Eisele, Athena

COVERAGE AND EXCLUSIONS

Reciprocity agreements

A person who works at a Washington State place of business of an Idaho employer and is domiciled in Washington, is a Washington worker covered by the Washington Industrial Insurance Act pursuant to the reciprocal agreement between Washington and Idaho (WAC 296-17-31009). ***….In re Athena Eisele*, BIIA Dec., 09 10809 (2010)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ATHENA A. EISELE	**)**	**DOCKET NO. 09 10809**
	)	
CLAIM NO. AE-90495	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Athena A. Eisele, by
Petgrave & Petgrave, PLLC, per
Randolph O. Petgrave

Employer, Inland Waterproofing Service, by
Shelley Carlson, Vice President

Department of Labor and Industries, by
The Office of the Attorney General, per
William A. Garling, Jr., Assistant

The claimant, Athena A. Eisele, filed an appeal with the Board of Industrial Insurance Appeals on February 2, 2009, from an order of the Department of Labor and Industries dated December 11, 2008, in which the Department affirmed an order dated January 9, 2008. In this order, the Department rejected the claim on the grounds the worker was an Idaho worker at the time of injury and not covered under the industrial insurance laws of the state of Washington. The Department order is **REVERSED AND REMANDED.**

OVERVIEW

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on December 31, 2009, in which the industrial appeals judge affirmed the December 11, 2008 Department order. The employer and the Department filed responses to the Petition for Review. The Board has reviewed the evidentiary rulings in the record of proceedings. The employer's relevance objection to Exhibit No. 2 is sustained. That exhibit is a disc containing photographs of a property purchased by the employer in Washington, after the claimant was no longer employed by Inland Waterproofing Service. The exhibit is rejected because it is not relevant to any issue before the Board. Likewise, any testimony regarding that exhibit is stricken. The Board finds that no other prejudicial error was committed and the remaining rulings are affirmed.

The Department rejected the claim on the grounds the claimant was an Idaho worker at the time of injury and not covered under the industrial insurance laws of the state of Washington. The issue on appeal is whether Ms. Eisele was excluded from coverage under the Washington industrial insurance laws pursuant to the reciprocal agreement between Washington and Idaho, set forth in WAC 296-17-31009.

The industrial appeals judge assumed that Ms. Eisele was an Idaho worker under subsection 4 of the reciprocal agreement without first going through the step-by-step analysis required by subsection 2 of that agreement. We conclude that, under either subsection 2(1) or 2(2), Ms. Eisele was a Washington worker. The December 11, 2008 Department order is reversed and the claim is remanded to the Department with directions to determine that Ms. Eisele was a Washington worker at the time she alleges she sustained an occupational condition. The Department has made no determination yet regarding whether the claimant suffered an industrial injury or an occupational disease. That question must be addressed by the Department on remand.

DECISION

The claimant presented her own testimony and that of Joan Lane, a former employee of Inland Waterproofing Service. The Department and employer presented the testimony of Shelley Carlson, the vice-president of Inland Waterproofing Service, and Luane Church, an accounts payable clerk and current payroll manager for the employer.

There is no dispute about the following facts, either because the parties presented consistent testimony or because the evidence presented by one party stands unrebutted. Ms. Eisele was hired in August 2007, to work for Inland Waterproofing Service. The employer has an office in Coeur d'Alene, Idaho, and does business in Idaho, Washington, and Montana. Ms. Eisele worked for the employer from August 2007, until sometime in January 2008, filing a claim for Washington industrial insurance benefits on January 7, 2008.

A claim was also filed on her behalf with the Idaho State Insurance Fund. The record does not reveal the status of that claim. The employer has paid workers' compensation taxes to the Idaho State Insurance Fund to cover Ms. Eisele. The company has not paid industrial insurance taxes to the Washington State Fund.

During the entire period of her employment, Ms. Eisele was living in Kirkland, Washington, and all the work she performed for the company was in Washington. She visited the company's Idaho office prior to beginning her employment and for the company Christmas party in December 2007. The company rented two apartments and storage facilities used to store some work materials and some tools in Renton, Washington. Ms. Eisele drove to Renton each day to pick up a company truck and the crew for the day's work. She returned to Renton each evening to drop off the truck and the crew, and to pick up her own vehicle. The rest of the crew traveled to Washington from Idaho every Sunday night and went home every Thursday night, staying in the Renton apartments during the week.

The parties disagree regarding whether the Renton apartments and storage facilities were places of business. They also disagree regarding what was contemplated in the future, that is, whether Ms. Eisele was going to be required to work in Idaho and Montana, not just Washington. In addition, they provided differing stories regarding when and where the contract of employment was entered into. According to the employer, Ms. Eisele was hired when she visited the Idaho office. According to the claimant, she was hired several weeks later, after she had returned to Washington. Neither party provided any supporting documentary evidence.

After reviewing the evidence, the industrial appeals judge made the following factual determinations:

> Ms. Eisele was hired by an Idaho company, Inland Waterproofing Service that does business in at least three states: Idaho; Washington; and Montana. Ms. Eisele is, and at all relevant times has been, a domiciliary of the State of Washington. All of the work she performed for Inland was performed in the State of Washington. At the time she incurred whatever alleged occupational disease she developed, she was working and living in the State of Washington.

Proposed Decision and Order, at 3.

The industrial appeals judge noted that: "Given these facts one would think that Ms. Eisele's appeal is well taken and that the Department's decision to reject her claim is both wrong and unreasonable." Proposed Decision and Order, at 3. However, the industrial appeals judge concluded that, under RCW 51.12.120(7) and WAC 296-17-31009, she was required to affirm the Department's rejection of the claim on the basis that Ms. Eisele was an Idaho worker.

RCW 51.12.120(7) permits the director of the Department to enter into reciprocal agreements with agencies in other states "with respect to conflicts of jurisdiction and the assumption of jurisdiction in cases where the contract of employment arises in one state . . . and the injury occurs in another." Once entered into, those agreements are binding with respect to jurisdictional determinations. Washington and Idaho have entered into a reciprocal agreement, which is set forth in WAC 296-17-31009. The industrial appeals judge quoted at length from that agreement, highlighting subsection 4, which provides:

> The Idaho IAB [Industrial Accident Board] in keeping with the provision of the Idaho WC law will assume and exercise extraterritorial jurisdiction of compensation claims on any Idaho worker injured in the state of Washington and of his/her dependents upon any Idaho employer under its jurisdiction and the latter's surety or insurance carrier.

The industrial appeals judge concluded that:

> In substance, the reciprocal agreement between Washington and Idaho embodied in WAC 296-17-10009 [*sic*-WAC 296-17-31009] metamorphoses Ms. Eisele from a Washington worker to an Idaho worker. Her residence here, her performance of her job exclusively in Washington, is not a factor. The agreement between the states mandates she be considered an Idaho worker.

Proposed Decision and Order, at 5.

It is not clear how the industrial appeals judge reached that conclusion in the absence of an analysis of whether Ms. Eisele's employment was principally localized in Idaho or Washington, which is key to determining whether she was an Idaho or Washington worker within the meaning of subsection 2 of the reciprocal agreement. That subsection provides in pertinent part:

> 2. For the purposes of this agreement: Person whose employment is "principally localized" in Idaho shall be deemed to be an Idaho worker. A person's employment is "principally localized" in Idaho when:
>
> (1) His/her employer has a place of business in Idaho and he/she regularly works (or it is contemplated that he/she shall regularly work) at or from such place of business; or
>
> (2) If clause (1) foregoing is not applicable, he/she is domiciled and spends a substantial part of his/her working time in the service of his/her employer in Idaho.
>
> . . .
>
> An employee whose duties require him/her to travel regularly in the service of his/her employer in more than one state may, by written agreement with his/her employer, designate the state in which his/her employment shall be "principally localized." Unless the state so designated refuses jurisdiction, such agreement shall be given effect under the instant agreement.
>
> In cases where none of the foregoing tests can be made to apply, the person shall be deemed to be a worker of whichever jurisdiction in which his/her contract of hire was made.

Identical provisions apply to determine if a person is a Washington worker, which is the flip side of the same question.

Thus, there are four steps for determining if the claimant was an Idaho worker, which can be reduced to the following four questions:

1. Did Ms. Eisele's job duties require her to travel regularly in more than one state and did the parties enter into a written agreement designating Idaho as the state where her employment was considered to be principally localized?
2. Did Inland Waterproofing Service have a place of business in Idaho out of which Ms. Eisele regularly worked or it was contemplated she would regularly work?

3. Was Ms. Eisele domiciled in Idaho and did she spend a substantial part of her working time in the service of Inland Waterproofing Service in Idaho?

4. Was the contract of hire made in Idaho?

There is a parallel set of questions to determine if Ms. Eisele was a Washington worker:

1. Did Ms. Eisele's job duties require her to travel regularly in more than one state and did the parties enter into a written agreement designating Washington as the state where her employment was considered to be principally localized?

2. Did Inland Waterproofing Service have a place of business in Washington out of which Ms. Eisele regularly worked or it was contemplated she would regularly work?

3. Was Ms. Eisele domiciled in Washington and did she spend a substantial part of her working time in the service of Inland Waterproofing Service in Washington?

4. Was the contract of hire made in Washington?

The reciprocal agreement mirrors the criteria set forth at RCW 51.12.120(5) and (6), adding the place of contract as an additional mechanism for determining where the employment is principally localized. In applying the reciprocal agreement, the first consideration is whether a worker and an employer have entered into an agreement regarding the applicable jurisdiction. If so, that agreement controls, unless the designated state refuses jurisdiction. In the current appeal, there is no evidence of such an agreement.

Turning to the remaining criteria, the reciprocal agreement envisions a process of elimination, beginning with subsection 2(1), proceeding to subsection 2(2) if necessary, and looking to the place of contract as a last resort if "none of the foregoing tests can be made to apply." Thus, if Ms. Eisele's employment is not considered "principally localized" in either Idaho or Washington under subsection 2(1), subsection 2(2) must be explored next, and then the place of contract.

In her Petition for Review, the claimant argues that she meets the criteria for a Washington worker under either subsection 2(1) or 2(2). We agree, and do not find it necessary to reach the question of where the contract of hire was made.

Did Inland Waterproofing Service have a place of business in Idaho out of which Ms. Eisele regularly worked or it was contemplated she would regularly work? Alternatively, did Inland Waterproofing Service have a place of business in Washington out of which Ms. Eisele regularly worked or it was contemplated she would regularly work?

The parties agree that Inland Waterproofing Service had a place of business in Idaho. However, Ms. Eisele did not regularly work out of it. She visited the office prior to beginning her employment and once for a company Christmas party. According to Ms. Eisele, she understood she was working for an Idaho company exclusively in Washington. 10/19/10 Tr. at 19. Ms. Church testified that the claimant was not hired to work exclusively in Washington. 10/19/10 Tr. at 49. Ms. Lane testified that the location of the intended employment was Washington (10/19/10 Tr. at 34), but that the claimant anticipated moving to Idaho and came to stay in Idaho for several months after she stopped working for Inland Waterproofing Service. 10/19/10 Tr. at 42, 44. Everyone agreed that Ms. Eisele worked solely in Washington during the six months she was employed by Inland Waterproofing Service.

According to Ms. Carlson, the claimant was working solely in Washington until her daughter finished high school. "It was a hardship for our company to have a person in that position, but out of respect and as a pre-arranged condition, that she—upon her hire she asked that she stay in the vicinity until her daughter was out of school and then she would be free to travel as the job requires." 10/19/10 Tr. at 76. The claimant's daughter turned 17 on October 5, 2009 (10/19/10 Tr. at 17), so she was 14 years old when the claimant was hired. Thus, even if it was expected that Ms. Eisele would, in the years to come, work outside Washington, when she was hired it was contemplated that she would work solely in Washington for three or four years.

We turn, then, to the question of whether Inland Waterproofing Service had a place of business in Washington out of which the claimant regularly worked. The parties agree that the employer rented two apartments in Renton, that one of them had a fax machine, and that the employer rented storage facilities in Renton. It appears that the apartments were primarily used to house men who drove over each week from Idaho to work. Ms. Church said the fax machine was used by Randall Carlson, Ms. Carlson's husband, to receive bids. 10/19/10 Tr. at 58. The claimant asserted it was used to receive work orders. 10/19/10 Tr. at 10-11. Ms. Lane said she faxed new work orders to the Renton apartment. 10/19/10 Tr. at 35. Ms. Carlson testified that the men were given their work orders at the Coeur d'Alene office each week, before they drove back to Washington. 10/19/10 Tr. at 82. Employees were also provided with company issued cell phones for maintaining contact.

Ms. Church initially testified that the company did not maintain trucks in Washington (10/19/10 Tr. at 52), however she later acknowledged that she did not know (10/19/10 Tr. at 56-57). Ms. Eisele presented photographs that she said were taken in Renton, depicting company trucks,

the apartments, and the storage facilities. Exhibit No. 1. She said that, as an employee, she had keys to the apartments, the trucks and the storage facilities. She drove to Renton each day to pick up a truck and crew, and she dropped them back off in Renton after the day's work was done. That depiction of her work day was not rebutted by the employer. Ms. Carlson agreed that Ms. Eisele's reporting station was in the state of Washington, though she also pointed out that "sometimes her reporting station was by cell phone or my office phone in Idaho." 10/19/10 Tr. at 74. Likewise, while there was some difference between the employer and the claimant regarding what was stored in the storage facilities and whether supplies were shipped directly to Renton, both agreed that the company rented the facilities and stored some materials and some tools there.

We have found no Washington cases deciding what constitutes a "place of business" within the meaning of RCW 51.12.120(5) or subsection 2(1) of the Idaho/Washington reciprocal agreement. However, there are cases interpreting the phrase "places of business" in RCW 50.04.140(2), which addresses the extent to which independent contractors are excluded from unemployment compensation coverage, and RCW 51.08.195(2), which addresses the extent to which independent contractors are excluded from industrial insurance coverage. Under RCW 51.08.195(2), one of the criteria for excluding an independent contractor from mandatory industrial insurance coverage is the determination that the "service is performed outside of all the places of business of the enterprises for which such service is performed." Likewise, under RCW 50.04.140(2), one of the criteria for excluding an independent contractor from unemployment compensation coverage is the determination that the "service is performed outside of all the places of business of the enterprises for which such service is performed."

In both contexts, the phrase "places of business" has been interpreted broadly. In *Miller v. Washington State Employment Security Dept.*, 3 Wn. App. 503 (1970), Joseph Miller was a logging contractor who entered into a contract with the owners of timber to log a 230-acre parcel of land. He then subcontracted the job out to Louis Uitto and William Fuller. The question was whether Mr. Miller was required to pay unemployment compensation taxes on behalf of Mr. Uitto and Mr. Fuller. Mr. Miller argued that the two were excluded from unemployment compensation coverage under RCW 50.04.140. The court concluded they were not, focusing on RCW 50.04.140(2) and holding: "When Miller contracted with the owners of the timber to log the 230-acre tract, that tract then became one of his places of business — a place where he and his employees on his behalf were engaged in a work effort hopefully for profit." *Miller*, 3 Wn. App. at

506. Thus, Mr. Uitto's and Mr. Fuller's services were not performed outside all of Mr. Miller's places of business and he was required to pay unemployment compensation taxes on their behalf.

Likewise, in *Schuffenhauer v. Department of Employment Security*, 86 Wn.2d 233 (1975), the Supreme Court concluded that clam diggers working on tidelands leased by the employer were not excluded from unemployment compensation coverage under RCW 50.04.140. The court held that property leased in connection with an employer's business constitutes one of the employer's places of business within the meaning of RCW 50.04.140(2).

Finally, in *In re Alliance Flooring Service, Inc.*, Dckt. No. 03 32294 (June 13, 2005), we concluded that carpet installers were not excluded from industrial insurance coverage under RCW 51.08.195(2), reasoning as follows: "For the most part, the installation service itself was performed outside Alliance's place of business. However, the installers went to Alliance's warehouse to pick up the carpet or vinyl. As a result, the installers' services were not performed outside **all** of the firm's places of business." (Emphasis in the original.) *Alliance* at 5.

We reach a similar conclusion here regarding what constitutes a place of business within the meaning of the reciprocal agreement. The properties rented by Inland Waterproofing Service in Renton, Washington, were places of business for the employer because the company parked its trucks there, stored materials and tools there, and required employees to pick up trucks and materials from those locations.

In summary, Inland Waterproofing Service had places of businesses in both Idaho and Washington. However, Ms. Eisele did not regularly work out of the Idaho place of business, nor was it contemplated that she would do so in the foreseeable future. Instead, she regularly worked out of the Washington places of business. She was therefore a Washington worker within the meaning of subsection 2(1) of the reciprocal agreement.

Was Ms. Eisele domiciled in Idaho and did she spend a substantial part of her working time in the service of Inland Waterproofing Service in Idaho? Alternatively, was Ms. Eisele domiciled in Washington and did she spend a substantial part of her working time in the service of Inland Waterproofing Service in Washington?

Having concluded that Ms. Eisele was a Washington worker under subsection 2(1), we need not analyze the facts under subsection 2(2). However, in the event our determination is reversed, we note that the parties agree Ms. Eisele was domiciled in Washington, not Idaho, and that she spent all of her time working in Washington. Thus, under subsection 2(2) as well as subsection

2(1) she was a Washington worker, entitled to the coverage of the Washington Industrial Insurance Act. On either basis, the December 11, 2008 Department order must be reversed.

Depending on the status of the Idaho claim, it is possible that offsets may apply under RCW 51.12.120(2). In addition, the insurance the employer has already purchased in Idaho may suffice under RCW 51.12.120(4). However, both of those issues are beyond the scope of our review in the current appeal and will have to be addressed by the Department on remand.

FINDINGS OF FACT

1. On January 7, 2008, Athena Eisele filed an Application for Benefits with the Department of Labor and Industries in which she alleged she sustained an occupational disease while in the course of employment with Inland Waterproofing Service. On January 9, 2008, the Department rejected the claim for the reason that the claimant was an Idaho worker at the time of the injury and was not covered under the industrial insurance laws of the state of Washington.

   On March 3, 2008, the claimant filed a Protest and Request for Reconsideration. On December 11, 2008, the Department affirmed the January 9, 2008 order. On February 2, 2009, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On March 18, 2009, the Board granted the appeal under Docket No. 09 10809, and agreed to hear the appeal.

2. Athena Eisele was an employee of Inland Waterproofing Service from August 2007, to some time in January 2008.

3. Inland Waterproofing Service has a place of business in Coeur d'Alene, Idaho, and does business in Idaho, Washington, and Montana.

4. During the time she worked for Inland Waterproofing Service, Ms. Eisele was domiciled in Kirkland, Washington.

5. During the time Ms. Eisele worked for Inland Waterproofing Service, the employer maintained places of business in Renton, Washington.

6. Ms. Eisele regularly worked out of Inland Waterproofing Service's places of business in Renton, Washington.

7. Ms. Eisele did not regularly work out of Inland Waterproofing Service's place of business in Coeur d'Alene, Idaho. Ms. Eisele was hired to work solely in Washington for several years, until her daughter completed high school in Washington. Until then, it was not contemplated that she would regularly work out of the employer's place of business in Coeur d'Alene, Idaho.

8. All of the work Ms. Eisele performed for Inland Waterproofing Service was performed in the state of Washington.

9. The Industrial Accident Board of the state of Idaho and the Department of Labor and Industries of the state of Washington, as administrators of the workers' compensation laws of their respective states, entered into a

reciprocity agreement involving their respective extraterritorial jurisdictional powers and duties effective January 1, 1971.

10. Based on its understanding of the reciprocal agreement between Idaho and Washington, Inland Waterproofing Service paid workers' compensation taxes to the Idaho State Insurance Fund to cover Ms. Eisele and did not pay industrial insurance taxes to the Washington State Fund.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. Athena Eisele is a Washington worker within the meaning of RCW 51.12.120 and the Idaho/Washington reciprocal agreement set forth in WAC 296-17-31009.

3. The December 11, 2008 Department order is incorrect and is reversed. The claim is remanded to the Department with directions to: determine that Ms. Eisele was a Washington worker at the time she alleges she sustained an occupational condition as a result of her employment with Inland Waterproofing Service; determine whether the claimant suffered an industrial injury or an occupational disease arising out of or in the course of her employment with Inland Waterproofing Service; determine whether any offsets apply under RCW 51.12.120(2); determine if the provisions of RCW 51.12.120(4) apply; and take further action as indicated by the law and the facts.

Dated: March 16, 2010.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member