

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Ian Burnett

Opinion No. 18-23WC

v.

By: Stephen W. Brown
Administrative Law Judge

Home Improvement Company of
Vermont, Inc. d/b/a Jancewicz & Son

For: Michael A. Harrington
Commissioner

State File No. SS-00093

RULING ON CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

APPEARANCES:

Brendan P. Donahue, Esq., for Claimant
William J. Blake, Esq., for Defendant

ISSUE PRESENTED:

Does the Vermont Department of Labor have jurisdiction over the injury Claimant suffered while working for Defendant in New Hampshire?

EXHIBITS:

Claimant's Statement of Undisputed Material Facts ("CSUMF")

Claimant's Exhibit 1: Affidavit of Ian Burnett

Claimant's Exhibit A to Exhibit 1: Payroll Records

Claimant's Exhibit B to Exhibit 1: Vehicle Registration

Claimant's Exhibit 2: Supplemental Affidavit of Ian Burnett

Claimant's Exhibit A to Exhibit 2: Video Showing Exterior of Building

Claimant's Exhibit B to Exhibit 2: Google Map Aerial View of 43°08'15N", 72°27'25"W

Claimant's Exhibit 3: Affidavit of Brendan Donahue, Esq.

Claimant's Exhibit A to Exhibit 3: Multiple Flyers Promoting Defendant's Business Mailed to Claimant's Counsel's Home in Vermont

Defendant's Statement of Undisputed Material Facts ("DSUMF")

Defendant's Exhibit A:	Vermont Secretary of State Page for Defendant
Defendant's Exhibit B:	Affidavit of Jayson Dunbar, President of Defendant
Defendant's Exhibit C:	Construction Permit
Defendant's Exhibit D:	New Hampshire Department of Labor Filing Showing Defendant's Payment of Benefits to Claimant
Defendant's Exhibit A to Reply:	Defendant's Website
Defendant's Exhibit B to Reply:	Supplemental Statement of Jayson Dunbar
Defendant's Exhibit C to Reply:	Business Records Showing Claimant's Hours Worked in New Hampshire and Vermont in 2022
Defendant's Exhibit D to Reply:	Photographs of Defendant's Vermont Real Property Showing Remodeling Work in Progress, including Sign Taped to Front Door stating, "We have moved! Our new [<i>sic</i>] is: 1162 Main Street, North Walpole, NH"
Defendant's Exhibit E to Reply:	Additional Photographs Showing Interior of Defendant's Vermont Real Property, Showing Warehouse and Skateboarding Facility
Defendant's Exhibit F to Reply:	Additional Photographs Showing Interior of Defendant's Vermont Real Property, Showing Two-Bay Garage
Defendant's Exhibit G to Reply:	Additional Photographs Showing Interior of Defendant's Vermont Real Property, Showing Four-Bay Garage

BACKGROUND:

Except where noted, there is no genuine issue as to the following material facts:

1. Defendant is a domestic Vermont for-profit corporation with a principal place of business in North Walpole, New Hampshire.
2. Claimant does not reside in Vermont.
3. Defendant hired Claimant in person at its facility in New Hampshire.
4. Defendant assigned Claimant a company truck in July 2022. He used that truck regularly until mid-September 2022. As of September 13, 2022, that vehicle was registered in Vermont.
5. On September 13, 2022, Claimant drove his company truck from North Walpole, New Hampshire to a job site in Ludlow, Vermont. After working for some time at that job site,

he drove the truck back to Walpole, New Hampshire, where he began cutting some gutter blocks that he had planned to transport to another job site in Londonderry, Vermont.

6. While cutting those gutter blocks in New Hampshire, he accidentally injured his hand with a saw. This claim therefore involves a work-related accident that occurred in New Hampshire.
7. Claimant received a bonus or sales commission¹ in the amount of \$204.97 for originating the job in Londonderry, Vermont for which he was working in New Hampshire at the time of his injury. Based on Defendant's business records, Claimant worked approximately 646 hours in Vermont in 2022; he worked approximately 1,381 hours in New Hampshire. (Defendant's Exhibit C).²
8. In addition to its principal place of business in North Walpole, New Hampshire, Defendant also owns a parcel of real property in Bellows Falls, Vermont. Defendant applied for and received a construction permit to convert certain office space at that Vermont property into two-family rental units. The parties dispute whether and the extent to which Defendant actively conducts business at that location, as well as the precise scope of the construction permit. The parties also dispute the extent to which Claimant has performed work at that location, although it is undisputed that at a minimum, he has picked up and dropped off supplies there. (*See generally* DSUMF Nos. 5-6 and Defendant's Responses thereto; CSUMF 11-12 and Claimant's replies thereto).
9. Claimant has supplied a video that he took showing Defendant's real property in Bellows Falls, Vermont. It appears to have been shot from the passenger window of a moving vehicle and shows a warehouse, multiple bays with closed garage doors, and several trucks and trailers in a parking lot, at least one of which bears Defendant's name and logo. (*See* Claimant's Exhibit A to Exhibit 2). Defendant has supplied photographs of the interior of that facility. (*See* Defendant's Exhibits D-G).
10. Claimant's attorney has also supplemented the record with his own affidavit, stating that he has received multiple business promotional flyers from Defendant at his home in Vermont during the pendency of these cross-motions.
11. AmTrust Insurance Company is Defendant's Vermont workers' compensation carrier. It has denied this Vermont claim in its entirety based on a lack of jurisdiction.
12. Defendant also maintains a separate workers' compensation insurance policy for work-related accidents and injuries in New Hampshire. Defendant's New Hampshire workers' compensation insurer has accepted Claimant's claim as compensable and has paid some benefits accordingly.

¹ The parties dispute the correct terminology to describe this payment, but they agree that the payment occurred.

² Claimant asserts that the majority of the work he performed for Defendant was in Vermont and that the majority of Defendant's projects are performed in Vermont. Defendant denies these factual contentions. (*See* CSUMF 8-9 and Defendant's Responses thereto). For the reasons discussed *infra*, I do not find this discrepancy material to the legal questions before me, as Claimant did not live in Vermont, was not hired in Vermont, and was not injured in Vermont.

13. Claimant contends that he did not voluntarily choose to have this case administered and adjusted in New Hampshire and would prefer to have this claim adjudicated in Vermont. Defendant denies that Claimant was improperly denied any rights as to the choice of venue or jurisdiction, and that it acted properly when it timely filed this claim with the New Hampshire Department of Labor.

ANALYSIS:

1. 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. Heritage Realty of Vermont*, 137 Vt. 425 (1979).
2. There are four statutory bases of jurisdiction that are potentially relevant in this case: 21 V.S.A. §§ 616(a), 619, 620, and 623. I consider each in turn below.

Section 616(a)

3. Section 616(a) provides in relevant part as follows:

Except as otherwise provided in this section and other provisions of this chapter, this chapter shall apply to all ***employment in this State***, and where provided, to employment outside of the State.

21 V.S.A. § 616(a) (emphasis added).

4. This leaves open the question of whether Claimant's employment was "in this State" within the meaning of Section 616(a).

A. Existing Decisional Interpretations of Section 616(a)

5. This Department has held that Section 616(a) "confer[s] 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." *Flores-Diaz v. Joel Letourneau Drywall, LLC*, Opinion No. 10-14WC (July 25, 2014) (emphasis added) (holding that Massachusetts resident employed by New Hampshire business who was injured while working in Vermont was within the scope of Section 616(a)) (citing *Letourneau v. A.N. Deringer/Wausau Ins. Co.*, 2008 VT 106)).
6. Similarly, the Vermont Supreme Court has held as follows:

A person working under a contract of hire made in a foreign state does not become an employee under the provisions of our act until he renders service for his employer in this State under such contract. Until then he is not an employee and the terms of the act do not affect him and he is not bound by it. But as soon as he renders service for his employer in this State under such contract, then the act enters and becomes a part of the contract. He is then bound by the provisions of the act and is entitled to compensation under its provisions **for an injury sustained in this jurisdiction** while rendering service under the contract.

Martin v. Furman Lumber Co., 134 Vt. 1, 2 (1975) (holding that a Vermont resident hired in Massachusetts to work for a Massachusetts employer who was killed by an accident in Vermont was subject to the Vermont's Workers' Compensation Act).

7. Although *Martin* supports the applicability of Vermont's Workers' Compensation Act to an employee hired in another state who performs services in Vermont, its holding only extends Vermont law to the injury that the employee sustains **in Vermont**. Nothing in that decision supports the notion that Vermont jurisdiction continues to follow an employee hired in another state indefinitely once he or she leaves Vermont and is injured elsewhere.
8. In this case, Claimant did not reside in Vermont, was not hired in Vermont, and was not injured in Vermont. I find no basis in the decisional interpretations of Section 616(a) discussed above for that Section to apply under these circumstances, even if Claimant was working on a project for a Vermont customer whose account he originated, worked roughly one-third of his total hours in Vermont, and even if Defendant owned some real property in Vermont that it used in its business.³ All of the key geographic elements of this claim relevant to existing interpretations of Section 616(a) point to New Hampshire rather than Vermont.

³ Although Defendant's ownership of real property in Vermont and incorporation in Vermont would of course be relevant to establishing that Defendant had minimum contacts with Vermont to render the exercise of jurisdiction consistent with constitutional due process, *e.g.*, *N. Aircraft, Inc. v. Reed*, 154 Vt. 36, 41 (1990) ("In order to invoke personal jurisdiction over an individual defendant, the defendant must have 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.'") (citations and punctuation omitted); *see also Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1984); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *see also Touchette v. Vermont Recycled Slate and Roofing*, Opinion No. 01-12WC (January 11, 2012) (minimum contacts analysis in workers' compensation context), there is no dispute that Defendant had constitutionally minimum contacts with Vermont. However, satisfying the constitutional threshold of minimum contacts does not confer jurisdiction on this Department absent some statutory basis for the Workers' Compensation Act to apply in the first place. Under existing law, Section 616(a) does not supply that statutory basis.

B. Claimant's Advocacy for a More Expansive Interpretation of Section 616(a)

9. Claimant advocates for a broader interpretation of the statutory phrase “all employment within this State” than either this Department or the Vermont Supreme Court has previously endorsed. He contends that the Department’s decision in *Flores-Diaz, supra*,
- ... considered only the verb form of ‘employment,’ the act of providing services, and the location where those services *were performed*. It did not address the noun form of ‘employment’ which speaks to the location of the work for hire *relationship*.”

(Claimant’s Motion at 6-7) (emphasis in original).

10. He submits that the “noun form” of “employment” is broader and refers not only to the “act of providing services” but also to the “locus” of the relationship itself. He contends that the locus of the parties’ relationship in this case existed in Vermont, noting that Defendant was paying Claimant to perform services to Vermont customers both inside and outside of this State’s borders and that Claimant was working on a project for a Vermont customer at the time of injury.
11. He argues further that limiting the conception of “employment” to its “verb form” based on the location where the employee was providing services at the time of his injury would cause jurisdiction to “vanish” whenever a Vermont employer sends a Vermont employee across state lines for work purposes, creating an overly “elastic” conception of jurisdiction that would incentivize Vermont employers to hire all their employees from out of state and require them to perform dangerous activities there to evade Vermont’s workers’ compensation system. He contends that limiting jurisdiction in this way would lead to irrational results, illustrated with the following hypothetical scenario:

Imagine that the Vermont Department of Labor hires a Specialist II (“Spec-II”) [who] resides in New Hampshire. The interview and job offer both occur in New Hampshire. The Spec-II primarily works from home but sometimes works in Montpelier. The Department provides the Spec-II a cellphone and computer for business use. One day while working at home and while conducting an informal conference, the business cellphone explodes and causes serious injuries to the Spec-II.

(Claimant’s Motion at 9-10).

12. Claimant contends that declining to adopt his interpretation of Section 616(a) would permit the Department to deny jurisdiction in such a case despite the hypothetical Specialist II’s unquestioned status as a Vermont state employee.
13. Claimant also cites *Griggs v. New Generation Communication*, Opinion No. 30-10WC (October 10, 2010) for the proposition that when a Vermont employer sends one of its employees out of state on a special errand or business trip, Vermont retains jurisdiction

over the out-of-state injury. From this, he reasons that the “noun form of employment” is “static” and does not change based on a worker’s traversal of political boundaries. From this, he contends that because Defendant is a “Vermont employer,” Claimant’s provision of services to Defendant brings his employment relationship—in its noun form—within the Vermont Workers’ Compensation Act’s jurisdictional coverage.

C. Claimant’s Arguments in Favor of an Expanded Interpretation Are Unpersuasive

14. As an initial matter, I must confess great difficulty understanding Claimant’s ascription of different meanings to the “noun form” and “verb form” of “employment.”
15. Neither *Flores-Diaz*, nor any of the Supreme Court decisions it cites, nor anything in the Workers’ Compensation Act, purports to impart a broader or narrower conceptual domain to the derivational morphemes of “employ” based on what part of speech results. At least within the context of Vermont workers’ compensation law, the underlying root word “employ” denotes the same relationship, even if prefixes or suffixes create a new but related word, such as “employer,” “employee,” “employs,” “unemployed,” and “employment.”⁴
16. Additionally, contrary to Claimant’s contention that *Flores-Diaz* only considered the “verb form” of “employment,” the Department in that case expressly considered the relationship between the noun and verb forms of this root word, noting that “[a]ccording 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.’” *Id.*
17. Semantic vagaries aside, I see no convincing reason to expand the Department’s and the Vermont Supreme Court’s existing interpretations of Section 616(a).
18. With respect to Claimant’s argument that tying this statute’s scope to the place of injury for employees hired out of state would render jurisdiction too “elastic,” I find the opposite to be true. Objective geographic requirements provide a measure of determinacy to the question of whether Vermont’s workers’ compensation laws will apply to a particular case. By contrast, attempting to ascertain the geographic “locus” of a relationship by reference to questions about how much work an employee performed at various locations, what tasks he or she was performing before an out-of-state injury, and what he or she planned do afterwards, would increase jurisdictional elasticity by introducing intrinsically nebulous concepts into the analysis. This, in turn, would only beget factual disputes with needlessly uncertain outcomes.⁵

⁴ See, e.g., 21 V.S.A. 601 (defining “employer” and “employment” by stating what relationships are included, with reference to other forms of the root, “employ”).

⁵ In his Reply Brief, Claimant suggests a yet broader jurisdictional scope, under which Defendant’s filing status as a domestic corporation with the Vermont Secretary of State is sufficient to render all activities its employees conduct

19. I am also unconvinced that following existing precedent would incentivize employers to outsource labor to neighboring states. All the decisions cited above have been in the public record for at least nine years. The *Martin* decision has been the law for nearly half a century. Claimant has cited no evidence of Vermont employers systematically outsourcing labor to New Hampshire, Massachusetts, or New York. Moreover, Vermont's neighboring states all have workers' compensation laws of their own. Thus, assuming a Vermont company sought to outsource labor to those states to avoid coverage under Vermont workers' compensation laws, it would still be liable for injuries its employees sustain under those jurisdictions' workers' compensation laws. Claimant has provided no evidence comparing the generosity of benefits available under Vermont's workers' compensation laws with those available in other states. Even assuming Vermont's workers' compensation system is the most advantageous for injured workers in the region, however, that would not be a basis on which to interpret the existence of jurisdiction where it would not otherwise exist.
20. As to Claimant's hypothetical Specialist II, if the Department ever hires an individual in such a manner as Claimant envisions, and that person suffers an injury at home in New Hampshire while performing work for the State of Vermont, I may have occasion to reexamine the scope of Section 616(a) in evaluating that person's claim. However, the facts of that hypothetical are not the facts of this case, and I need not assess claims that are not before me.⁶
21. Finally, with respect to the *Griggs* decision, Defendant accurately notes that jurisdiction under Section 616(a) was not a disputed issue in that case. Although *Griggs* discussed the Commissioner's jurisdiction to apportion expenses of recovery under Section 624, geography played no part in that analysis. The primary disputed issues in *Griggs* were the extent of Claimant's entitlement to benefits following an accepted workplace injury, the effects of two third-party tort settlements on the parties' workers' compensation rights and obligations, and whether the employer was liable for penalties and interest for making untimely benefits payments.
22. Additionally, the claimant in *Griggs* was the defendant's owner and president, and the defendant's principal place of business was in Vermont, making the jurisdictional nexus geographically stronger than it is in this case. Finally, as Claimant acknowledges in a footnote, the Department's decision in *Griggs* does not say where Claimant's injury

on its behalf "Vermont employment" under Section 616(a). Although this interpretation is perhaps less "elastic" than the requirements of existing case law, I find it untenably expansive and without basis in the Workers' Compensation Act. A corporation can choose any state to incorporate irrespective of the location of its business or its employees' activities.

⁶ In his Reply Brief, Claimant also expresses concerns for hypothetical employees impacted by remote hiring and post-Covid geographic dispersion of the workforce, or employees hired by Vermont companies at job fairs in New Hampshire. I decide only case before me. These hypotheticals are not analogous to the facts of this case, and I decline to assess them here.

occurred; it simply states that he was on a “work related business trip.” Because *Griggs* did not make any express holdings on the question of jurisdiction under Section 616(a) and does not recite the key facts that could potentially make it relevant to this case, I find it inapposite.⁷

23. I conclude that Section 616(a) does not confer a basis for this Department to apply Vermont’s Workers’ Compensation Act to this case.

Section 619

24. Under Section 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 this State.

21 V.S.A. § 619.

25. As discussed above, Claimant was hired in New Hampshire. This section therefore does not apply.

Section 620

Under Section 620:

If a worker who has been hired outside 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.

21 V.S.A. § 620.

⁷ Claimant’s analysis of *Griggs* suggests he may have been seeking to invoke the “traveling employee doctrine,” which goes to the question of compensability rather than jurisdiction. Generally, under the “going and coming” rule, an employee is generally not within the course of employment when he or she is injured while traveling to and from work, unless the injury occurs on the employer's premises. The “traveling employee” doctrine provides a limited exception to that principle for employees who either have no fixed place of employment or who are engaged in a special errand or business trip at the time of their injuries. *Rainville v. Boxer Blake & Moore, PLLC*, Opinion No. 02-21WC (January 15, 2021), fn. 10. Because that principle only relates to whether an injury is compensable, however, it only becomes relevant if there is already a sufficient statutory basis for jurisdiction; it does not create jurisdiction where none would otherwise exist.

26. Section 620 allows this Department to assume jurisdiction to enforce another state's laws, but only if this Department can reasonably determine and deal with the parties' rights and obligations under such other state's laws. It does not allow this Department to apply Vermont's Workers' Compensation Act where that Act would not apply under the other statutory provisions discussed in this opinion. *See Letourneau, supra*, ¶ 2 ("We hold that Letourneau is not entitled to transfer his case to Vermont under § 620 for the purpose of claiming Vermont workers' compensation benefits. However, Letourneau is entitled to transfer his case to Vermont under § 620 for the purpose of enforcing his entitlement to New York benefits here if his rights under New York law can be reasonably determined and dealt with by the Commissioner and the courts in this state.").
27. In this case, Claimant does not expressly request a transfer of his accepted New Hampshire workers' compensation claim to the Vermont Department of Labor for the purposes of enforcing New Hampshire law. He only cites Section 620 in the context of explaining his interpretation of "employment" within Vermont's overarching jurisdictional scheme while advocating for jurisdiction under Section 616(a). *See* Claimant's Cross-Motion at 8-9.
28. However, to the extent Claimant does seek to invoke Section 620, he has provided no basis for me to conclude that this Department is equipped to ascertain or administer the parties' rights or obligations under New Hampshire law. This Department has no expertise in New Hampshire's workers' compensation laws or procedures. Absent an express request or explanation of what differences may exist between Vermont and New Hampshire workers' compensation laws, I find no basis to exercise jurisdiction under this Section.

Section 623

29. Section 623 provides as follows:

Employers who hire workers within this State to work outside the State may agree with such workers that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this State by accident arising out of and in the course of such employment. All contracts of hiring in this State shall be presumed to include such an agreement.

21 V.S.A. § 623.

30. Defendant hired Claimant outside this state, Accordingly, this Section does not apply.

Conclusion

31. Claimant did not live in Vermont, was not hired in Vermont, and was not injured in Vermont. Both Claimant and Defendant engaged in some business activities in Vermont, and although Claimant had recently traveled from Vermont for work on the day of his injury and was planning to return to Vermont later that same day, that is not where his injury occurred. The facts surrounding this claim do not support the Vermont Department of Labor's exercise of jurisdiction in this case. This is fundamentally a New Hampshire case, and it is pending in New Hampshire before an administrative agency with expertise in New Hampshire law.

ORDER:

Accordingly, this claim is **DISMISSED FOR LACK OF JURISDICTION**, without prejudice to any of Claimant's rights under New Hampshire law.

DATED at Montpelier, Vermont this 26 of September 2023.

DocuSigned by:
Michael Harrington
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Michael A. Harrington
Commissioner