CASE NO. 5751 CRB-2-12-5 : COMPENSATION REVIEW BOARD
CASE NO. 5752 CRB-2-12-5

CLAIM NO. 200176238
CLAIM NO. 200176484

JOHN T. LEE
DOUGLAS MICHAELSON
CLAIMANTS-APPELLEES : WORKERS' COMPENSATION COMMISSION

v.

: AUGUST 8, 2013

EMPIRE CONSTRUCTION
SPECIAL PROJECTS, LLC
EMPLOYER

and

ATLANTIC CHARTER INSURANCE
INSURER
RESPONDENT-APPELLANT

and

SHEPARDVILLE CONSTRUCTION
EMPLOYER
and

ACADIA INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES
and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimants were represented by Paul S. Levin, Esq., Law Offices of Paul S. Levin, 40 Russ Street, Hartford, CT 06106.

The respondent Empire Construction was represented by Steven M. Richard, Esq., Nixon Peabody, LLP, One Citizens Plaza, Suite 500, Providence, RI 02903.

The Workers' Compensation Rating and Inspection Bureau of Massachusetts, Amicus party, Gallaher & Associates, PC, The Gateway Center, 14 Summer Street, Suite 102, Malden, MA 02148 was represented by Garrett Harris, Esq.

The respondent Atlantic Charter Insurance Company was represented by Robert S. Bystrowski, Esq., Morrison Mahoney, LLP, One Constitution Plaza, Hartford, CT 06103.

The respondents Shepardville Construction and Acadia Insurance Company were represented by Lucas D. Strunk, Esq., Pomeranz, Drayton & Stabnick, 95 Glastonbury Boulevard, Suite 216, Glastonbury, CT 06033-4453.

The respondent Second Injury Fund did not appear at oral argument.

This Petition for Review[1] [2] from the May 7, 2012 Finding and Award of the Commissioner acting for the Second District was heard March 22, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Charles F. Senich and Peter C. Mlynarczyk.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The matters herein are appeals brought by the respondent/insurer Atlantic Charter Insurance ("Atlantic Charter") from Finding and Awards issued to two workers injured in the same construction accident at a construction project in Storrs, Connecticut. The claimants, John T. Lee and Douglas

[1] We note that postponements and extensions of time were granted during the pendency of these appeals.

[2] As the two cases herein were heard together at the trial level and a single Memorandum was issued by the trial commissioner outlining his conclusions of law; we have determined that a single opinion for both appeals would be an appropriate exercise of adjudicative economy.

Michaelson, were employees of the respondent Empire Construction Special Projects LLC ("Empire"), a firm based in Massachusetts. Atlantic Charter argues that this commission lacks jurisdiction over this claim as Mr. Lee was a resident of Rhode Island when he was injured and Mr. Michaelson was a "Massachusetts employee" at the time of the injury. Atlantic Charter further argues that in the event this Commission had jurisdiction over these claims, such jurisdiction does not extend to the insurance coverage in place for Empire, as they argue the policy in question was not intended to cover workplace injuries outside the Commonwealth of Massachusetts. Upon consideration of these arguments we find no error from the trial commissioner's Finding and Awards and his supporting Memorandum. We affirm the trial commissioner's decisions.

The trial commissioner reached the following factual conclusions as to the claim brought by Mr. Lee. He found Mr. Lee was a resident of Foster, Rhode Island, a small town on the Connecticut border. Empire was a small construction firm based at the home of its sole member, Jerry Piekielniak, in Dudley, Massachusetts. Empire's place of business was close to Connecticut, but the firm had no facilities within the state. In August 2010 Atlantic Charter issued a workers' compensation policy for Empire which provided coverage until August 6, 2011. Atlantic Charter is a workers' compensation insurance carrier licensed by the Commonwealth of Massachusetts and having its offices in Boston, Massachusetts. Atlantic Charter owns no places of business in Connecticut, does not market or solicit insurance business in Connecticut, and does not adjust claims within this state. In the summer of 2011 Empire had no jobs in progress and Mr. Piekielniak and his wife were vacationing in Poland. The policy with Atlantic Charter

lapsed or was canceled and Mr. Piekielniak or his wife contacted their carrier about reinstating coverage.

In August of 2011 Empire, through the Oxford Insurance Agency, applied for workers' compensation policies with two other insurance companies, but both declined to voluntarily cover the risk. Empire then filed an application with the Massachusetts Workers' Compensation Assigned Risk Pool, along with a check for $4,378 to cover the full anticipated premium. The policy was assigned to Atlantic Charter and the coverage period for the new policy ran from September 3, 2011 through September 3, 2012, and was in force on November 28, 2011. The commissioner noted the policy issued on September 3, 2011 included a "Limited Other States Endorsement" stating Atlantic Charter *"will pay promptly, when due, the benefits required of you by the workers' compensation law of any state other than Massachusetts, but only if the claim for such benefits involves work performed by a Massachusetts employee."* (Emphasis in Original.) Findings, ¶ 9, Lee Finding and Award ("Lee Finding"). The Limited Other States Endorsement also contained the following advisory: *"IMPORTANT NOTICE! If you hire any employees to work outside Massachusetts or begin operations in any state other than Massachusetts, you must obtain insurance coverage in that state and do whatever else may be required under that state's law, as this Limited Other States Endorsement does not satisfy the requirement of that state's workers' compensation insurance law."* (Emphasis in original.) Findings, ¶ 10, Lee Finding. Atlantic Charter did not file a § 31-348 C.G.S. notice of workers' compensation insurance for Empire with the Chairman of the Connecticut Workers' Compensation Commission. The Chairman's records show no insurance for Empire on the date of injury.

Shepardville Construction, LLC ("Shepardville") is a contracting company with facilities and operations in Connecticut. At all times material to this case, Shepardville was insured for workers' compensation risk in Connecticut by Acadia Insurance. In October of 2011, Shepardville had a contract to perform work at Storrs Center in the town of Mansfield, Connecticut. Shepardville subcontracted all or part of the siding labor for that job to Empire. Empire's work on the project was expected to last eight or ten weeks. At that time Empire had only one carpenter on staff and needed to hire additional staff to perform the contract, which would eventually require six additional staff. Empire placed advertisements on the Craigslist website, Monster.com and in the Worcester Telegram & Gazette seeking workers for exterior carpentry and offering year round work. The Piekielniaks interviewed potential applicants in late October and early November, and provided them with an application and other work related forms. Shepardville requested that Empire provide a certificate of workers' compensation insurance as well as a subrogation waiver from its carrier. On November 3, 2011, after accepting an additional premium of $192, Atlantic Charter issued the subrogation-waiver endorsement and also issued a "Certificate of Liability Insurance" to Shepardville, which referenced Empire's policy with Atlantic Charter and included the words "Coverage in CT." Findings, ¶ 19, Lee Finding.

On Monday, November 14, 2011, Mr. Lee responded to the Craigslist posting via the internet, and later in the day spoke to Mr. Piekielniak over the telephone about the job opening. Mr. Lee was not hired in this conversation, but they did agree the claimant should travel to the Storrs site for an interview. On November 17, 2011 Mr. Lee met with Mr. Piekielniak in a parking lot in Storrs, Connecticut around 4:00 p.m. The

meeting was very brief and Mr. Piekielniak and Mr. Lee exchanged documents and because of the late hour, Mr. Lee was told to fill out the papers and to fax them to Empire. Mr. Lee was not hired at that time. On Monday, November 21, 2011, Mr. Piekielniak called the claimant to inquire about his paperwork. The two men spoke around that time and Piekielniak said he would hire the claimant once he got his paperwork. On Wednesday, November 23, 2011, Mr. Lee faxed back to Mr. Piekielniak the single page employment application, the Form I-9 and IRS Form W-4, all reportedly filled out on November 18, 2011. On November 27, 2011 Mr. Piekielniak informed Mr. Lee by phone that he was hired and was to report for work the next day at the Storrs jobsite. On the morning of November 28, 2011 Mr. Lee arrived for work at the Storrs jobsite, filled out a Form RI W-4 withholding form and then went to work at an hourly rate of $15.00.

Later on November 28, 2011 Mr. Lee and Mr. Michaelson fell off a piece of equipment at the jobsite and sustained injuries. The trial commissioner reached the following factual findings as to how Mr. Michaelson had been hired by Empire. Mr. Michaelson was a resident of Groton, Connecticut when he was hired by Empire. On Monday, November 14, 2011, Mr. Michaelson responded to Empire's Craigslist posting via the internet. He said he was interested in working for Empire and attached a copy of his resume. He also provided his cell phone number, which bore the "860" area code. On November 15, 2011 Mr. Piekielniak called Mr. Michaelson at his home in Groton to discuss the job opening. Mr. Michaelson was not hired during this conversation, but they did agree he should travel to the Storrs site for an interview which was scheduled for November 17, 2011. At that time Mr. Michaelson filled out paperwork for the job

opening but when Mr. Piekielniak suggested a $12 per hour rate of pay Mr. Michaelson said he would not work for $12 per hour, but would be willing to start at $15 per hour. The claimant was not hired at that time.

On Monday evening, November 21, 2011, Mr. Piekielniak informed the claimant that he was hired and would be paid the $15/per hour the claimant demanded to start. Mr. Michaelson was told to report for work the next day at the Storrs jobsite. Mr. Piekielniak placed a call from his home in Massachusetts to Mr. Michaelson, who was in Connecticut at the time of this call. Mr. Michaelson attended a safety meeting in Storrs on November 22, 2011. Due to rain and the Thanksgiving holiday there was no work at the Storrs project until November 28, 2011, when Mr. Michaelson showed up, filled out a CT W-4 form, and went to work. Later in the day Mr. Michaelson was injured in the same accident as Mr. Lee.

Mr. Lee and Mr. Michaelson both filed a separate Form 30C seeking benefits from the incident and Mr. Piekielniak filed a Form 43 for Empire responding to each claim acknowledging the accident had occurred in the course of employment, but denying that Empire was uninsured for workers' compensation. Acadia Insurance, carrier for Shepardville, filed a Form 43 denying responsibility for each claim on the basis that the claimants were not employed by its insured, and that their employer, Empire, had a valid workers' compensation policy. Atlantic Charter filed a Motion to Dismiss the claims against it, alleging a lack of jurisdiction.

Based on these subordinate facts the trial commissioner concluded that Empire was an employer within the scope of Chapter 568 and that Mr. Lee was an employee within the scope of Chapter 568. The commissioner found a similar employer-employee

relationship existed between Empire and Mr. Michaelson. The commissioner found that Empire had workers' compensation insurance from Atlantic Charter and this policy included coverage for Connecticut Workers' Compensation benefits that might be owed to one of the employer's Massachusetts employees. The commissioner found Atlantic Charter was aware the policy might lead to a claim for Connecticut workers' compensation benefits, and on November 3, 2011 the carrier accepted an additional premium knowing that Empire had a Connecticut jobsite and issued a supplemental policy endorsement that specifically covered employees at that worksite. The trial commissioner found that for the purposes of the Atlantic Charter policy the claimants herein were "Massachusetts employees." As Atlantic Charter purposefully acted to expose itself to claims from workers' compensation injuries within Connecticut, Empire was an insured party for the claimants' injuries. The trial commissioner ordered Atlantic Charter to pay the indemnity benefits and medical expenses due to the claimants as a result of the compensable November 28, 2011 injuries. The trial commissioner also issued a 22 page Memorandum outlining the legal reasoning he had for reaching his conclusions in these matters.

Atlantic Charter filed a Motion to Correct for both Finding and Awards. The trial commissioner denied the majority of the corrections. He granted various corrections that clarified the location of the claimants at various points in the hiring process, clarified the staffing status of Empire at various times, as well as adding verbiage as to the carrier's understanding as to the nature of the Massachusetts assigned risk pool and the term "Massachusetts employee." Atlantic Charter has pursued the present appeal on the grounds the evidence herein does not support the trial commissioner's legal conclusion

that they are liable as an insurance carrier for the claimants' injuries. They argue that neither claimant qualifies as a "Massachusetts employee" for the purposes of being insured under Empire's policy. In the alternative, they argue that if the claimants were "Massachusetts employees" so as to put them within the ambit of the policy that Connecticut would then lack jurisdiction over their injuries pursuant to § 31-275(9)(B)(vi) C.G.S. Finally they argue that precedent such as Park v. Choi, 46 Conn. App. 596 (1997) stands against the extraterritorial application of a workers' compensation policy issued in another state to insure against injuries in Connecticut.

We commence our analysis of this situation by examining what the purpose is behind Chapter 568. When the original Workers' Compensation Act was passed one century ago the *raison d'etre* was to replace the uncertainty and cost of a tort litigation system for workplace injuries within Connecticut with a reliable and cost-effective means of compensating those injured on the job. The Act is intended "to provide a prompt, efficient, simple and inexpensive procedure for obtaining benefits related to employment." Pietraroia v. Northeast Utilities, 254 Conn. 60, 74 (2000). "Furthermore, the Act 'is remedial and must be interpreted liberally to achieve its humanitarian purposes.'" Id., *citing* Gil v. Courthouse One, 239 Conn. 676, 682 (1997). "The purposes of the act [Chapter 568] itself are best served by allowing the remedial legislation a reasonable sphere of operation considering [its] purposes. . . . In [reservations] arising under workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purposes of the act." Mello v. Big Y Foods, Inc., 265 Conn. 21, 26 (2003). It is also unambiguous that

Connecticut "has an interest in compensating injured employees to the fullest extent possible…" Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002).

In considering these expressions of statutory purpose from the Connecticut Supreme Court we must also examine the economic and social realities of the 21st Century. One constant in modern history has been the increase in the flow of goods, products, services and labor across political borders. We recently noted these facts in our opinion in Santiago-Vivo v. Bridgeport, 5716 CRB-4-12-1 (December 11, 2012). While we found the claimant's position in that case that "locality" as defined in Chapter 568 could include a community in Florida unsustainable, we acknowledged that term could readily encompass a town in close proximity to the State of Connecticut. See Footnote 2 of Santiago-Vivo. Id.[3] In the present case, we find the circumstances wherein the presence of a state line did not prevent a Massachusetts firm from doing work in Connecticut for a Connecticut general contractor while hiring a Rhode Island worker and a Connecticut worker whom sustained injuries in their employ. In considering the issues herein, we take notice of the present-day economy, and further take notice that to that extent our Commission should consider the economic ramifications of its application of the law, it should do so in a manner supportive of the Connecticut economy, and not create a chilling effect on Connecticut business or Connecticut workers.

[3] We said in part in Santiago-Vivo v. Bridgeport, 5716 CRB-4-12-1 (December 11, 2012), "we take administrative notice that the border areas of New York, Massachusetts and Rhode Island are in many ways economically integrated with adjoining Connecticut communities and commuting to work in Connecticut from such areas or performing job searches in such areas would be reasonable under the statute. See, e.g. McEnerney v. United States Surgical Corporation, 72 Conn. App. 611 (2002), footnote 6." Id., footnote 2.

On appeal, we generally extend deference to the decisions made by the trial commissioner. "As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Daniels v. Alander, 268 Conn. 320, 330 (2004). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing and Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Nonetheless, while we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The initial question herein is whether this Commission has jurisdiction over the claimants and their injuries. If the Commission does not have jurisdiction over Mr. Lee or Mr. Michaelson's injuries, no further inquiry into the circumstances of the case is warranted. Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd,* 126 Conn. App. 902 (2011)(Per Curiam). In the event this Commission has jurisdiction over the claimants and their injuries, we may then ascertain if the trial commissioner was justified in finding Atlantic Charter liable as an insurer in this matter.

1. **Does the Commission have jurisdiction over Douglas Michaelson's November 28, 2011 injury?**

This analysis is rather straightforward. This claimant was a resident of the State of Connecticut at the time he was hired by Empire and on the date of his injury. The claimant was injured while working in the State of Connecticut. We find the precedent in Healey v. Hawkeye Construction, LLC, 5336 CRB-2-08-4 (February 26, 2009), *rev'd*, 124 Conn. App. 215 (2010), *cert. granted*, 299 Conn. 927 (2011) stands for the proposition that Connecticut has jurisdiction over this injury. In Healey, the Appellate Court found jurisdiction in Connecticut for a Connecticut resident hired by a New York firm who sustained work-related injuries in Florida. The Appellate Court looked at the three-prong test promulgated in Johnson v. Atkinson, 283 Conn. 243 (2007) and Burse, supra, and found that the claimant satisfied two of the three prongs. "Applying the foregoing precedent, particularly that of *Burse*, to the facts of this case, we conclude that this state's relationship to the employment contract, Connecticut being both the place of the plaintiff's residence and the place of the contract's formation, was sufficiently significant such that Connecticut law may be applied to the plaintiff's claim for workers' compensation benefits." Id., 227. In the present case Mr. Michaelson was a resident of Connecticut, was injured in Connecticut, and the entirety of his work with Empire prior to his injury (i.e. the "employment relationship") had been in Connecticut. Given these uncontroverted facts, we believe that the trial commissioner could not have reached any decision other than that Connecticut had a sufficiently significant relationship to the claimant's employment to confer jurisdiction.[4]

[4] The appellant Atlantic Charter has gone to great length to argue that the formation of the employment contract between Mr. Michaelson and Empire occurred in Massachusetts. We find that since the other two prongs of the Johnson test are unquestionably satisfied that this issue is not material to determining Connecticut jurisdiction.

2. Does the Commission have jurisdiction over John T. Lee's November 28, 2011 injury?

In Mr. Lee's case, given that he was not a Connecticut resident at any time herein, we find a more detailed analysis of the employment relationship between the claimant and Empire is required. The precedent in Healey, supra, is inapplicable when the claimant is not a Connecticut resident and the contract of employment was not entered into in the State of Connecticut. The precedent in Cleveland v. U.S. Printing Ink, Inc., 218 Conn. 181 (1991) would suggest that when an out-of-state resident sustains a work related accident within Connecticut, this injury can be compensable under Connecticut law. Since Cleveland, the General Assembly enacted legislation which served to restrict the ability of out-of-state claimants to obtain awards under Chapter 568 for injuries sustained while working in Connecticut.[5] The trial commissioner in the present case considered the terms of this statute but determined that Connecticut had jurisdiction over Mr. Lee's injury. We must ascertain if this was a valid conclusion.

The facts of this case indicate that the entirety of the employment relationship Mr. Lee had with Empire at the time of his injury was within the State of Connecticut. The question of whether the anticipated employment relationship would potentially lead Mr. Lee to spend less than 50% of his time with Empire on work within the State of Connecticut is not relevant to whether on the date of injury Connecticut had jurisdiction

[5] Section 31-275(9)(B)(vi) C.G.S. is the applicable statute and reads as follows:

(B) "Employee" shall not be construed to include:
(vi) Any person who is not a resident of this state but is injured in this state during the course of his employment, unless such person (I) works for an employer who has a place of employment or a business facility located in this state at which such person spends at least fifty per cent of his employment time, or (II) works for an employer pursuant to an employment contract to be performed primarily in this state.

over his injury. Mr. Lee worked for Empire on only one project, which was in Connecticut. A recent Appellate Court case Baron v. Genlyte Thomas Group, LLC, 132 Conn. App. 794 (2012) reiterates the principle in Burse, supra, that jurisdiction requires ". . . a showing of a *significant* relationship between Connecticut and either the employment contract or the employment relationship."(Emphasis in original.) Id., 801. The employment relationship between Mr. Lee and Empire anticipated a sustained period of work at a Connecticut jobsite. We believe the trial commissioner could reasonably have concluded based on these facts that Connecticut had a significant relationship with the employment relationship and that the statutory limitations on compensability of § 31-275(9)(B)(vi) C.G.S. were not applicable as of the date of Mr. Lee's injury.[6] Therefore, we find Connecticut had jurisdiction over Mr. Lee's injury.

3. Did Atlantic Charter have insurance in force that covered the November 28, 2011 injuries?

Although we have resolved the question of whether the injuries of the claimants herein are compensable under Connecticut law, we must ascertain if the trial commissioner correctly determined that Empire's insurance carrier, Atlantic Charter, is responsible for the compensation due to the claimants. Atlantic Charter vehemently denies that they are obligated, and have obtained support for this position from the

[6] See Lee Findings, ¶ 13 "Empire's work on the project was expected to last from eight to ten weeks." In his Memorandum the trial commissioner also *cited* Mitchell v. J.B. Retail Inventory Specialists, 3458 CRB-2-96-10 (March 31, 1998) as controlling precedent on the applicability of § 31-275(9)(B)(vi) C.G.S. In that case, there was a dispute as to whether Ms. Mitchell, a Rhode Island resident, had spent over 50% of her time working in Connecticut prior to her injury. The Compensation Review Board determined the claimant had proffered sufficient evidence to establish jurisdiction by virtue of working 19 of 29 days within Connecticut; notwithstanding the place of her injury was Rhode Island, *citing* Kluttz v. Howard, 228 Conn. 401, 408-409 (1994) that the purpose of the 1993 revision to the statute was to limit claims from employees "passing through the state." Id., fn. 3.

Workers' Compensation Rating and Inspection Bureau of Massachusetts ("Massachusetts Assigned Risk Pool.") Atlantic Charter argues that the more appropriate path herein would be to determine that the general contractor that retained Empire, Shepardville, and their carrier, Acadia Insurance, should be found responsible for the award pursuant to a "principal employer" approach under § 31-291 C.G.S. While we agree with the reasoning of the trial commissioner that this may well be the path of least resistance, we concur with his decision not to apply this statute. We believe that to do this would be to effectively penalize Shepardville for their good faith reliance on the affirmative representations of Atlantic Charter.

The trial commissioner found Atlantic Charter took the following actions which caused the various parties involved in this endeavor to conclude that they were insuring Empire's employees on the Storrs, Connecticut job for workers' compensation. The trial commissioner found that as a condition of retaining Empire as a contractor on the Storrs job Shepardville demanded Empire provide a subrogation waiver and a policy endorsement from Atlantic Charter, as well as a certificate of workers' compensation insurance. Atlantic Charter argues in its appeal it had no choice but to issue the policy it issued to Empire as a result of its participation in the Massachusetts Assigned Risk pool. Had Atlantic Charter confined its commercial undertaking to the original policy, which insured only risks under Massachusetts law; we would find this argument pertinent. However, at the request of its insured, Atlantic Charter, in exchange for consideration, materially altered its original contractual undertaking. We look to Findings, ¶¶ 18 and 19 of the trial commissioner's findings in both claims.

18. On November 3, 2011 Atlantic Charter issued the subrogation-waiver endorsement in exchange for an additional premium of $192 from Empire. The endorsement stated, in pertinent part: *"We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule.* The "Schedule" portion of the endorsement stated the following: *"Shepardville Construction, LLC, its affiliates and subsidiaries Project: Storrs Center, 1250 Storrs Road & Dog Lane Mansfield CT 06268."*

19. That same day, November 3, the Oxford Insurance Agency issued a "Certificate of Liability Insurance" to Shepardville. The certificate identified Empire's workers' compensation policy with Atlantic Charter as policy number WCV00974700, and added the words "Coverage in CT."

The plain meaning of these statements would lead a third party to reasonably rely on Empire having procured workers' compensation insurance for its employees on the Storrs, Connecticut job through Atlantic Charter. We also note that this constitutes a willful and purposeful decision by Atlantic Charter to conduct business within the State of Connecticut.[7] Indeed, Shepardville required this documentation prior to commencing its business relationship with Empire[8]. In the absence of this endorsement, and subrogation waiver, we may reasonably conclude based on the record herein that Empire

[7] Since Atlantic Charter provided Empire an endorsement to its policy insuring it for risks within the State of Connecticut we find Atlantic Charter's citation of Cogswell v. American Transit Insurance Co, 282 Conn. 505 (2007) as grounds for reversal to be totally without merit. In Cogswell, the Supreme Court applied International Shoe v. Washington, 326 U.S. 310 (1945) to find a New York claims adjuster did not meet the "minimum contact" standard for Connecticut jurisdiction. Id., 523. We do not find International Shoe applicable when a party knowingly and willfully chooses to conduct business within Connecticut, such as issuing an insurance endorsement for such risks. See our reasoning in Zolla v. John Cheeseman Trucking, Inc., 5261 CRB-5-07-8 (August 4, 2008), *appeal dismissed*, A.C. 30251 (March 5, 2009). If Atlantic Charter did not want to face the jurisdiction of the Connecticut Workers' Compensation Commission, it should not have accepted premiums for endorsements that cover injuries compensable under Chapter 568.

[8] We note that Empire, by presenting a certificate of insurance to Shepardville, produced what appeared to be a certificate of workers' compensation insurance consistent with the requirements of § 31-286 C.G.S. We also note, although the record does not reflect that the project in question was a public works project, that the certificate proffered by Empire was consistent with the requirements of § 31-286a(a) and (d) C.G.S. We do not believe Shepardville had any further duty to investigate the validity of the insurance coverage in place after receipt of the certificate of insurance.

would not have been retained by Shepardville. We also note that Atlantic Charter received an additional premium for this endorsement. It would be difficult to create a more definitive example of promissory estoppel than the facts herein present.[9]

Atlantic Charter now argues that the policy in question did not cover the employees on the Storrs job for a variety of reasons rooted in the intricate details of Massachusetts insurance law. They also argue that the precedent in Park v. Choi, 46 Conn. App. 596 (1997) bars coverage in Connecticut from workers' compensation policies written in other states. In the alternative, they suggest that their agent, Oxford Insurance, acted in an *ultra vires* manner in issuing this endorsement and subrogation waiver and they should now not be bound by their agent's error. Finally, they argue that this Commission cannot consider insurance coverage disputes pursuant to Stickney v. Sunlight Construction, Inc., 248 Conn. 754 (1999). We are not persuaded by any of these arguments.

Atlantic Charter argues that what we are considering herein is an "insurance coverage" dispute and pursuant to the precedent in Stickney this Commission lacks jurisdiction to consider the dispute. We disagree as this case is distinguishable both on the facts and the law. We note that it is a statutory obligation for an employer as defined by § 31-275(10) C.G.S. in Connecticut to provide workers' compensation insurance. The employer in Stickney had such coverage and the carrier, who believed at the time they were on the risk, Aetna, was obligated under a voluntary agreement to pay the

[9] Section 90 of the Restatement of Contracts defines promissory estoppel as "[a] promise which the promisor should reasonably expect to induce action or forbearance of the part of a promissee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

claimant benefits. Years later Aetna discovered that as of the date of injury their coverage had lapsed and another carrier, Commercial Union, had been retained by the claimant's employer.[10] Aetna then moved to reopen the voluntary agreement on the grounds that they were the wrong carrier. On appeal, the Supreme Court ruled that this Commission lacked jurisdiction under Chapter 568 to reopen the voluntary agreement. The Court held that this dispute did not involve "adjudicating claims arising under the act . . ." and "resolving the central issue in the motion requires application of laws other than the provisions of the act." Id., 762. The Supreme Court declined Aetna's entreaty to find the trial commissioner was conferred with "broad equitable powers" to consider the dispute. Id., 766. The Supreme Court, in Stickney, also declined to apply § 31-342 C.G.S. to this situation, but footnote 6 suggested that under other circumstances "a common-law issue properly could be determined by the commission when incidentally necessary to the resolution of a claim arising under the act."[11] The Stickney opinion also pointed out that such incidental reliance on other laws had been upheld by the Supreme Court in Hunnihan v. Mattatuck Mfg. Co., 243 Conn. 438 (1997). Id., 763-764, Fn., 5 and 6.

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[10] Aetna had failed to notify the Commission of their policy cancellation as required by § 31-348 C.G.S. Stickney v. Sunlight Construction, Inc., 248 Conn. 754, 757 (1999). Commercial Union also failed to notify this Commission of their coverage as required by that statute. Id.

[11] This statute reads as follows:
Sec. 31-342. Award; enforcement. In any such hearing, the commissioner having jurisdiction may make his award directly against such employer, insurer or both, except that, when there is doubt as to the respective liability of two or more insurers, he shall make his award directly against such insurers; and such awards shall be enforceable against the insurer in all respects as provided by law for enforcing awards against an employer, and the proceedings on hearing, finding, award, appeal and execution shall be in all respects similar to that provided by law as between employer and employee.

In the present case, we find that we do not have a coverage dispute between two insurance carriers clearly outside our authority to resolve and where alternative forums exist for resolution. We have a situation where we must reach an initial determination as to whether Empire is an insured party. We believe that § 31-342 C.G.S., § 31-343 C.G.S. and § 31-355(b) C.G.S. statutorily require this Commission to make a determination at the onset of a contested claim as to whether the employer is insured.[12] [13] We also note that in a case where we cited Stickney as controlling authority, we noted "[a] review of the Connecticut Workers' Compensation statutes indicates that to a great extent they have presumed an identity of interest exists between the insured employer and the insurance

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[12] This statute reads as follows:
Sec. 31-343. Certain defenses not available against employee or dependent. As between any such injured employee or his dependent and the insurer, every such contract of insurance shall be conclusively presumed to cover the entire liability of the insured, and no question as to breach of warranty, coverage or misrepresentation by the insured shall be raised by the insurer in any proceeding before the compensation commissioner or on appeal therefrom.

[13] This statute reads as follows:
Sec. 31-355. Hearings; awards. Payments from Second Injury Fund on employer's failure to comply with award. Civil action for reimbursement. Insolvent insurer. Settlements and agreements. Failure of uninsured employer to pay.
(b) When an award of compensation has been made under the provisions of this chapter against an employer who failed, neglected, refused or is unable to pay any type of benefit coming due as a consequence of such award or any adjustment in compensation required by this chapter, and whose insurer failed, neglected, refused or is unable to pay the compensation, such compensation shall be paid from the Second Injury Fund. The commissioner, on a finding of failure or inability to pay compensation, shall give notice to the Treasurer of the award, directing the Treasurer to make payment from the fund. Whenever liability to pay compensation is contested by the Treasurer, the Treasurer shall file with the commissioner, on or before the twenty-eighth day after the Treasurer has received an order of payment from the commissioner, a notice in accordance with a form prescribed by the chairman of the Workers' Compensation Commission stating that the right to compensation is contested, the name of the claimant, the name of the employer, the date of the alleged injury or death and the specific grounds on which the right to compensation is contested. A copy of the notice shall be sent to the employee. The commissioner shall hold a hearing on such contested liability at the request of the Treasurer or the employee in accordance with the provisions of this chapter. If the Treasurer fails to file the notice contesting liability within the time prescribed in this section, the Treasurer shall be conclusively presumed to have accepted the compensability of such alleged injury or death from the Second Injury Fund and shall have no right thereafter to contest the employee's right to receive compensation on any grounds or contest the extent of the employee's disability.

carrier." Verrinder v. Matthew's Tru Colors Painting & Restoration, 4936 CRB-4-05-4 (December 6, 2006), *appeal dismissed*, A.C. 28367 (July 25, 2007). Finally, we have observed that "it is well-settled that a workers' compensation commissioner has the authority to determine whether a contract for insurance coverage is in effect at the time of an injury. O'Connell v. Indian Neck General Store, 6 Conn. Workers' Comp. Rev. Op. 42, 44, 530 CRD-3-86 (October 6, 1988), *citing Rossini v. Morganti*, 127 Conn. 706 (1940); Piscitello v. Boscarello, 113 Conn. 128 (1931)." Coley v. Camden Associates, Inc., 3432 CRB-2-96-9 (April 6, 1998).

We also note that we have decided a long line of cases since Stickney where we concluded that consideration of insurance issues was incidentally necessary in order to resolve the merits of a dispute under Chapter 568. In DiBello v. Barnes Page Wire Products, 3970 CRB-7-99-2 (March 2, 2000), *aff'd,* 67 Conn. App. 361 (2001) this panel concluded it had the power to determine whether the employer had a valid workers' compensation insurance policy on the date of the incident which precipitated the claim for benefits. We note that DiBello involved issues as to what insurer, if any, was obligated to pay benefits at the inception of a claim. In Bell v. Thomas Lombardo & Charles Holt d/b/a N&E Private Investigation & Security et al., 4152 CRB-2-99-11 & 4065 CRB-2-99-6 (November 27, 2000) we reversed a trial commissioner's determination that we lacked the ability to ascertain if insurance coverage was in force on the claimant's date of injury, *citing* Coley, supra, that "…the core issue of this matter is not merely an issue of contract law between two insurers, as was the case in Stickney. It addresses the claimant's right to recover compensation that is unpaid, as of yet." Bell, supra. Finally, in Omachel v. Sunshine Masonry Construction, 5148 CRB-1-06-10

(October 22, 2007), *appeal dismissed*, A.C. 29366 (February 27, 2008), *cert. denied*, 286 Conn. 923 (2008) this panel reversed a trial commissioner's ruling that after hearing evidence on whether the employer had workers' compensation insurance that he lacked subject matter jurisdiction to rule on the issue. We held in Omachel as follows:

> The commission's authority to determine whether a workers' compensation insurance policy was in place on a particular date has long been established and most recently acknowledged by this tribunal in Velez v. Domino's Pizza, 5105 CRB-1-06-6 (September 26, 2007). See Piscitello v. Boscarello, 113 Conn. 128 (1931). See also, Rossini v. Morganti, 127 Conn. 706 (1940); DiBello v. Barnes Page Wire Products, Inc., 67 Conn App. 361 (2001); Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440 (2001); DeGruchy v. Buy, Sell or Hold Co., 4676 CRB-7-03-6 (July 27, 2004); Degnan v. Employee Staffing of America, Inc., 4580 CRB-3-02-10 (October 27, 2003); Thibodeau v. Rizzitelli, 3373 CRB-4-96-7(October 14, 1997); O'Connell v. Indian Neck General Store, 6 Conn. Workers' Comp. Rev. Op. 42, 530 CRD-3-86 (October 6, 1988). Further, a commissioner's inquiry is not limited to the records on file with the Workers' Compensation Commission. See e.g.; Bell v. Lombardo, 4152 CRB-2-99-11, 4065 CRB-2-99-6 (November 27, 2000); Bruce v. Bert Miller Associates, 15 Conn. Workers' Comp. Rev. Op. 47, 1872 CRB-1-93-10 (December 1, 1995); Vernon v. V.J.R. Builders, 11 Conn. Workers' Comp. Rev. Op. 237, 1360 CRD-7-91-12 (November 8, 1993).

Id.

Counsel for Shepardville suggested at oral argument before this panel that Atlantic Charter essentially seeks to have this panel overrule Omachel. We decline this suggestion. As we held in Chambers v. Electric Boat, Corp., 4952 CRB-8-05-6 (June 7, 2006), *aff'd*, 283 Conn. 840 (2007), "a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. Maltbie, Conn. App. Proc., p. 226." Herald Publishing Co. v. Bill, 142 Conn. 53, 62 (1955). Id. More importantly, we are in no position to overrule the Appellate Court's opinion in DiBello,

supra. We find this case indistinguishable from DiBello and as the Appellate Court has distinguished this fact pattern from that in Stickney, we believe the trial commissioner had firm legal grounds to consider the issue of insurance coverage herein.

Atlantic Charter also argues that the precedent in Park v. Choi, supra, prevents this Commission from ordering an out-of-state insurer to pay benefits for a Connecticut workplace injury. While we acknowledge both the insurance policy in this case, as well as the policy in question in Park v. Choi were issued to out of state employers by out of state insurers, at that point the resemblance ends. The insurance policy in Park v. Choi was issued by the New York Insurance Fund and had no provision whatsoever that undertook to expose the carrier to extraterritorial risks. For that reason, the Appellate Court reversed this Commission's order against the carrier to pay benefits for a compensable Connecticut injury.

> The policy issued by the fund expressly limited coverage to operations in the state of New York, except as expanded by endorsement. There was not, however, an extraterritorial endorsement attached to the policy, nor any testimony or documentary evidence offered to the commissioner to suggest that coverage extended beyond the borders of New York.

Id., 597.

The Appellate Court further noted that had the employer sought to have insured its activities in Connecticut for workers' compensation claims, New York law held "a specific endorsement was required." Id., 599. We note that in this case the insurance policy **had** such a specific endorsement insuring Empire's employees on the Storrs Center project. Empire paid an additional premium to obtain this endorsement, and a subrogation waiver was issued to the general contractor on the Connecticut project. We

find rather than supporting a reversal of the trial commissioner's decision, Park v. Choi stands for the principle that an out-of-state insurer may expose itself to risks in Connecticut when it issues a specific endorsement to their policy accepting those risks. Considering that Park v. Choi's actual precedent is unhelpful to their arguments, Atlantic Charter seeks to attack the formation and the terms of the policy it issued. Atlantic Charter argues that its agent, Bristol Insurance, should not have issued this endorsement and that it should have only been issued by the carrier itself. They also argue that the "Limited States Endorsement" was not meant to cover a long term project such as the Empire contract with Shepardville. The difficulty with this argument is that both their insured and Shepardville acted in reliance on the issuance of this endorsement by Atlantic Charter's agent. There are no findings in the record that suggest that anyone involved in this transaction had any reason to believe that the agent for Atlantic Charter lacked actual authority to issue the endorsement and subrogation waiver, nor are there any factual findings suggesting Empire inaccurately described the nature of the insured risk to Atlantic Charter's agent. Atlantic Charter accepted monetary consideration from Empire for the issuance of these agreements. Given this factual circumstance, we find DiBello on point herein.

In DiBello, the Compensation Review Board's opinion discusses the facts of that case. There, the insured, obtained a certificate of insurance from a "rogue agent" who after accepting the premium payments for the carrier and issuing insurance certificates, "converted all of the money to his personal use." Id. Therefore, "Ohio Casualty received no cash, nor did it issue an insurance policy." Id. The trial commissioner determined that as there was no evidence of insurance coverage pursuant to § 31-348 C.G.S. Ohio

Casualty was not liable on the claim. On appeal, the Compensation Review Board ordered a remand to ascertain if the factual circumstances required Ohio Casualty to accept liability. We did so as we accepted the insured's argument that "evidenced by §§ 31-286a and 31-286b, a certificate of insurance issued by a licensed agent has 'special significance' within the Workers' Compensation Act, as it establishes prima facie proof of insurance before the commissioner." Id. Therefore, this required the Commission to consider evidence beyond the database maintained by the Chairman's office to ascertain if insurance coverage existed. We noted "…[u]nder this reasoning, though the issue of fraud or misrepresentation by Cahill [the agent] is indeed outside of our jurisdiction, that matter was raised as a defense by Ohio Casualty, and is solely between the insurer and its agent." Id.

In the present matter the trial commissioner performed an extensive review of the factual circumstances as to the issuance of the insurance certificate and subrogation waiver. Unlike DiBello there is no need to remand for additional findings. Our reasoning in DiBello would support limiting our determination to matters within the jurisdiction of this Commission; i.e., whether the employer obtained insurance coverage as required by our statutes. The trial commissioner concluded the employer did so and factual evidence supports this conclusion.[14] Whether the agent's conduct in issuing those

[14] The standard under Connecticut law to determine whether an agent can bind a principal is as follows; With respect to the governing legal principles, ''it is a general rule of agency law that the principal in an agency relationship is bound by, and liable for, the acts in which his agent engages with authority from the principal, and within the scope of the agent's employment.. . . An agent's authority may be actual or apparent. . . . Actual authority exists when [an agent's] action [is] expressly authorized . . . or . . . although not authorized, [is] subsequently ratified by the [principal].'' (Citations omitted; internal quotation marks omitted.) *Maharishi School of Vedic Sciences, Inc.,(Connecticut)* v. *Connecticut Constitution Associates Ltd. Partnership*, 260 Conn. 598, 606–607, 799 A.2d 1027 (2002). In contrast, ''[a]pparent authority is that semblance of authority which a principal, through his own acts or inadvertences, causes or allows third persons to believe his agent possesses. . . . Consequently, apparent authority is to be determined, not by the

coverage documents constitutes some form of malfeasance under Massachusetts regulations or law, or its contract with Atlantic Charter, is outside our jurisdiction and must be addressed in another forum.[15]

Finally, Atlantic Charter essentially attacks its own policy in this appeal. While the trial commissioner found that the intention of Empire was to obtain worker's compensation insurance to cover its employees on the Shepardville job in Connecticut, and the insurance agent procured insurance coverage intended to accomplish that goal, Atlantic Charter argues that the policy in question was incapable of performing that function. Atlantic Charter argues that the policy it wrote covered only "Massachusetts employees." Since neither claimant had worked for Empire within Massachusetts prior to their injuries, and none were able to work for Empire after their injuries, Atlantic Charter claims that neither claimant qualified as insured under the policy. In addition, Atlantic Charter argues that if Connecticut had jurisdiction over the claimant's injuries

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agent's own acts, but by the acts of the agent's principal. . . The issue of apparent authority is one of fact to be determined based on two criteria. . . . First, it must appear from the principal's conduct that the principal held the agent out as possessing sufficient authority to embrace the act in question, or knowingly permitted [the agent] to act as having such authority. . . . Second, the party dealing with the agent must have, acting in good faith, reasonably believed, under all the circumstances, that the agent had the necessary authority to bind the principal to the agent's action. . . . Ackerman v. Sobol Family Partnership. LLP 298 Conn. 495, 508-509 (2010).

We believe the trial commissioner could reasonably determine from the facts herein that Atlantic Charter's agent had the authority to bind the carrier, based on the test in Ackerman, supra.

[15] See Verrinder v. Matthew's Tru Colors Painting & Restoration, 4936 CRB-4-05-4 (December 6, 2006), *appeal dismissed*, A.C. 28367 (July 25, 2007) where the Compensation Review Board found that compliance with the notice provision of an insurance policy between the insured and the carrier was outside the scope of our jurisdiction when "the insurer had available remedies in a court of general jurisdiction to assert the claimant/employer/insured had not complied with the terms of the policy."

that it would require a legal conclusion that the claimants were not "Massachusetts employees."

We question whether it was even necessary for the trial commissioner to have performed the extensive review of the issue of whether the claimants were "Massachusetts employees" as defined by the Atlantic Charter policy. The relevant statutes governing Connecticut Workers' Compensation law do not contain any loopholes or exceptions wherein certain employees on a worksite would be covered by a contract of insurance and not others left uninsured based on the locus of an employer's principal place of business. The plain language of § 31-343 C.G.S. states that insurance contracts under Chapter 568 "shall be conclusively presumed to cover the entire liability of the insured, and no question as to breach of warranty, coverage or misrepresentation by the insured shall be raised by the insurer." Id. Atlantic Charter's effort to advance a defense that the claimants were not "Massachusetts employees" specifically repudiates an obligation to cover the entire liability of the insured by asserting that only some of Empire's employees were to be insured on the Storrs Center project. We believe that once Atlantic Charter undertook to insure any of Empire's employees on the Storrs Center job, Connecticut statute and the plain language of the insurance certificate created a legal obligation for all of Empire's employees on this project to be covered.

Nonetheless, the trial commissioner did an extensive review of the "Massachusetts" employee issue. We believe that he had the ability to look at the intent of the parties in entering into the contracts of employment as well as the insurance policy in question. First, we believe that the test of whether Connecticut possessed jurisdiction over the claimant's injuries at the time they were injured involves a very different factual

test than whether over the course of the term of the policy the claimants were likely to work a sufficient number of days within Massachusetts to qualify as "Massachusetts employees." See Conclusion, ¶ F and Conclusion, ¶ L of the Lee Finding and the Michaelson Finding as well as Findings, ¶ 25a of the Michaelson finding.[16] The trial commissioner laid out in great detail in his Memorandum of Law why he believed the evidence supported a finding that each claimant was retained by Empire as a full time employee and why it was likely those employees would have worked a substantial amount of time for Empire in Massachusetts had they not been injured.[17] We see no need to repeat this analysis, other than to find it thorough and that it reaches a reasonable conclusion from the evidence presented.

We note that the trial commissioner presented numerous policy arguments against Atlantic Charter's reasoning. We agree with the commissioner that a situation where only some of a contractor's employees on a job are insured, and other are not would

[16] Findings, ¶ 25a of the Michaelson finding states:

"Mr. Michaelson testified that he expected to work for Empire year round, and the Mr. Piekielniak told him he had other projects lined up in Connecticut, Massachusetts and Rhode Island, though no specific job other than the Storrs job was discussed by the parties."

We note that the Lee finding does not contain a finding that the claimant was specifically informed he would be working in Massachusetts with Empire after the Storrs job was completed, but we are satisfied that the totality of the evidence supports the trial commissioner's conclusions.

[17] Atlantic Mutual has focused on the "place of contract" as a reason to assert the claimants are not "Massachusetts employees." While both claimants may have been outside the Commonwealth of Massachusetts at the point when they initiated the final communication accepting Empire's offer of employment, there is also no dispute Mr. Piekielniak, Empire's principal, was within the Commonwealth at the time he received their acceptance, or that the principal place of business for Empire was within Massachusetts. The trial commissioner could reasonably place more weight on those factors in determining the "place of contract."

create an impractical situation for all concerned.[18] In interpreting statutes we are directed by § 1-2z C.G.S. to eschew interpretations that would create "absurd or bizarre results." We find this guidance applicable to this situation as well. The plain meaning of the documents presented by Empire to Shepardville would lead a reasonable person to assume **all** of Empire's workers in Connecticut were insured by Atlantic Charter. The alternative reasoning presented by Atlantic Charter would appear to condone a situation where at a minimum, a negligent misrepresentation occurred. We have made clear in our past rulings "[w]e do not condone the use of misrepresentation or artifice by either claimants or respondents in proceedings before this Commission." Mankus v. Robert Mankus, 4958 CRB-1-05-6 (August 22, 2006), *aff'd,* 107 Conn. App. 585 (2008). We are unwilling to apply the policies of the Massachusetts Assigned Risk pool in a fashion that penalizes the workers and businesses of the State of Connecticut.

We finally note that the appellant has argued in both cases that the trial commissioner should have granted those corrections in their Motion to Correct that the commissioner denied. When a trial commissioner denies such a motion, we may properly infer that the commissioner did not find the evidence submitted probative or credible. Brockenberry, supra. We do not find the trial commissioner's denial of the

[18] Apparently, on the Storrs jobsite Atlantic Charter believes that of Empire's employees Connecticut could have had jurisdiction over Mr. Michaelson's injury. Rhode Island might be the appropriate state to compensate Mr. Lee, and the other employees could have been "Massachusetts employees." This is clearly an anomalous situation and as the trial commissioner noted, the inevitable result will encourage Connecticut firms not to hire Massachusetts contractors and Connecticut workers not to seek work with such firms. We also note that had the claimants been injured a year later and had worked only 25 of 52 weeks in Massachusetts, and had spread their work out in each of the states bordering the Commonwealth, Atlantic Charter would disclaim that the claimants were Massachusetts employees while no other jurisdiction would have had a significant relationship to the employment contract. This result would be inconsistent with the principle of universal coverage promulgated in § 31-284 C.G.S.

those corrections in the Motion to Correct that he denied in these cases to be arbitrary or capricious pursuant to the standards delineated in In re Shaquanna M., 61 Conn. App. 592 (2001). We must defer to his decisions.[19]

For the foregoing reasons, the Finding and Award for Douglas Michaelson and the Finding and Award for John T. Lee are affirmed.

Commissioners Charles F. Senich and Peter C. Mlynarczyk concur in this opinion.

[19] At oral argument before our panel counsel for Atlantic Charter suggested that the proper response to this situation would have been to have found that Empire was an uninsured employer pursuant to § 31-288(c) C.G.S. The Second Injury Fund was noticed for the hearing but was not represented. Generally, we have deferred to their lead to address issues regarding uninsured employers. See Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007).