SECTION 305.2 OF THE PENNSYLVANIA WORKERS' COMPENSATION ACT AND EXTRATERRITORIAL JURISDICTION: BACKGROUND, STATUTE, AND INTERPRETATION

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I. Introduction

When originally enacted in 1915, the Pennsylvania Workers' Compensation Act did not apply to out-of-state injuries.[1] This restrictive statutory formulation was likely the result of the tort-law idea that the Act, and the power of the nascent workers' compensation authorities, could only legitimately apply to injuries occurring within the state.[2]

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[1] Section 101 of the Act, now codified at 77 P.S. § 1, originally provided, in pertinent part, "[T]his Act … shall apply to all accidents occurring within this Commonwealth, irrespective of the place where the contract of hiring was made, renewed, or extended, and shall not apply to any accident occurring outside of the Commonwealth."

[2] According to Larson:

> The earliest theory on applicability of compensation statutes, in the absence of any express statutory conflict-of-laws provision, was the "tort theory." Under this view,

The Pennsylvania statute relative to "extraterritorial jurisdiction," as this issue is universally referred to, was amended in 1929, 1956, and most recently (with a major addition to the Act) in 1974.[3]

In 1929, Commonwealth employees who were out of state on government business gained Pennsylvania coverage, and other "Pennsylvania" employees whose principal work site was within the state also gained coverage, as long as the injury was sustained within 90 days of their work outside Pennsylvania. In 1956, meanwhile, the time period was extended to six months, and the statute was seemingly liberalized to allow the potential for non-Pennsylvania domiciliaries to enjoy extraterritorial coverage (the word "Pennsylvania" was deleted from the phrase "Pennsylvania employees").

In 1974, finally, the reform movement of that era caused a complete upheaval of the long-existing status quo. In that year, the legislature adopted, with Section 305.2,[4] virtually word for word, the language of a Model Act that at once worked (1) to broaden the circumstances under which an extraterritorial injury could be covered; (2) to ensure that no worker whose employment had a substantial link with Pennsylvania would be denied a potential source of coverage; (3) to further define how multi-state awards of compensation are coordinated; and (4) to provide for a method for out-of-state employers whose employees are injured in Pennsylvania, but which failed to secure insurance, can show compliance and avoid penalties. The former and latter, notably, address not only the issue of extraterritorial injuries but "intraterritorial" injuries as well.

Since 1974, the Commonwealth Court has published over twenty-five opinions interpreting and applying Section 305.2.[5] Virtually all of these opinions explore the nuances of the four criteria available in the present day for an employee to establish an extraterritorial claim. Others, however, address the coordination of benefits provision.

The purpose of this article is to present, some thirty-five years after enactment of the statute, an unabridged summary and analysis of the court cases that have interpreted Section 305.2. As a prelude to that review, this article discusses the general issues surrounding, and the theoretical bases of, intraterritorial and extraterritorial jurisdiction; explains how Pennsylvania treated extraterritorial issues prior to 1974; and reviews the background and purposes of the Model Act. At the conclusion of the article, a number of

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> compensation liability was regarded as a sort of substitute for tort liability, which meant that the *lex loci delicti* should govern…. To the extent that [this theory] thus restricted coverage of out-of-state injuries, this holding quickly lost importance in the United States as the affected states expressly amended their statutes to cover injuries occurring outside of their boundaries.

Larson, WORKERS' COMPENSATION, § 143.02[2] (2000).

[3] *See infra* Part VII.

[4] Section 305.2 of the Act, 77 P.S. § 411.2. For the full text, see Appendix A. Section 1 was amended at the same time to coordinate with new 305.2

[5] For a table setting forth these twenty-six cases, see Appendix B.

appendices appear. This article sets forth in full the wording of Section 305.2, and shows how Pennsylvania's adoption of the Model Act reflects, through added language, an alteration of the model legislation. The second appendix is a table setting forth the claim characteristics of the twenty-six reported Pennsylvania cases. The third appendix is a table of states that have also adopted, in whole or part, the Model Act. The fourth table reveals the markedly different approaches to extraterritoriality taken by the six states contiguous to Pennsylvania.

A note on terminology is appropriate at the outset. Section 305.2 does not utilize the term "jurisdiction" when discussing the out-of-state coverage of the Pennsylvania Act. Purdon's title 77, meanwhile, editorially captions Section 305.2 as "Injuries Occurring Extraterritorially." The courts, however, have always referred to this statute as applying to "jurisdiction."[6] One notable exception exists: in one case, the court remarked as follows:

> The board, after correctly deciding that the claimant could not have benefits in this case because he was not [the putative employer's] employee, wrote that it had no jurisdiction because the accident occurred in Ohio and none of the section 305.2(a) conditions applied. Of course, the result in such a case is not that the board is without jurisdiction but simply that the Pennsylvania Act does not apply.[7]

II. Issues, Past and Present, Surrounding Extraterritoriality

A. Extraterritoriality in the Cases and in the Statutes

The applicability of a state's workers' compensation laws to injuries sustained outside the state has always been a challenging issue. On a day-to-day basis, it is agents and brokers who struggle with the issue, making sure that they have placed adequate insurance to ensure that their clients have coverage in those states where it is required. When an extraterritoriality case does develop, meanwhile, most lawyers and judges must scramble to re-introduce themselves to the fairly complex provisions of the Pennsylvania statute and, on occasion, the laws of neighboring states.[8]

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[6] *See, e.g.*, *McIlvaine Trucking, Inc. v. WCAB (States)*, 810 A.2d 1280 (Pa. 2002); *Macomber v. WCAB (Penske Transportation)*, 837 A.2d 1283 (Pa. Commw. 2003).

[7] *Patterson v. WCAB (Wayne W. Sell Corp.)*, 485 A.2d 886 (Pa. Commw. 1985). This issue is revisited *infra*. *See* Section VII(B).

[8] For discussions of the issue, see D. Torrey & A. Greenberg, PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE, §§ 3:46 – 3:60 (West 3rd ed. 2008 & Supp. 2009); P. Weber, M. Wilson et al., PENNSYLVANIA WORKERS' COMPENSATION: PRACTICE & PROCEDURE §§ 3.4 – 3:29 (2008) (PBI: Harrisburg, PA); Eldridge & Hillsberg, *Extraterritorial Jurisdiction*, in Collected Papers, TOUGH PROBLEMS IN WORKERS' COMPENSATION (2001) (PBI: Harrisburg, PA).

The challenge is, in general, illustrated by recent cases from other states. In a 2009 New Jersey decision, an employer that dispatched teachers to other countries found itself no longer able to purchase New Jersey workers' compensation coverage that would follow the teachers to their respective workplaces. The employer ultimately filed a declaratory judgment action and received a ruling that it was not, in fact, necessarily obliged to purchase workers' compensation coverage for the teachers. The court concluded, however, that if upon further analysis some of the teachers had sufficient contacts with New Jersey, such teachers might well have potential New Jersey claims and insurance coverage would presumably be required.[9]

In a 2008 Connecticut case, meanwhile, the complexity of extraterritoriality was revealed in the realm of the exclusive remedy. In that case, the deceased worker, who lived in New York and performed must of his work there, died in a work-related motor vehicle accident in Connecticut. His co-worker, who was driving, was ultimately convicted of negligent homicide. The worker's administrator filed a wrongful death action against the employer and co-worker in Connecticut. In that state, notably, an exception to the exclusive remedy would allow the suit. The trial and Supreme Court, however, granted summary judgment, applying a "most significant relationship" test and thus applying the workers' compensation law of New York, which included no such exception to immunity.[10]

These cases suggest the complexity of the issue, but also reveal a remarkable phenomenon in this "Age of Statutes": in a few major states – New Jersey and New York, notably – the issue of extraterritorial application is still governed by case law.

Pennsylvania's approach is dramatically different. As noted both above and below, in 1974, as part of the major amendments of that year, the state superannuated its prior statute and precedents and adopted the Council of State Governments' Model Act. Although it has made a few additions, Pennsylvania is one of only six states that have adopted the statute in its whole form.

In the decades since, Pennsylvania has been the undisputed leader in interpretation of the statute. As foreshadowed above, Pennsylvania courts have produced twenty-six reported opinions. Other states have adopted portions of the Model Act, and others have been influenced by its recommendations,[11] but Pennsylvania's activity in reporting these opinions makes the Commonwealth far and away the leader in experience with the Model Act. The good news is that the statutory approach taken by Pennsylvania has been a success because its courts have maintained black and white rules on the extraterritorial issue, and, by doing so, have avoided the confusion and consequent

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[9] *International Schools Service, Inc. v. New Jersey Dept. of Labor & Workforce Development*, ___ A.2d ___ (N.J. Super. 2009) (2009 N.J. Super. LEXIS 157).

[10] *Jaiguay v. Vasquez*, 948 A.2d 955 (S. Ct. Ct. 2008).

[11] *See, e.g.*, *Patton v. Industrial Commission*, 498 N.E.2d 539 (1986) (court referencing background of Model Act, even though Illinois legislature had not expressly adopted its terms).

litigation that can still arise in neighboring states – as illustrated by the two appellate court cases noted above.

B. Concerns Surrounding Extraterritorial Jurisdiction

Reformers in the 1960's and 70's proposed the Model Act and expansion in extraterritorial jurisdiction because of a concern that restrictive laws could (and did) result in workers with *bona fide* injuries on occasion being left without *any remedy*, because all possible states denied jurisdiction.[12]

As an example of a case where a claimant slipped through the cracks and had no remedy, the Commentary to the Model Act, said to have been written by Arthur Larson,[13] cited *House v. State Industrial Commission*,[14] a 1941 Oregon decision. In that case:

> The deceased was hired in Oregon by an Oregon company and was sent to manage a branch office in California. He was called to Oregon to attend a brief dealer's meeting, and in the course of the temporary visit was accidentally killed in Oregon. Unfortunately for his dependents, California required the place of contract to be in California, and Oregon required the place of regular employment to be in Oregon. Decedent had things turned around exactly the wrong way – his place of contract was Oregon, his place of regular employment was California, and he could satisfy neither state. Compensation was denied in California because the contract was not made there. Compensation was subsequently denied in Oregon because no regular employment existed there.[15]

The reform movement was, according to Larson, a success.[16] And, indeed, this writer has not heard or read of modern reports of situations where workers injured while laboring outside their home states have been left without a remedy.

Pennsylvania courts have also recognized that the certainty of a *convenient* forum for recovery was a purpose of the adoption of the model act provisions: "The legislature, in enacting Section 305.2(a)(2) realized that it would be unjust to compel an itinerant employee injured on the job in a foreign state while working out of a hotel room to return

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[12] The reformers declared that "[t]here is no portion of the compensation act more urgently in need of coordinated state action than the extraterritoriality provision. The present provisions of the various state acts are in a state of chaos." WORKMEN'S COMPENSATION AND REHABILITATION LAW: WITH SECTION BY SECTION COMMENTARY (The Council of State Governments), p. 97 (January 1973).

[13] Memo from John F. Burton, Jr., to the Author, September 15, 2008.

[14] *House v. State Industrial Commission*, 117 P.2d 611 (Oregon 1941).

[15] WORKMEN'S COMPENSATION AND REHABILITATION LAW: WITH SECTION BY SECTION COMMENTARY (The Council of State Governments), p. 97 (January 1973).

[16] Larson, WORKERS' COMPENSATION, § 143.01[1] (2000).

to the foreign state in order to file a claim for compensation. This is precisely the situation that Section 305.2(a)(2) was intended to rectify…."[17]

In the present day, with expanded opportunities for coverage, it is employers that seem to have concerns over expanded jurisdiction. The most critical concern is the perceived unfairness in allowing the injured worker to pursue successive awards in multiple states. As one writer has noted succinctly, "The primary concern with the issue of successive awards [in an era of expanded jurisdiction] is double-dipping."[18]

From 1995 to 2008, for example, a worker could (via a liberal reading of the Iowa statute) secure the jurisdiction of the Iowa Workers' Compensation Act for an out-of-state injury based *simply* on his or her Iowa *domicile*. One critic explained the perceived problem:

> [Allowing an Iowa claim based on domicile alone] enables employees who live in Iowa and work in neighboring states to forum shop to reap the most favorable benefits of both states. A claimant can [for example] obtain an award of industrial or permanent partial disability benefits in Iowa and also claim entitlement to vocational rehabilitation benefits under Nebraska law. ….
>
> An employee can have petitions pending in both states, precipitously raising litigation expenses. Administering such claims is difficult at best because state laws vary significantly from one state to another….[19]

The Iowa statute was, notably, altered in 2008 to eliminate jurisdiction based solely on domicile.

Under the Nebraska Act, meanwhile, extraterritorial jurisdiction can attach on the mere grounds that the *employer* can be said to have its business localized in the state. Section 48-115(2)(b) "permits Nebraska courts to extend subject matter jurisdiction upon a showing that: (a) the defendant employer performs work in Nebraska, and (b) the injured employee's work, at the time of injury, was 'incidental' to the defendant employer's industry in Nebraska." After the Nebraska Workers' Compensation Court gave the statute a literal reading, two critics complained: "The unsettling effect of a plain

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[17] *Taylor v. WCAB (Ace Installers, Inc.)*, 543 A.2d 219 (Pa. Commw. 1988).

[18] Levasseur, *A Primer for Successive Awards in Workers' Compensation*, 28 THE BRIEF (ABA) 38 (Winter 1999). Levasseur provides, as an example, a worker who pursued both Maryland and Pennsylvania claims. *M&G Convoy, Inc. v. Maui*, 584 A2d 101 (MD 1991). In that case, claimant was a Maryland resident who was injured in Maryland. At the time, he was working for a Pennsylvania employer. He was paid Pennsylvania benefits, but when he apparently stabilized he was unable to receive any PPD award, as Pennsylvania provides no such benefits. Thus, he filed a successive claim in Maryland where permanently workers injured can receive PPD.

[19] Grimm, *Henricksen v. Younglove Construction: Subject Matter Jurisdiction Based Solely on the Claimant's Iowa Domicile*, 45 DRAKE LAW REVIEW 859 (1997) (discussing and criticizing *Henricksen v. Younglove Constr.*, 540 N.W.2d 254 (Iowa 1995)).

language fashioning of [the section] effectively empowers forum-shopping plaintiffs with a previously unrecognized avenue to file qualifying workers' compensation claims in Nebraska, thereby granting a significantly greater population access to the potentially pro-employee advantages provided in the Nebraska Workers' Compensation Act …."[20]

The most strident complaints come from the interstate trucking industry, which has asserted that underwriting risk is complicated when its employees labor in a variety of states, most of which claim jurisdiction over all injuries occurring within its borders.[21] These employers maintain that the multiple opportunities for coverage results in forum shopping by workers after an injury and resultant lack of finality and certainty with regard to liability. In 1992, a trucking company executive stated:

> The [trucking] industry is in many respects a unique one and thus traditional concepts of the "right to control," the "right to discharge," and other aspects of the common law tests are difficult to apply to motor carrier/owner–operator relationships. Thus, motor carriers are always fearful of forum shopping.
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> A state normally will take jurisdiction of a claim based on such factors as where the contract was executed, where the injury occurred, where the injured individual resides, or where the business was localized.
>
> Thus, an injured individual frequently will file his or her claim in the state with one of the above contacts and with the best benefits. In the case of an owner-operator seeking workers' compensation coverage, the choice will frequently turn on the question of which of the states with possible jurisdiction has the most liberal definition of employment and/or favorable law.
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> The issue of forum shopping might be overcome if the contract governing the relationship has a choice of law clause which has some reasonable relationship to the contracting parties' situation. This, however, is not assurance that an agency will apply the law of the state chosen. Most states will not recognize such contract clauses.[22]

The author concludes by submitting, "Workers' compensation should be resolved under the law which the employer and employee anticipate irrespective of the fortuitous circumstances which often determine the forum."

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[20] Zink & Zink, *Eliminating a Most Convenient Forum: The Case for Restricting the Extraterritorial Operation of Neb. Rev. Stat. Section 48-115(2)(B)*, 38 CREIGHTON LAW REVIEW 1 (2004).

[21] Of the twenty-six Pennsylvania cases that deal with extraterritorial jurisdiction, ten were over-the-road truck drivers. One other was a wholesale delivery driver. *See* Appendix B.

[22] Hardman, *Workers' Compensation and the Use of Owner-Operators in Interstate Motor Carriage: A Need for Sensible Uniformity*, 20 TRANSPORTATION LAW JOURNAL 255 (1992).

An argument to the same effect was advanced before the Pennsylvania Supreme Court in 2001 in an *amicus* brief filed by the American Trucking Association (ATA).[23] The ATA argued, unsuccessfully, that the Pennsylvania statute should be read to permit binding "choice-of-law" agreements, which may rout Pennsylvania of jurisdiction even when the injury occurs *within the state*.

The ATA set forth three basic arguments with regard to why good policy favored the legitimacy and enforcement of choice of law agreements. The first argument focused on the lack of administrative efficiency in interstate employers having to comport with multiple state acts:

> Employers subjected to different and often conflicting workers' compensation schemes face significant burdens in the form of time and effort spent understanding and complying with the requirements of many different workers' compensation schemes.
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> [T]hese burdens include costs associated with finding appropriate and competent counsel in various states to handle workers' compensation claims; costs associated with interacting with counsel, health care providers, panel physicians and workers' compensation agencies in various different states; costs associated with attending hearings in multiple jurisdictions; costs associated with complying with notice requirements under various state workers' compensation laws; and costs associated with understanding and navigating differing claims and contest procedures (e.g., time requirements for reporting injury, for filing claim petition, for appealing determination[s], etc.) in various states.[24]

The second argument addressed uncertainty in the substantive law with regard to liability:

> Employers are also subjected to uncertainty based on differing liability rules under the various state workers' compensation schemes. Liability rules may vary greatly from state to state. There may be differing rules on liability with respect to aggravation of pre-existing injuries; on personal animus or employee misconduct exceptions to workers' compensation

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[23] In that case, *McIlvaine Trucking, Inc. v. WCAB (States)*, 810 A.2d 1280 (Pa. 2002), the court considered the Pennsylvania/Model Act's provision that the parties may agree in advance as to where the claimant's employment is "principally localized." Where a traveling employee enters into such an agreement, the Pennsylvania authorities are to enforce the same. The specific issue, however, was whether the agreement applied when the injury occurred *in Pennsylvania*. After all, while Section 305.2 authorizes principal localization agreements, Section 101 provides that all injuries in the state are subject to the Pennsylvania Act. *See* 77 P.S. § 1. For further discussion, see Section VIII(B).

[24] Brief of Amici Curiae, American Trucking Association, Inc. and Pennsylvania Motor Truck Association in Support of Appellee, p. 11, in *McIlvaine Trucking, Inc. v. WCAB (States)*, 810 A.2d 1280 (Pa. 2002).

liability; differing rules on where an injury occurs for coverage purposes; differing rules on bars to civil tort liability; etc.[25]

The final argument involved the difficulty in securing insurance:

> Employers also face difficulty in obtaining appropriate and reasonably priced insurance coverage to manage workers' compensation liability where they are subject to the jurisdiction of many, different workers' compensation schemes. Insurance carriers are reluctant to provide cost-effective coverage when the liability at issue can vary greatly from state to state and there is no way to predict which state or states will have jurisdiction over any employees' injuries. Insurers are unable to accurately assess the employer's liability experience to extrapolate the required premium for future injuries because the liability experience varies radically, depending on the state or states which may assert jurisdiction over any claim.
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> [F]urther, interstate employers must comply with a host of requirements as to adequate insurance coverage which vary widely among states.[26]

III. Legitimacy of and Rules Surrounding Intraterritorial Jurisdiction

From the very inception of the law, Section 101 of the Act declared that all injuries suffered within the state were subject to the law, regardless of where the employment contract was formed.[27] Thus, Pennsylvania has always maintained a comprehensive "intraterritoriality" rule.[28] In 1974, when the legislature adopted the Model Act, it removed from Section 101 its provision as to limited extraterritorial reach, and cross-referenced the new provision (Section 305.2), but left *intact* the declaration that the Act "shall apply to all injuries occurring within this Commonwealth …."

As noted below, employers in Pennsylvania over the last few decades have on occasion questioned the legitimacy of such broad intraterritorial jurisdiction. These efforts have, perhaps predictably, been unsuccessful. No constitutional argument has ever been found viable in Pennsylvania to support the idea that the legislature cannot

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[25] *Id*. at 11-12.

[26] *Id*. at 12.

[27] For the full text of the original statute, see note 1.

[28] *Gringeo v. Rutherford & Mignatti*, 5 Departmental Reports 1653 (1919) (worker who fell, injuring foot, while boarding employer-provided truck in Philadelphia, to travel to work at employer's plant in New Jersey, suffered compensable injury in light of place of injury (Pennsylvania), and fact that employer included transportation as part of contract of employment).

provide for coverage of its compensation laws to injuries within the state. Multiple "rational bases" exist for such a law, and Larson explains them as follows:

> [T]he physical presence of the injured man within the state must concern the state. His medical and hospital bills are owed to local residents, who should not be required to go to foreign states for payment; the witnesses to the accident are within the state, and most of the best evidence bearing on the circumstances of the injury; the state's safety laws and standards may be involved; and [as the U.S. Supreme Court has stressed], the mere presence of a disabled and destitute human being within a state's borders is a social problem of concern to that state since the man may become a public charge if not provided for by compensation law.[29]

The Commonwealth Court rejected an employer attack on broad in-state jurisdiction in what is perhaps the quintessential intraterritoriality situation – the interstate truck driver who is "just passing through" the state and is involved in an accident.[30] In that case, the employer asserted that it was a "violation of the due process and full faith and credit clauses of the U.S. Constitution …. to apply Section 101 of The Pennsylvania Workmen's Compensation Act … in this situation, since the only connection between Pennsylvania and the employment relationship is that the decedent's death occurred within Pennsylvania." The court responded as follows:

> This issue is controlled by *Pacific Employers Insurance Co. v. Industrial Accident Commissioner of the State of California*, 306 U.S. 493 (1939). In that case, the injury occurred in California during a Massachusetts employee's temporary stay. The Court held:
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> > [T]he conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.[31]

In another challenge, the claimant had been injured while working at his employer's Mars, Pennsylvania facility.[32] He had signed an agreement purporting to "elect" Ohio workers' compensation benefits as his exclusive remedy in the event of work injury. He received Ohio benefits and then sought Pennsylvania benefits as a

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[29] Larson, WORKERS' COMPENSATION, § 143.02[4] (2000) (referencing *Alaska Packers Ass'n v. Industrial Accident Commission*, 55 S. Ct. 518 (U.S. 1935)).

[30] *Jay Lines, Inc. v. WCAB*, 443 A.2d 1370 (Pa. Commw. 1982).

[31] *Jay Lines, Inc. v. WCAB*, 443 A.2d 1370 (Pa. Commw. 1982).

[32] *Robert M. Neff, Inc v. WCAB (Burr)*, 624 A.2d 727 (Pa. Commw. 1993).

supplement. The employer opposed the claim, arguing that such agreements were legitimate under Section 305.2, but also that the "Full Faith and Credit Clause of the United States Constitution also requires Pennsylvania to give effect to the Ohio statute authorizing an employer and employee to elect Ohio law as the exclusive remedy for a workmen's compensation claim." The court rejected this argument:

> [A] plurality of the United States Supreme Court has recognized that the Full Faith and Credit Clause does not require a state to subordinate its own compensation policies to those of another state. *Thomas v. Washington Gas and Light*, … 100 S. Ct. 2647 … (1980)… The Court held: "[A] State has no legitimate interest within the context of our 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. The Full Faith and Credit Clause should not be construed to preclude successive workmen's compensation awards."[33]

Finally, in the leading case of *McIlvaine Trucking v. WCAB (States)*,[34] the employer argued – unsuccessfully – that the Pennsylvania statute allowing for agreements as to "principal localization" should be applicable to rout Pennsylvania of jurisdiction even when the injury occurred *within the state*. The court rejected this proposition on a number of grounds, and in any event held that Section 101 of the Act provide for comprehensive coverage of within-state injuries. Thus, while legitimate pre-injury agreements as to principal localization are valid, such agreements only apply in the context of *out-of-state* injuries.

A number of cases have addressed miscellaneous issues arising in the realm of intraterritoriality.

In one case, the claimant suffered an injury in Pennsylvania, but at first received New Jersey benefits. Five years after the injury, he filed a Pennsylvania claim. The employer opposed the claim as untimely, pointing out that while Section 305.2 allows for a successive award in Pennsylvania following an out-of-state award, such "claim under this act [must be] filed within three years after [the] injury …." The court rejected this argument, pointing out that section 305.2 addresses *extraterritorial injuries*. The court applied, instead, the more general rule, found in Section 315, that payments intended to compensate for a work injury tolls the three-year limitation of that section.[35]

In another case, an employer opposed the occupational hearing loss claim of a worker whose chief exposures had been out-of-state. The employer charged that

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[33] *Robert M. Neff, Inc v. WCAB (Burr)*, 624 A.2d 727 (Pa. Commw. 1993).

[34] *McIlvaine Trucking, Inc. v. WCAB (States)*, 810 A.2d 1280 (Pa. 2002).

[35] *Martin v. WCAB (U.S. Steel Corp.)*, 572 A.2d 1307 (Pa. Commw. 1990). *See also infra* Section VIII(C).

claimant could not show that at least 10% of his loss was sustained in Pennsylvania (a 10% minimum is required for a cognizable claim), and hence that he had no Pennsylvania injury. The court rejected this assertion: "The date of the loss was the date of the claim filing, in claimant's case, and the Pennsylvania Act covers all injuries occurring within the Commonwealth, irrespective of the extraterritorial provisions of Section 305.2."[36]

In a third case, the claimant was injured in Pennsylvania, but received benefits, voluntarily, from his employer under the Maryland Act. Later, claimant filed his Pennsylvania claim, and asserted that the Maryland payments constituted an admission by employer as to liability under the Pennsylvania Act. The court rejected this argument.[37]

IV. Legitimacy of Pennsylvania (and other States) Enforcing its Laws to Injuries Occurring Outside the State

Pennsylvania desires to extend the reach of its workers' compensation statute to out-of-state injuries so that workers with some material nexus to Pennsylvania will have a remedy.[38] In providing for this extraterritorial coverage, the "General Assembly sought to further the overall purpose of the Act to provide benefits to employees who suffer work-related injuries resulting in a loss of earnings, and the Commonwealth's interest in insuring that the benefits received are sufficient to sustain them during the duration of their disability."[39]

Under Section 305.2, the initial criterion of coverage is that the worker's employment be principally localized in the state. "Principal localization" of the injured worker's employment is the primary consideration of the Pennsylvania statute.

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[36] *Wheeling-Pittsburgh Steel Corp. v. WCAB (Sesco)*, 828 A.2d 1189 (Pa. Commw. 2003).

[37] *Kelly v. WCAB (Cont. Dist. Serv.)*, 625 A.2d 135 (Pa. Commw. 1993). The court stated as follows: "In *Holmes v. Workmen's Compensation Appeal Board (Schneider Power Corp.) ...* 542 A.2d 197 (1988), we held that a claimant who asserted that his employer was barred from presenting a defense because he had received payment under a voluntary employee benefit program did not require the application of *Mosgo*. We held that before a *Mosgo* issue could be addressed, the referee must determine whether the payments made by the employer constituted an admission by the employer that the claimant suffered a work-related disability. We determined that the payment of the voluntary employee benefits program did not constitute an admission by the employer that claimant had suffered a work-related disability and hence, the claimant still had the burden of proving his claim." (referring to the precedent *Mosgo v. WCAB (Tri-Area Beverage, Inc.)*, 480 A.2d 1285 (Pa. Commw 1984)).

[38] *See, e.g., Taylor v. Workmen's Compensation Appeal Board (Ace Installers, Inc.)*, 543 A.2d 219 (Pa. Commw. 1988) ("The legislature, in enacting Section 305.2(a)(2) realized that it would be unjust to compel an itinerant employee injured on the job in a foreign state while working out of a hotel room to return to the foreign state in order to file a claim for compensation. This is precisely the situation that Section 305.2(a)(2) was intended to rectify….").

[39] *Robert M. Neff, Inc. v. Workmen's Compensation Appeal Board (Burr)*, 624 A.2d 727 (Pa. Commw. 1993).

The second, third, and forth criteria all demand, meanwhile, that the claimant have contracted for employment in the state. [40] While mere contracting constitutes a perhaps tenuous contact with Pennsylvania, the material nexus to Pennsylvania is clear in these categories of cases: experience shows that the prevailing injured worker will almost always have been a Pennsylvania resident.[41]

The ideas of "principal localization" of employment, referred to in the common law realm as the "place of employment' test,"[42] and contract formation, rationalize the further idea that Pennsylvania legitimately applies its statute to extraterritorial injuries. Considering these criteria, the drafters of the Model Act remarked, "The justification for adopting this broad coverage of out-of-state injuries is that if any one of the four tests applies, it can be said that the state has a sufficient interest in the industrial injury to bring it within its own act."[43]

The Commonwealth Court, notably, has in effect undertaken this analysis in an extraterritorial case.[44] There, the claimant had originally been hired in Philadelphia, where employer had its headquarters, but he had long worked only in New Jersey, where he suffered a serious injury in a motor vehicle accident. The claimant thereupon tried to gain a foothold for Pennsylvania benefits by arguing that his work was principally localized in the state.

He admitted that he never worked in the state, but argued "that because he conducts business by telephone with employer with respect to orders, prospective customers, and supervisory instructions, he regularly works from Philadelphia. We cannot agree…. Here, his 'paperwork' may be regularly handled from Pennsylvania, but not his actual daily duties …. Hence his 'employment cannot be said to be principally localized here." The court concluded that receiving and sending Pennsylvania phone calls for work was not enough:

> It is evident that the legislature intended that an employee have something more than a minimal nexus with Pennsylvania under this subsection. Were we to hold that telephone calls made by salespersons living in distant states to a Pennsylvania office were sufficient to establish that nexus under Section 305.2(a)(1) (merely because an employer had an office in Pennsylvania which issued paychecks and maintained accounts

[40] For the second, third, and fourth criteria, see the complete statutory language as reproduced at Appendix A.

[41] Indeed, in the reported cases, no non-Pennsylvania resident has ever gained Pennsylvania jurisdiction under Section 305.2(a)(2),(3), or (4). *See* Appendix B.

[42] Little, Eaton, & Smith, CASES AND MATERIALS ON WORKERS' COMPENSATION, p. 587 (5th ed. 2004).

[43] WORKMEN'S COMPENSATION AND REHABILITATION LAW: WITH SECTION BY SECTION COMMENTARY (The Council of State Governments), p. 98 (January 1973).

[44] *Minus v. WCAB (Tastykake Baking Co.)*, 496 A.2d 1340 (Pa. Commw. 1985).

> and files even though that office was never visited by a claimant), we would be construing the Act to encompass individuals whose connections with this state are extremely attenuated.[45]

While Pennsylvania has recognized the need for contacts prior to applying its statute, the U.S. Supreme Court, through decisions filed from the 1930's through the 1950's, has *not* particularly restricted the extraterritorial reach of state workers' compensation laws. Commenting on these decisions, scholars have remarked, "the exercise of state power in [the] workers' compensation context is virtually untrammeled."[46] The Supreme Court has not seemed interested in applying the Full Faith and Credit requirement to prevent extraterritorial application.[47] Nor has the Court been offended by the idea that claimants can receive benefits under the provisions of one applicable state law and then receive further benefits (less a credit) under the provisions of another.[48]

V. Other States' Approach to Intraterritoriality and Extraterritoriality; "Reciprocal Exemption Statutes"

In the present day, most states address the extraterritorial reach of their workers' compensation laws by way of statute. By this writer's count, fourteen states, including Pennsylvania, adopted in whole or part the provisions of the Model Act discussed both above and below. Four persist in addressing the issue through court precedent, and the remaining states have statutes that do not seem particularly patterned after the Model Act (though they may have been amended to conform with the reform movement's advocacy of broadened coverage.) The states seem to break down as follows:

[45] *Minus v. WCAB (Tastykake Baking Co.)*, 496 A.2d 1340 (Pa. Commw. 1985)

[46] Little, Eaton, & Smith, CASES AND MATERIALS ON WORKERS' COMPENSATION, p. 600 (5th ed. 2004).

[47] The authors discuss, in this regard, *Carroll v. Lanza*, 75 S. Ct. 804 (U.S. 1955); *Cardillo v. Liberty Mut. Ins. Co.*, 67 S. Ct. 801 (U.S. 1947); *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 59 S. Ct. 629 (U.S. 1939); *Alaska Packers Association v. Industrial Accident Commission*, 55 S. Ct. 518 (U.S. 1935).

[48] *See Industrial Commission of Wisconsin v. McCartin*, 67 S. Ct. 886 (U.S. 1947). The pursuit by claimant of a second claim has been referred to as the "successive award" issue. *See* Section VIII(c)(2).

TABLE
STATE APPROACHES TO REGULATING
EXTRATERRITORIAL JURISDICTION

~DBT (7-2009)

States adopting in whole or in part Model Act	Alabama, Alaska, Delaware, Idaho, Iowa, Kentucky, Louisiana, New Mexico, North Dakota, Pennsylvania, Tennessee, Washington, Wisconsin, Wyoming
States with other statutory authority	Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio,* Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia
States in which extraterritorial jurisdiction governed by common law	Arkansas, New York, New Jersey, Ohio

* The Ohio statute seems to address intraterritorial injuries only.

This writer's review of statutes confirms the findings of scholars Little, Eaton and Smith:

> Most of the states have statutes that deal in one way or another with the question [of] whether the workers' compensation law is to be applicable to out-of-state injuries. The provisions of these laws may differ widely, but a modicum of uniformity was achieved following the publication of the recommendations of the 1972 National Commission on State Workmen's Compensation Laws…. The promulgation of the "model act" by the Council of State Governments … further facilitated uniformity among the dozen or so states that adopted it wholly or in a modified form.
>
> [O]ver a dozen states have patterned their statutes on the Workmen's Compensation and Rehabilitation Law as promulgated by the Council on State Governments….[49]

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[49] Little, Eaton, & Smith, CASES AND MATERIALS ON WORKERS' COMPENSATION, p. 583 (5th ed. 2004). The authors further remark:

> One type of statute does no more than state in general terms that the local law is applicable to out-of-state injuries, leaving it to the courts to work out any restrictions that may be necessary or advisable. (Massachusetts cited.)
>
> Most statutes, however, designate specifically the circumstance under which it is intended that the law be applied to an out-of-state injury. An examination of these laws, reveals that in formulating them the legislatures have drawn heavily on the basic theories and tests that the courts originally worked out, although they frequently combine two or more theories or tests in a fashion that brings a result quite different from the original judge-made law in that state.

Id. at 589.

Larson makes similar remarks: "Almost all states now have express statutory authority provisions on the conflicts question. Thanks to the 1972 recommendation on this point by the National Commission on State Workmen's Compensation Laws, a much greater degree of uniformity and compatibility has been introduced into this formerly ragged area of law."[50]

As to intraterritoriality, most states seem to maintain a rule such as that of Pennsylvania – that all injuries occurring within state borders are covered by state law. Missouri and Hawaii, for example, are states that have a statute similar to section 101 of the Pennsylvania Act.[51] The Larson treatise posits, "In the majority of states, the local statute will be applied if the place of injury … is within the state."[52]

However, a number of jurisdictions feature a provision commonly referred to as a "reciprocal exemption" statute. Such statutes provide that state law will not cover an in-state injury with respect to an out-of-state worker only temporarily laboring within the state. This is so, in any event, when the worker is covered for workers' compensation by the employer in his home state, and when the worker's home state also has the same type of non-coverage law. Maryland,[53] West Virginia,[54] and Ohio[55] are states contiguous to Pennsylvania that maintain such a rule. California is another jurisdiction which is often identified as having such a "reciprocity" statute.[56]

According to one expert, "Reciprocal exemption statutes are based on the theory that the state of injury, having the lesser interest, can afford to allow jurisdiction to the

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[50] Larson, WORKERS' COMPENSATION, § 143.01[1] (2000).

[51] *See* 18 MISSOURI STATUTES § 287.110; HAWAII REVISED STATUTES § 386-6. *See generally* Little, Eaton, & Smith, CASES AND MATERIALS ON WORKERS' COMPENSATION, pp. 591-94 (5th ed. 2004)(discussing various state approaches, case law and statutory).

[52] Larson, WORKERS' COMPENSATION, Chapter 143 (Abstract), p. 143-1 (2000).

[53] MARYLAND LABOR AND EMPLOYMENT CODE § 9-203(b). The Maryland reciprocity statute is reproduced in its entirety in Appendix D.

[54] OHIO REVISED CODE § 4123.54.

[55] WEST VIRGINIA CODE § 23-2-1c(c).

[56] The IRMI Manual features, along with its discussion of this issue, a 50-state table in which it identifies the following states as maintaining reciprocity statutes: Alaska, California, District of Columbia, Maryland, Mississippi, Montana, Nevada, New Hampshire, North Dakota, Ohio, Oregon, Rhodes Island, Utah, Washington, West Virginia, Wyoming. IRMI WORKERS' COMPENSATION MANUAL, Exhibit VIII.C.13 (2008).

state with the dominant interest. That is usually the state where the control of conduct or where the principal employment is located."[57]

VI. Extraterritoriality in Pennsylvania Before 1974 Amendment

When the law was first enacted, the legislature made no provision for injuries sustained outside Pennsylvania.[58] This lack of extraterritorial jurisdiction, obvious from Section 101 of the Act,[59] was noted by the Board and early courts, and hence claims for injuries suffered outside of Pennsylvania were dismissed.[60] Thus, even workers who had fixed sites of work within Pennsylvania, and who ventured outside of the state for work for the employer only as an exception, would have no standing to file a Pennsylvania claim.

The law was first tested by claims of shipyard workers at the Philadelphia Navy Yard (then called "League Island"), employed by private contractors. If their injuries occurred on League Island their claims were considered extraterritorial, as League Island was under federal jurisdiction, and their claims were dismissed.[61]

In 1929, the legislature altered Section 101 in two amendments made during the same session. The Act was first amended to provide extraterritorial coverage to Commonwealth employees "engaged in duly authorized business of the State." In the second change, other "*Pennsylvania employes*" became entitled to compensation if injured extraterritorially when their "duties require them to go temporarily beyond the territorial limits of the Commonwealth, not over ninety days, when such employes are performing services for employers whose place of business is within the Commonwealth."[62]

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[57] Levasseur, *A Primer for Successive Awards in Workers' Compensation*, 28 THE BRIEF (ABA), p.42 (Winter 1999). *See also* Larson, WORKERS' COMPENSATION, § 143.01[3] ("A number of states exclude in-state injuries to transients if there is coverage in the other state and if the other state grants reciprocity.").

[58] The limited jurisdiction of the Act was noted by Commonwealth Court in *Nemitz v. Air Services International*, 298 A.2d 654 (Pa. Commw. 1971) ("As originally enacted, the … Act ... applied only to accidents occurring within the Commonwealth ….").

[59] Section 101 of the Act originally provided, in pertinent part, "[T]his Act … shall apply to all accidents occurring within this Commonwealth, irrespective of the place where the contract of hiring was made, renewed, or extended, and shall not apply to any accident occurring outside of the Commonwealth."

[60] *See, e.g., Harrity v. Ford Motor Co.*, 13 WORKMEN'S COMPENSATION BOARD 33 (1928) (where claim petition alleged that deceased worker was a steward "at sea on [a] boat owned, operated, and controlled by the Ford Motor Co.," petition was deficient on its face, and subject to dismissal, as Act "shall not apply to accidents occurring outside of the Commonwealth.").

[61] *Haggerty v. O'Brien Bros*., 21 Luzerne 7 (Ct. Common Pleas Luzerne County 1919); *Burke v. Aspromet Co*., 4 Dep. Rep. 2566, reported in 3 WORKMEN'S COMPENSATION DIGEST 8 (1919)).

The Superior Court put teeth in this law to limit the type of employees who could succeed in extraterritorial claims. The law was first interpreted in 1932, and the court held that "'Pennsylvania employes' refers only to employes who perform the major part of their services within the Commonwealth." The court rejected a claimant argument that the phrase "refers to every employe who is working for a Pennsylvania employer."[63]

Still, with this amendment to the law, a Pennsylvania worker for the first time had extraterritorial coverage. Thus, the employee who traveled temporarily out of state, such as on a sales call, or to work at a particular construction or other worksite in a foreign state, maintained the protections of the Pennsylvania Act. This was so if the major portion of his services were performed in Pennsylvania, and the accident occurred within six months of the time out-of-state. Thus, an employee who normally worked in Philadelphia assisting his employer with the maintenance of multiple rental units, but who suffered his injury in New Jersey while assisting the employer at his farm, set forth a cognizable Pennsylvania claim.[64]

The liberal amendments of 1937 included a removal of the restrictive phrase, "Pennsylvania employes." Instead, the law simply stated "employes." This change

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[62] For a discussion of these amendments, see Skinner, WORKMEN'S COMPENSATION LAW, pp. 15-16 (Bisel 2nd ed. 1930). *See also Nemitz v. Air Services International*, 298 A.2d 654 (Pa. Commw. 1971); *DeSimone v. Beam*, 126 A.2d 799 (Pa. Super. 1956); *Bock v. D.B. Frampton & Co*., 161 A. 762 (Pa. Super. 1932).

[63] *Bock v. D.B. Frampton & Co*., 161 A. 762 (Pa. Super. 1932) (where deceased worker, an Ohio resident, accepted work in Ohio, for work in Ohio, for a Pittsburgh, PA company, and then suffered accidental death in Ohio, dependents had no Pennsylvania claim).

The *Bock* case was noted by an insurance actuary who in 1936 surveyed state workers' compensation laws on the extraterritoriality issue and assembled an impressive cataloging of differing approaches. *See* C. Hobbs, *The Extraterritorial Application of Compensation Acts*, PROCEEDINGS OF THE CASUALTY ACTUARIAL SOCIETY – ARLINGTON, VIRGINIA, Vol. XXII, pp. 223-293 (1936), available at http://www.casact.org/pubs/proceed/proceed35/35223.pdf.

[64] *Morrison v. Vance*, 42 A.2d 195 (Pa. Super. 1945):

> The claimant was only temporarily outside of the Commonwealth. The undisputed testimony of the claimant, the only evidence on this point, was that he commuted from New Jersey to Philadelphia daily, and that the longest period he stayed in New Jersey was for ten days. At no time was he out of the Commonwealth for a period of ninety days or more…. Manifestly, the legislature intended the "ninety days" to mean a continuous period and not ninety days spread out over a period of months or years. Otherwise, a traveling salesman, for illustration, whose duties required him to go "temporarily beyond the territorial limits of the Commonwealth" would not be covered by the amendment if he were required to make such a trip say once a month for more than three months or ninety days. … The purpose of the amendment … "was to put men temporarily performing service outside of the state on a parity with those working within the state, limited only by the extent of time during which such services might be performed." ….

Id. (Quoting *Kelly v. Ochiltree Elec. Co*., 190 A. 166 (Pa. Super. 1937) (deceased worker, a Pittsburgh-based salesman of kitchen appliances, who died in a motor vehicle accident on the way back from electrical appliance convention in Miami, did set forth a cognizable claim; *and held also*: referee and Board did not commit error in holding that deceased was in the course of his employment at time of accident)).

portended a potential expansion of the types of employees who would have cognizable extraterritorial claims. The inference was, presumably, that an employee could advance a cognizable extraterritorial claim even when "the major part of [his] services" was not based in Pennsylvania.

The tumultuous 1937 changes were, of course, short lived, and the 1939 amendments restored the "Pennsylvania employes" phraseology to Section 101. The court once again imputed sharp teeth to this statutory language. Thus, in one case the employee formed his contract of employment in Pennsylvania doing carnival work. After working three days in Pennsylvania, he decamped with the carnival for shows in Virginia and Maryland. While working in Maryland erecting an amusement ride, he was struck by a truck and killed. The referee and Board awarded benefits but the court reversed. The Superior Curt rejected the idea that the major part of claimant's services were in Pennsylvania: "Of the thirty-two days during which decedent was employed … he spent only the first three days working within Pennsylvania."[65]

In 1956, two significant changes were made to the statute. In a liberalizing mode, the legislature expanded the time during which a claim was cognizable from 90 days to six months. In addition, reference to the restrictive term "Pennsylvania employe" was once again deleted.[66]

The appellate courts did not seem to address this change until Commonwealth Court did so in 1972. In the court's view, the deletion of the term reflected the conviction of the legislature that the scope of extraterritoriality was not to be so circumscribed.

In the 1972 case, the claimant was a New Jersey resident. He was employed as an "aircraft ferry pilot," and for an extended period (fifty flights' worth), he would travel from his home to the Piper aircraft factory in northeast Pennsylvania, retrieve a new airplane and then fly it to its recipient overseas. He died when his plane went down and he was "lost at sea" off the Irish coast. The employer contested the claim, and asserted that "the major part of [the] services" of the deceased was not in Pennsylvania. The court, like the workers' compensation authorities, allowed the widow's claim. Noting the 1956 deletion, the court stated that "[the deceased] was an employe whose duties required

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[65] *DiSimone v. Beam*, 126 A.2d 799 (Pa. Super. 1956).

[66] Thus, on the eve of the 1974 amendments, when Pennsylvania enacted Section 305.2, the extraterritorial provision was Section 101, and it provided as follows:

> [T]his act … shall apply to all accidents occurring within this Commonwealth, irrespective of the place of contract of hiring was made, renewed, or extended, and shall not apply to any accident occurring outside of the Commonwealth, except to accidents occurring to Commonwealth employes outside the Commonwealth while such employes are engaged in duly authorized business of the Commonwealth, and except accidents occurring to employes whose duties require them to go temporarily beyond the territorial limits of the Commonwealth, not over six months when such employes are performing services for employers whose place of business is within the Commonwealth.

him to go temporarily beyond the territorial limits of the Commonwealth. At the time of his fatal accident he was performing services for his employer whose place of business was within the Commonwealth…."[67]

Just before the 1974 amendments that fundamentally changed the law, the Commonwealth Court again interpreted Section 101. On this occasion, the issue was the meaning of "temporarily." The claimant was a Pennsylvania employee who traditionally worked at his employer's plant in Pennsylvania. His employer was relocating its facility to New Jersey, and at the end of each week claimant assisted in the move by driving to the New Jersey site and sleeping in his camper. While in New Jersey on one such trip, he was killed in a motor vehicle accident. The employer opposed his widow's Pennsylvania claim, asserting that the deceased was not on a temporary assignment at that time. This defense was rejected at all levels, as the facts demonstrated that claimant had no plans to accompany employer in its ultimate relocation, and that in any event he was still laboring part of the week in Pennsylvania.[68]

VII. Section 305.2 of the Pennsylvania Act: Genesis in Model Act Provision

A. Introduction

Section 305.2 of the Act, as codified, is captioned "Injuries occurring extraterritorially."[69] And, indeed, subsection (a) sets forth the four criteria that establish an extraterritorial claim,[70] and subsection (d) features the definition of "principally localized" which is so pivotal to application of three of the criteria.

The statute, however, addresses intraterritoriality as well. While Section 101 of the Act[71] is the source of the basic rule that all injuries within the state are under the jurisdiction of the law, subsections (b) and (c) of Section 305.2 refine the rule. Subsection (b) is in effect a "coordination" clause, providing that mere receipt of compensation under the auspices of another state statute is not a binding election out of a Pennsylvania claim, but providing further that the employer receives a credit for payments made under the other law. At the same time, the law states that receipt of *Pennsylvania* compensation does not preclude the worker from pursuing an *out-of-state* claim.[72] Subsection (c), meanwhile, establishes that, when an out-of-state worker suffers an injury within Pennsylvania, and the employer has insurance only in another state or

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Id.

[67] *Nemitz v. Air Services International*, 298 A.2d 654 (Pa. Commw. 1971).

[68] *March Brownback Co., Inc. v. Favinger*, 303 A.2d 878 (Pa. Commw. 1973).

[69] *See* 77 P.S. § 411.2.

[70] 77 P.S. § 411.2(a). For the full statutory language, see Appendix A.

[71] 77 P.S. § 1.

[72] 77 P.S. § 411.2(b). *See also infra* Section VIII(C).

states, such insurer can register with the Commonwealth as a guarantor of payments and hence avoid penalties for failing to insure within Pennsylvania.[73]

Section 305.2 also provides, in subsection (d) that, prior to an injury, employer and employee can agree, within certain limits, as to which state his or her work is "principally localized." This proviso is not quite a "choice of law" device, but does allow, in advance of injury, some ability of the parties to agree on which law will be applicable in the event of injury. A critical controversy as to the operation of this proviso of the law has been resolved by the Pennsylvania Supreme Court. In this regard, whereas principal localization agreements are legitimate, in the end, if the injury occurs *in Pennsylvania*, Section 101 of the Act is applicable to provide jurisdiction in the Commonwealth.[74]

In short, the parties cannot contract out of Pennsylvania coverage for an injury which occurs in Pennsylvania.

B. General Interpretive Rules

Virtually all of the Commonwealth Court decisions on Section 305.2 have addressed its extraterritorial aspect. These cases are reviewed, in unabridged fashion, below.[75] After thirty-five years of experience with the law, however, a number of general interpretive rules concerning the statute are evident.

First, as with the law in general, Section 305.2 is to be liberally construed.[76] Where a provision of the section is ambiguous, the judge is to read the statute liberally so as to afford coverage, and not narrowly so as to disallow coverage.

Second, as in all cases, the claimant has the burden of showing entitlement to benefits, and this is the case in the context of the extraterritorial provisions. Thus, a worker injured outside the Commonwealth has the burden of proof of showing entitlement to coverage under the various provisions of Section 305.2.[77]

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[73] *See also infra* Section VIII(E).

[74] *McIlvaine Trucking, Inc. v. WCAB (States)*, 810 A.2d 1280 (Pa. 2002).

[75] *See* Section VIII.

[76] *Furnco Construction v. WCAB (Dorogy)*, 555 A.2d 275 (Pa. Commw. 1989) (in rejecting employer's argument that, while occupational disease claimant may have shown an extraterritorial claim, his case had to be dismissed because he failed to satisfy the "2-in-10" exposure rule, court states: "[B]y satisfying the jurisdictional element of Section 305.2, Claimant has transformed his extraterritorial employment into employment in Pennsylvania. After satisfying the extraterritorial jurisdictional requirements of the Act, to require a Claimant to also prove physical presence on a Pennsylvania job site is an impossible burden. Employer's argument not only defeats the rationale behind the extraterritorial provisions, but also undermines the remedial purposes for the Act.").

[77] *See, e.g., George Liko Co. v. WCAB (Stripay)*, 616 A.2d 197 (Pa. Commw. 1992).

A minor discrepancy in the cases exists with regard to whether Section 305.2 is a "jurisdictional" statute. The Commonwealth Court has repeatedly discussed the lack of "jurisdiction" of the WCJ and Board to grant a particular claimant benefits who has not shown covered extraterritorial employment.[78] In a 1985 case, however, the court declared that the Board had committed legal error in regarding the matter as jurisdictional:

> The board, after correctly deciding that the claimant could not have [Pennsylvania] benefits in this case because he was not [the Pennsylvania employer's] employee, wrote that it had no jurisdiction because the accident occurred in Ohio and none of the Section 305.2(a) conditions applied. Of course, the result in such a case is not that the board is without jurisdiction but simply that the Pennsylvania Act does not apply.[79]

The uncertainty is not merely semantic, because if the matter is jurisdictional it is an issue that can be raised for the first time on appeal.[80] And, in fact, the court has held that the existence of extraterritorial employment at time of injury is jurisdictional and hence an issue that can be raised for the first time on appeal.[81]

In one case, the court created an important rule for the extraterritorial provisions, to wit, that a "contract of hire" is "made" in the place of acceptance of the offer. The court reviewed the four criteria of coverage and remarked that the "[f]ocus is on claimant's employment and not on employer."[82] Thus, in the familiar scenario where an unemployed, itinerant worker receives an offer of work over the phone, at his home in Pennsylvania, the contract has been made in Pennsylvania.

As discussed below, in virtually all cases a determination must be made by the WCJ with regard to where the employee's work was principally localized. As with all critical issues, a familiar and predictable rule applies in this context: if the WCJ makes no

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[78] *See Robert M. Neff, Inc. v. WCAB (Burr)*, 624 A.2d 727 (1993) (indicating that "there may be concurrent jurisdiction with another state"). *See also Furnco Constr. Corp. v. WCAB (Dorogy)*, 555 A.2d 275 (1989) (referring to claimant having satisfied "jurisdictional requirement of Section 305.2"); *Taylor v. Workmen's Compensation Appeal Board (Ace Installers, Inc.)*, 543 A.2d 219 (1988) (referring to Appeal board as having dismissed the employee's "claim petition for lack of jurisdiction under Section 305.2(a)(2) ....").

[79] *Patterson v. WCAB (Wayne W. Sell Corp.)*, 485 A.2d 886 (1985).

[80] *See McDevitt v. WCAB (Ron Davison Chevrolet)*, 525 A.2d 1252 (1987), *appeal granted* 518 Pa. 629, 541 A.2d 1140 (1988) *and appeal dismissed* 520 Pa. 119, 552 A.2d 1048 (1989).

[81] *Atkins v. WCAB (Geo-Con, Inc.)*, 651 A.2d 694 (Pa. Commw. 1994); *General Elec. Co. v. WCAB (Sporio)*, 615 A.2d 833 (Pa. Commw. 1992).

[82] *Interstate Carriers Cooperative v. WCAB (DeSanto)*, 443 A.2d 1376 (Pa. Commw. 1982)).

finding at to principal localization, the Board or court will remand for such a pivotal finding.[83]

In providing for this extraterritorial coverage, the General Assembly sought to further the overall purpose of the Act to provide benefits to employees who suffer work-related injuries resulting in a loss of earnings, and the Commonwealth's interest in insuring that the benefits received are sufficient to sustain them during the duration of their disability.[84]

C. Genesis of Section 305.2 in the 1972-1974 Reform Movement and the Council of State Governments' Model Act

As foreshadowed above, section 305.2 of the Pennsylvania Act[85] was based on a provision, Section 7, of the Council of State Governments' [CSG] model "Workmen's Compensation and Rehabilitation Law." According to the treatise writer Barbieri, "The new provisions … [were] intended to bring Pennsylvania law in line with provisions of the Model Act of the Council of State Governments."[86]

The extraterritorial provisions of the Model Act had already been floated when the National Commission issued its reform recommendations in 1972. One of the essential recommendations was that states structure the extraterritorial provisions of their laws to broaden coverage. The Commission found that the then-extant variations of the law "present[ed] serious practical obstacles to American workers in their efforts to obtain … benefits." In light of this concern, Recommendation 2.11 provided:

> We recommend that an employee or his survivor be given the choice of filing a workmen's compensation claim in the State where the injury or death occurred, or where the employment was principally localized, or where the employee was hired.[87]

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[83] *Rock v. WCAB (Youngstown Cartage Co)*, 500 A.2d 183 (Pa. Commw. 1985) (where referee adjudicated case on erroneous grounds that claimant had contracted out of Pennsylvania coverage by signing an unauthorized choice of law agreement with his employer, remand was required for finding with regard to principal localization).

[84] *Robert M. Neff, Inc. v. WCAB (Burr)*, 624 A.2d 727 (1993).

[85] 77 P.S. § 411.2.

[86] A.F. Barbieri et al., PENNSYLVANIA WORKMEN'S COMPENSATION AND OCCUPATIONAL DISEASE, § 4.01 (citing I. Stander, *Review of New Workers' Compensation Amendments*, THE LEGAL INTELLIGENCER (December 2, 1974)).

[87] REPORT, NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS. The Labor Department for many years monitored states' compliance with these recommendations. As of 2004, the Department reported that twenty-seven states had met Recommendation 2.11. *See* http://www.workerscompresources.com/National_Commission_Report/National_Commission/1-2004/Jan2004_Tbl2.htm.

The proponents of the CSG Model Act had similar concerns about lack of coverage for employees laboring out of state, although the precise formulation, as will be seen, was somewhat more restrictive than that of the National Commission recommendation. Still, one critical goal was the same: that state laws so interface that no otherwise covered employee would be refused a forum in which to file and/or prosecute his injury claim.

1. The Council of State Governments *Commentary*

The CSG committee authoring the proposed law published a valuable commentary to explain Section 7's design.[88] According to John Burton, Chairman of the National Commission, "The Model Act was revised in 1973 after the National Commission on State Workmen's Compensation Laws submitted its report [1972], although the coverage section was not changed, as I recall. The original version of the Model Act was prepared by a committee chaired by Arthur Larson who also prepared commentary on the Act."[89]

As the Pennsylvania Supreme Court has recognized this Commentary, and found it pivotal in interpretation of the Pennsylvania law,[90] this document bears close study. The Commentary addresses not only the four criteria of coverage (subsection (a)), and the idea of principal localization of employment, but the coordination of benefits (subsection (b)) and registration provisions (subsection (c)) as well.

The authors of the Commentary characterized the law in this area as being in a state of "chaos." Many states maintained highly restrictive laws, typically limiting extraterritorial coverage by requiring short time limits for a worker being out of the state or, more problematically, by demanding that the worker and/or employer have a *series* of significant contacts in a state before jurisdiction would apply. In practice, these limitations resulted in some workers with *bona fide* work-related injuries being left without *any remedy*, as all possible states denied jurisdiction.[91]

The authors explained that they so designed the law that this non-coverage situation would simply become an impossibility. The strategy was to list all four of the possible permutations of a worker's employment out of state, and then separating these tests "by the word 'or.' This means that the employee needs to demonstrate only one of the four circumstances in order to come under the act…."[92] In addition, the Model Act

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[88] WORKMEN'S COMPENSATION AND REHABILITATION LAW: WITH SECTION BY SECTION COMMENTARY (The Council of State Governments) (January 1973).

[89] Memo from John F. Burton, Jr., to the Author, September 15, 2008.

[90] *McIlvaine Trucking, Inc. v. WCAB (States)*, 810 A.2d 1280 (Pa. 2002).

[91] See Section II(B) (discussion of *House v. State Industrial Commission*, 117 P.2d 611 (Oregon 1941)).

sets forth *two definitions* of the pivotal criterion of the "principal localization" of employment. This test, importantly, "can be satisfied by either of [the] two circumstances.[93]

The authors also offered the politico-philosophical basis for recommending this "broad coverage," in contradistinction to the preexisting parochial idea that favored only in-state injuries: "The justification for adopting this broad coverage of out-of-state injuries is that if any one of the four test applies, it can be said that the state has a sufficient interest in the industrial injury to bring it within its own act."[94]

The Model Act does allow, in the case where an employee's employment is not principally localized in any state, for a pre-injury agreement to designate the state of principal localization. This provision "is applicable only to cases in which an employee's duties require him to travel regularly in more than one state. It would therefore not cover the many other situations in which extraterritoriality problems arise, such as questions involving out-of-state representatives who do not travel, large individual out-of-state construction projects, and the like." Such agreements, in addition, "only act upon the first two of the four tests of out-of-state coverage," that is, cases where employment is *indeed principally localized in a state*, or claimant is working under a contract of hire "made in this state in employment not principally localized in any state."[95]

The authors of the Model Act considered the criticism that allowing such agreements "provides an opportunity for an employer to force or maneuver employees into designating a less desirable statute." Still, "On balance, the committee felt that, in view of the class of employees involved and their presumed ability to resist any attempt to agree to inferior coverage, and in view of the desirability of rapid identification of the responsible state for purposes of provision of prompt medical care and other benefits, the suggested provision could be justified within the narrow limits to which it has been applied."[96]

With regard to the scenario where an injured employee first receives benefits in one state, and then secures an award in a different state – subject to credit – the authors first noted that the U.S. Supreme Court had already held that state workers' compensation laws may operate in this fashion. This was so held in the landmark decision *Industrial Commission of Wisconsin v. McCartin*.[97] Once again, the authors set forth their

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[92] SECTION BY SECTION COMMENTARY, *supra*, at 98.

[93] *Id*.

[94] *Id*.

[95] Id. at 100.

[96] Id. at 100, 101.

[97] *Industrial Commission of Wisconsin v. McCartin*, 67 S. Ct. 622 (1947). Subsection (b) of the proposed law, the authors state, "enacts the rule" of that case.

subjective basis for allowing additional recoveries arising from the same injury and, presumably, rejecting the idea that acceptance of benefits under the auspices of one state's laws essentially acts as an election and forbids receipt under the laws of another: "This result [that is, additional recovery less credit] seems desirable from a policy point of view, since it can easily happen that the employee, through no fault of his own, might bring his claim under the less generous statute and thus receive less than he is entitled to…."[98]

The Commentary also clarifies that avoidance of penalties is the motive for allowing an employer insured in its "home state" to certify *ad hoc* in Pennsylvania as an insurer. Penalties for non-insurance, the authors reasoned, are really intended to apply to total scofflaws who have ignored the insuring responsibility. In contrast, penalties are really not intended for employers who are otherwise responsible but have an occasional unexpected out-of-state claim and have not "taken[n] out 'all states' coverage…."[99]

"Accordingly," the authors state, "this subsection merely provides that the employer can escape these penalties and can achieve the status of insured employer in the state of injury by filing with the director a certificate showing that he is insured." Still, the employer *qua employer* is still liable for *Pennsylvania* benefits. The statute "does not affect the amount received by the employee, who receives the full amount to which he is entitled under the act. It merely affects the division of the liability between the employer and insurer."[100] This division may be necessary upon the following reasoning:

> [A]s between the employer and the insurer, there remains the possibility that the insurer may have collected premiums based upon the benefit levels of the home state of the employer and may have limited coverage to that state. It would be unfair to this particular insurer to make him pay the higher benefits on which he has not collected premiums – as between the insurer and the employer.[101]

2. Pennsylvania's Adoption – As Modified – of the Model Act

The Pennsylvania legislature adopted the Model Act virtually word for word, though it added (1) a proviso clarifying that an employee does not make a binding "election" by accepting benefits under one statute or another; and (2) language altering the definition of "principally localized" to add a one year maximum.[102]

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[98] SECTION BY SECTION COMMENTARY, *supra*, at 99.

[99] *Id*.

[100] *Id*.

[101] *Id*.

[102] *See* Appendix A.

The "non-election" statute, incorporated at the end of Section 305.2(b), states:

> Nothing in this act shall be construed to mean that coverage under this act excludes coverage under another law or that an employe's election to claim compensation under this act is exclusive of coverage under another state or is binding on the employe or dependents ….[103]

In a shifting of subject matter, however, the same proviso continues to state "except, perhaps[,] to the extent of an agreement between the employe and the employer[;] or where employment is localized to the extent than an employe's duties require him to travel regularly in this State and another state or states."[104]

With regard to defining "principal localization," the Model Act includes no time limitation for the employee to have been occupied by his duties out of state. Such omission suggests that a worker otherwise principally localized in a state can be sent out of the home jurisdiction for an *indefinite* period of time and that, correspondingly, coverage continues *indefinitely* to *follow* him. The Pennsylvania legislature apparently balked at this idea of indefinite coverage. The statute provides that:

> A person's employment is principally localized in this or another state when (i) his employer has a place of business in this or such other state and he regularly works at or from such place of business, *or (ii) having worked at or from such place of business, his duties have required him to go outside of the State not over one year*, or (iii) if clauses (1) and (2) foregoing are not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state.[105]

The phrase in italics was added by the Pennsylvania legislature and was not part of the Model Act.

[103] Section 305.2(b) of the Act, 77 P.S. § 411.2(b).

[104] Section 305.2(b) of the Act, 77 P.S. § 411.2(b).

[105] Section 305.2(d)(4) of the Act, 77 P.S. § 411.2(d)(4).

VIII. Interpretation of Section 305.2

A. The Four Criteria of Extraterritorial Coverage; Primacy of Definition of "Principally Localized" Employment

1. The Two Critical Statutes; Mere Domicile and Business Presence not Sufficient

Section 305.2(a) of the Act provides that an injured worker or his dependents will be entitled to benefits, in respect of an otherwise compensable injury occurring outside Pennsylvania, when:

> 1. His employment is principally localized in this State [Pennsylvania].
> 2. He is working under a contract of hire made in this State in employment not principally localized in any state.
> 3. He is working under a contract of hire made in this State in employment principally localized in another state whose workers' compensation law is not applicable to his employer.
> 4. He is working under a contract of hire made in this State for employment outside the United States and Canada.[106]

The definition of "principally localized" is all-important in understanding these criteria. That concept is defined in § 305.2(d)(4) as follows:

> A person's employment is principally localized in this or another state when (i) his employer has a place of business in this or other state and he regularly works at or from such place of business, or (ii) having worked at or from such place of business, his duties have required him to go outside of the State not over one year, or (iii) if clauses (1) and (2) foregoing are not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state.[107]

Based on these pivotal statutory criteria, two points merit at the outset: First, under the Pennsylvania scheme, a worker's mere domicile in Pennsylvania is not enough, standing alone, to establish a Pennsylvania claim.[108] Second, an employer's mere business presence in Pennsylvania is similarly inadequate.[109]

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[106] Section 305.2(a), 77 P.S. §411.2(a).

[107] 77 P.S. §411.2(d)(4).

[108] *See, e.g., Lambie v. WCAB (Curry Lumber Co.)*, 736 A2d 67 (Pa. Commw. 1999); *Holland v. WCAB (Pep Boys)*, 586 A.2d 988 (Pa. Commw. 1990).

[109] *See, e.g., Minus v. WCAB (Tastykake Baking Co.)*, 496 A.2d 1340 (Pa. Commw. 1985).

2. Examples of the Criteria in Action

A few examples of these opportunities for coverage are valuable in understanding the statute. The examples which follow are fairly straightforward. Many of the cases that follow present, perhaps predictably, more complex scenarios.

The first category is surely applicable to most workers, and reflects the commonly understood idea that insurance "follows" the insured person.[110] Consider, for example, an attorney for a large, Pittsburgh-based law firm whose only office is in Pittsburgh. The firm dispatches him to a CLE conference in Tampa. While in Florida, he suffers a traumatic injury. Because the attorney's employment is principally localized in Pennsylvania, and he has not been outside the state for more than a year, his Pennsylvania coverage has followed him and he has a cognizable claim.

The second category is also commonly encountered. Consider, in this realm, a Harrisburg resident who accepts an offer of employment from an interstate truck freight company. He has occasion to pick up and deliver freight in all of the forty-eight continental states and spends no exceptional amount of time in his home state of Pennsylvania. While in California dropping off a load, he suffers a traumatic injury. Because he has made his contract in Pennsylvania, and his work is not principally localized in any state, he has Pennsylvania coverage and a cognizable claim.

The third category may seem obscure. Consider, however, the same Pittsburgh law firm hypothesized above. The firm, to take advantage of the robust real estate market in Gulf Coast Florida, opens a three-employee office in Tampa. The firm dispatches an associate, who originally made his contract with the firm in Pittsburgh, to work in the Tampa office. After two years in this position, he suffers a traumatic injury. The associate's work is principally localized in Florida. However, the Florida Act is not mandatory for employers with fewer than five employees (outside the construction industry),[111] and the firm did not secure voluntary coverage in the state. Thus, the Florida "workers' compensation law is not applicable to his employer" and he has Pennsylvania coverage and a cognizable claim. This is so even though his employment duties have obviously taken him outside of the state for more than a year.

The fourth category is straightforward. Consider the same Pittsburgh law firm. To take advantage of its relationship with its client, U.S. Steel Corporation, the firm opens an Eastern European office in Kosice, near U.S. Steel's new plant in Slovakia. The

[110] *American Ass'n of Meat Processors v. Casualty Reciprocal Exchange*, 588 A.2d 491 (Pa. 1991). In this case, a carrier had argued, quite inappositely, that the Pennsylvania Act did not extend its protections outside the state. The court, however, recognized Section 305.2 and replied that under that law workers' compensation coverage follows workers out of state, so the carrier's argument was completely "absurd." The court analogized the reach of the law to that of auto insurance: "Every standard automobile insurance policy issued in Pennsylvania insures against risks outside the Commonwealth, as coverage does not cease when the automobile crosses the border into a contiguous state, yet such automobile policies indisputably must comply with Pennsylvania insurance law and regulations…."

[111] *See* FLORIDA STATUTES § 440.02(17)(b).

firm dispatches an associate, who originally made his contract with the firm in Pittsburgh, to work in the Kosice office. After eighteen months in this position, he suffers a traumatic injury. The associate's work is outside the United State and Canada. Thus, he has Pennsylvania coverage and a cognizable claim. This is so even though his employment duties have taken him outside of the U.S. for more than a year.

3. Definition of "Principally Localized"

The Commonwealth Court has produced several decisions that deal with the definition of employment as "principally localized."

a. Analysis of the Three Options

Perhaps the most important general holding is that, when considering the three potentials for principal localization, the third option is only to be considered if the first and second are not applicable. In other words, if a worker can be conceptualized as having his employment principally localized in one state or another under the first and second options, one does not continue on to consider the third.

The court so held in *Holland v. WCAB (Pep Boys*).[112] There, the claimant was involved in a fatal truck accident in New Jersey and his widow sought a Pennsylvania award. A fact-finding was ultimately made demonstrating that claimant's work was principally localized in New Jersey, though it was true that claimant was a Pennsylvania domiciliary and did undertake some deliveries in Pennsylvania. The referee awarded benefits, ignoring the import of principal localization in New Jersey and adjudicating the petition under the third option. The court reversed. "Because clause (i) is applicable," the court insisted, "we need not discuss the factors of clause (iii) Claimant urges us to consider." Prior cases, the court noted, may have ignored the precise wording of the statute and muddled the three criteria together, but to the extent they did so, the language of those decisions was dicta.[113]

The doctrinaire *Holland* approach was followed by the court in a 2003 case. There, the claimant had been injured at his employer's New Jersey facility but he similarly sought a Pennsylvania award. The WCJ found the employment principally localized in Pennsylvania, but the court reversed. Claimant's work was, in contrast, principally localized in New Jersey, and this was so even though employer neither owned nor leased its place of business there. Further, because the employment was principally localized in New Jersey, claimant's domicile in Pennsylvania and his work in the state were not to be considered.[114]

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[112] *Holland v. WCAB (Pep Boys*), 586 A.2d 988 (Pa. Commw. 1990).

[113] *Holland v. WCAB (Pep Boys*), 586 A.2d 988 (Pa. Commw. 1990) (so distinguishing *Hiller v. WCAB (DeBerardinis & HSC Transport)*, 569 A.2d 1024 (Pa. Commw. 1990); *Robbins v. WCAB (Mason-Dixon Lines, Inc.)*, 496 A.2d 1349 (Pa. Commw. 1985)).

[114] *Macomber v. WCAB (Penske Transportation)*, 837 A.2d 1283 (Pa. Commw. 2003). In a 2004 case, the court seemingly forgot the *Holland* admonition and was, on its way to ultimately denying a Pennsylvania

b. Definition of "Place of Business"

On two occasions, the court has dealt with the phrase "place of business."

In the first case, claimant, a multi-unit convenience store manager, made his contract with employer in New Jersey, so he was obliged, for a cognizable Pennsylvania claim, to prove that his work was principally localized in Pennsylvania.[115] A WCJ awarded benefits, noting that claimant often worked in Pennsylvania at the employer's various convenience stores. The Board reversed, stating, "[a]lthough it is true that employer did business within Pennsylvania via these stores, the fact remains that employer's primary place of business was the office in New Jersey, and not the individual stores which were serviced by that office." The court, however, restored the award:

> [T]he Court concludes that Claimant's employment was principally localized in Pennsylvania because Employer transacted business in Pennsylvania and maintained places of business in Pennsylvania and Claimant regularly worked at or from such places of business. The plain language of Section 305.2(d)(4)(i) does not require that an employer's "place of business" be its "primary place of business"' to establish that a claimant's employment is principally localized in a particular state. In effect, the Board erred when it reversed the WCJ and added an additional element to the statutory provision governing extra-territorial jurisdiction.

In the second case, a WCJ was held to have committed error in requiring that the out of state "place of business" be *owned or leased* by the employer, in order for a claimant's employment to be principally localized there.[116] In that case, the claimant, a delivery driver, had apparently made his contract in New Jersey. He picked up his loads at the terminal of his employer's client, where the employer maintained a presence under an agreement with the client. Claimant was injured in New Jersey, and employer opposed his claim, asserting that his work was principally localized in New Jersey. The WCJ granted the claim, but the court reversed:

> We hold that an employer is not required to own or lease property to have a place of business under Section 305.2 of the Act…. The Legislature did not use the specific words "owns or leases," but the more general term "has." We decline to impose on that term a more restrictive meaning than the

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claim, willing to consider the third option, even though he had failed to show principal localization under the first option. *See Pugh v. WCAB (Transpersonnel, Inc.)*, 858 A.2d 641 (Pa. Commw. 2004).

[115] *Goldberg v. WCAB (Star Enterprises)*, 696 A.2d 263 (Pa. Commw. 1997).

[116] *Macomber v. WCAB (Penske Transportation)*, 837 A.2d 1283 (Pa. Commw. 2003).

> "common" one, when there is no indication that the General Assembly intended that the word "has" . . . , to be so narrowly construed. . . .[117]

c. Definition of "Regularly Works at or From":
The Work "as a Rule, not as the Exception" Formulation

The court has also interpreted the phrase, "regularly works at or from" such place of business. Three cases have held that the language means that "regularly works" means "as a rule, not as the exception."

This interpretive guide was first articulated in *Root v. WCAB (U.S. Plywood Corp.)*.[118] In that case, claimant was the employer's South New Jersey field sales representative. All of her customers were in New Jersey. She was supervised out of employer's Philadelphia office, and she was obliged to attend a monthly sales meeting in Philadelphia. While returning home from one such meeting, on January 9, 1986, she stopped to remove dead animals from the road. She was struck by another car while doing so, and she suffered serious injuries.

The WCJ, Board, and court all denied claimant's claim. In this regard, while claimant's contract had been made in Pennsylvania, her work was principally localized in New Jersey. The court rejected claimant's argument that "her contacts with the Philadelphia office were sufficient to establish jurisdiction ….":

> In this case, Claimant's sales territory was limited exclusively to southern New Jersey, and she started and ended every work day in her home/office in New Jersey. She was required to attend only monthly sales meetings and other sporadic functions at Employer's Philadelphia office. However, because Claimant was not expected to "regularly" be present in the Philadelphia office, she was provided no workspace. The WCJ correctly found these periodic contacts were not enough to establish that Claimant "regularly worked at or from" Employer's Philadelphia office.

The court concluded, "In order to establish such, a claimant must prove that he or she works from the Pennsylvania location as a rule, not as the exception."[119]

The court again applied this language in a similar case where claimant made his contract in New Jersey, but performed 75% of his work as a convenience store manager in Pennsylvania. He was injured in New Jersey. The court was satisfied that this quantum of work met the test of a valid extraterritorial claim. Invoking the rhetoric of

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[117] *Macomber v. WCAB (Penske Transportation)*, 837 A.2d 1283 (Pa. Commw. 2003).

[118] *Root v. WCAB (U.S. Plywood Corp.)*, 636 A.2d 1263 (Pa. Commw. 1994).

[119] *Root v. WCAB (U.S. Plywood Corp.)*, 636 A.2d 1263 (Pa. Commw. 1994).

Root, "Claimant worked at Employer's Pennsylvania stores as a rule and not as the exception."[120]

In a 1999 case, meanwhile, the court utilized this concept and rejected the idea that claimant's work was principally localized in Pennsylvania. Claimant was the manager of a sawmill in Maryland, but maintained a variety of contacts with the company headquarters in Pennsylvania. After he suffered an injury in Maryland, he tried unsuccessfully to establish a Pennsylvania claim. Invoking *Root*, the court declared: "[A]lthough Claimant spoke with his boss in Pennsylvania on a daily basis to receive his assignments and occasionally stopped at the office, such does not prove that he regularly worked at or from such office. Here claimant has failed to prove that he worked at the Pennsylvania location as a rule, not the exception."[121]

d. The Alternative Criterion: "Domiciled and Spends a Substantial Part of his Working Time in the Service of his Employer" in a State

In the trenches of practice, lawyers seeking to prove (or rebut) principal localization are often dealing with workers who labor in several states. To prove principal localization on the alternative basis of domicile and substantial work, skilled counsel often present a diagram and/or pie-chart illustrating how much (or how little) a worker actually works, per week, month, or year "in the service of his employer" in a particular state.[122]

To succeed in these proofs, counsel must first prove domicile, which should be easy enough, and has not been the subject of any controversy that has made it to the reported precedents.[123]

Precisely what is "substantial," on the other hand, is more difficult and must be resolved on a case-by-case basis. The dictionary definition of "substantial" is: "of real worth and importance; of considerable value; valuable." Presumably, this is the criterion the judge must employ in determining if the percentage of time spent in the state is sufficient for jurisdiction to attach.[124]

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[120] *Goldberg v. WCAB (Star Enterprises)*, 696 A.2d 263 (Pa. Commw. 1997).

[121] *Lambie v. WCAB (Curry Lumber Co.)*, 736 A2d 67 (Pa. Commw. 1999).

[122] Comments to the Author of WCJ William Lowman, July 14, 2009. *See Owens v. WCAB (G.D. Leasing)*, 769 A.2d 1220 (Pa. Commw. 2001) (court discussing pie chart).

[123] The dictionary definition of "domicile" is "[t]hat place where a man has his true, fixed, and permanent home and principal establishment, and to which, whenever he is absent he has the intention of returning." BLACK'S LAW DICTIONARY, p. 435 (5th ed. 1979) (citing, among others, *Smith v. Smith*, 213 A.2d 94 (Pa. Super. 1965)).

[124] BLACK'S LAW DICTIONARY, p. 1280 (5th ed. 1979). In the asbestos civil litigation, the Superior Court has recently held that the "substantial" of "substantial contributing factor," in the multi-factorial causation cases, means "significant or recognizable; it need not be quantified as considerable or large." *Jeter v. Owens-Corning Fiberglas Corp.*, 716 A.2d 633 (Pa. Super. 1998).

Of course, this criterion is not considered at all if the first criterion is applicable.[125]

In one case, the Commonwealth Court noted the "time in service" percentage that was involved with a worker trying to prove principal localization. The case, which dealt with a Pennsylvania-domiciled over-the-road truck driver, may be the only reported precedent that purported to decide principal localization on this basis. In any event, the court stated:

> Did the claimant spend a substantial part of his working time in the course of his employment in Pennsylvania? The claimant was hired in July 1979 and sustained the heart attack in January 1980. During that time 14 of the 37 loads he carried originated in Morrisville or Philadelphia; he discharged one load each in Lancaster and Beaver Falls. On nine of the assignments which did not originate in Pennsylvania he spent time driving in Pennsylvania. This, we believe, constituted a showing that he spent a substantial part of his working time in the service of his employer in Pennsylvania.[126]

4. Application of "Principally Localized" to the Jurisdictional Provisos

a. Cases Addressing an Allegation that Employment was Principally Localized in a Jurisdiction

The Commonwealth Court has issued a number of precedents where the case turns on the proposition that the claimant's employment was principally localized in Pennsylvania – or in some *different* state. Of course, when the *latter* finding is made, the injured worker will have no viable Pennsylvania claim.

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[125] *Holland v. WCAB (Pep Boys*), 586 A.2d 988 (Pa. Commw. 1990).

[126] *Robbins v. WCAB (Mason-Dixon Lines, Inc.),* 496 A.2d 1349 (Pa. Commw. 1985). In another case, where there was there is "no dispute that Claimant's employment was principally located in Pennsylvania," claimant's counsel submitted:

> A "series by day" pie chart [that] indicated that 24% of the total number of days that Claimant worked were spent picking up loads in Pennsylvania and delivering loads within Pennsylvania; 13% were spent picking up loads in Pennsylvania and delivering loads outside of Pennsylvania; 30% were spent picking up loads outside of Pennsylvania and delivering loads back to Pennsylvania; and 33% were spent picking up loads outside of Pennsylvania and delivering loads outside of Pennsylvania.

Owens v. WCAB (G.D. Leasing), 769 A.2d 1220 (Pa. Commw. 2001).

Pennsylvania resident who worked in New York. Such was the result in the first case the court ever filed interpreting the statute.[127] There, the deceased worker was an outside salesman for employer, a vendor of restaurant equipment. He was hired in New York, where employer had its only facility, a large establishment in Horseheads. His sales territory was Northern Pennsylvania and Southern New York. He worked out of his house and car, but every Friday was required to attend a meeting at the Horseheads facility. There, he would go over protocols and he would "take in his orders and sales slips at that time and they would discuss policy and receive assignments and instructions…." The unfortunate death occurred while the decedent was piloting a private plane on the way to a restaurant manufacturer's tradeshow in Kentucky. The crash occurred in West Virginia.

As the contract was made in New York, the claimant (a widow) necessarily had to prove that the deceased's work was principally localized in Pennsylvania. A referee awarded benefits but the Board and court reversed. The facts showed that the deceased's work was principally localized in New York. In this regard, referring to the initial definition of "principally localized," the employer had a place of business in New York and the deceased regularly worked at or from that facility.[128]

Of course, the deceased was a Pennsylvania domiciliary, and he worked a substantial part of his time in Pennsylvania. However, these facts are pertinent to the *alternative* definition of "principal localization," a concept one does not consider when "principal localization" can be determined under the initial definition.

Pennsylvania resident who drove over the road truck but was still principally localized in Pennsylvania. In another case, the claimant was an over the road truck driver who suffered his work accident in South Carolina.[129] He was a Pennsylvania domiciliary, had the employer's Pennsylvania terminal as his base of operations, but drove his truck in all states. The Board denied his claim, stating that employer had no place of business in Pennsylvania. The court reversed and awarded benefits, rejecting the idea that employer had no place of business for purposes of the statute. This case stands as a model of draftsmanship, as the court methodically marches through the definition of principal localization as applicable to the first criterion of out-of-state coverage:

> Did the employer have a place of business in Pennsylvania? The facts in this regard are that the employer used a truck terminal in Morrisville; that it had an agent there who kept a list or "board" of the trucks and drivers under contract to the employer; that the agent dispatched these trucks and drivers, as available, to pick up loads and deliver them throughout the employer's eighteen state territory; that the claimant, as were other drivers,

[127] *Loomer v. WCAB (Hample Equipment Co.)*, 388 A.2d 788 (Pa. Commw. 1978).

[128] *Loomer v. WCAB (Hample Equipment Co.)*, 388 A.2d 788 (Pa. Commw. 1978).

[129] *Robbins v. WCAB (Mason-Dixon Lines, Inc.)*, 496 A.2d 1349 (Pa. Commw. 1985).

> was required when he finished an assignment to get on the "board" with an employer's agent at a terminal not more than two hours from his then location; that the employer's drivers received their road expense in cash advanced by the employer's agent; and that the employer had agents at least five other terminals in Pennsylvania.
>
> [C]learly, the Morrisville terminal and other Pennsylvania terminals where the employer's agents acted for the employer in these important capacities were places of business.[130]

The court then reasoned:

> Did the claimant regularly work at or from the Morrisville terminal? The claimant testified that his home office was the Morrisville terminal; that when he came home he signed in for work there; that he reported there whenever he did not have a load to take elsewhere; and that by the employer's instruction his truck was registered in Pennsylvania and carried a sign stating that it, the truck, was domiciled in Pennsylvania. The employer's director of safety testified that the claimant was assigned to Morrisville; that when he was home for vacation, holidays or weekends he would be required to "sign the board"; and that this normally would be done at the Morrisville terminal. This evidence amply supports the referee's findings to the effect that the claimant worked at or from Morrisville.[131]

New Jersey resident supervised from Philadelphia. In another case, the claimant was the Southern New Jersey salesperson for a plywood company, working out of her New Jersey home office. She had originally accepted employment in Pennsylvania, but for many years had worked predominately in New Jersey. While she was supervised out of employer's Philadelphia office, and she was obliged to attend a monthly sales meeting in Philadelphia, all of her customers were in New Jersey. While returning home from one such meeting, she stopped to remove dead animals from the road. She was struck by another car while doing so, and she suffered serious injuries.[132]

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[130] *Robbins v. WCAB (Mason-Dixon Lines, Inc.)*, 496 A.2d 1349 (Pa. Commw. 1985). As to the place of business requirement, the court also noted: "[T]he claimant has called to our attention 42 Pa. C.S. § 5301 providing that the carrying on in Pennsylvania by a corporation of a continuous and systematic part of its business is sufficient for Pennsylvania tribunals to exercise jurisdiction and 42 Pa. C.S. § 5322(a)(1) providing that a Pennsylvania tribunal may exercise jurisdiction over persons and corporations which transact any business here and that transacting business is defined at 42 Pa. C.S. § 5322(a)(1)(iii) as including the shipping of merchandise into or through the Commonwealth."

[131] *Robbins v. WCAB (Mason-Dixon Lines, Inc.)*, 496 A.2d 1349 (Pa. Commw. 1985). *See also Hiller v. WCAB)(DeBerardinis & HSC Transport)*, 569 A.2d 1024 (Pa. Commw. 1990) (where over-the-road truck driver, a Pennsylvania resident, started all of his trips from Pennsylvania, and employer had its place of business in Pennsylvania, driver's work was principally localized in Pennsylvania).

[132] *Root v. WCAB (U.S. Plywood Corp.)*, 636 A.2d 1263 (Pa. Commw. 1994).

This claim was denied at all levels. In this regard, while claimant's contract had been made in Pennsylvania, her work was principally localized in New Jersey. The court rejected claimant's argument that "her contacts with the Philadelphia office were sufficient to establish jurisdiction ….":

> In this case, Claimant's sales territory was limited exclusively to southern New Jersey, and she started and ended every work day in her home/office in New Jersey. She was required to attend only monthly sales meetings and other sporadic functions at Employer's Philadelphia office. However, because Claimant was not expected to "regularly" be present in the Philadelphia office, she was provided no workspace. The WCJ correctly found these periodic contacts were not enough to establish that Claimant "regularly worked at or from" Employer's Philadelphia office. In order to establish such, a claimant must prove that he or she works from the Pennsylvania location as a rule, not as the exception.[133]

Pennsylvania resident laboring only in New York. In another case, claimant was again found to have his work principally localized in New York. There, claimant was a Pennsylvania domiciliary and a member of the plumbers' union. He received word that an employer in Oswego, New York, had need of plumbers. His union dispatched him up to Oswego, where he filled out an application with the company. After hire, he was injured at a New York worksite. His Pennsylvania claim was denied at all levels, as he had contracted for work in New York, and his work was principally localized in New York.[134]

Pennsylvania resident working temporarily in Kentucky at fixed site. In another union journeyman case, the claimant, an industrial mason, did make his contract with employer General Electric in Pennsylvania, but his work was at a fixed site in Kentucky. The court denied his claim for asbestosis, ruling that the facts showed that his work was principally localized in Kentucky. This was so even though claimant had worked in the past, for other discrete periods of time, for General Electric, at various other sites in different

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[133] *Root v. WCAB (U.S. Plywood Corp.)*, 636 A.2d 1263 (Pa. Commw. 1994). For a similar result, see *Lambie v. WCAB (Curry Lumber Co.)*, 736 A2d 67 (Pa. Commw. 1999) (lumber mill manager who normally worked at employer's Maryland facility did not show principal localization in Pennsylvania: "[A]lthough Claimant spoke with his boss in Pennsylvania on a daily basis to receive his assignments and occasionally stopped at the office, such does not prove that he regularly worked at or from such office. Here claimant has failed to prove that he worked at the Pennsylvania location as a rule, not the exception.").

For a case citing *Root* where the court did find claimant's work principally localized in Pennsylvania, see *Goldberg v. WCAB (Star Enterprises)*, 696 A.2d 263 (Pa. Commw. 1997) (where claimant, an itinerant retail manager, worked 75% of the time at employer's Pennsylvania convenience stores, his work was principally localized in Pennsylvania).

[134] *Oliveri v. WCAB (I.T.T. Grinnell)*, 542 A.2d 658 (Pa. Commw. 1988).

states.[135] This case is remarkable because the court considers a temporary worksite, presumably a mill furnace that claimant was assisting in relining, can be a "place of business" for the purposes of the principal localization definition.[136]

b. The Concept of Where Contract was "Made"

The second, third, and fourth criteria of coverage possess, as conditions precedent, the fact that the claimant's contract of employment has been made in Pennsylvania. Before reviewing the cases decided under the auspices of those criteria, it is important to note the rule defining where a contract is considered "made."

Two basic rules have developed in the court precedents. First, the place of the employee's acceptance constitutes the making of the contract. Second, in cases of workers who travel from job to job in various states, accepting new assignments as soon as the old are completed, the place of original acceptance will *endure* as the place the contract was made. This is so, however, only if true *continuity of employment*, or "ongoing employment relationship,"[137] such as being kept on the payroll, exists.

The "ongoing employment relationship" is also important in another context: when it is present, and claimant has worked in several states, he may well be considered to have his employment not principally localized in any state. If claimant works for employer for discrete periods at various locations, however, his work will likely be found to be principally localized in the state of that discrete employment.[138]

Place of acceptance is where contract made. The court announced the first, basic rule in 1982: "Where a contract is accepted by telephone, the acceptance is effective and the contract is created at the place where the acceptor speaks."[139] In one well-known case,

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[135] *General Elec. Co. v. WCAB (Sporio*), 615 A.2d 833 (Pa. Commw. 1992).

[136] The claimant's last (and critical) job during which he experienced asbestos exposure was a "job in Lexington, Kentucky, from July 20, 1982, to August 1, 1982." *General Elec. Co. v. WCAB (Sporio*), 615 A.2d 833 (Pa. Commw. 1992). *Compare Meyer v. WCAB (Raytheon Co.)*, 776 A.2d 338 (Pa. Commw. 2001) (claimant's work was principally localized in New Jersey, where he worked as a maintenance supervisor at a power plant; even though he had worked for the employer in other states previously, and maintained a home in York, PA, employer nevertheless had a place of business, in New Jersey, and claimant worked at or from such business).

[137] *Atkins v. WCAB (Geo-Con, Inc.)*, 651 A.2d 694 (Pa. Commw. 1994).

[138] *See, e.g., Atkins v. WCAB (Geo-Con, Inc.)*, 651 A.2d 694 (Pa. Commw. 1994).

[139] *Interstate Carriers Cooperative v. WCAB (DeSantis)*, 443 A.2d 1376 (Pa. Commw. 1982) (citing *Linn v. Employers Reinsurance Corp.*, 139 A.2d 638 (Pa. 1958)). *See Oliveri v. WCAB (I.T.T. Grinnell)*, 542 A.2d 658 (Pa. Commw. 1988) (where claimant heard, through union hall, of work available in Oswego, NY, and claimant thereupon traveled to Oswego and worked there, later suffering injury in that state, contract was held made in New York; thus, no Pennsylvania jurisdiction accrued.). To the same effect as *Oliveri* is *Creel v. WCAB (Overland Express, Inc.)*, 643 A.2d 784 (Pa. Commw. 1994) (where claimant traveled to Indiana to accept employment, and then undertook work not principally localized in any state, he was unable to set forth a viable Pennsylvania claim – he did not make his contract in Pennsylvania).

claimant, a resident of Coraopolis, PA, established the contract in court through the following exchange:

> Q. How did you find out about that job?
> A. Pete McMichaels called me.
>
> Q. He called you from where?
> A. From home.
>
> Q. From his house?
> A. Yes.
>
> Q. Where does he live?
> A. He lives in Moon Township, I think.
>
> Q. Would you repeat the conversation that you and he would enter into when he called you about this job?
> A. He asked me if I wanted to go to work for S.I. Industries in Piketon, Ohio and I said yes.
>
> Q. Who does this gentlemen work for?
> A. S.I. Industries.
>
> Q. Did you sign any contract?
> A. No. I used to work with him before when he had his own company. I worked with him as a laborer. He needed laborers out there and he called me and asked me if I wanted to work and I went to work with him.[140]

Continual employment preserves initial place of acceptance. The leading precedent of the "serial worksite" cases is *Taylor v. WCAB (Ace Installers, Inc.)*.[141] There, the claimant (Taylor) was hired in Coraopolis, Pennsylvania to undertake a job installing furniture in a hotel room in Crystal City, Virginia. He received his offer from Ace (owned by a Mr. DeLumba). This was essentially Taylor's "tryout" for work. He completed the job successfully and then returned to Coraopolis. Later, in Coraopolis, he received another offer from Beacon (also owned by DeLumba) for work in Texas. While in that state, he was offered and accepted a job in Miami. Thereafter, while in Miami, he was offered and accepted a job (from Beacon) at Marco Island, Florida. He was injured there moving furniture.

Taylor filed against both Ace and Beacon, but the referee denied both petitions. He found that claimant had accepted the offer in Florida. His work was not principally

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[140] *S.I. Industries v. WCAB (Zon)*, 613 A.2d 170 (Pa. Commw. 1992).

[141] *Taylor v. WCAB (Ace Installers, Inc.)*, 543 A.2d 219 (Pa. Commw. 1988).

localized in Pennsylvania so he had no claim. Also, the referee found that the offering employer was in any event not Ace but Beacon. The court reversed, agreeing with claimant that Ace and Beacon were really the same, and that the contract as accepted in Pennsylvania was for, in essence, continuous work. This was so as claimant went to Texas and then performed the two Florida jobs. Taylor was, notably, continually kept on payroll between jobs:

> The testimony establishes an ongoing employment relationship in which Claimant was kept on the payroll to supervise and run the various jobs that his employer, Beacon, shifted to him…. Claimant's testimony, which was the only testimony presented in the case, establishes that his employment contract with Beacon was consummated in Coraopolis, PA in June of 1982, and that his employment relationship was never terminated until Claimant injured his back in Florida on November 24, 1982.[142]

The Commonwealth Court applied this reasoning in a 1992 case.[143] In that case, the claimant was hired in Pennsylvania to perform what was apparently unskilled labor in Ohio. He suffered an injury in Ohio, missed just a few days, and was then "terminated" before renewed sessions of work commenced at different worksites in Ohio and Pennsylvania. The employer denied his Pennsylvania claim, and the apparent crux of the defense must have been that the three transactions were all separate contracts for claimant to work in *one specific place*. (Were this argument accepted, claimant's work would have been conceived of as "principally localized" in Ohio at the time of the accident). The court, however, viewed claimant's labor as in effect continuing despite temporary lay-offs "[u]ntil we got other work.":

> In the present case … although the employer's superintendent initially hired the claimant for the Piketon, Ohio [job], the parties contemplated that the claimant would work at other sites. The ongoing employment relationship is evidenced by the claimant's employment with the employer from August, 1985 until March, 1986, at various sites located in Ohio and Pennsylvania. Additionally, although the employer's personnel records indicate that the claimant was terminated after each job and subsequently rehired, Mr. McMichael testified that new paperwork is completed at each site because the employer has a separate corporation in every state in which it operates. Mr. McMichael stated that the personnel status records are kept by the employer to track days worked by employees for unemployment compensation purposes….
>
> [A]dditionally, Mr. McMichael characterized the claimant's departure as a layoff.[144]

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[142] *Taylor v. WCAB (Ace Installers, Inc.)*, 543 A.2d 219 (Pa. Commw. 1988).

[143] *S.I. Industries v. WCAB (Zon)*, 613 A.2d 170 (Pa. Commw. 1992).

[144] *S.I. Industries v. WCAB (Zon)*, 613 A.2d 170 (Pa. Commw. 1992).

In one case, the claimant, an over-the-road truck driver, had made his contract in Pennsylvania. He found his truck empty at the end of his run, and entered into a "trip lease" with another company, in another state, to haul freight. On his way back to Pennsylvania, he was injured in New Jersey. His employer sought to portray the other company as the employer, but the court rejected this idea: "We hardly think that the Legislature would intend that every time a traveling employee accepted a piece of business in the interest of his employer in Pennsylvania, this automatically created a new form of employer/employee relationship with whomever was availing itself of the operation, here the trucking operation."[145]

c. Cases Addressing an Allegation that Contract of Hire was Made in Pennsylvania (or other State) for Work not Principally Localized in any State

Pennsylvania has produced at least four cases where claimant was successful in securing Pennsylvania jurisdiction when he accepted employment in Pennsylvania for work not principally localized in any state.

Claimant hired in Pennsylvania, working in Virginia, Texas, and Florida. Perhaps the leading case is *Taylor v. WCAB (Ace Installers, Inc.)*,[146] the same precedent summarized above. There, after holding that claimant's Pennsylvania contract was not broken because of the multiple assignments, the court held that his employment was not principally localized in any state. This conclusion was quite reasonable, as the claimant's three jobs were in Virginia, Texas, and then Florida. Noting the purpose of the statute, the court remarked:

> The legislature, in enacting Section 305.2(a)(2) realized that it would be unjust to compel an itinerant employee injured on the job in a foreign state while working out of a hotel room to return to the foreign state in order to file a claim for compensation. This is precisely the situation that Section 305.2(a)(2) was intended to rectify….[147]

Claimant hired in Pennsylvania, working in various states for seventeen years. In another case, the claimant was an itinerant mason (actually a manager of the same).[148] Employer, a New York firm, initially offered him work and he accepted at Monessen, Pennsylvania. He worked for employer at various furnace locations for seventeen years, supervising re-lining work. Claimant never worked at or from that office, but instead took assignments remotely, receiving them at his personal residence.

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[145] *Hiller v. WCAB (DeBerardinis & HSC Transport)*, 569 A.2d 1024 (Pa. Commw. 1990).

[146] *Taylor v. WCAB (Ace Installers, Inc.)*, 543 A.2d 219 (Pa. Commw. 1988).

[147] *Taylor v. WCAB (Ace Installers, Inc.)*, 543 A.2d 219 (Pa. Commw. 1988).

[148] *Furnco Construction v. WCAB (Dorogy)*, 555 A.2d 275 (Pa. Commw. 1989).

Claimant ultimately retired and filed for TTD, alleging a dust disease disability. The employer opposed the claim, arguing, among other things, that claimant's employment had been predominately outside of Pennsylvania. The proofs showed that, while claimant did have some Pennsylvania assignments in the three years before his final day of work, claimant in fact labored in various states, as he was required to "travel from job to job in and outside of Pennsylvania." This claim was granted at all levels. The court ruled that referee had not erred on the jurisdiction issue. The court stated: "The referee correctly applied section 305.2 to the facts because claimant was working under a contract of hire made in Pennsylvania but his employment was not located in any particular state."[149]

Claimant hired and based in Pennsylvania, working in six states. The claimant was also successful in the memorable case *Pfizer, Inc. v. WCAB (Gresham)*.[150] There, the deceased worker was mid-Atlantic district sales manager for his employer. He worked out of his home office in Harrisburg, Pennsylvania. With regard to the geographical expanse of his work, he spent more than 30% of his time managing the multi-state staff of the sales division. His job required travel "throughout the mid-Atlantic region including Eastern Pennsylvania, Southern New Jersey, Delaware, Maryland, Washington, D.C., and West Virginia…." In addition, "the pattern of Harrisburg office telephone usage by Decedent established that on more than sixty eight percent of regular workdays Decedent utilized the Harrisburg business office at some time during a work day."

On the day in question, August 10, 1984, a Friday, claimant was in the midst of a dual purpose trip from Harrisburg, with an ultimate vacation destination of Bethany Beach, Delaware. After a work-related stop in Dover, Delaware, a fatal motor vehicle accident occurred when the deceased's car crossed the center line and it collided with a tractor-trailer. The employer contested the idea that claimant could be covered for an accident in Delaware, but an award for the dependents was entered at all levels. Given the work arrangement summarized above, the deceased's work was not principally localized in any state.[151]

The "ongoing relationship" cases. In many work relationships, employees, particularly skilled journeymen working out of a union hall, will labor for many employers at various sites, in various states, for specific, discrete periods of time. When the job finishes up, these types of employees are laid off until the union hall next connects them with work with the same or a different employer.

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[149] *Furnco Construction v. WCAB (Dorogy)*, 555 A.2d 275 (Pa. Commw. 1989).

[150] *Pfizer, Inc. v. WCAB (Gresham)*, 568 A.2d 286 (Pa. Commw. 1989).

[151] *Pfizer, Inc. v. WCAB (Gresham)*, 568 A.2d 286 (Pa. Commw. 1989). The employer also contested, unsuccessfully, the proposition that claimant was in the course of employment at the time of injury.

The Pennsylvania cases indicate that when workers labor in this context, their employment is considered principally localized at the discrete work site.[152] On the other hand, when the union, or other itinerant worker, can prove an "ongoing employment relationship," he may well be considered to have his employment not principally localized in any state.

The leading case in this category is *S.I. Industries v. WCAB (Zon)*.[153] In that case, the claimant was a laborer who lived in Aliquippa, Pennsylvania. A businessman contacted claimant and offered him a job to perform labor work at a job in Piketon, Ohio. He accepted in Pennsylvania, and hence his contract was made in Pennsylvania. Claimant was working at Piketon when he was hit (September 1985) by a backhoe. He missed four days of work but continued with his labor. The job went from August 26, 1985 to November 16, 1985. At that time he was marked "terminated" (later characterized by employer in court as "laid off."). On November 18, 1985 he started on another job for employer at Springfield, Ohio. This job went to December 6, 1985 and claimant was then terminated. However, he began working for employer in Lancaster PA on December 10, 1985 thru March 7, 1986. When the Lancaster job was over claimant finally asserted his claim petition.

The employer opposed his claim, but all levels agreed that claimant was entitled to an award: he was injured out of state (*i.e.*, in Ohio), after making a contract in Pennsylvania for work not principally localized in any state. The crux of the employer's defense was, apparently, that the three transactions were all separate contracts for Claimant to work in one specific place. The court, however, viewed claimant's labor for employer as in effect continuing, despite the temporary lay-offs, "[u]ntil we got other work.":

> The facts in that case indicated that the owner paid for the claimant's living expenses at all of the various locations. Additionally, the claimant received a weekly salary whether he worked or not. Based on the record, this court determines that both companies were controlled by the same owner, and that once hired in Pennsylvania, the owner shifted the claimant from job to job as needed – hence the ongoing relationship…. In the present case, as previously stated, although the employer's superintendent initially hired the claimant for the Piketon, Ohio, the parties contemplated that the claimant would work at other sites. The ongoing employment relationship is evidenced by the claimant's employment with the employer from August, 1985 until March, 1986, at various sites located in Ohio and Pennsylvania….[154]

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[152] *General Elec. Co. v. WCAB (Sporio*), 615 A.2d 833 (Pa. Commw. 1992).

[153] *S.I. Industries v. WCAB (Zon)*, 613 A.2d 170 (Pa. Commw. 1992).

[154] *S.I. Industries v. WCAB (Zon)*, 613 A.2d 170 (Pa. Commw. 1992).

The court, citing *Zon*, followed this approach in a 1994 case.[155] In that case, claimant accepted work in Pennsylvania for a job in Columbus, Georgia. When claimant first went on with employer, he was "to be sent to different areas all over the United States." He was "considered part-time[, but] he has worked continuously for employer since his date of hire … [which was] …. four years." He was not terminated and then rehired after each job assignment.

While working at the job in Georgia, he had his injury. His employer opposed his Pennsylvania claim on grounds of lack of causation and lack of jurisdiction. The WCJ and Board dismissed the claim on both grounds. The Commonwealth Court affirmed, but *only* because the WCJ had discredited claimant's expert medical. As to *jurisdiction*, the court stated that the Pennsylvania Act could apply, as the evidence showed that claimant's employment was not principally located in any state. This was so based upon the fact pattern discussed above. The court remarked, among other things:

> Although claimant testified that he was hired on a per job basis, it is clear from the record evidence that claimant and employer had an ongoing employment relationship. In order to consider what are usually distinct jobs as a single period of employment, there must be evidence of an ongoing employment relationship…. There is evidence in this case of an ongoing employment relationship. Claimant testified that although he was considered part time he has worked continuously for employer since his date of hire, and the referee found that claimant has worked for employer for four years….
>
> Employer did not present any evidence to indicate that claimant was terminated and rehired after each job assignment. Although claimant testified that he was required to have a physical prior to each job, he explained that the reason for such a requirement was that he worked with contaminants and the purpose of the physical was to make sure he was healthy enough to wear respirators and suits.…[156]

In another case, the claimant was pursuing Pennsylvania benefits on this theory, but the court denied his claim. In this regard, the claimant had, over the years, worked for the employer in more than one state, but his most recent New Jersey assignment, managing a nuclear power plant, had followed a two year lay-off. True, the court noted, if there is continuous employment, all aspects of past employment will be considered in determining if there is or is not principal localization in any state – "[I]f the evidence …

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[155] *Atkins v. WCAB (Geo-Con, Inc.)*, 651 A.2d 694 (Pa. Commw. 1994).

[156] *Atkins v. WCAB (Geo-Con, Inc.)*, 651 A.2d 694 (Pa. Commw. 1994). The court thus concluded: "Based on the foregoing facts, the referee erred in concluding that claimant's employment was principally localized in Georgia, based on the fact that his employment was centered in Georgia at the time of the alleged work-related injury. Accordingly, claimant is eligible for compensation under section 305.2(a)(2) of the Act as he was working under a contract of hire made in Pennsylvania in employment not principally localized in any state."

establishes a continuous employment relationship, we may consider the individual jobs as a single period of employment for the purpose of determining where the employee's employment is principally localized." Such circumstances did not exist in the present case: the latest year and on-half of work for the employer "cannot be considered part of that same, single period of employment after a year and a half break during which he worked for another employer…."[157]

c. Cases addressing worker whose contract was made in Pennsylvania for employment principally localized in a state whose workers' compensation law is not applicable to him

The Pennsylvania courts have not produced a case where the claimant successfully established jurisdiction based on the proposition that, while his employment was principally localized in another state, the laws of the state were not applicable.[158]

The court in two cases did discuss this third criterion of potential overage. In the first case the court simply noted that claimant's employment was principally localized in New York, and claimant had not shown that the New York Act was not applicable. The extraterritorial claim was, in any event, doomed, as claimant had also accepted his employment offer in New York, not Pennsylvania.[159]

The second case clearly shows the court explaining how the criterion is *not* applicable. There, the claimant accepted the employment offer of work in Pennsylvania, for work to be performed in Ohio. While working in Ohio, he suffered an injury. The employer defended on the basis of lack of extraterritorial coverage, but the referee and Board awarded benefits. They did so on the basis that the contract was made in Pennsylvania for work principally localized in Ohio. However, as court, reversing, pointed out, this basis of extraterritorial coverage applies *only* when the claimant shows that the workers' compensation law of that state is not applicable to claimant: "Having failed to show that he would be denied the protections of the Ohio workmen's compensation law, the claimant cannot invoke the extraterritorial provision of the Pennsylvania Act."[160]

d. Worker whose contract was made in Pennsylvania for employment outside the United States and Canada

The Pennsylvania courts have not produced a case where the claimant successfully established jurisdiction based on the proposition that he made his contract of

[157] *Meyer v. WCAB (Raytheon Co.)*, 776 A.2d 338 (Pa. Commw. 2001).

[158] For a hypothetical example of how such a circumstance might arise, see *supra*, Section VIII(A)(2).

[159] *Oliveri v. WCAB (I.T.T. Grinnell)*, 542 A.2d 658 (Pa. Commw. 1988).

[160] *George Liko Co. v. WCAB (Stripay)*, 616 A.2d 197 (Pa. Commw. 1992).

employment in Pennsylvania, for employment outside the United States and Canada.[161] Plainly, this statute answers the question with which the New Jersey court had to struggle in 2009 – to wit, whether a New Jersey employer which dispatches teachers to Venezuela and to Asian countries was obliged to maintain workers' compensation coverage for such employees.[162] The court New Jersey court essentially answered in the negative, unless in some individual case the employee had sufficient contacts with New Jersey, as established by New Jersey case law.[163] In Pennsylvania the answer – "yes" – is spelled out in statute.

B. Agreements as to "Principal Localization"

As discussed above, the definition of "principally localized" is all-important in applying the statutory provisions describing the circumstances under which extraterritorial coverage is provided. In addition, the concept is implicated in two further sections of the law which provide that an employee and employer can agree, in advance of any injury, that for compensation purposes the employee's employment is "principally localized" in a particular jurisdiction.

1. Two Provisions of Section 305.2 Referencing Pre-injury Agreements

The law actually makes two references to pre-injury agreements. In this regard, Section 305.2*(b)* contains a final clause. The proviso was not part of the Model Act and was added by the Pennsylvania legislature when it adopted the Model Act in 1974. This initial reference, which follows non-election language, features what is surely the oddest statutory prose in the law:

> Nothing in this act shall be construed to mean that coverage under this act excludes coverage under another law or that an employe's election to claim compensation under this act is exclusive of coverage under another state act or is binding on the employe or dependent,
>
> [e]xcept, *perhaps*, to the extent of an agreement between the employe and the employer
>
> [o]r where employment is localized to the extent that an employe's duties require him to travel regularly in this State and another state or states.[164]

Although the provision, second clause, speaks of an agreement to the effect that employment is "localized" in a particular jurisdiction in general terms, this phrase has

[161] For a hypothetical example of how such a circumstance might arise, see *supra* at Section VIII(A)(2).

[162] *See supra* Section II(A) of this article.

[163] *International Schools Service, Inc. v. New Jersey Dept. of Labor & Workforce Development*, ___ A.2d ___ (N.J. Super. 2009) (2009 N.J. Super. LEXIS 157).

[164] 77 P.S. §411.2(b) (emphasis added).

been held to refer to the authorized "principal localization" agreement provided for at Section 305.2(d)(5). That second, more definitive, reference provides as follows:

> An employe whose duties require him to travel regularly in the service of his employer in this and one or more other states may, by written agreement with his employer, provide that his employment is principally localized in this or another such state, and, unless such other state refuses jurisdiction, such agreement shall be given effect under this act.[165]

These provisions are intended to provide employers and employees a means of gaining certainty with regard to compensation coverage in the event of a work-related injury. The employer has the knowledge that it can safely secure coverage under one state for an appropriate employee without being in possible violation of another state's compensation law and regulations. The employee gains the knowledge that he or she has a remedy under a defined state's compensation law.

2. Outright "Choice of Law" Agreements Not Permitted

Still, these provisions have correctly been held as not authorizing "choice of law" agreements providing, regardless of where claimant's principal localization truly is, that a particular state's workers' compensation law "will be the exclusive remedy for any work-related injury claim."[166]

Further, it is likely that such agreements are only applicable to employees who are truly "traveling" employees.[167] Even agreements that accurately adopt the language of "principally localized" are subject to review and to being disregarded if the agreement was not founded in fact and was merely a ruse to avoid Pennsylvania coverage. It is fair, in this regard, that the test of legitimacy is whether the employee's work and work relationship comports with the "principally localized" definition included in the Act.

With regard to the proviso, first clause – "an agreement between the employe and the employer" – the Commonwealth Court has unambiguously nullified the idea that this clause allows some broader choice of law agreement:

> When read in conjunction with subsection 305.2(a), subsection 305.2(b) does not authorize agreements providing for exclusive jurisdiction in another state….
>
> Consequently, Employer's interpretation that Section 305.2(b) permits

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[165] 77 P.S. §411.2(d)(5).

[166] *Robert M. Neff, Inc. v. WCAB (Burr)*, 624 A.2d 727 (1993).

[167] *See Robert M. Neff, Inc. v. WCAB (Burr)*, 624 A.2d 727 (1993).

agreements vesting exclusive jurisdiction over workmen's compensation claims in another state is erroneous. The only agreements between an employer and employee permitted by Section 305.2(b) are "perhaps" those where:

- a constantly traveling employee, like a truck driver, with contacts with Pennsylvania as set forth in section (a) elects exclusive Pennsylvania jurisdiction; or
- a constantly traveling employee agrees to designate a location as the principal place of employment for purposes of jurisdiction.

Section 305.2(b) does not authorize employers to enter into agreements with employees otherwise covered by Pennsylvania law and subsequently injured in Pennsylvania to bind them to significantly lower benefit amounts or medical coverage in another state. The use of the term "perhaps" perhaps indicates that those agreements authorized by this subsection are not controlling in particular factual settings.[168]

3. Choice of Law Agreement held Unenforceable

This section was invoked, futilely, by an employer in *Owens v. WCAB (G.D. Leasing of Indiana)*.[169] In that case, the claimant had entered into his contract in Indiana, but his work was principally localized in Pennsylvania. His injury, meanwhile, occurred in Ohio. The employer paid benefits under the Indiana Act. The employer sought to be free from Pennsylvania liability under this section, as the claimant had signed a document at the beginning of his employment, providing that if he was injured, his exclusive remedy for workers' compensation would be in the state of Indiana. While the WCJ and Board denied benefits, the Commonwealth Court reversed. While claimant had agreed that Indiana law would apply, in the end he did "not sign an agreement localizing his

[168] *Robert M. Neff, Inc. v. WCAB (Burr)*, 624 A.2d 727 (1993). The court concluded by suggesting that a choice of law agreement would in fact be contrary to other more general provisions of the Act:

> Finally, while the General Assembly has mandated that employers operating in Pennsylvania subscribe to the workmen's compensation system providing penalties for a failure to do so, it also prohibited an employer entering into a future agreement with an employee to "vary" the amount to be paid . . . under this Act and terms to the contrary "shall be wholly null and void" … that would affect his or her future rights to compensation under the Act. Nothing in the language of Section 305.2(b) creates an exception to this prohibition. To hold otherwise would permit employers to require applicants and employees to waive statutory rights to obtain benefits under the Act, which is clearly contrary to the clear language of Section 410.

Id.

[169] *Owens v. Workers' Compensation Appeal Board (G.D. Leasing of Indiana)*, 769 A.2d 1220 (Pa.Cmwlth.2001). For a similar case, see *Rock v. Workmen's Compensation Appeal Board (Youngstown Cartage Co.)*, 92 Pa.Cmwlth. 491, 500 A.2d 183 (1985) (employer, at time of hire, requested that claimant sign a document saying that Ohio workers' compensation law would control in case of a work-related injury; held: agreement did not comport with Pennsylvania statute and was unenforceable).

employment in Indiana ....” Accordingly, Section 305.2(d)(5) did not apply to the worker's circumstances.

4. Principal Localization Agreement Enforced

An employer, having utilized a legitimate principal localization agreement, did defeat a claimant’s attempt at securing a Pennsylvania claim in a 1994 case.[170]

There, the claimant was an over the road truck driver for his employer. He first sought work by answering an advertisement in Pennsylvania, but was then dispatched to Indiana for training. After successful training, he formally accepted the job. He signed an agreement stating that he is “employment is principally localized in Indiana and an agreement that the workers’ compensation law of that state shall apply to his work-related injuries….” While his contract was hence made in Indiana – and not Pennsylvania – all of his trips thereafter began in Pennsylvania. As to the scope of his work, the claimant’s “work for the Defendant was performed in many states. He did not work primarily in Pennsylvania or in any other individual state.”[171]

Claimant was ultimately to suffer an injury while in California, at the end of a multi-state trip which took him from New Jersey to Tennessee, and then westward to Modesto, California. After receiving Indiana benefits, he was able to secure a Pennsylvania award, but the Board and court reversed. The court pointed out that claimant’s employment was not principally localized in any state, and the agreement was otherwise legitimate under Section 305.2(d)(5).[172]

5. Principal Localization Agreement not Applicable to Within-state Injuries

Section 305.2(d)(5) was construed in 2002 by the Pennsylvania Supreme Court in a leading case, *McIlvaine Trucking, Inc. v. W.C.A.B. (States).*[173] The court stressed that the provision applies in the context of injuries occurring *outside* Pennsylvania. The decision confirms the proposition of this article that the “principal localization” section does not authorize agreements that state simply that a particular state's workers' compensation law will be the exclusive remedy for any work-related injury claim.

In *McIlvaine Trucking*, the claimant, an interstate trucker, had signed an agreement, as an apparent condition of his employment, stating that he was, in the event of a work injury, “bound by the workers' compensation laws of West Virginia.”[174] The

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[170] *Creel v. WCAB (Overland Express, Inc.)*, 643 A.2d 784 (Pa. Commw. 1994).

[171] *Creel v. WCAB (Overland Express, Inc.)*, 643 A.2d 784 (Pa. Commw. 1994).

[172] *Creel v. WCAB (Overland Express, Inc.)*, 643 A.2d 784 (Pa. Commw. 1994).

[173] *McIlvaine Trucking, Inc. v. WCAB (States)*, 570 Pa. 662, 810 A.2d 1280 (2002).

[174] *McIlvaine Trucking, Inc. v. Workers' Compensation Appeal Board (States)*, 570 Pa. 662, 810 A.2d 1280 (2002). The agreement stated, in full, “I (We), the undersigned employees of the above employer, a

claimant worked in several states, including Pennsylvania, and his injury ultimately occurred at the employer's facility at New Stanton, Pennsylvania. The employer argued that the WCJ had no jurisdiction, but this assertion was unsuccessful before the judge and Board. Commonwealth Court reversed, but the award was restored by the Supreme Court.

The court explained that, while parties may agree in advance on the issue of where employment is principally localized, this does not deprive the Pennsylvania authorities of jurisdiction over injuries that occur *within* Pennsylvania. The statute is, in this regard, explicit that the Pennsylvania Act is applicable to all injuries that occur within the Commonwealth.[175] The court noted that the Commentary to the Model Act supported this interpretation,[176] as did a persuasive federal district court opinion which had already addressed the issue.[177]

The court, notably, rejected the argument that Section 305.2 was intended to create binding choice of law agreements.[178] As foreshadowed by the earlier Commonwealth Court decision quoted above, the Supreme Court gravely questioned the idea that a worker could, prior to any injury, waive his right to an intraterritorial Pennsylvania claim:

> [I]t should be emphasized that courts do not lightly override private contractual undertakings. Nevertheless, agreements may be avoided where, as here, their terms offend public policy as reflected, *inter alia*, in express legislative provisions such as Section 101's directive that the Act applies to in-state injuries. This is particularly appropriate in the workers' compensation arena where, in Section 410 of the Act, the Legislature has explicitly directed that agreements made prior to the seventh day after an injury that would vary the amount of compensation to

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subscriber to the West Virginia Workers' Compensation Fund, do hereby agree to be bound by the Workers' Compensation Act and the Laws of the State of West Virginia while working in the States(s) of [the] continental US as well as the State of West Virginia."

[175] Section 101 of the Act, 77 P.S. §1.

[176] The *McIlvaine* court cited the Commentary from the text, Council of State Governments, WORKMEN'S COMPENSATION AND REHABILITATION LAW, p. 100 (1973): "[T]he agreement [under the Model Act equivalent to Section 305.2(d)(5)] only acts upon the issue whether the employment is 'principally localized' in a particular state. It therefore would act only upon the first two of the four tests *for out-of-state coverage* [i.e., the model law equivalent to Section 305.2(a)(1) and (2)]."

[177] *McIlvaine Trucking, Inc. v. Workers' Compensation Appeal Board (States)*, 570 Pa. 662, 810 A.2d 1280 (2002) (citing *L.R. Willson & Sons, Inc. v. PMA Group*, 867 F.Supp. 335 (D.Md.1994), *aff'd by* 62 F.3d 1415 (4th Cir.1995)) (concluding that § 305.2(d)(5) "functions only with respect to work performed and injuries which occur outside of Pennsylvania, not within Pennsylvania ... .").

[178] *See* Brief of Amici Curiae, American Trucking Association, Inc. and Pennsylvania Motor Truck Association in Support of Appellee, pp. 8, 14-16, in *McIlvaine Trucking, Inc. v. WCAB (States)*, 810 A.2d 1280 (Pa. 2002).

be paid under the Act are not to be enforced….[179]

The court cited with approval, in this context, the remark by Larson that an:

> express agreement between employer and employee that the statute of a named state shall apply is ineffective either to enlarge the applicability of that state's statute or to diminish the applicability of the statutes of other states. Whatever the rule may be as to questions involving commercial paper, interest, usury and the like, the rule in workmen's compensation is dictated by the overriding consideration that compensation is not a private matter to be arranged between two parties; the public has a profound interest in the matter which cannot be altered by any individual agreements.[180]

C. Coordination Provisions

1. The Statute: Section 305.2(b)

Section 305.2, subsection (b), is in effect a "coordination" clause, providing that mere receipt of compensation – voluntarily or by *award* – under the auspices of another statute is not a binding election out of a Pennsylvania claim. The law does, however, provide further that the employer receives a credit for payments – medical, disability, and death – made under the other law. These provisos are taken word-for-word from the Model Act.[181] Importantly, if benefits have been received under another state's laws, and the claimant then seeks benefits under the Pennsylvania Act, a time limit applies; that is, the same three years of Section 315 is applicable: "the claim under this act [must be] filed within three years after such injury or death."

The law states, at the same time, that receipt of *Pennsylvania* compensation does not preclude the worker from pursuing an *out-of-state* claim.[182] This language is not from the Model Act and was added by the Pennsylvania legislature: "Nothing in this act shall be construed to mean that coverage under this act excludes coverage under another law or than an employe's election to claim compensation under this act is exclusive of coverage under another state act or is binding on the employe or dependent …."

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[179] *McIlvaine Trucking, Inc. v. Workers' Compensation Appeal Board (States)*, 570 Pa. 662, 810 A.2d 1280 (2002) (citing, among other things, *Robert M. Neff, Inc. v. Workmen's Compensation Appeal Board (Burr)*, 624 A.2d 727 (1993)).

[180] *McIlvaine Trucking, Inc. v. Workers' Compensation Appeal Board (States)*, 570 Pa. 662, 810 A.2d 1280 (2002) (quoting Larson, THE LAW OF WORKMEN'S COMPENSATION, § 87.71 (1994)).

[181] For the complete language of Subsection 305.2(b), see Appendix A.

[182] 77 P.S. § 411.2(b).

2. Background of "Successive Awards"

In the literature of workers' compensation, the practice, pre- and post-Model Act, of allowing more than one state award, is referred to as "successive awards."[183] The U.S. Supreme Court has, notably, held that Full Faith and Credit principles are not offended by allowing a worker to pursue a successive award. Summarizing the somewhat inconsistent cases on the subject, one scholar has stated, "Essentially, successive awards are proper as long as (1) the first award is credited against the second award, and (2) the first act was not designed to preclude recovery under the second act."[184]

It is quite plain that, under the Pennsylvania Act, no prohibition exists on seeking "successive awards." This approach differs from that of other states. The same scholar quoted above points out that a Tennessee court has (for example) held "that where a claimant voluntarily and affirmatively accepts compensation in another state he is barred by public policy from recovering in Tennessee."[185]

3. Reconciling Section 305.2(b) and Section 322

In 1993, the legislature added a Section 322 to the Act. That statute prohibits "any employee [from receiving] compensation under this Act if he is at the same time receiving workers' compensation under laws of … any other state for the same injury …."[186] In an initial interpretation, the Commonwealth Court ruled that an employee, after the receipt of benefits under the West Virginia (WV) Act, could *not* prove a Pennsylvania claim and, for the weeks of prior receipt of WV benefits, receive Pennsylvania benefits less a credit for the WV payments.[187] This prohibition arguably revealed a conflict between the new Section 322 and the Section 305.2(b) coordination clause.

In a 2004 case, however, the court reconsidered its holding.[188] In that case, the claimant had actually been injured in Pennsylvania, but received benefits under the New Jersey Act. The court ultimately held that the claimant could receive Pennsylvania benefits for the full period of the disability claim, less a credit for the New Jersey benefits. The court pointed out that section 305.2 was not, in this precise context, applicable, as the injury occurred *within* Pennsylvania. However, the court ruled that

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[183] The best recent discussion of this issue appear to be Little Eaton & Smith, Little, Eaton, & Smith, CASES AND MATERIALS ON WORKERS' COMPENSATION, pp. 600-603 (5th ed. 2004).

[184] Levasseur, *A Primer for Successive Awards in Workers' Compensation*, 28 THE BRIEF (ABA) p.40 (Winter 1999).

[185] *Id*. (Citing, among others, *Tidwell v. Chattanooga Boiler & Tank Co*., 43 S.W.2d 221 (1931)).

[186] 77 P.S. § 677.

[187] *Merchant v. WCAB (TSL)*, 758 A.2d 762 (Pa. Commw. 2000).

[188] *Lesco Restoration v. WCAB (Mitchell)*, 861 A.2d 1002 (Pa. Commw. 2004).

section 305.2 allowed maximization of benefits for a worker injured *outside* of the state, and this allowance necessarily had to apply likewise to a worker injured *within* Pennsylvania.

In that 2004 case, the claimant suffered a work-related injury on January 25, 2000. He was paid benefits voluntarily. The claimant's injury occurred in the Pennsylvania. Claimant, however, was paid benefits under the New Jersey Act until May 2002, when, under New Jersey law, employer was no longer required to pay benefits. After the benefits stopped, claimant initiated a Pennsylvania claim for the same injury. The WCJ and Board awarded benefits for the period from the date of the work injury, less credit for the payments employer made under the New Jersey Act. The Board, in allowing claimant Pennsylvania benefits (which were more generous than weekly benefits under the New Jersey Act),

> concluded that Section 322 is intended to prevent essentially two payments for the same injury, whereas in this case, the award provides the difference between benefits that claimant received for the period of his disability in New Jersey and the benefits to which he would have been entitled had he filed his claim originally in Pennsylvania at the outset. The Board noted that the net result would be that an employer would "have to pay no more than the highest compensation allowed by any single state having an applicable statute."[189]

On appeal, the employer asserted that the claimant was entitled to compensation under the laws of Pennsylvania *only* from the date his New Jersey benefits *terminated*. The Commonwealth Court, however, affirmed. While it was true that section 322 prohibited dual receipt, section 305.2(b) seemed to coordinate dual benefits. As the court observed, a portion of the statute provides as follows:

> The total amount of all income benefits paid or awarded the employe under such other workmen's compensation law shall be credited against the total amount of income benefits which would have been due the employe under this Act had claim been made solely under this Act.

True, section 305.2(b) applied to extraterritorial injuries, and here claimant had been injured in Pennsylvania. Still, "the apparent purpose of [this subsection] is to accomplish the very result that occurred in this case – to provide a claimant who is receiving or has received workers' compensation benefits from another jurisdiction with the right to file a petition under the [Pennsylvania] Act for the same period covered by the other jurisdiction's benefits with the right to recover the more generous benefits available in Pennsylvania. Regarding this provision, there is little doubt that, had claimant, a resident of Pennsylvania, [been] injured in New Jersey, he would have been entitled to the relief the Board here approved."

[189] *Lesco Restoration v. WCAB (Mitchell)*, 861 A.2d 1002 (Pa. Commw. 2004).

4. Limitation of Action

Under the coordination provision, the claimant does not elect out of Pennsylvania coverage by receiving benefits under the other state act, but he or she still must file for Pennsylvania benefits within three years of the injury. This is the statute of limitations on an original claim in any event.[190] The Commonwealth Court, however, has held that this proviso only applies when the claimant has been injured extraterritorially. In contrast, if the claimant has been injured *in Pennsylvania*, and for some reason receives benefits first under the auspices of another state law, the operation of the time limitation is different.

This was so held in a 1990 case. There, claimant suffered an injury in Pennsylvania, but at first received New Jersey benefits. Five years after the injury, he filed a Pennsylvania claim. The employer opposed the claim as untimely, pointing out that while section 305.2 allows for a successive claim in Pennsylvania following an out-of-state award, such "claim under this act [must be] filed within three years after [the] injury …." The court rejected this defense, pointing out that section 305.2 addresses extraterritorial injuries, and applying the more general rule, found in Section 315, that payments intended to compensate for a work injury *toll* the three-year limitation of that section.[191]

D. Special Cases of Insidious Occupational Diseases

Application of the extraterritorial provisions has given rise to issues in the context of occupational disease recovery. The creators of the Model Act were crafty and were sure to note that "Workmen's compensation law" includes "occupational disease law." Thus, the Pennsylvania statute, which adopted this phraseology, facilitates recovery for insidious occupational disease.[192] Still, workers who have worked in multiple states have had to struggle to succeed in their Pennsylvania claims because of the difficulty in determining the date of injury and because of further coverage requirements unique to disease recovery. Three reported cases exist in this area, two involving dust diseases and the third involving long-term occupational hearing loss.

1. ***Claim denied as longest-employing employer exposed claimant at out-of-state, fixed job site***. In the first disease case, the claimant was an itinerant mason, working out of a union hall, at various locations in many states.[193] One of his employers over the years was General Electric (GE). When claimant developed asbestosis, he filed a claim against GE. He named GE as the defendant as it was that employer who had longest exposed

[190] Section 315 of the Act, 77 P.S. § 602.

[191] *Martin v. WCAB (U.S. Steel Corp.)*, 572 A.2d 1307 (Pa. Commw. 1990).

[192] *See* Section 305.2(d)(6), 77 P.S. § 411.2(d)(6).

[193] *General Elec. Co. v. WCAB (Sporio*), 615 A.2d 833 (Pa. Commw. 1992).

him to the disease hazard in the 300 weeks prior to disability.[194] That exposure occurred at a job in Kentucky.

The workers' compensation authorities granted benefits, but the court reversed. The WCJ and Board had determined that claimant had made his contract in Pennsylvania for work not principally localized in any state. In this regard, when claimant worked for GE, he had done his labor in a number of states, including Pennsylvania, Mississippi, Kentucky, and Ohio. The court disagreed with this analysis. The court could not determine that any "ongoing relationship" existed between claimant and GE. As far as the court was concerned, claimant's employment was principally localized in Kentucky.

2. ***Claim granted even though claimant could not show two years in preceding ten of Pennsylvania disease hazard exposure.*** In the second case, the claimant, an itinerant mason, had worked for employer for seventeen years, relining furnaces, always commencing his work by accepting contract offers at his home at Monessen.[195] After he retired, he sought benefits for asbestosis and silicosis. His employer opposed the claim on a number of grounds, one of which being that claimant could not meet the statutory "two in ten rule," which requires a common dust disease victim to prove two years of Pennsylvania exposure in the last ten years of work.

The claimant was, however, successful at all levels, prevailing as a threshold matter on the theory that he had made his contract of employment in Pennsylvania for work not principally localized in any state.

As to the charge that claimant did not show "two in ten," a requirement found in Section 301(d) of the Act,[196] the court declared that "[b]y satisfying the jurisdictional element of Section 305.2, Claimant has transformed his extraterritorial employment into employment in Pennsylvania. After satisfying the extraterritorial jurisdictional requirements of the Act, to require a Claimant to also prove physical presence on a Pennsylvania job site is an impossible burden." The court added: "To accept Employer's interpretation of Section 301(d), requiring physical presence in Pennsylvania, would emasculate the purpose of Section 305.2 of permitting compensation for extraterritorial employment. We can find no indication that the legislature intended Section 301(d) to operate independently."[197]

3. ***Hearing loss claim cognizable in Pennsylvania.*** In a third case, the employer opposed the claimant's long-term hearing loss claim on the theory that the loss occurred

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[194] *See* Section 301(c)(2) of the Act, 77 P.S. § 602.

[195] *Furnco Construction v. WCAB (Dorogy)*, 555 A.2d 275 (Pa. Commw. 1989).

[196] 77 P.S. § 412.

[197] *Furnco Construction v. WCAB (Dorogy)*, 555 A.2d 275 (Pa. Commw. 1989). The court did require claimant to show an "aggregate employment [in a disease hazard] of at least two years during the ten year period preceding disability," though not necessarily in Pennsylvania. Claimant was held to have met that burden.

in Ohio and not in Pennsylvania.[198] In that case, the claimant was a long-time employee of the company (Sesco), which operated steel mills. He began his work in April 1971. From that time, until 1998, he apparently worked at the employer's facility in Yorkville, Ohio. In 1998, he was transferred to employer's Allentown plant. Two years later, in 2000, he filed for long-term occupational hearing loss. At the time, he was still working for employer. Both experts found considerable hearing loss, and the WCJ ultimately determined that claimant had a 35.6% loss.

The employer's expert opined that some of this loss was not work-related, as a 1971 audiogram showed that claimant had a loss of 17.8%. Also, an audiogram undertaken just before the worker's move to Allentown showed a 32.5% loss. Thus, employer's expert arguably supported the position that employer "should only be responsible for that hearing loss occurring since 1998, or 3.1%, which is not compensable under the Act." Employer also argued that claimant's losses were suffered in Ohio, that claimant did not have a Pennsylvania claim, and that claimant in any event did not suffer at least 10% loss in Pennsylvania.

These arguments, however, were unsuccessful. The claimant received awards at all levels. According to the court, that some of claimant's loss occurred in Ohio did not mean that claimant did not have a cognizable claim. The date of the loss was the date of the claim filing, in claimant's case, and the Pennsylvania Act covers all injuries occurring within the Commonwealth.[199]

E. Intraterritoriality and the Registration Provision

Section 305.2(c) of the Act,[200] which follows word-for-word the Model Act,[201] sets forth an elaborate scheme which creates a system of *post-hoc* Pennsylvania insurance coverage for non-Pennsylvania employers who have secured insurance coverage in the state of their domiciliary, and who then encounter a situation where their employee becomes entitled to benefits under the Pennsylvania Act because the injury occurred Pennsylvania.

This statute provides that when a worker has sustained an injury under such circumstances the employer may file with the Department of Labor & Industry (actually its Bureau of Workers' Compensation) a certificate from its own state's compensation authorities indicating that it has "secured the payment of compensation under the workmen's compensation law of such other state and that with respect to such injury such

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[198] *Wheeling-Pittsburgh Steel Corp. v. WCAB (Sesco)*, 828 A.2d 1189 (Pa. Commw. 2003).

[199] *Wheeling-Pittsburgh Steel Corp. v. WCAB (Sesco)*, 828 A.2d 1189 (Pa. Commw. 2003).

[200] 77 P.S. §411.2(c).

[201] *See* Section VII(C)(1).

employe is entitled to the benefits provided under such law."[202] Certain advantages apply to both employer and employee pursuant to this procedure. These advantages are set forth in a series of further sub-sections.

The most pivotal provisions indicate that a qualified self-insurer under the other state's law, upon proper certification, will "be deemed to be a qualified self-insurer under [the Pennsylvania] act" and similarly, that the carrier of an employer, upon proper certification, "shall be deemed to be an insurer authorized to write insurance under and be subject to this act." It is with these provisions that the other state coverage becomes, as to the injury in question only, *post-hoc* Pennsylvania coverage.

Importantly, the liability of such an employer when the worker asserts a right to benefits in Pennsylvania *is* Pennsylvania benefits. Accordingly, while the employer is deemed to have coverage, with its attendant protections, the employer's liability will be at the level required by the Pennsylvania Act. The self-insurer thus must pay full Pennsylvania benefits. With regard to an insured entity, the statute specifically provides that the carrier's liability, in lieu of any special contractual provision, is only that which is demanded by the domiciliary state law. The employer, upon assertion of rights by the employee under the Pennsylvania law, must make up the difference. In this connection, a further provision indicates that the Department may, in its discretion, request security satisfactory to secure the payment of benefits due to such employee or his dependents under the Pennsylvania Act.[203]

When an employer complies with these provisions it avoids (1) a possible criminal action for violation of the Act; (2) a viable penalty petition before a WCJ claiming violation of the Act for failing to insure; and (3) the possibility of a negligence suit because of the failure to secure coverage. The process has its advantage for the claimant also, as it provides a clear source of Pennsylvania benefits.

With regard to actual administration of this proviso, "There is no [Bureau] form[;] the employer simply files a copy of their certificate of insurance with the Bureau's Compliance Section. Compliance then keeps that certificate on file."[204]

IX. Conclusion

As submitted above, the statutory approach taken by Pennsylvania has been a success. The courts have been attentive to the background and purpose of the Model Act and has maintained black and white rules on the extraterritorial jurisdiction issue. In the next issue of this newsletter, the author will explore the experiences of the other twelve states that adopted in whole or in part the Model Act.

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[202] Section 305.2(c), 77 P.S. § 411.2(c).

[203] 77 P.S. §411.2(c)(4).

[204] Memorandum of Ms. Kathleen Dupin, Bureau of Workers' Compensation, to WCJ Torrey (July 22, 2009).

APPENDICES

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APPENDIX A

FULL TEXT OF SECTION 101 OF THE ACT, 77 P.S. § 1

That this act shall be called and cited as the Workers' Compensation Act, and shall apply to all injuries occurring within this Commonwealth, irrespective of the place where the contract of hiring was made, renewed, or extended, and extraterritorially as provided by section 305.2.

FULL TEXT OF SECTION 305.2 OF THE ACT, 77 P.S. § 411.2

Italicized Portions are Pennsylvania Additions to the Model Act

(a) If an employe, while working outside the territorial limits of this State, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this act had such injury occurred within this State, such employe, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this act, provided that at the time of such injury:

(1) His employment is principally localized in this State, or

(2) He is working under a contract of hire made in this State in employment not principally localized in any state, or

(3) He is working under a contract of hire made in this State in employment principally localized in another state whose workmen's compensation law is not applicable to his employer, or

(4) He is working under a contract of hire made in this State for employment outside the United States and Canada.

(b) The payment or award of benefits under the workmen's compensation law of another state, territory, province or foreign nation to an employe or his dependents otherwise entitled on account of such injury or death to the benefits of this act shall not be a bar to a claim for benefits under this act; provided that claim under this act is filed

within three years after such injury or death. If compensation is paid or awarded under this act:

(1) The medical and related benefits furnished or paid for by the employer under such other workmen's compensation law on account of such injury or death shall be credited against the medical and related benefits to which the employe would have been entitled under this act had claim been made solely under this act.

(2) The total amount of all income benefits paid or awarded the employe under such other workmen's compensation law shall be credited against the total amount of income benefits which would have been due the employe under this act, had claim been made solely under this act.

(3) The total amount of death benefits paid or awarded under such other workmen's compensation law shall be credited against the total amount of death benefits due under this act.

Nothing in this act shall be construed to mean that coverage under this act excludes coverage under another law or that an employe's election to claim compensation under this act is exclusive of coverage under another state act or is binding on the employe or dependent, except, perhaps to the extent of an agreement between the employe and the employer or where employment is localized to the extent that an employe's duties require him to travel regularly in this State and another state or states.

(c) If an employe is entitled to the benefits of this act by reason of an injury sustained in this State in employment by an employer who is domiciled in another state and who has not secured the payment of compensation as required by this act, the employer or his carrier may file with the director a certificate, issued by the commission or agency of such other state having jurisdiction over workmen's compensation claims, certifying that such employer has secured the payment of compensation under the workmen's compensation law of such other state and that with respect to said injury such employe is entitled to the benefits provided under such law.

In such event:

(1) The filing of such certificate shall constitute an appointment by such employer or his carrier of the Secretary of Labor and Industry as his agent for acceptance of the service of process in any proceeding brought by such employe or his dependents to enforce his or their rights under this act on account of such injury;

(2) The secretary shall send to such employer or carrier, by registered or certified mail to the address shown on such certificate, a true copy of any notice of claim or other process served on the secretary by the employe or his dependents in any proceeding brought to enforce his or their rights under this act;

(3)(i) If such employer is a qualified self-insurer under the workmen's compensation

law of such other state, such employer shall, upon submission of evidence, satisfactory to the director, of his ability to meet his liability to such employe under this act, be deemed to be a qualified self-insurer under this act;

(ii) If such employer's liability under the workmen's compensation law of such other state is insured, such employer's carrier, as to such employe or his dependents only, shall be deemed to be an insurer authorized to write insurance under and be subject to this act: Provided, however, That unless its contract with said employer requires it to pay an amount equivalent to the compensation benefits provided by this act, its liability for income benefits or medical and related benefits shall not exceed the amounts of such benefits for which such insurer would have been liable under the workmen's compensation law of such other state;

(4) If the total amount for which such employer's insurance is liable under clause (3) above is less than the total of the compensation benefits to which such employe is entitled under this act, the secretary may, if he deems it necessary, require the employer to file security, satisfactory to the secretary, to secure the payment of benefits due such employe or his dependents under this act; and

(5) Upon compliance with the preceding requirements of this subsection (c), such employer, as to such employe only, shall be deemed to have secured the payment of compensation under this act.

(d) As used in this section:

(1) "United States" includes only the states of the United States and the District of Columbia.

(2) "State" includes any state of the United States, the District of Columbia, or any Province of Canada.

(3) "Carrier" includes any insurance company licensed to write workmen's compensation insurance in any state of the United States or any state or provincial fund which insures employers against their liabilities under a workmen's compensation law.

(4) A person's employment is principally localized in this or another state when (i) his employer has a place of business in this or such other state and he regularly works at or from such place of business, *or (ii) having worked at or from such place of business, his duties have required him to go outside of the State not over one year,* or (iii) if clauses (1) *and (2)* foregoing are not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state.

(5) An employe whose duties require him to travel regularly in the service of his employer in this and one or more other states may, by written agreement with his employer, provide that his employment is principally localized in this or another such state, and, unless such other state refuses jurisdiction, such agreement shall be given

effect under this act.

(6) "Workmen's compensation law" includes "occupational disease law."

APPENDIX B

TABLE
CLAIM & CASE CHARACTERISTICS
THE TWENTY-SIX REPORTED PENNSYLVANIA CASES
ADDRESSING EXTRATERRITORIAL INJURIES (1978-TO DATE)
SECTION 305.2 OF THE ACT, 77 P.S. § 411.2

~ DBT

Claimant/Year	Occupation	State of Injury	State of Domicile	State of Contract	Principal Localization Found?	PA Jurisdiction?
Loomer (‘78)	multi-state sales	WV	PA	NY	Yes (NY)	No
DeSanto (‘82)	OTR driver	DC	PA	PA	No	Yes
Pilot (‘84)	itinerant mason	IN	PA	OH	Yes (OH)	No
Patterson (‘85)	OTR driver	OH	OH	[?]	[?]	No
Minus (‘85)	wholesale delivery driver	NJ	NJ	PA	Yes (NJ)	No
Robbins (‘85)	OTR driver	SC	PA	TN	Yes (PA)	Yes
Rock (‘85)	OTR driver	UNK*	PA	OH	remanded for determination	remanded for determination
Oliveri (‘88)	journeyman plumber	NY	PA	NY	Yes (NY)	No
Taylor (‘88)	itinerant laborer	FL	PA	PA	No	Yes
Dorogy (‘89)	itinerant mason	NA•	PA	PA	No	Yes
Gresham (’89)	multi-state sales	DE	PA	PA	No	Yes
Hiller (’90)	OTR driver	NJ	PA	PA	Yes (PA)	Yes
Holland (’90)	OTR driver	NJ	PA	UNK♦	Yes (NJ)	No
Zon (’92)	itinerant laborer	OH	PA	PA	No	Yes
Sporio (’92)	itinerant mason	KY	PA	PA	Yes (KY)	No
Stripay (’92)	journeyman	OH	PA	PA	Yes (OH)	No

* Opinion does not state jurisdiction of injury; it was not, however, Pennsylvania.

• Insidious occupational disease where state of last exposure was not critical.

♦ Opinion does not state jurisdiction of contract; however, opinion proceeds on the assumption that the contract was made outside of Pennsylvania.

	plumber					
Denison ('93)	skilled laborer	KS	PA	PA	No[**]	Yes
Root ('94)	sales	NJ	NJ	PA	Yes (NJ)	No
Creel ('94)	OTR driver	CA	PA	IN	No	No
Atkins ('94)	itinerant driller	GA	PA	PA	No	Yes
Goldberg ('97)	retail chain supervisor	NJ	PA	NJ	Yes (PA)	Yes
Lambie ('99)	lumbermill manager	MD	PA	PA	Yes (MD)	No
Owens ('01)	OTR driver	OH	PA	IN	Yes (PA) ?	Yes ?
Meyer ('01)	power plant supervisor	NJ	NJ[••]	PA	Yes (NJ)	No
Macomber ('03)	OTR driver	NJ	PA	UNK[♦♦]	Yes (NJ)	No
Pugh ('04)	OTR driver	MN	PA	NJ	No [***]	No

APPENDIX C

TABLE
STATES, IN ADDITION TO PENNSYLVANIA, ADOPTING SPECIFIC PROVISIONS OF SECTION 7 OF THE MODEL ACT

Key to Model Act Provisos

Subsection (a): The four criteria of extraterritorial coverage
Subsection (b): Provision for "successive awards" and credits (*McCartin* codified)
Subsection (c): Out-of-State compliance via post-injury registration
Subsection (d): Definitions, including "principally localized";
provision for pre-injury agreement by traveling employees as to their state of principal localization

~ DBT

State	Statute	Year	Extent Adopted; Comments
Alabama	CODE OF ALABAMA § 25-5-35	?	In substantial part. Subsections (a), (b) and (d) adopted, with modifications. The definition of "principally localized" is *either* (a) or (b). The Alabama statute also includes subsections stating (1) that receipt of benefits under the law of another state bars any tort action (*i.e.*, the exclusive remedy operates whether claimant receives benefits under the Alabama Act or that of another state); (2) that injuries suffered by employees whose work is principally localized outside of Alabama may, under certain conditions, be entitled to an Alabama claim.

[**] Opinion does not state grounds upon which extraterritorial jurisdiction was based; however, opinion proceeds on the assumption that the claimant's work was not principally localized in any state.

[••] Claimant did have a permanent home in York, PA; however, during the indefinite period of his work at the New Jersey power plant, he lived in a rented apartment in New Jersey, near the site.

[♦♦] Opinion does not state jurisdiction of contract; however, opinion proceeds on the assumption that the contract was made in New Jersey.

[***] Opinion holds that claimant's work was not principally localized in Pennsylvania; however, a final determination of whether or not his work was principally localized anywhere is never reached.

Alaska	ALASKA STATUTES § 23.30.011	1975	In full
Delaware	19 DELAWARE CODE § 2303	?	In full
Idaho	IDAHO CODE § 72-217; § 72-218; § 72-219; § 72-220	1971	In full, with modifications: (1) occupational disease incorporated into body of statute – criteria must apply "at the time of manifestation of … disease."; (2) definition of "principally localized" is *either* (a) or (b).
Iowa	IOWA CODE § 85.71	?	Subsection (a) only adopted, with modifications; amended again in 2008 to eliminate (non-Model Act) domicile-alone jurisdictional basis.
Kentucky	KENTUCKY REVISED STATUTES § 342.670	1972	In full
Louisiana	LOUISIANA REVISED STATUTES 23:1035.1	1975	In part. Subsection (a) adopted only in truncated form, and section allows for jurisdiction *whenever* claimant is working "under a contract of hire made" in Louisiana; Subsection (b) adopted in full; Subsections (c) and (d) not included; a 2001 Subsection (d) added an "election" proviso that allows a claimant to agree that Louisiana will be his "exclusive" state remedy when certain conditions are met.
New Mexico	NEW MEXICO STATUTES § 52-1-64 § 52-1-65 § 52-1-67	1975	In substantial part. Subsections (a), (b) and (d) adopted. Subsection (c) was not adopted, but § 52-1-66 addresses out-of-state employers and their responsibility to secure insurance for New Mexico operations. In 2007, a further ground for extraterritorial coverage was added to § 52-1-64: "the employee is an unpaid health professional deployed outside this state by the department of health in response to a request for emergency heath personnel made pursuant to the Emergency Management Assistance Compact ….").
North Dakota	NORTH DAKOTA CENTURY CODE § 65-08-01	?	In minimal part. The statute at certain points adopts the language of the Model Act, and the framework of the statute seems patterned after the same. The criteria for extraterritorial coverage are generally those of the Model Act Subsection (a), with modifications. Contrary to the model, receipt of benefits under the laws of another state "bars a claim for benefits under this title."
Tennessee	TENNESSEE CODE § 50-6-115	?	In minimal part. The introduction of the Tennessee statute is from the Model Act, as is provision of coverage when the employee's employment is principally localized in the state (subsection (a)). Otherwise, the criteria of coverage diverge from the Model Act, and Subsections (b), (c), and (d) were not adopted
Washington	REVISED CODE OF WASHINGTON § 51.12.120	?	In full. The Washington statute also includes subsections addressing reciprocal agreements.
Wisconsin	WISCONSIN STATUTES § 102.03	?	Subsection (a) only adopted. The phrase "principally localized" does not seem to be defined as per the model statute, or at all. Certain law enforcement personnel are added when working under particular circumstances.
Wyoming	WYOMING	?	In minimal part. Subsection (a) seems to have language that

	STATUTES § 27-14-301 § 27-14-204		follows the Model Act, though in 2006 the criterion of coverage, "if the employment is principally localized in Wyoming" was repealed. In addition, the definition of "principal location of employment" was deleted in the same year. Subsection (b) appears, in principle, in a separate statute.

APPENDIX D

TABLE
APPROACH TO EXTRATERRITORIAL JURISDICTION OF STATES CONTIGUOUS TO PENNSYLVANIA

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State	Statute	Criteria	Illustrative Case
New York	None. "The jurisdiction of the New York State Workers' Compensation [WC] Board is not defined anywhere in the [WC] Law."[205] Rules are found in case law.	"For the Board to have jurisdiction over a claim arising from a work-related injury that occurred outside New York, it must determine whether there were sufficient and significant contacts between the state and the employer to support a reasonable conclusion that the employment was to some extent sited in this state …. In making that determination, the Board may consider, among other things, the extent to which the employer conducted business in New York, whether the employee resides in New York, how the employee was recruited and hired by the employer, whether the employee was expected to return to New York after completing out-of-state work assignments for the employer and whether the employer routinely contacted the employee regarding work assignments while the employee was located in New York."	*Deraway v. Bulk Storage, Inc*., 858 N.Y.S.2d 459 (S. Ct. NY 2008) (quoted at left).
New Jersey	None Rules are found in case law.	"[T]he following factors traditionally trigger jurisdiction in the New Jersey compensation court: (1) the injury occurred in New Jersey …; (2) New Jersey is the place of the employment contract or hiring ….; (3) the employee lives in New Jersey …. and there were at least some employment contacts in New Jersey …; and (4) "where there exists neither location of the injury, location of the employment contract or hiring, or residency of the employee in New Jersey, jurisdiction may still arise where the 'composite employment incidents present a[n] . . . identification of the employment relationship with	*International School Services, Inc. v. New Jersey Dept. of Labor & Workforce Dev*., 2009 N.J. Super. LEXIS 157 (N.J. Super. 2009) (quoted at left, itself quoting *Connolly v. Port Authority of NY*, 722 A.2d 110 (N.J. Super. 1998)).

[205] NEW YORK WORKERS' COMPENSATION HANDBOOK, § 50.08 (Lexis 2009).

		this State.'" …. The location of the employer, however, is never, by itself, sufficient to confer jurisdiction over out-of-state injuries."	
Delaware	19 DELAWARE CODE § 2303	Same as Pennsylvania, though Delaware did not alter definition of "principally localized" as did PA	
Maryland	MARYLAND LABOR AND EMPLOYMENT CODE § 9-203 **Note**: Intraterritoriality is also addressed.	§ 9-203. Site of employment (a) In general. -- Except as otherwise expressly provided, an individual is a covered employee while working for the employer of the individual: (1) in this State; (2) outside of this State on a casual, incidental, or occasional basis if the employer regularly employs the individual within this State; or (3) wholly outside the United States under a contract of employment made in this State for the work to be done wholly outside of the United States. **[*Intraterritoriality*]** (b) Incidental service in State. -- (1) An individual is not a covered employee while working in this State for an employer only intermittently or temporarily if: (i) the individual and employer make a contract of hire in another state; (ii) neither the individual nor the employer is a resident of this State; (iii) the employer has provided workers' compensation insurance coverage under a workers' compensation or similar law of another state to cover the individual while working in this State; (iv) the other state recognizes the extraterritorial provisions of this title; and (v) the other state similarly exempts covered employees and their employers from its law. (2) If an individual is exempted from coverage under this subsection and injured in this State while working for the employer of the individual, the sole remedy of the individual is the workers' compensation or similar law of the state on which the exemption is based. (3) A certificate from an authorized officer of the workers' compensation commission or similar unit of another	*Hodgson v. Flippo Constr. Co*., 883 A.2d 211 (Ct. Special Appeals MD 2005).

		state certifying that the employer is insured in that state and has provided extraterritorial insurance coverage for the employees of the employer while working within this State is prima facie evidence that the employer carries that compensation insurance. (c) Outside State. -- Except as otherwise expressly provided, an individual who is employed wholly outside of this State is not a covered employee.	
West Virginia	WEST VIRGINIA CODE § 23-2-1a § 23-2-1c **Note**: Intraterritoriality is also addressed by statute, but also by regulation. *See* West Virginia Code of State Rules § 85-8-7 ("Extraterritorial Coverage and Related Issues")	Sec. 23-2-1(b)(3) (b) The following employers are not required to subscribe to the fund, but may elect to do so: … (3) Employers of employees while the employees are employed without the state except in cases of temporary employment without the state …. § 23-2-1a (a) Employees subject to this chapter … [include]: (1) Persons regularly employed in the state whose duties necessitate employment of a temporary or transitory nature by the same employer without the state. ***[Choice of law agreements]*** § 23-2-1c (a) Whenever … there is a possibility of conflict with respect to the application of workers' compensation laws because the contract of employment is entered into and all or some portion of the work is performed or is to be performed in a state or states other than this state, the employer and the employee may agree to be bound by the laws of this state or by the laws of any other state in which all or some portion of the work of the employee is to be performed: …. If the parties agree to be bound by the laws of this state, an employee injured within the terms and provisions of this chapter is entitled to benefits under this chapter regardless of the situs of the injury or exposure to occupational pneumoconiosis or other occupational disease, and the rights of the employee and his or her dependents under the laws of this state shall be the exclusive	*McGilton v. U.S. Express Enterprises, Inc.*, 591 S.E.2d 158 (S. Ct. WV 2003)

		remedy against the employer on account of injury, disease or death in the course of and as a result of the employment. (b) If the parties agree to be bound by the laws of another state and the employer has complied with the laws of that state, the rights of the employee and his or her dependents under the laws of that state shall be the exclusive remedy against the employer on account of injury, disease or death in the course of and as a result of the employment without regard to the situs of the injury or exposure to occupational pneumoconiosis or other occupational disease. ***[Intraterritorial claims limited]*** omitted ***[Coordination provision]*** omitted	
Ohio	None OHIO REVISED CODE § 4123.01 § 4123.54 address intraterritoriality, choice of law, coordination of claims, and reciprocity agreements	"An employee injured outside the state may recover under the Ohio act if the employing industry and his relationship thereto are localized in Ohio…. The determination of whether employment is localized in Ohio for purposes of workers' compensation coverage entails an inquiry into the claimant's contacts with the state. In making this determination, courts look at (1) where the employment contract was executed; (2) where the employee's name is included on the payroll reports; (3) where the injury occurred; (4) the employee's residence; (5) where the employee works; (6) whether the employee can receive workers' compensation benefits elsewhere; (7) the relationship between the employee's work and the employer's place of business; and (8) which state has the primary interest in the employee." ***[Choice of law agreements]*** omitted: same as West Virginia **[*Coordination provision*]** omitted **[*Reciprocity: Intraterritorial claims limited]*** omitted	*Standring v. Gebrus Bros*., 2002 Ohio App. LEXIS 5685 (Ct. Appeal OH 2002) (quoted at left).