STATE OF VERMONT
DEPARTMENT OF LABOR

Victoria Hilliker

v.

Synergy Solar, Inc.

Opinion No. 12-16WC

By: Jane Woodruff, Esq.
Administrative Law Judge

For: Anne M. Noonan
Commissioner

State File No. GG-01096

OPINION AND ORDER

Hearing held in Montpelier, Vermont on December 1, 2015
Record closed on January 13, 2016

APPEARANCES:

Vincent Illuzzi, Esq., for Claimant
William Blake, Esq., for Defendant

ISSUE PRESENTED:

1. Does jurisdiction over Claimant's March 27, 2015 work-related injury lie in Vermont?

2. If yes, do principles of full faith and credit, comity, waiver and/or estoppel preclude her from seeking workers' compensation benefits here?

EXHIBITS:

Claimant's Exhibit 1:	Massachusetts Division of Industrial Accidents Notice of Conciliation, November 19, 2015
Claimant's Exhibit 2:	EFT form, Noncompetition and Nondisclosure Agreement, IRS Form W4, USCIS Form I-9
Claimant's Exhibit 3:	Email from Emily Beaulieu to Claimant with attached "new hire paperwork," August 10, 2015
Claimant's Exhibit 4:	Check payable to Claimant, December 23, 2014
Claimant's Exhibit 5:	Signed receipt for employee safety handbook, January 14, 2015
Claimant's Exhibit 6:	Employee handbook receipt/acknowledgment, January 14, 2015
Claimant's Exhibit 7:	Text messages to/from Claimant, December 19, 2014
Defendant's Exhibit A:	Text messages to/from Claimant, December 18, 2014 through August 25, 2015
Defendant's Exhibit B:	Correspondence from Massachusetts Department of Industrial Accidents, June 1, 2015

CLAIM:

All workers' compensation benefits to which Claimant proves her entitlement under Vermont law
Costs and attorney fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

3. Defendant is a solar energy contractor with principle business offices in Plymouth, Massachusetts. It erects solar arrays around the country. In November 2014, Dan Clinton was Defendant's partner and co-owner.

4. Claimant is a resident of Newport, Vermont. She has prior experience erecting solar panels in Barton, Vermont. In November 2014, she learned through her friend, Kristi Powers, that Defendant might be hiring additional employees. Ms. Powers told Claimant that she would try to get her a job there, so that the two of them could drive to worksites together. To that end, she provided Claimant with Mr. Clinton's telephone number.

Claimant's Initial Contact with Mr. Clinton

5. Claimant first spoke with Mr. Clinton, who was in Massachusetts at the time, by telephone on November 26, 2014, a call that she initiated from her home in Vermont. According to her credible testimony, during this call Mr. Clinton offered her employment on the following terms: wages at the rate of $15.00 per hour, $25.00 per diem for food, paid wages for travel time between her home in Vermont and her assigned jobsites and paid hotel accommodations when necessary. Mr. Clinton further explained that he would contact her when the next job became available.

6. There being no evidence of any subsequent negotiation between the parties, I find that Claimant accepted the terms of employment exactly as Mr. Clinton proposed them during their November 26, 2014 telephone conversation.

7. On December 9, 2014, Ms. Powers telephoned Claimant to advise that the two of them had been assigned to work on Defendant's next job in Sheffield, Massachusetts. The following day, December 10, 2014, Claimant received an email from Emily Beaulieu, Defendant's administrative assistant. The email was entitled, "New Employee Paperwork," and read as follows:

> Hi Victoria!
>
> Welcome aboard! Attached is all of your new hire paperwork. Please complete them and scan and email them back to me. If you don't have access to a scanner, you can throw them in the mail to me.
>
> Any questions, don't hesitate to call/email. Thanks!!

8. Attached to Ms. Beaulieu's email were the following documents: Defendant's Noncompetition and Nondisclosure Agreement; USCIS Form I-9 Employment Eligibility Verification; IRS Form W-4; and an Electronic Funds Transfer (EFT) Form.

9. The instructions for completing the Form I-9, which were also appended to Ms. Beaulieu's email, specifically state:

> Employers must complete Form I-9 to document verification of the identity and employment authorization of each *new employee* (both citizen and noncitizen) hired . . . to work in the United States (emphasis supplied).
>
> *Newly hired employees* must complete and sign Section 1 of Form I-9 **no later than the first day of employment.** *Section 1 should never be completed before the employee has accepted a job offer* (italicized emphasis supplied; bolded emphasis in original).
>
> Employers may not ask an individual to complete Section 1 *before he or she has accepted a job offer* (emphasis supplied).

10. I find that Ms. Beaulieu's December 10, 2014 email evidences Defendant's understanding that Claimant had accepted its job offer at least as of that date.

Claimant's First Job Assignment and In-Person Meeting with Mr. Clinton

11. On December 15, 2014 Claimant and Ms. Powers traveled together from Orleans County, Vermont to Sheffield, Massachusetts so that they could start work the next day on Defendant's solar project. Upon arrival, they checked into the motel at which Defendant had arranged for them to stay. They began work at the Sheffield project the next day, December 16, 2014.

12. Claimant credibly testified that she first met Mr. Clinton on either her first or second day at the Sheffield jobsite. According to both hers' and Mr. Clinton's accounts, the meeting was brief. Mr. Clinton credibly recalled telling Claimant to submit her new employee paperwork as soon as possible, so that Defendant could add her to its payroll. Neither he nor Claimant testified to any further negotiation regarding the terms of Claimant's employment during this meeting.

13. Ms. Powers credibly testified that she saw Claimant complete her new employee paperwork while in their hotel room. Claimant transmitted the documents to Mr. Clinton via her cell phone on December 18, 2014. According to Claimant, this was the second time she had filled out and submitted the documents; she recalled that initially she had completed and emailed them to Ms. Beaulieu while still in Vermont. Ms. Beaulieu left Defendant's employ at around this time, so possibly the first set of documents were lost when her email account was closed.

14. Claimant received her first wages from Defendant by way of a business check in the amount of $862.50, dated December 23, 2014. Because she had not yet been entered into Defendant's payroll system, the check stub did not indicate how that amount was calculated. However, Claimant credibly testified that the amount paid was consistent with what she calculated was due for (a) her travel time to and from Vermont; (b) a $25.00 per diem; and (c) her hourly wages while on the jobsite.

15. After completing the Sheffield job, Claimant worked for Defendant on a project in Maryland. Her third assignment was at a jobsite in Boxborough, Massachusetts. On each job, Defendant paid for her travel time to and from Vermont, at her agreed-upon hourly wage.

Claimant's Work-Related Injury and Massachusetts Workers' Compensation Claim

16. On March 27, 2015 Claimant injured her ankle while working at Defendant's Boxborough project. Defendant filed an Employer's First Report of Injury or Fatality (Form 101) with the Massachusetts Department of Industrial Accidents, accepted the injury as compensable and began paying both indemnity and medical benefits in accordance with Massachusetts' workers' compensation statute.

17. Immediately after her injury, Claimant received emergency treatment at a hospital in Massachusetts. Later, Defendant's workers' compensation insurance adjuster arranged for her care to be transferred to Dartmouth-Hitchcock Medical Center in New Hampshire, as that facility was closer to her home in Newport, Vermont. Claimant underwent surgery at DHMC and later, physical therapy in Newport.

18. Claimant was disabled from working as a consequence of her injury for approximately nine months, during which time Defendant paid both temporary disability and medical benefits in accordance with Massachusetts law. She has since returned to work for another employer.

19. Claimant's Massachusetts workers' compensation claim was assigned to the Department of Industrial Accidents' Springfield, Massachusetts office. This is a four or five-hour drive from her Newport, Vermont home. Claimant credibly testified that she would not be able to participate in any hearings connected to her claim there, because traveling that distance was too onerous for her. While her claim remains open, there is no evidence of any pending dispute regarding her entitlement to benefits in Massachusetts.

CONCLUSIONS OF LAW:

1. The disputed issue in this claim is whether, having already accepted workers' compensation benefits for her work-related injury in accordance with Massachusetts' law, Claimant can now pursue a claim for supplemental benefits under Vermont's workers' compensation law. To resolve this question, I must consider first, whether the facts support a statutory basis for asserting jurisdiction in Vermont, and second, whether legal principles of full faith and credit, comity, waiver and/or estoppel should operate to bar Claimant from receiving a supplemental award here.

Statutory Basis for Jurisdiction under Vermont Law

2. 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.

3. The parties' primary focus in this claim is on whether Claimant was or was not hired in Vermont. If she was, then jurisdiction attaches here under 21 V.S.A. §619:

> 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.

See, e.g., Letourneau v. A.N. Deringer, 2008 VT 106 (noting that Vermont's workers' compensation statute confers jurisdiction under §616(a) for workers who are employed here, and under §619 for workers who are hired here); *Flores-Diaz v. Letourneau Drywall, LLC et al.*, Opinion No. 10-14WC (July 25, 2014).

4. As is the case generally, the place of a hiring 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 (Tex. 2011), quoting *Martin v. Credit Protection Association, Inc.*, 793 S.W.2d 667, 669 (Tex. 1990).

5. I conclude here that Claimant's hiring contract with Defendant was completed when she assented to the employment terms that Mr. Clinton proposed during their November 26, 2014 telephone conversation. Further confirmation of the employment relationship came on December 10, 2014, when she received Ms. Beaulieu's "Welcome aboard!" email and attached "new employee paperwork." As both of these acts occurred while Claimant was in Vermont, I conclude that the hiring contract was made here.

6. In reaching this conclusion, I must reject Defendant's assertion that the last act essential to the completion of the hiring contract did not occur until December 18, 2014, when Claimant transmitted the completed "new employee paperwork" to Mr. Clinton via cell phone from her Sheffield, Massachusetts hotel room. To accept that date as the operative one, I would have to ignore the specific admonition contained on the USCIS Form I-9 against asking "an individual to complete Section 1 *before he or she has accepted a job offer* (emphasis supplied)." I also would have to ignore the credible evidence establishing that, in accordance with the parties' hiring agreement, Defendant paid Claimant wages beginning with her business-related travel from Vermont on December 15, 2014. Defendant has offered no factual or legal basis for me to do so, however.

7. Defendant confuses the last act essential to the making of the hiring contract – Claimant's assent to its terms – with actions that were triggered once she did so, such as completing federal tax and homeland security forms. Had Claimant been injured on her first day at the Sheffield worksite, there is no doubt but that her injury would have been compensable notwithstanding that she had not yet submitted the forms that Ms. Beaulieu and Mr. Clinton had requested. These documents may have evidenced her hiring, but they did not in any way create it.

Principles of Full Faith and Credit, Comity, Waiver and Estoppel

8. Having concluded that Claimant's hiring occurred in Vermont, such that workers' compensation jurisdiction attaches under 21 V.S.A. §619, I must next consider whether principles of full faith and credit, comity, waiver and/or estoppel preclude her from recouping benefits in Vermont over and above what she already has received in Massachusetts. I conclude that they do not.

(a) Constitutional Full Faith and Credit

9. The United States Supreme Court has specifically considered whether the Constitution's Full Faith and Credit Clause[1] precludes one state from awarding workers' compensation benefits according to its own statutory framework notwithstanding that the injured worker already has received benefits in accordance with another state's workers' compensation statute. The claimant in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980), was injured while working in Virginia, but was hired and lived in the District of Columbia. Initially he received temporary disability benefits in Virginia. When later he sought to recover permanent total disability benefits in the District of Columbia, his employer objected on the grounds that the Virginia award was entitled to full faith and credit, such that any additional benefits were only payable in accordance with Virginia law.

10. In a plurality opinion, the Court disagreed. Noting that jurisdiction could have attached in the District of Columbia in the first instance, it concluded that Virginia had no legitimate interest in preventing the claimant from recovering a supplemental award there. "For all practical purposes," it observed, "[the employer] and its insurer would have had to measure their potential liability exposure by the more generous of the two workmen's compensation schemes in any event." *Id.* at 280. Thus, there was no reason "to give extra weight to the first State's interest in placing a ceiling on the employer's liability than it otherwise would have had." *Id.* at 284.

11. As is the case in most states, the Court found that the workers' compensation statutes in both Virginia and the District of Columbia reflected an interest in providing an expedient and relatively informal process by which injured workers can receive compensation for their work-related injuries. The unintended consequence of denying a claimant's right to a supplemental award would be to thwart that goal:

> Compensation proceedings are often initiated informally, without the advice of counsel, and without special attention to the choice of the most appropriate forum. Often the worker is still hospitalized when benefits are sought . . . And indeed, it is not always the injured worker who institutes the claim . . . A rule forbidding supplemental recoveries under more favorable workmen's compensation schemes would require a far more formal and careful choice on the part of the injured worker than may be possible or desirable when immediate commencement of benefits may be essential. *Id.* at 284-285 (internal citations omitted).

[1] United States Constitution, Art. IV, §1: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

12. With these considerations in mind, the Court concluded that the concept of a supplemental award did not violate the Full Faith and Credit Clause in any respect. *Id.* at 286. Notably, in reaching this conclusion the Court distinguished an earlier case, *Chicago, R.I. & P. R. Co. v. Schendel*, 270 U.S. 611 (1926), in which, because of a contested factual finding, the two statutes at issue offered two mutually exclusive remedies. In *Thomas*, the same set of facts would have justified an award under either state's statute. Under those circumstances, "[a] supplemental award gives full effect to the facts determined by the first award, and also allows full credit for payments pursuant to the earlier award. There is neither inconsistency nor double recovery." *Id.* at 281.

13. Consistent both with the Supreme Court's determination in *Thomas* and with cases decided since then in other states,[2] I conclude here that to allow Claimant to recover a supplemental award in Vermont would not violate the principles underlying the Full Faith and Credit Clause. Claimant having been hired in this state, Vermont has a legitimate interest in applying its workers' compensation statute to her injury. *Letourneau, supra; see also* 9 Lex K. Larson, *Larson's Workers' Compensation* §142.01 (Matthew Bender Rev. Ed.). So long as (a) the facts underlying Claimant's recovery in Massachusetts are given full effect here; and (b) Defendant is given full credit for all payments made under her Massachusetts claim, a supplemental award is constitutionally permissible.

(b) <u>*Comity*</u>

14. 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*.

15. 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.*

[2] *See, e.g., Williams v. Johnson Custom Homes*, 288 S.W.3d 607, 610 (Ark. 2008) (describing the issue as "well-settled"); *Sea-Land Service, Inc. v. Workers' Compensation Appeals Board*, 925 P.2d 1309 (Ca. 1996); *Gulf Interstate Geophysical v. Industrial Commission*, 555 N.E.2d 989 (Ill. 1990); *McGowan v. General Dynamics Corp.*, 546 A.2d 893 (Ct. 1988); *see generally*, 9 Lex K. Larson, *Larson's Workers' Compensation, supra* at §142.05 (remarking upon the "uniform right of all states having a legitimate interest in the injury to apply their own diverse rules and standards – separately, simultaneously or successively").

16. In the case before me now, while Claimant's Massachusetts claim may still be open, there is no evidence of any ongoing dispute in that forum concerning either the compensability of her injury or her entitlement to benefits. Consistent with the full faith and credit principles discussed above, Conclusion of Law No. 13 *supra*, a supplemental award in this state will neither supplant nor undermine the factual determinations already made in Massachusetts. There is no risk that Defendant will be subjected to multiple or inconsistent judgments, therefore. As was the case in *Thomas*, ultimately what it will owe Claimant in workers' compensation benefits will be no more (or less) than what it would have owed had she selected Vermont as her forum to begin with.

17. I conclude that principles of comity do not in any way preclude Claimant from pursuing a supplemental award of workers' compensation benefits in Vermont.

(c) *Waiver and Estoppel*

18. A waiver is the voluntary relinquishment of a known right. To establish it, "there must be shown an act or an omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right in question." *Holden & Martin Lumber Co. v. Stuart*, 118 Vt. 286, 289 (1954). A waiver can be express or implied, but if it is the latter, "caution must be exercised both in proof and application. The facts and circumstances relied upon must be unequivocal in character." *Id.*

19. The doctrine of equitable estoppel promotes fair dealing and good faith "by preventing 'one party from asserting rights which may have existed against another party who in good faith has changed his or her position in reliance upon earlier representations.'" *Beecher v. Stratton Corp.*, 170 Vt. 137, 139 (1990), quoting *Fisher v. Poole*, 142 Vt. 162, 168 (1982). At the doctrine's core is the concept that through its conduct, the party against whom estoppel is asserted must have intended that the other party would be misled to his or her detriment. *Id.*; *Longe v. Boise Cascade Corp.*, 171 Vt. 214, 224 (2000).

20. There is no evidence here from which I can conclude that by receiving workers' compensation benefits in Massachusetts, Claimant has either waived her right to seek a supplemental award in Vermont or is estopped from doing so now. By first accepting benefits in Massachusetts – pursuant to a process that Defendant initiated by filing her claim there – she did not voluntarily relinquish her right to a supplemental award. Nor did she intend thereby to mislead Defendant to its detriment. Again, what Defendant is now obligated to pay her is no more than what it would have owed had she filed her claim in Vermont *ab initio*.

Summary

21. In sum, I conclude first, that because Claimant was hired in Vermont, jurisdiction lies here under 21 V.S.A. §619, and second, that neither the Full Faith and Credit Clause nor principles of comity, waiver and/or estoppel bar her claim for a supplemental award here. So long as any such award is consistent with the facts underlying her Massachusetts claim, and provided that Defendant is allowed full monetary credit for the benefits it already has paid, she is free to proceed in this forum.

22. As Claimant has prevailed on her claim for benefits, she is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit her itemized claim.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. All workers' compensation benefits to which Claimant proves her entitlement in accordance with Vermont law, *provided that* (a) her entitlement is consistent with the facts determined in conjunction with her prior award of benefits under Massachusetts law; and (b) full monetary credit is given for all payments made in the context of her Massachusetts claim; and

2. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this _____ day of August 2016.

_____
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.