[Cite as *Villasana v. Admr., Bur. of Workers' Comp.*, 2004-Ohio-2083.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PEDRO VILLASANA	:	JUDGES:
	:	Sheila Farmer, P.J.
Plaintiff-Appellant	:	John Wise, J.
	:	Julie Edwards, J.
-vs-	:	
	:	Case No. 2003 AP 09 0070
ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION	:	
and	:	
UTILITY POLE TECHNOLOGIES, INC.	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From Tuscarawas County Court of Common Pleas Case 02 CW 11-0748
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 20, 2004
APPEARANCES:	
For Plaintiff-Appellant	For Defendant-Appellee
STEVEN G. THOMAKOS 158 North Broadway P. O. Box 944 New Philadelphia, OH 44663	ADELE E. O'CONNER 41 South High St. Columbus, OH 43215 ERICA BASS Asst. General – Workers' Compensation Section 150 Gay Street, 22nd Flr. Columbus, OH 43215

Edwards, J.

{¶1} Plaintiff-appellant Pedro Villasana appeals from the August 13, 2003, Judgment Entry of the Tuscarawas County Court of Common Pleas which granted summary judgment in favor of defendant-appellees Administrator, Bureau of Worker's Compensation and Utility Pole Technologies, Inc.

STATEMENT OF THE FACTS AND CASE

{¶2} The issue before this Court is whether appellant Pedro Villasana [hereinafter appellant] is entitled to participate in the Ohio Workers' Compensation Fund for injuries he sustained on March 27, 2002. Appellant filed a workers' compensation claim for his injuries which was denied by the Industrial Commission of Ohio. The following facts form the basis of appellant's claim.

{¶3} Appellant is an employee of Utility Pole Technologies, Inc. [hereinafter UPT]. UPT is a corporation with its principal place of business in Pennsylvania. Appellant lives in Texas. Appellant entered into an employment contract with UPT in Texas. Appellant's job involves servicing utility poles. Appellant usually performed his work in Texas. Appellant was paid, supervised and controlled in Texas.

{¶4} UPT obtained workers' compensation coverage for its employees in Texas. UPT reported appellant's payroll to the State of Texas for workers' compensation purposes.

{¶5} However, on March 26, 2002, appellant and several crews of other UPT employees were sent from Texas to Ohio to service utility poles in Ohio. They were scheduled to remain in Ohio for one month to perform their work, after which they were

to return to Texas[1]. Appellant traveled by truck from Texas to Ohio, arriving in Ohio on March 26 or March 27, 2002.

{¶6} Appellant and his crew began working on the morning of March 27, 2002, in the Uhrichsville, Ohio, area. After working for several hours, the crew took a lunch break. They traveled 15 minutes from the work site to a McDonald's restaurant. While in the restaurant parking lot, appellant was struck by a car, suffering injuries.

{¶7} Appellant notified UPT of his injuries. UPT notified its Texas Workers' Compensation insurance carrier. The carrier denied appellant's workers' compensation claim on the basis that appellant's injuries were not sustained in the course and scope of his employment. Following the carriers' denial of his claim, appellant did not file a claim with the Texas Workers' Compensation Commission. Instead, appellant filed a claim for workers' compensation in Ohio.

{¶8} Once the Industrial Commission of Ohio denied appellant's claim for Workers Compensation, appellant appealed to the Tuscarawas County Court of Common Pleas, pursuant to R.C. 4123.512. Appellees, UPT and Administrator, Bureau of Workers' Compensation [hereinafter BWC], filed motions for summary judgment asserting that appellant's Ohio Workers' Compensation claim was barred by R. C. 4123.54(B) and on grounds that appellant's injury on March 27, 2002, did not occur in the course of and arise out of appellant's employment with UPT. On August 13, 2003, the trial court granted appellees' motions.

---

[1] This was not the first time appellant had come to Ohio for UPT. Appellant had come to Ohio twice since January, 2002. On each of those two occasions, appellant stayed at a hotel chosen by UPT for a month, went back to Texas for a week, and then returned to Ohio for another month. On this third visit, which included the date of appellant's injuries (March 27, 2002), appellant had expected to stay another month, but actually stayed only three weeks.

{¶9} Thus, it is from the August 13, 2003, grant of summary judgment that appellant appeals raising the following assignment of error:

{¶10} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT."

{¶11} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56(C) which provides, in pertinent part: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶12} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. It is pursuant to this standard that we review appellant's assignment of error.

{¶13} Ohio workers' compensation laws permit employees to participate in the fund for most injuries that occur in the course of and arising out of the employee's

employment. R.C. 4123.01. However, certain exclusions apply. Specific to this case, R.C. 4123.54(B) provides as follows:

{¶14} "If an employee is a resident of a state other than this state and is insured under the workers' compensation law or similar laws of a state other than this state, the employee and the employee's dependents are not entitled to receive compensation or benefits under this chapter, on account of injury, disease, or death arising out of or in the course of employment while temporarily within this state, and the rights of the employee and the employee's dependents under the laws of the other state are the exclusive remedy against the employer on account of the injury, disease, or death."

{¶15} Thus, a non-resident employee, who is insured under the workers' compensation law of another state, and who is injured while temporarily working in Ohio, must look exclusively to the laws of the other state as a remedy for his or her injuries. Appellant is such an employee.

{¶16} Appellant was a resident of Texas at the time of his injury. Additionally, all of the evidence presented to the trial court in this case supports the conclusion that appellant was "insured under the workers' compensation laws" of Texas. Appellant did not dispute that UPT submitted appellant's report of injury to its insurance carrier. However, appellant argues that he was not "insured under" the workers' compensation laws of Texas because his insurance claim was denied by UPT's insurance carrier for lack of a work-related injury.

{¶17} There are two reasons why appellant's argument fails: First, it is not necessary for a claimant to actually receive benefits under another state's workers' compensation laws in order to be considered "insured under" the workers'

compensation laws of that state. Second, appellant's entitlement to workers' compensation benefits in Texas has never been determined by the Texas workers' compensation authorities or courts.

{¶18} In *Wartman v. Anchor Motor Freight Co.* (1991), 75 Ohio App.3d 177, 598 N.E.2d 1297, the Sixth District Court of Appeals stated that the term "insured" used in R.C. 4123.54(B) "does not mean that benefits were actually 'awarded' or 'recovered.'" Id. at 182. Rather, the court in *Wartman* held that a claimant is not "insured" under the laws of another state where the claimant's workers' compensation claim in that state is precluded on jurisdictional or quasi-jurisdictional grounds. Id.[2] Thus, the court rejected the argument that a mere denial of benefits renders a claimant "uninsured."

{¶19} Additionally, in *Trackwell v. Signal Delivery Service, Inc*. (May 30, 1991), Union App. No. 14-90-11, the Third District Court of Appeals found that it was sufficient for purposes of the "insured under" requirement in R.C. 4123.54(B), that the employer had workers' compensation coverage in the claimant's state of residence, Michigan. Id. Because the employer in that case had workers' compensation coverage in Michigan, Michigan law provided the employee's sole remedy for injury. Id.

---

[2] In *Wartman*, the claimant was a resident of Kentucky who was employed by a Michigan corporation. The claimant regularly dispatched out of the corporation's Michigan terminal. He was injured while driving through Ohio in the course of, and arising out of, employment entered into outside of Ohio. The issue was whether the claimant was insured under the workers' compensation law of Kentucky. See R.C. 4123.54. The *Wartman* court found that the claimant was not able to participate in the Kentucky workers' compensation system and the claimant was "not entitled to participate in, nor is…covered under Michigan's Workers' Compensation law, since he is an out-of-state resident, and the accident occurred outside the Sate of Michigan." Id at 179-180. The court concluded that because the claimant was precluded from being an insured in another state on a jurisdictional or quasi-jurisdictional basis (e.g. situs of injury, length of stay, place of hire and/or state of residence), the claimant was not insured in another state as that term is used in R.C. 4123.54. Id. at 181-184.

{¶20} It was undisputed below that UPT obtained workers' compensation insurance for its employees, including appellant, pursuant to Texas law. Appellant was "insured under" the workers' compensation laws of Texas, irrespective of whether he actually obtained benefits in Texas. Further, appellant was not precluded from benefits in Texas on the basis of jurisdictional or quasi-jurisdictional reasons. UPT's workers' compensation insurance carrier denied appellant's claim based upon the facts giving rise to the injury, not for lack of jurisdiction.

{¶21} Even if a denial of workers' compensation benefits in Texas could form the basis of a finding that appellant was not "insured" in Texas, appellant never sought to have his right to benefits determined in Texas. Appellant's claim was rejected by UPT's insurance carrier. Following a denial of an employee's claim by the employer's workers' compensation insurance carrier, the employee must file a claim with the Texas Workers' Compensation Commission within one year. Tex Lab. Code Ann. 409.003. At that point, the employee is entitled to have his claim determined by the Texas Workers' Compensation Commission.

{¶22} There is no evidence in the record that appellant ever filed a claim with the Texas Workers' Compensation Commission. In fact, appellant testified that he did not file a claim. Thus, the compensability of appellant's workers' compensation claim, and his rights under Texas law have never been determined. Appellant cannot rely on a "denial" of benefits in Texas to support his argument that he was not "insured" in Texas because there has been no such denial in Texas.

{¶23} The next issue is whether appellant was working in Ohio temporarily when injured on March 27, 2002. The determination of whether a particular claimant is

temporarily in Ohio for purposes of workers' compensation coverage depends on the length of time the claimant has been in this state or is expected to be in this state at the time of the industrial accident. *Davis v. Admr., Bur. of Workers' Comp.* (1996), 110 Ohio App.3d 57, 58, 673 N.E.2d 635 (quoting *Fowler v. Paxchall Truck Lines, Inc*. [July 27, 1995], Franklin App. No. 94 APE11-1654).

{¶24} The Ohio Administrative Code addresses what constitutes a "temporary" period of time under R.C. 4123.54(B). Ohio Adm.Code 4123-17-23(C) provides:

{¶25} "The bureau of workers' compensation respects the extra-territorial right of the workers' compensation insurance coverage of an out-of-state employer for his regular employees, whose contracts of hire have been consummated in some state other than Ohio, while performing work in the state of Ohio for a temporary period not to exceed ninety (90) days." Ohio Adm.Code 4123-17-23.

{¶26} Based upon this definition, appellant was injured while working "temporarily" in Ohio. Appellant testified that he was expected to remain in Ohio for one month and in fact, appellant and his crew only remained in Ohio for three weeks. Because appellant was injured during a work assignment that only lasted three weeks, this visit fell well within the Ohio Adm.Code 4123-17-23 definition of a "temporary period" of work.

{¶27} Appellant had previously worked in Ohio for a month or less on two separate occasions. Each visit involved a separate work assignment, which was completed within one month or less, and after which appellant and his work crew returned to Texas. Even if this Court were to consider all of appellant's visits to Ohio together, there is no evidence in the record that the total number of days in which

appellant was in Ohio exceeded ninety (90) days. At best, appellant can show only that the total number of days that he actually worked or would have worked in Ohio but for the accident was ninety days or less.[3] Thus, pursuant to Ohio Adm.Code 4123-17-23, appellant was working "temporarily" in Ohio when he was injured on March 27, 2002.

{¶28} In conclusion, appellant is a Texas resident, who was insured under the workers' compensation laws of Texas, and was working in Ohio temporarily when he was injured on March 27, 2002. Pursuant to R.C. 4123.54(B), appellant is not entitled to participate in the Ohio workers' compensation fund, and must look to Texas law as his exclusive remedy for his injuries.

[3] At a deposition, appellant stated that he worked in Ohio in February, 2002, (not a leap year) for a month and January, 2002, for a month or three weeks. On the third visit to Ohio, appellant and his crew remained in Ohio for only three weeks. Although initially they expected to stay in Ohio for one month on this last visit, the visit was shortened to three weeks. When added together, appellant cannot show that he worked in the state of Ohio for more than 90 days, nor expected to work in the state of Ohio for more than 90 days.

{¶29} Accordingly, we find that summary judgment was appropriate. Thus, appellant's sole assignment of error is overruled.

{¶30} The judgment of the Tuscarawas County Court of Common Pleas is affirmed.

Judgment affirmed.

Farmer, P.J., and Wise, J., concur

[Cite as *Villasana v. Admr., Bur. of Workers' Comp.*, 2004-Ohio-2083.]

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

PEDRO VILLASANA Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION and UTILITY POLE TECHNOLOGIES, INC. Defendants-Appellees	:	CASE NO. 2003 AP 09 0070

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Tuscarawas County Court of Common Pleas is affirmed. Costs assessed to appellant.

_____

_____

_____

JUDGES