The ABCs of Handling Multijurisdictional Workers' Compensation Claims

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The “A B Cs” of Handling Multijurisdictional Workers’ Compensation Claims

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Each individual State has developed its own unique workers’ compensation system. When today’s mobile workforce combines with the expansion of companies having a national or international presence, complicated issues arise as to which jurisdiction should be used for purposes of workers’ compensation claims. More than one jurisdiction’s workers’ compensation act may be implicated – perhaps the accident occurred in one State, the employee was hired in a separate jurisdiction, and the employer’s principal place of business is elsewhere. Any State having a “legitimate state interest” in the injury may grant workers’ compensation benefits.¹ Yet benefit rates, legal standards applied to compensability of claims, or types of benefits may greatly favor one jurisdiction over the other from the employer's perspective.

Employers who strategically analyze multi-jurisdictional implications of claims early on in the claims process can significantly impact the course of those claims and, often, maintain better control of the expenses associated with them. Savvy employers who proactively embrace and address multi-jurisdictional claims, and coordinate well when an injured worker pursues benefits in more than one State, will serve themselves well. In

order to keep claims costs under control and effectively manage claims with multijurisdictional potential, employers should **Always Be Cognizant** of the following:

**A  Accident Location as a Basis for Establishing Jurisdiction:** Often claims are pursued in the jurisdiction where the injury occurred.² States vary as to whether the place of injury alone is enough to provide jurisdiction. For example, Illinois will not exercise jurisdiction over in-state injuries solely because Illinois is the situs of the accident.³ Other states find this a sufficient basis for jurisdiction.

**Average Weekly Wage Computation:** Variations in average weekly wage computations from jurisdiction to jurisdiction may significantly impact the indemnity costs of claims. Over what period of time is raw wage data collected? Which wage components are included – bonuses, expense reimbursements, costs of employee benefits, for example? Are overtime hours included based upon time-and-a-half or are overtime hours factored into the wage analysis based on straight time wages? Are abnormally low or abnormally high wages excluded from the wage computations?

**B  Benefit Differences Between Jurisdictions:** Each State has its own system for determining benefits paid for injuries that arise out of and in the course of the employment. Consider the differences in length and amount of indemnity, types of medical benefits paid, whether vocational rehabilitation is allowed and to what extent, how permanent injuries are compensated, whether penalties may be assessed for delays

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² Larson’s Workers’ Compensation Law § 143.02 (2015).
in payment, and whether there are limitations on the duration of an employer’s obligations for workplace injuries.

**C  Choice of Physician:** Who is empowered to select treating and examining medical providers? Is the claimant entitled to do so or does the employer have any control over the primary treating physician? What a large impact that factor has on the course of a claim!

**Contractual Basis for Establishing Jurisdiction in Particular Jurisdiction:**
While most States expressly prohibit the limitation of workers’ compensation rights by contract, some States allow an employee and employer to contractually agree that a local statute will not apply to out-of-State injuries. However, parties cannot contract into coverage—that is, a court does not gain jurisdiction over a workers’ compensation claim simply because the parties consented. An employee and employer can, though, make a private contract to pay employees in the event of injury at a scale of benefits that references the compensation act of a certain State.

**D  Denial of Claim:** Consider a situation in which a claim for benefits has been denied by one State. If another State can properly exercise jurisdiction over the claim, the second State is not necessarily bound by the first State’s denial. Employers should not assume that a denial of benefits in the State where the claim is initially filed lets them off the hook altogether, as the employee may still be able to file and be eligible for benefits in another jurisdiction. Take steps to determine the effect of denials in all relevant jurisdictions.
For example, say you are an Oregon-based corporation who hires an employee in Oregon, but you subsequently transfer the employee to work at a Washington job-site for a period of time. While in Washington, the employee becomes injured and makes a claim for benefits there, which is denied by Washington’s workers’ compensation act. The employee can still file a claim for benefits in Oregon, despite Washington’s denial, because he would be covered by the Oregon Act – he was hired in Oregon, worked there, and would have returned to Oregon to work once his work in Washington was completed. The employer cannot argue that Washington’s denial precludes the employee’s claim in Oregon.

**Double-Dipping Should Not Be Permitted:** Although a State may not preclude other States from entering successive workers’ compensation awards, it may control its own policy for entering such awards. The Supreme Court’s ruling in *Thomas* did not guarantee that claimants may always seek successive awards for workers’ compensation benefits, but rather that the laws of the first State (in which the claimant seeks benefits) cannot preclude - under the guise of Full Faith and Credit or res judicata - a second State from applying its own workers’ compensation statutes. Whether the second State’s laws are amenable to successive awards is beyond the scope of *Thomas*. Accordingly, “it is for each State to formulate its own policy whether to grant supplemental awards according to its perception of its own interests.”\(^4\)

Employers should become familiar with relevant States’ laws on supplemental awards, as different States use various standards to determine whether to grant

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supplemental awards. Several States do not award benefits to claimants who have already received benefits in other States, whereas other states preclude claimants who have merely “pursued their remedies” in other States from receiving benefits. For example, Kentucky seems to require that a claimant actually receive a final award before it will determine he or she is not entitled to any benefits under Kentucky law.\(^5\)

**E  Election of Remedies:** Where an employee elects to bring a workers’ compensation claim for a workplace injury, the applicable workers’ compensation act becomes the sole remedy for the injury.\(^6\) If this occurs, employers are relieved of both common law tort and statutory liability, as well as of contract and admiralty liability for the covered injury. Examples of the types of suits that are barred when the employee has elected to receive workers’ compensation benefits include those based on: employers’ liability acts; the Federal Tort Claims Act; Structural Work, Scaffold, and Defective Machinery Acts; Occupational Safety and Health acts, Safe Place statutes, labor laws, and RICO; products liability; and automobile No-Fault and owners’ liability statutes. Suits for punitive damages also may be barred.\(^7\)

**Employment Relationship as a Basis for Establishing Jurisdiction:** Another major test for determining when a State will exercise jurisdiction over a claim is whether the employment relationship exists or is carried out within the State.\(^8\) What exactly creates an employment relation within a State? Some States take the legal position that entering into a contract of hire in the State creates an employment relationship. Other

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\(^5\) *Industrial Track Builders v. LeMaster*, 429 S.W.2d 403 (Ky. 1968).
\(^6\) Larson’s Workers’ Compensation Law § 100.01 (2015).
\(^7\) Larson’s Workers’ Compensation Law § 100.03 (2015).
\(^8\) Larson’s Workers’ Compensation Law § 143.04 (2015).
States require more, such as performance of services in the State in addition to the formation of the contract. The theory for recognizing jurisdiction where the employment relationship exists is that "[t]he interests of a jurisdiction in workers’ compensation cases are primarily that those employees who work within its boundaries be adequately protected and that those employers who operate extensively within its boundaries be fairly limited in their liability".⁹

**F Full Faith and Credit:** The Full Faith and Credit Clause provides that “Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.”¹⁰ [See Washington Gas Light Company case below.]

As discussed above, the Full Faith and Credit clause does not preclude successive workers’ compensation awards, and the law of the state where the supplementary claim is filed and will control whether a supplementary award is allowed. However, these defenses should be available for successive awards which are not supplemental, i.e., scenarios involving inconsistent factual determinations, mutually exclusive remedies, or the possibility of double recovery.

**G Great Communication is Needed Between Employer Representatives in Various Jurisdictions:** Employers with locations in various jurisdictions should be vigilant in maintaining open lines of communication between

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¹⁰ U.S. CONST. art. IV, § 1.
representatives, which will ensure consistency in approaches taken as to the claim and coordination as to applicable milestones or deadlines.

**H  Hiring Location as Basis for Jurisdiction:** Jurisdiction can also potentially be established in the State where the contract for hire was made.\(^{11}\) However, this basis for jurisdiction raises other questions. For example, is the place of execution controlling? What if the contract was executed in one State for performance in another? What if the contract was accepted in a different place than it was formed? All of these questions are resolved on a jurisdiction by jurisdiction basis.

**I  Initial Report of Accident:** The employer may be able to favorably impact the course of the claim by filing the First Report of Injury in the most favorable jurisdiction from its perspective.

**J  Judge Assignment:** Consider who the finder of fact may be. Which jurisdictions have courts versus commissions? What procedures for fact finding exist? Is there a viable avenue for appeal? Are the fact finders in potential jurisdictions fair and reasonable?

**K  Keep Monitoring Claim for Changes:** As the claim progresses either the claimant or the employer may seek to change the jurisdiction in which the claim is being handled. Perhaps the maximum rate is higher in one jurisdiction so the claim is initially pursued there, but if vocational rehabilitation benefits for the claimant are more favorable

\(^{11}\) Larson's Workers' Compensation Law § 143.04 (2015).
in another one, the claimant may seek further benefits there. Employers need to remain watchful as the dynamic nature of the claim unfolds.

**Legal Considerations:** Substantive or procedural statutes and case law in each potential jurisdiction should be factored into the analysis of a claim from the outset.

**Loss of Earning Capacity:** Loss of earning capacity is the basis for providing compensation, rather than actual loss of wages. Consider how different jurisdictions may assess and compensate for loss of earning capacity.

**Medical Benefits to be Paid on Behalf of Claimant:** An employer generally has an “affirmative and continuing” duty to provide prompt, sufficient medical care, and to comply with the applicable “choice of physician” statutory requirements, to a claimant where the employer knows such care is necessary. What types of expenses qualify as compensable medical benefits, though, vary greatly from State to State. While hospital expenses, nursing care, and prescriptions are generally covered, employers should be on the lookout for other, expenses that may be allowed. For example, a majority of States allow palliative care benefits, and at least one court has determined that lifelong treatment intended to relieve only pain and discomfort was still covered, even though there was no possibility of the claimant’s condition improving. The careful employer will be familiar with the types of expenses allowed in the jurisdictions in which it operates. It will also be mindful of jurisdictions in which medical benefits may be fully

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12 Larson’s Workers’ Compensation Law § 94.02 (2015).
13 Larson’s Workers’ Compensation Law § 94.04 (2015); Jones & Laughlin Steel Corp. v. Kilburne, 477 N.E.2d 345 (Ind. Ct. App. 1985) (determining the Indiana Industrial Board had authority to award prospective non-curative benefits since the applicable statute allowed awards “limiting or reducing the extent or effect of the employee’s loss of physical function”).
and finally resolved through settlement and those where medical benefits remain an open component of a workers’ compensation claim.

**Medicare Coordination**: Does the State court or commission impose any specific requirements as to Medicare compliance? Although the Medicare Secondary Payer Act, 42 U.S.C. section 1395(y)(b), is a federal statute, some jurisdictions place obligations upon the claimant and employer to properly consider Medicare’s interest in the State workers’ compensation claim.

**Notice of Injury**: Notifying the employer or insurance carrier of a workplace injury is generally the first step in the claims process. In turn, should the employer wish to refute a claim, the employer must similarly give notice to the administrative body in charge of handling workers’ compensation claims in the jurisdiction. For example, an employer in Florida must respond to an employee’s claim within 30 days or lose the right to object. Being aware of any special jurisdictional rules regarding notice of injury and responding to claims will allow prudent employers to avoid waiving any rights they may otherwise have.

**Oxycodone and Oxycontin**: Prescription medication dispensing practices, availability of pricing based upon generic medications, or application of fee schedules to medications may be more favorable in certain jurisdictions.

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15 *Panzer Law, P.A. v. Palm Beach County Sch. Dist.*, 150 So.3d 823 (Fla. 1st DCA 2014).
Principal Place of Business as a Basis for Establishing Jurisdiction: In some states, jurisdiction may be established if the principal place of business for the employer is located in the state.

Penalties: Most states allow for successive workers’ compensation awards that are supplemental in nature. Filing in multiple jurisdictions is often a way for claimants to attain greater benefits. It is important for employers to understand this in order to avoid unintentional penalties. An employer may already be paying benefits in one jurisdiction, when an employee files a claim for benefits in another jurisdiction. The employer cannot ignore the second claim simply because it is already paying benefits. The employer will need to analyze its separate obligations under the laws of the jurisdiction in which the second claim was filed. By doing so, an employer may subject itself to waiting time penalties in the second state.

Quirks of Particular Jurisdictions: Be familiar with the “quirks” of various jurisdictions and use them to your advantage!

Regulatory Issues: Regulatory or administrative rules or procedures may be more favorable to the employer in certain jurisdictions.

Residence of Claimant as a Basis for Establishing Jurisdiction: Many States hold that domicile is a highly relevant factor, but does not provide a basis for jurisdiction on its own. For example, Iowa statutes formerly provided that residence alone was a

18 Larson’s Workers’ Compensation Law § 143.06 (2015).
sufficient basis to exercise jurisdiction over a workers’ compensation claim, but later it amended its statute to require a more significant connection to the State.\textsuperscript{19}

\textbf{S  Settlement Coordination:} There can be complicated implications to settlements when jurisdiction potentially may be established in more than one State. An employer may need to consider whether settlement agreements need to be finalized in more than one jurisdiction in order to limit potential exposure. It may be important to include language in a settlement agreement precluding future claims in each of the specific States in which a claimant could bring suit, and the agreement may need to be submitted for approval in each jurisdiction where the claim is pending or may be brought.\textsuperscript{20}

In multijurisdictional situations, wise employers are cognizant of how timing of the settlement approval process may impact settlement agreements. Some jurisdictions may take longer than others to approve settlement documents. Employers need to avoid situations in which a settlement agreement is approved early and immediately in one jurisdiction while another State takes significant time to approve the settlement. If the first settlement is promptly approved, and the second one is delayed, the employer may find itself with a need to pay the first in order to avoid a penalty situation as to the first settlement. The requisite time may pass requiring benefits to begin being distributed, and at that point, with the claimant already receiving payment, he may no longer have any

\textsuperscript{19} \textit{Heartland Exp. v. Gardner}, 675 N.W.2d 259 (Iowa 2003).
\textsuperscript{20} \textit{Adams v. Emery Transp. Co.}, 15 Mich. App. 593 (1969) is illustrative of why this is important. An employee was injured while working in Michigan. He was employed by two different Illinois companies performing trucking duties. He applied for compensation in both Illinois and Michigan. He settled his Illinois claim with one employer and that agreement provided that Illinois had exclusive jurisdiction over the matter and that he would dismiss the Michigan proceedings. The settlement was not submitted to the Michigan Court for approval. The Michigan Court later held that the Illinois settlement was not a bar to proceedings in Michigan.
interest in following through with the second settlement. Thus, do your best to resolve settlements concurrently.

Suspension of Benefits May be More Complicated in Certain Jurisdictions:
Each jurisdiction has different requirements that the employer must meet before benefits will be suspended, some of which are harder to satisfy than others. For instance, does the employee have to consciously refuse the offer of employment before temporary indemnity benefits can be suspended? Or is the employee’s mere inability to qualify for the proffered position sufficient to allow the employer to suspend such benefits?²¹ Similarly, employers may have to satisfy special notice requirements informing the employee of the consequences of his refusal to accept work. Keep in mind your jurisdiction’s requirements when considering whether to suspend a claimant’s benefits.

Timing of Claim Progression: Be cognizant of the various time frames and deadlines for each stage of a claim to avoid waiving rights and defenses and to avoid falling into a penalty situation.

Update Coverage to Ensure all Locations are Properly Covered:
Employers should keep records of which type of insurance coverage is required by each jurisdiction in which they are operating and be vigilant in knowing whether their coverage is updated. Under some compensation statutes, insurance carriers have a duty to notify employers and the compensation commission when an employer’s insurance coverage

²¹ See, e.g., Cote v. Great N. Paper Co., 611 A.2d 58 (Me. 1992) (holding that the claimant failing a re-employment drug test did not constitute a ‘refusal to accept an offer of reinstatement’ that would allow the suspension of benefits). But see, e.g., Martines v. Worley & Sons Constr., 278 Ga. App. 26, 268 S.E.2d 113 (2006) (determining that an employee’s legal inability to qualify for an offer of employment constituted a refusal of employment such that suspension of benefits was proper).
Whether this duty exists depends on the language of the governing statute. However, being proactive in keeping your coverage up-to-date will avoid any disputes that may arise in the event you are in a jurisdiction where this duty does not exist or the insurance carrier fails to fulfill it.

**Venue:** Which jurisdiction is most favorable for litigation?

**Vocational Rehabilitation:** Vocational rehabilitation can be required where, despite reaching maximum medical recovery, an injured employee is still unable to find a suitably similar position to his or her pre-injury employment. Two main considerations employers should keep in mind are: (1) the claimant must be eligible for vocational rehabilitation; and (2) rehabilitation is “feasible,” “desirable,” “reasonable,” or “necessary.”

Not every employee who has suffered a workplace injury is entitled to vocational rehabilitation benefits. Most States require that the employee be permanently impaired; some require that the employee’s injuries prevent him or her from performing the job for which he or she had previous training or experience; other States focus on the employee’s ability to earn wages equal to or similar to those earned at his or her previous position; and still others require some combination of these factors. Keep in mind that a number of jurisdictions may require employers to bear the cost of actually retraining the employee.

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22 Larson’s Workers’ Compensation Law § 150.03 (2015).
23 For example, Delaware law requires insurance carriers to notify employers at least 60 days in advance of the expiration of their policies. Del. Code Ann. tit. 19, § 2378 (1988). But see Struve Enters., Inc. v. Travelers Ins. Co., 243 Neb. 516, 500 N.W.2d 580 (1993) (holding that since the employer’s policy expired at the end of its term rather than being cancelled, the insurance carrier had no duty to notify the employer that its policy was about to expire).}
24 Larson’s Workers’ Compensation Law § 95.03 (2015).
injured employee for employment in a wholly new occupation rather than just rehabilitating him or her for employment in a similar field.\footnote{Larson’s Workers’ Compensation Law § 95.03 (2015).}

\textbf{Washington Gas Light Company case:} \textit{Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980):} In the \textit{Thomas} case the United States Supreme Court examined the ability of a workers’ compensation claimant to secure workers’ compensation benefits in successive States and how the employer should coordinate those benefits. Since more than one State can have jurisdiction over a workers’ compensation claim, a claimant can potentially file the claim in one jurisdiction, receive an award of benefits, subsequently file in another jurisdiction to take advantage of its higher cap on benefits, and receive a secondary award. So long as each State has a legitimate state interest in the case, successive awards that are supplemental in nature are permitted. Employers need to be watchful for these types of issues - just because benefits are being paid in one jurisdiction doesn’t mean there is immunity as to an employee’s subsequent claim for supplementary benefits in another jurisdiction.

For example, suppose you are a Virginia-based corporation doing business both within and outside of Virginia. You hire an employee who is a resident of the District of Columbia (“DC”) to work on a construction project in DC, and while on the job the employee sustains an elbow injury. The employee seeks benefits under Virginia’s Workmen’s Compensation Act and benefits are awarded by the Commission. Later the employee seeks additional benefits for the same injury by filing a claim in DC. Can you successfully argue that Virginia’s award of benefits precludes \textit{any} other recovery on the
grounds that the District owes full faith and credit to the Virginia decision? The answer seems to be “no.”

In *Thomas* the Court held that the Full Faith and Credit Clause of the United States Constitution\(^{27}\) does not preclude successive workmen's compensation awards. The Court reasoned that “a State has no legitimate interest within the context of the federal system in preventing another State from granting a supplemental compensation award when that second State would have had the power to apply its workmen’s compensation law in the first instance.”\(^{28}\) Before *Thomas*, States had the power to enact legislation which would control whether a workers’ compensation judgment was final, meaning it could not be supplanted in a subsequent proceeding in another State.\(^{29}\) The *Thomas* decision took the power to make that determination out of legislators’ hands and gave it to the courts.

Perhaps the most important issue as to successive workers’ compensation awards is what effect the first adjudication and/or award has on subsequent claims. Normally, the common law principles of res judicata and collateral estoppel ensure that a court’s findings of facts and award are conclusive with respect to a claim that is litigated. Accordingly, issues cannot be re-litigated when they stem from a claim that has already been adjudicated. In *Thomas*, the Court distinguished between judgments entered by a court of general jurisdiction and awards entered by administrative tribunals that derive their powers exclusively through statute, such as workers’ compensation courts.\(^{30}\)

\(^{27}\) U.S. CONST. art. IV, § 1.


\(^{30}\) *Thomas*, 448 U.S. at 282.
Because workers’ compensation statutes (and the benefits stemming therefrom) vary from State to State, a workers' compensation judgment is not viewed as conclusive with respect to the rights of the claimant arising under a different State’s workers’ compensation laws.

The Supreme Court’s ruling in *Thomas*, only contemplates the application of res judicata for successive awards that are “supplementary” in nature. That is, when compensation is awarded “on the basis of the same set of facts,” but differs with respect to the amount of benefits the claimant is owed due to a successive State’s “more generous” workers’ compensation scheme.\(^{31}\)

Currently, it appears that the Supreme Court’s stance in *Thomas* only applies to supplementary awards. That is, neither full faith and credit nor res judicata can bar a supplemental award giving effect to the facts determined by the first award and allowing for a credit stemming from the same; thereby resulting in neither inconsistency nor double recovery.\(^ {32}\) Successive awards not “supplementary” in nature—but rather based on inconsistent factual determinations, mutually exclusive remedies, or the possibility of double recovery—are not afforded the same treatment. In these instances, *Thomas* should not control, and the workers’ compensation insurer or self-insured employer should be able to successfully present Full Faith and Credit and/or res judicata defenses.

**X eXamine all Aspects of Handling Claims in Most Favorable Jurisdiction:** Workers’ compensation claimants may “shop” for the jurisdiction that

\(^{31}\) *Id.* at 281.

would provide the greatest overall workers’ compensation benefits, and, thus control where the claim is pursued. Often, though, the employer may be able to affect the place where the claim will be initiated by strategically identifying the jurisdiction in which the First Report of Injury should be filed.

**Y** Years of Additional Benefits May Be Required in Certain Jurisdictions: Remain watchful of the duration over which a claim may remain open or benefits must be paid.

**Z** Zest for These Issues Will Help You Control Costs!