

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

**QUESTION: Is an out-of-state employee who is injured in Ohio, and who is covered by a third-party disability policy under which he received benefits, still entitled to file a workers' compensation claim in Ohio?**

In many cases involving out-of-state employees who are injured while temporarily in Ohio, R.C. 4123.54(H) is invoked. This statute, which among other things limits the filing and payment of multiple claims in multiple jurisdictions, specifically precludes out-of-state employees who are injured in Ohio from receiving benefits in Ohio if they are similarly insured in another state. *R.C. 4123.54(H)*. Recently, the Twelfth Appellate District was asked to consider the case of an employee who resided in Florida, worked for a Texas company, and who was injured in Ohio, and whether his receipt of disability benefits under a third-party policy purchased in Texas precluded an Ohio claim.

*Linardos v. Joe Tex, Inc.*, 2014-Ohio-4522, involved an over-the-road truck driver who was injured in Ohio on August 31, 2011, when a bungee cord struck his eye. The claimant filed a workers' compensation claim in Ohio, which was opposed by the employer and denied. On appeal, a District Hearing officer vacated the denial and allowed the claim permitting the claimant to participate in the Ohio Fund. This decision was over the objection of the employer, who contended that, as a Texas corporation, it was a "lawful non-subscriber" under Texas law as it opted out of the Texas Workers' Compensation Fund and purchased a third-party insurance policy. There was no dispute that the claimant made a claim under that policy, and had received disability income, dismemberment benefits, and payment of his medical expenses. The employer appealed, but an SHO affirmed the decision, and after the Industrial Commission refused further appeals, the employer appealed to the common pleas court. Both parties filed cross-motions for summary judgment, but the trial court found in favor of the claimant, holding that he was entitled to participate in the Ohio Fund because the policy purchased did not mean he was "similarly covered by the workers' compensation laws of the State of Texas." The trial court relied upon the fact that when an employer purchases a third-party insurance policy under Texas law, the administration of such a policy is "markedly different from Ohio's workers' compensation system." The employer appealed as of right to the Twelfth District Court of Appeals.

The Twelfth District affirmed, holding that the claimant was entitled to participate. Ohio laws are to be construed liberally in favor of coverage pursuant to R.C. 4123.95, and the relevant portion of R.C. 4123.54 holds that a claimant is precluded from filing for Ohio benefits only when three conditions are met: (1) the employee is a resident of a state other than Ohio; (2) the employee is insured in a state other than Ohio; and (3) the employee is only temporarily in Ohio. *Wartman v. Anchor Motor Freight Co.*, 75 Ohio App.3d 177 (6<sup>th</sup> Dist, 1991). The absence of one of the three requirements will generally result in the entitlement to benefits. In the case at bar, the claimant clearly fit the first and third requirements, but the second requirement – insured for workers' compensation benefits in another state – was not. Under Texas law, an employer may participate in the Texas Workers' Compensation Fund or obtain insurance through a third-party broker. However, only employers who participate in the Fund are subject to Texas laws governing workers' compensation. The Twelfth District held that, because employees of employers who obtain private insurance are not subject to appeals through the workers' compensation system, but instead must file in federal court under ERISA, they are not governed by the same procedural

protections under Texas law as employees in Ohio. Additionally, because Ohio does not have an “opt out” provision, employees are not covered by a “similar [Texas] law.” As such, the claimant was entitled to benefits.

*Linardos* seems to be a decision that is mostly limited to its peculiar set of facts and circumstances, but it is instructive as to how courts will look at third-party, out-of-state policies that are very common, particularly in the transportation industry. If the “opt out” policy circumvents the workers’ compensation system (including the right to appeals) in the state of origin, it is likely that an Ohio court will examine it closely to determine if it is a “workers’ compensation or similar” policy.

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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