insureds, Defendants Hartford and Travelers' both assert that as a matter of law jurisdiction does not lie over Claimant's workers' compensation claim in Vermont. Both further assert that even if a basis for jurisdiction can be found, the Commissioner should decline to exercise it based on principles of comity and/or *forum non conveniens*.

Jurisdiction under 21 V.S.A. §§616, 619, 620 and 623

3. Vermont's workers' compensation statute provides four separate avenues for asserting jurisdiction over an injured worker's claim for benefits – one based on whether the claimant's employment is covered here, 21 V.S.A. §616, two based on whether he or she was hired here or in another state, 21 V.S.A. §§619, 620, and one based on the parties' agreement to be bound by Vermont law, 21 V.S.A. §623.

(a) Jurisdiction under Section 616

4. Section 616 vests jurisdiction in the commissioner to apply Vermont's workers' compensation law to "all employment in this state." Defendant Hartford argues that by this language the Legislature intended merely "to describe the scope of the chapter that follows," not to confer jurisdiction. The legislative history does not support such an interpretation, however.

[2] This is according to the Department's file, which reflects three separate Notice of Injury and Claim for Compensation forms (one for each of the named Defendants) filed on July 3, 2013.

5. Prior to 1967, the purpose of §616 was to provide a *de minimus* exemption from the requirements of the Workers' Compensation Act for small employers, that is, those who regularly employed fewer than five employees. *See Martin v. Furman Lumber Co.*, 134 Vt. 1, 3 (1975). In 1967, the statute was amended to exempt only employers with fewer than two employees from its coverage. *Id.* In 1973, the exemption was eliminated altogether. *Id.* In its current form, therefore, there is no "minimum-number requirement," *id;* unless otherwise exempted, the Act applies equally to all employers, whether large or small.

6. The most basic requirement of the Act – to pay workers' compensation benefits to employees who are injured on the job – is reflected in the following section:

> If a worker receives a personal injury by accident arising out of and in the course of employment *by an employer subject to this chapter*, the employer or the insurance carrier shall pay compensation in the amounts and to the person hereinafter specified.

21 V.S.A. §618(a)(1) (emphasis added).

7. Considered in conjunction with the emphasized language in §618, what the 1973 amendment to §616 accomplished was to confer jurisdiction in Vermont over even the smallest employer when an employee is injured as a consequence of his or her "employment in this state."

8. As Defendant Hartford correctly notes, "employment" is a defined term under the Act. However, the definition provided does not explain the word's meaning *per se*; rather, it simply clarifies what the Legislature intended to include therein:

> "Employment" includes public employment, and, in the case of private employers, includes all employment in any trade or occupation notwithstanding that an employer may be a nonprofit corporation, institution, association, partnership or proprietorship.

21 V.S.A. §601(4).

9. The Legislature having failed otherwise to define the meaning of the term "employment," it is appropriate to consider its common usage. *Walker v. Wolverine Fabricating & Mfg. Co.*, 391 N.W.2d 296, 300 (Mich. 1986), cited in *State v. Madison*, 163 Vt. 360, 368 (1995). According to Merriam-Webster, the word "employ" means "to use or engage the services of," and the word "employment" means "an activity in which one engages or is employed."

10. Construing together §§601(4), 616 and 618, the Legislature thus intended to confer subject matter jurisdiction over an employee who is injured in Vermont while engaged in the services of a covered employer, regardless of where he or she was hired.[3] *See, e.g., Letourneau v. A.N. Deringer*, 2008 VT 106 ¶2 (2008) (acknowledging the application of §616 to persons employed in Vermont).

11. In the pending claim, the evidence establishing that Claimant was injured in Vermont, while engaged in work activities on behalf of a covered employer, is undisputed. Jurisdiction over his workers' compensation claim thus lies under §616.

(b) Jurisdiction under Sections 619 and 620

12. Even apart from §616, §§619 and 620 provide another possible basis for asserting jurisdiction over Claimant's claim in Vermont. Section 619 vests jurisdiction in the Commissioner to award workers' compensation benefits *under Vermont law* to an employee who is hired in Vermont, even if the injury occurs 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.

13. 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.

[3] That the Legislature could do so without running afoul of constitutional full faith and credit concerns is well settled. *See, e.g., Martin v. Furman Lumber Co.*, 134 Vt. 1, 5-8 (1975) and cases cited therein; 9 Lex K. Larson, *Larson's Workers' Compensation* §142.01 *et seq.* (Matthew Bender Rev. Ed.) and cases cited therein; *Restatement (Second) of Conflict of Laws* §181 (1971).

14. As past precedent has shown, it is a far more difficult matter for the Commissioner to exercise jurisdiction under §620 than it is for her to do so under §619. *See, e.g., L.S. v. Dartmouth College*, Opinion No. 45-05WC (August 9, 2005), cited with approval in *Letourneau, supra* at ¶12; *Grenier v. Alta Crest Farms, Inc.*, 115 Vt. 324 (1948). Under §619, the Commissioner is empowered to apply Vermont law in any claim involving an injured worker who was hired in Vermont.[4] *Letourneau, supra* at ¶2. However, if the worker was both hired and employed in a foreign state, jurisdiction lies in Vermont only if (1) the worker would be entitled to benefits under the foreign state's law; and (2) the foreign state's process and procedure can be accommodated here. *Letourneau, supra* at ¶¶9-10; *Grenier, supra* at 330-31.

15. Lacking sufficient familiarity with the foreign state's law and/or access to the appropriate decision-making tribunal, practical considerations pose substantial impediments to the exercise of jurisdiction under §620. *Letourneau, supra* at ¶10. These considerations are of great concern in the case before me now. Significant differences exist between New Hampshire's statute and our own as to the circumstances under which jurisdiction can be taken over an injury that occurs in a foreign state. *Compare* New Hampshire RSA 281-A:12 (Finding of Fact No. 32 *supra*), with 21 V.S.A. §620 (Conclusion of Law No. 13 *supra*). Given the New Hampshire hearing officer's initial determination – that Claimant was not entitled to benefits under New Hampshire law – it would be presumptuous for me to apply the same law to different effect in this forum. For this reason, I conclude as a matter of law that it would be inappropriate to assume jurisdiction over Claimant's claim under §620.

16. It is a far easier matter for me to assume jurisdiction over Claimant's claim under §619, provided, of course, that he was hired here. To determine that issue, I must decide where his employment contract with NWS was completed, whether in Brattleboro, when he first came on the jobsite there, or in New Hampshire or Massachusetts, during his telephone conversation with Mr. Lazo the night before.

17. The place of a contract is "where the last act essential to its completion was done." *Chase Commercial Corp. v. Barton*, 153 Vt. 457, 461 (1990), quoting *West-Nesbitt, Inc. v. Randall*, 126 Vt. 481, 483 (1967). And while a completed contract "need not contain each and every contractual term, it must contain all of the material and essential terms" in order to be binding. *Evarts v. Forte*, 135 Vt. 306, 309 (1977). In the context of employment agreements, "typical essential terms include, among others, 'compensation, duties or responsibilities.'" *City of Houston v. Williams*, 353 S.W.3d 128, 139 (Tx. 2011), quoting *Martin v. Credit Protection Association, Inc.*, 793 S.W.2d 667, 669 (Tx. 1990).

[4] Defendant Hartford correctly interprets the language of §619 to mean that if the injured worker was hired in Vermont, jurisdiction lies under that section regardless of where he or she was injured, whether here or in another state. However, this does not mean that it is duplicative also to interpret §616 as conferring jurisdiction on the basis of an injury that occurs here. For example, under §616 the Commissioner is empowered to assume jurisdiction (and to award benefits in accordance with Vermont law) if the injured worker both resides and is injured here, as was the case in *Martin v. Furman Lumber, supra*. Under §619, Vermont workers' compensation benefits could not be awarded unless the injured worker also was hired here.

18. Claimant cites *Candido v. Polymers*, 166 Vt. 15 (1996), in support of his assertion that his employment agreement with NWS was not completed until his first morning on the job, when he met with Mr. Wallace at the Brattleboro jobsite. That case concerned the informed consent required in order to find that an employee hired and placed by a temporary employment agency could be said to have become the statutory employee of the employer for whom he or she actually worked. Although not directly on point, the Court's focus on the employee's "informed consent" to the employment relationship as an essential element of the contract of hire, *id.* at 20, is equally applicable here.

19. Considering the evidence in the light most favorable to Claimant, I conclude here that genuine issues of material fact exist as to when and where Claimant gave his informed consent to the salary Mr. Wallace offered for his work on the Brattleboro project. Although Claimant's testimony on this point was somewhat ambiguous,[5] Mr. Lazo's account was clearly stated – he did not learn that Mr. Wallace intended to pay Claimant $12.00 per hour for his work until the four-man crew arrived on the Brattleboro jobsite for their first day on the project.

20. Genuine issues of material fact also exist as to whether, when Mr. Wallace told Mr. Lazo on the day prior to Claimant's appearance on the Brattleboro worksite to bring two more men to join the work crew, he thus empowered him to be a hiring agent with full authority to bind NWS to an employment contract. Mr. Lazo's testimony that he was "acting on [Mr. Wallace's] behalf" when he enlisted Claimant to work on the Brattleboro project is open to interpretation on this point. It is equally plausible that his role was merely as a recruiting or referral source, and that Mr. Wallace retained the ultimate hiring authority.

21. With these two factual issues as yet undecided, I cannot yet determine whether Claimant was hired in Vermont or elsewhere. Consequently, I cannot as a matter of law eliminate §619 as a basis for asserting jurisdiction over his claim.

(c) Jurisdiction under Section 623

22. The fourth and final statutory basis by which the Commissioner can assume jurisdiction over an injured worker's claim for benefits derives from §623. That section governs "employers who hire workers within this state to work outside of the state." The statute authorizes the parties to the employment contract to agree that Vermont's benefit scheme will apply to any work-related injury that subsequently occurs.[6]

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[5] Defendants claim that because Claimant's deposition testimony was unambiguous, he is bound by it, and cannot now create a genuine issue of material fact by pointing instead to contradictory evidence. *See Johnson v. Harwood*, 2008 VT 4, ¶5. However, as noted above, Finding of Fact No. 19 *supra*, Claimant's sworn testimony on the salary question was by no means clear, and therefore Defendants' characterization is inaccurate.

[6] Notably, §623 further provides that "[a]ll contracts of hiring in this state shall be presumed to include such an agreement." Vermont law thus favors jurisdiction in all cases in which the injured worker was hired here, even if the work was to be done exclusively in another state. In contrast, New Hampshire law seems to favor exactly the opposite, *see* RSA 281-A:12(I)(c) and (d), Finding of Fact No. 32 *supra.*

23. Claimant here was hired to work in Brattleboro, not elsewhere. The language of §623 contemplates work exclusively in a foreign state, furthermore; thus, even if Mr. Wallace intended to hire him on as well to work on his next project, in Manchester, New Hampshire, this still would not trigger jurisdiction over the current claim under that section. For this reason, I conclude as a matter of law that jurisdiction does not lie under §623.

Principles of Comity and Forum non Conveniens

24. Considering the evidence in the light most favorable to Claimant, I have identified both a legal basis for asserting jurisdiction in Vermont under §616 and possibly a factual basis for doing so as well under §619. The fact that Vermont's statute authorizes jurisdiction over a particular claim does not necessarily mean that it must be exercised, however. *DeGray v. Miller Brothers Construction Co.*, 106 Vt. 259, 276 (1934). Principles of comity and *forum non conveniens* may point to another state as presenting a more suitable forum.

25. In appropriate circumstances, principles of comity can provide a basis "for nonintervention by a Vermont court in a dispute that has already come before some other forum." *Cavallari v. Martin*, 169 Vt. 210, 215 (1999). The doctrine is designed to foster cooperation among the states, preclude forum shopping and promote uniformity of decision. *Brightpoint, Inc. v. Pedersen*, 930 N.E.2d 34, 39 (Ind. Ct. App. 2010). Comity has "the power to persuade but not command;" it is not an imperative rule of law, but rather a rule of convenience and courtesy. *Boston Law Book Co. v. Hathorn*, 119 Vt. 416, 422 (1956) (internal quotations omitted); *Brightpoint, supra*. As such, where the forum state's established legislative policy conflicts with that of another state, the doctrine does not require the forum state to yield in any way. *Boston Law Book Co., supra*.

26. Comity is often applied in cases in which a final judgment in another court has already been rendered. *See, e.g., Office of Child Support v. Sholan*, 172 Vt. 619, 621 (2001). In cases where an already-filed suit is still pending in another forum, factors to consider include whether the first suit has been proceeding normally and without delay, and whether there is a danger that the parties may be subjected to multiple or inconsistent judgments if the second suit is allowed to continue. *Brightpoint, supra.*

27. In this case, were Claimant's appeals before the New Hampshire Department of Labor still moving forward, principles of comity might dictate that his Vermont claim be stayed in the meantime. The New Hampshire tribunal having already agreed to stay its proceedings pending a hearing and decision here, it would serve no purpose for me to do likewise, however.

28. That Vermont's legislative policy conflicts with New Hampshire's with respect to jurisdiction over an employee who is injured here is of even greater significance. I have determined that jurisdiction lies over Claimant's claim in Vermont under §616, and possibly under §619 as well. But because Claimant was hired only for work outside of New Hampshire, jurisdiction in that forum already has been denied, *see* Finding of Fact Nos. 32-33 *supra*. It would be unfair to deny Claimant his right to benefits based solely on principles of convenience, courtesy and deference to a policy that our own statute has rejected. *Boston Law Book Co., supra* at 422-423. For this reason as well, I conclude that principles of comity should not in any way dissuade me from assuming jurisdiction over Claimant's claim.

29. Nor does the equitable doctrine of *forum non conveniens* play any appropriate role here. The application of this doctrine "is by far the exception, not the rule." *Burrington v. Ashland Oil Co., Inc.*, 134 Vt. 211, 215-216 (1976). Its purpose is "to prevent the plaintiff from seeking to vex, harass, or oppress the defendant by inflicting upon [it] expenses not necessary to [the plaintiff's] own right to pursue his remedy . . . ." *Id.* Dismissing an action on *forum non conveniens* grounds should be granted only "in the rare case in which the combination of factors to be considered tips the scales overwhelmingly in favor of" the defendant, *id.*, quoting *States Marine Lines v. Domingo*, 269 A.2d 223, 225 (Del. 1970). Thus, merely showing inconvenience on the defendant's part is insufficient; "it must also be established that the dismissal will cause no serious inconvenience to the plaintiff." Were the rule otherwise, a defendant would be given an unfair opportunity to undermine the plaintiff's right to a good faith choice of forum. *Id.*

30. Both Defendants here point to a variety of factors in support of their assertion that Claimant's claim could be more conveniently resolved in another jurisdiction. Claimant lives in Massachusetts, and as most of his injury-related medical care has been provided there, it is likely that whatever medical expert witnesses he calls to support his claim for benefits will hail from there as well. Mr. Lazo, his brother, Mr. Piña and Mr. Wallace reside in New Hampshire, as do all three of the named defendants in this action. Defendants argue that conducting discovery under these circumstances will be needlessly expensive. In addition, they fear that if key witnesses refuse to testify voluntarily the Department will have no means of compelling them to do so by subpoena. Last, they assert that costly litigation on tangential issues, involving both coverage disputes and breach of subcontractor agreements, likely will accompany their defense of Claimant's claim for benefits in Vermont, but might be avoidable in New Hampshire.

31. Weighed against these concerns, Defendants argue that Claimant will not be unduly inconvenienced by pursuing his claim in another forum. Somewhat blithely, they assert that Claimant likely will prevail on his appeals in New Hampshire, or alternatively, that the facts will support a claim for compensation under Massachusetts law.[7] Last, they assert that because Claimant initially chose New Hampshire as his forum, he should be precluded from transferring to another jurisdiction now.

[7] Jurisdiction lies in Massachusetts over a claim involving a worker who was hired in that state, even if the injury occurred elsewhere. *See, e.g., Case of Murphy*, 759 N.E.2d 754, 757 (Mass.App.Ct. 2001).

32. Having carefully considered the parties' competing interests, I am unconvinced that any of the concerns Defendant has raised justify dismissing Claimant's claim on *forum non conveniens* grounds. While it is true, first of all, that most of the fact witnesses reside out of state, they are not so far away as to pose an unduly burdensome expense for Defendants. In the event a witness refuses to appear voluntarily, laws in both Vermont and New Hampshire now provide a streamlined process for compelling testimony by subpoena, *see* V.R.C.P. 45(f); New Hampshire RSA §517-A:1. As for expert witnesses, the Department's long-established practice is to accommodate expert witness testimony either by deposition or by telephone, *see* Workers' Compensation Rule 7.1500. Defendants' protestations to the contrary, the discovery process in this claim likely will be no more complicated or expensive than it is in most other workers' compensation claims.

33. Nor does the threat of litigation on tangential issues compel me to deny Claimant his chosen forum. The fact is, had each of the potentially responsible employers here complied with the responsibilities imposed on it by both contract and law, all would have been properly insured for their work in Vermont and none of them would now be faced with litigation over such matters as insurance coverage, statutory employment or breach of contract. The fault for those omissions lies with them, not with Claimant.

34. Considered in this light, I conclude that whatever inconvenience Defendants face in this forum are insubstantial. Should jurisdiction here be declined, the "inconvenience" to Claimant may well prove insurmountable, however. The most likely alternative forum, New Hampshire, already has denied his claim, by virtue of a statute that, unlike Vermont, does not permit jurisdiction over a claimant who was hired to work exclusively in another state. And although Defendants point to Massachusetts as another possible forum, jurisdiction in that state would depend on a finding that Claimant's employment contract was completed there. Based on the evidence presented so far, neither the New Hampshire tribunal nor I have found this to be true.

35. An initial requirement for applying the *forum non conveniens* doctrine to justify dismissal of an action is that an adequate alternative forum exists. Where the alternative forum does not permit litigation of the subject matter of the dispute, it is clearly unsatisfactory, and the inquiry must end. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981) (internal citations omitted). That is the case here.

36. I am mindful of Defendants' claim that because Claimant initially chose New Hampshire as his forum they already have incurred defense costs there, some of which likely will be duplicated if he is allowed to proceed now in this forum. However, I am more concerned about implementing the public policy embodied in Vermont's workers' compensation law, which affords protection to employees who are hired to work on Vermont jobsites. There being no alternative forum in which that policy can be effectuated, to dismiss Claimant's action here would be inappropriate.

Summary

37. I conclude that jurisdiction over Claimant's claim in Vermont lies as a matter of law under §616, and also that genuine issues of material fact exist as to whether jurisdiction might also lie under §619. I further conclude that neither principles of comity nor the equitable doctrine of *forum non conveniens* compel me to reject jurisdiction here. For these reasons, summary judgment in Defendants' favor is inappropriate.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendants Letourneau and Baybutt's Motions for Summary Judgment are hereby **DENIED**.

DATED at Montpelier, Vermont this 25th day of July 2014.

_____
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.