From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: I have employees who live outside Ohio, but temporarily work in Ohio. I also maintain an occupational disability insurance policy for these employees which provides benefits if they are injured. If they are injured in Ohio, can these employees still file for workers' compensation benefits?

This question, which is one that arises in many jurisdictions, turns on the issue of what constitutes "coverage" under a state's workers' compensation laws. As many of you know, Ohio is a monopolistic, single-payer jurisdiction where employees who do not work for self-insured employers are covered under the "state fund," which bills employers and affords a variety of benefits and protections to all employees, even employees of employers who don't contribute. Issues arise when employees (or contractors) from outside Ohio are injured in the state and an application for benefits is filed, be it by an employee or the medical provider. Are these employees entitled to Ohio benefits? What constitutes a "similar" law to Ohio? The Twelfth District Court of Appeals was recently presented with exactly these questions.

Linardos v. Joe Tex, Inc., 2014-Ohio-4522, involved an over-the-road truck driver who suffered an eye injury while picking up a load in Ohio. The claimant was a Florida resident employed by a company based in Texas. Texas has, as part of its workers' compensation system, a provision whereby an employer can "opt out" of its workers' compensation system if similar coverage is maintained via private insurance. The employer in *Linardos* had purchased a third-party occupational disability policy that provided disability income, dismemberment benefits, and payment of medical expenses for work-related injuries. There is no dispute that the policy was in effect, that it was legal, and that the claimant made a claim under the policy for his injury. Nonetheless, the claimant also opted to file a workers' compensation claim in Ohio, which was initially rejected for lack of contacts with Ohio. The claimant appealed, and the claim was eventually allowed by the Ohio Industrial Commission. The employer appealed into the common pleas court and both parties filed motions for summary judgment. The claimant argued that he was entitled to benefits under Ohio law because the policy purchased by his employer provided benefits and rights which were substantially different from his rights under the Texas and Ohio workers' compensation systems, the third-party policy was not equivalent to participation in the workers' compensation system in Texas, and that such coverage was required in order to exclude participation under Ohio law. The employer argued that it was in full compliance with the laws of the State of Texas by virtue of its purchase of the third-party policy, and that the benefits provided under that policy are equivalent to workers' compensation coverage. The trial court disagreed and found that the system in Texas, which allowed for such policies, was markedly different from the system in Ohio, and that the claimant was entitled to an Ohio claim. The employer filed an appeal to the Twelfth District Court of Appeals.

The Twelfth District affirmed, finding that the private insurance policy purchased by the employer was not "equivalent" to workers' compensation coverage in Ohio or in Texas. In order for an individual who resides outside of the State of Ohio and is only temporarily in Ohio to be excluded from applying for benefits, three elements of R.C. 4123.54(H)(3) must be satisfied: 1)

the employee is a resident of a state other than Ohio; 2) the employee is insured "by the workers' compensation laws" of a particular state other than Ohio; and 3) the employee is temporarily in Ohio. *Wartman v. Anchor Motor Freight Co.*, 75 Ohio App.3d 177 (6th Dist. 1991). If one of these elements is not satisfied, the claimant is entitled to seek benefits in Ohio. In the case at bar, there was no dispute that the employee in question was a resident of Florida and only in Ohio temporarily when he was injured, so the sole inquiry was whether he was covered by the "workers' compensation laws" of another state. In this case, the Court held that he was not, as the employer had chosen to opt out and buy a private policy. While the law of Texas permitted this action, it cannot be said that the claimant was "covered" by Texas' workers' compensation laws. The Court also found that there are a number of differences between coverage under the policy and coverage under Ohio law, including a lack of certain protections provided in the Texas and Ohio systems, such as the ability to file an administrative appeal in lieu of an appeal through ERISA. The Court also noted that Ohio does not permit private insurance policies that provide workers' compensation-like benefits at all.

Linardos is a troubling decision for any employer who utilizes occupational disability policies and temporarily sends employees to Ohio. The problem lies with the unique nature of Ohio's system, which includes multiple levels of administrative proceedings, *de novo* jury trials on appeal, and the ability of a plaintiff to dismiss and re-file civil actions without permission of the employer. *Linardos* has been appealed to the Ohio Supreme Court, and I believe it is an excellent candidate for consideration for two reasons: 1) a finding that a non-resident employee in Ohio can seek benefits under Ohio law will mean increased costs to the state fund; and 2) any employer who maintains coverage in a state that permits employers to "opt out" could be deemed to be a "non-complying employer," with the resulting dollar-for-dollar liability and a loss of employer immunity in a tort action brought by an employee.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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