

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

TOWN OF DELMAR, )  
 )  
 Employer, )  
 )  
 v. ) Hearing No. 1462051 (HEACOOK)  
 )  
 CHESAPEAKE INSURANCE, )  
 (“CHESAPEAKE”) )  
 )  
 Insurer, )  
 )  
 and )  
 DELEA FOUNDERS INSURANCE )  
 TRUST (“DFIT”), )  
 )  
 Insurer. )

**ORDER**

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on July 10, 2019, in a Hearing Room of the Board, in Dover, Delaware. Final deliberations concluded on July 22, 2019.

On June 18, 2018, Town of Delmar (“Employer”) filed a Motion requesting the Board to Review Keith Heacock’s (“Claimant”) Agreement as to Compensation and determine its insurance coverage for Claimant’s work accident and injuries.

The parties stipulated that Employer operates a joint, interstate police force in Delmar, Delaware and Delmar, Maryland, the employees of which, for many years, were covered by Strategic Insurance Partners (“SIP”). In 2017, SIP inducted Employer into Delaware’s DFIT and Chesapeake Insurance programs to cover its employees.

On June 5, 2017, Claimant was injured in a work accident while working in Sussex County, Delaware. Initially, Chesapeake paid more than \$8,000.00 of Claimant's medical bills, but when Chesapeake and DFIT denied coverage, Employer entered into an agreement and began paying Claimant compensation directly.

Jacqueline Baroody, claims supervisor for Chesapeake Insurance, testified by video deposition on Employer's behalf. Ms. Baroody testified that the adjusters first verify that a policy is insured, investigate to determine compensability and then determine whether to open a claim and issue benefits, after a claim is reported initially. Ms. Baroody testified that Claimant's June 5, 2017 claim was originally filed as "record only" and assigned a claim number because there was no treatment initially. She confirmed that Employer reported that Claimant was an employee on June 5, 2017 when he was injured while working in Delmar, Delaware. She confirmed that Employer's policy number is 5212588 and Claimant's claim is 6387545.

Ms. Baroody acknowledged that Chesapeake had issued a letter (with her signature), dated June 7, 2017, in which it acknowledged receipt of Claimant's report of the work related injury. She reported that the normal process involves submitting the claim to Maryland's Workers' Compensation Commission electronically, but Claimant's had not been submitted because Claimant chose to file for benefits in Delaware. She agreed that when Maryland's Workman's Compensation Commission receives the First Report of Injury, a claim number is assigned for the claim after the employee files a claim in Maryland. Ms. Baroody agreed that the June 7, 2017 letter she sent to Employer directed Employer to send all Claimant's medical bills to Chesapeake and indicated that Chesapeake would pay Claimant's medical expenses. The June 7, 2017 letter also directed Employer to contact Chesapeake if Claimant was absent from work for more than three days because after that time, Claimant's claim would become an indemnity claim.

Ms. Baroody admitted that Chesapeake had issued payments for Claimant's claim from June 7, 2017 to August 16, 2017, based on Claimant's claim #6387545, with an occurrence date of June 5, 2017. Employer's policy number and name were listed as the associated policies. She confirmed that Chesapeake paid more than \$8,000.00 in medical expenses, including payments for physical therapy, diagnostic studies, and providers. Ms. Baroody testified that payments were made regularly until August 30, 2017, when Claimant's claim exceeded \$2,500.00, which caused her to review it. Ms. Baroody testified that, when she saw that Claimant was pursuing Delaware benefits, "...we would stop any authorizations or payments for medical treatment since he has – he was opting not to pursue a Maryland claim." Baroody Deposition 22:21-24 (July 3, 2019).

Ms. Baroody confirmed that the claim was reported to Chesapeake as having occurred in Delaware from the beginning and they began issuing payments immediately following the report of the incident. She believed the claim to be a Maryland based claim because Claimant worked in Maryland and "the policy cover[sic] Maryland." *Id.* at 24:16-17. She agreed that the fact that the work accident occurred in Delaware had no bearing on Claimant's coverage. Ms. Baroody confirmed that a pre-certification nurse at Chesapeake issued a letter, dated September 25, 2017, in which it indicated it was denying Claimant's claim because "it was in another jurisdiction." *Id.* at 25:23-24. Ms. Baroody acknowledged that, on September 18, 2018, Jenn Conlon, a claims adjuster from Chesapeake, issued a letter indicating Chesapeake has reopened Claimant's claim. She was unaware of any instance in which Chesapeake has paid a claim and was bound by Delaware's workers' compensation law.

On cross examination by Chesapeake's counsel, Ms. Baroody reported that the information documented in the First Report of Injury is provided by Employer, but Chesapeake employees "possibly" alter the information provided. *Id.* at 31:19. She reported that the bills

Chesapeake paid on Claimant's claim were paid pursuant to the Maryland fee schedule and none of the medical claims or state forms were filed with Delaware. She confirmed that Claimant's claim was handled as a Maryland claim.

On cross examination by DFIT's counsel, Ms. Baroody admitted that she was aware that the work accident occurred in Delaware from the time it was originally reported and the fact that the injury occurred in Delaware did not raise any "red flags" in the initial investigations process. Ms. Baroody denied that the payments made from June 7, 2017 until August 16, 2017 should be characterized as made by mistake. She agreed that it is possible for a claim in which the accident occurs in a different state than where the employee is located could be governed by the law of that different state. Ms. Baroody testified that "...our concern is does the Maryland policy cover this claim, and it – and it does and it did and it still does." Baroody Deposition 38:3-6 (July 3, 2019). She testified further that Chesapeake accepted the claim and was "...willing to pay Maryland benefits. [Claimant] opted not to go that route." *Id.* at 38:23-24, 39:1. Ms. Baroody testified that her understanding of the process is that an insurance policy written in Maryland is prohibited from paying benefits under another state's law. She was unaware of exactly why Chesapeake denied the claim, but she had sought advice from their legal department.

Ms. Baroody confirmed that Claimant is "...covered for Maryland benefits no matter where he is. So we're not denying the claim, but – in Maryland, for Maryland benefits. But he chose not to pursue his benefits in Maryland. He pursued – pursuing them somewhere else. So we are no longer responding to the claim because he's pursuing a claim – through another jurisdiction... ." Baroody Deposition 48:17-24, 49:1-3 (July 3, 2019). She explained that Claimant is covered by Chesapeake whether he is injured in Delaware or Maryland, but his claim was denied because he chose to pursue benefits in Delaware.

On redirect examination by Employer's counsel, Ms. Baroody admitted she had processed other claims in which an employee could have filed a claim in more than one state, but initially chose Maryland. Ms. Baroody confirmed her testimony that Chesapeake pays Maryland benefits and that the only reason Chesapeake denied Claimant's claim is because he chose to pursue benefits in Delaware instead of Maryland. She confirmed that employees working in another state on an incidental basis are covered under Chesapeake's policies.

On re-cross examination by Chesapeake's counsel, Ms. Baroody agreed that there is a difference between insurance coverage and jurisdiction and insurance companies do not pay claims for which they do not provide coverage.

On re-cross examination by DFIT's counsel, Ms. Baroody denied that Chesapeake is notifying other insureds that they may be uninsured if their employees are injured while working in Delaware.

Mary Louise Wozney, underwriter for Chesapeake Insurance, testified on behalf of Employer. Ms. Wozney testified that she reviews underwriting guidelines when considering coverage. If the underwriting guidelines are unclear she will review the statutes or consult with counsel. Ms. Wozney reported that Chesapeake Insurance was formerly IWIF, but the Board of Directors remain appointed by the Governor of Maryland. Ms. Wozney underwrote the policy for the Employer. She agreed that each employer has one employer identification number and they use that number as an identifier for the entity. She agreed that the policy she underwrote for Employer covered all police officers employed by it and included on its payroll. Ms. Wozny confirmed that Chesapeake received payroll deductions from Employer's police officers for Maryland coverage.

Ms. Wozny agreed that if Claimant's payroll was included in the policy, then he would be a covered employee in the policy she underwrote. The policy she underwrote included an endorsement which indicates Chesapeake will promptly pay and defend for an employee who is working in another jurisdiction. Ms. Wozny testified that she does not believe the endorsement would apply because "there is Delaware coverage." She reported that there was separate coverage for Delaware and she calculated the premiums based on Maryland coverage. She testified that "as an underwriter that's a claims issue" when asked if the location of the accident made a difference. Ms. Wozny testified that if a Maryland employee is injured in another state and returns to Maryland and applies for benefits, then their policy would cover that injury. If a Maryland employee "regularly" works in another state and is injured, then that employer would need to obtain coverage for that other state. She agreed that the terms are not defined in the endorsements and she assumes that the agent reviews the policy with the client. Ms. Wozny agreed that many politicians were included in Employer's coverage and includes both politicians from both Maryland and Delaware. She could not recall the percentage of Delaware politicians included in the policy, but did recall that they were included in the policy.

On cross examination by Chesapeake's counsel, Ms. Wozney testified that Employer's policy applied to Maryland workers' compensation law only. She confirmed that the endorsement to the policy confirmed that Chesapeake would not cover Maryland employees who regularly worked in other states and employers with such employees should obtain additional coverage.

Ms. Wozney reported that she is not allowed to speak directly to employers, but deals with the insurance brokers. As far as Ms. Wozney is aware, Claimant is covered under Maryland's system.

When questioned by counsel for DFIT, Ms. Wozney acknowledged that Chesapeake had paid some of the claims associated with Claimant's claim. She explained that Chesapeake covers whichever employees whose payrolls are submitted to them. Ms. Wozney agreed that police, municipal employees, politicians and some clerical employees are included as Maryland covered employees. She agreed that emergency medical technicians were not included in Maryland coverage because they are included in Delaware coverage. She acknowledged that a Maryland employee who is injured in Delaware has a right to choose the jurisdiction in which to pursue benefits and that is different than asking an insurance company to write insurance in a different jurisdiction. Ms. Wozney testified that the decision to deny Claimant's claims was made by the claims department because he did not pursue Maryland benefits. She reported David Wilt told them that Employer had coverage for Delaware.

When questioned by Claimant's counsel, Ms. Wozney testified that her job is not to decide whether to write a policy at all, but they do decline to write policies for states other than Maryland. She agreed that part of underwriting includes deciding on the premium associated with that policy. When determining pricing, she considers the applicant's job, salary, and the rates for the classifications. Ms. Wozney agreed that she was aware that the policy she underwrote for Employer included police officers and she was aware that police officers worked in both jurisdictions. The payroll she received from Employer was for Maryland police officers. She did not assess how much time the police officers spent in one jurisdiction or another. She agreed that she did not believe the police officers received paychecks from any other state and she accepted payroll from Maryland. She believes that Claimant was a Maryland employee at the time of his work accident and his injury appears to be covered "if he was filing for Maryland benefits." Ms.

Wozny reported that she does not believe Claimant's employment is "incidental" because she was told there was Delaware coverage.

On re-direct examination by Employer's counsel, Ms. Wozny agreed that municipal employees are covered by Chesapeake's policy, but was unaware that the municipal employees' office is located in Delaware. Ms. Wozny confirmed that if Claimant had filed his claim in Maryland, Chesapeake would have covered his claim. She was unaware why a different tribunal made a difference in whether coverage was offered.

When questioned by the Board, Ms. Wozny confirmed that Chesapeake covers the Delmar Police Department.

Casey Robinson, premium audit director for Chesapeake Insurance, testified by video deposition on behalf of Employer. Mr. Robinson confirmed that Employer's Federal Employee Identification Number for the fiscal year 2017 was 52-6002077. Mr. Robinson agreed that Employer's workers' compensation policies (as listed on the Maryland Worker's Compensation Commission website) from 2013, 2014, 2015 indicated Employer had one location and its 2016 and 2017 policies indicate Employer has two locations. Employer's 2018 policy lists Employer as having one location. In fiscal year 2017, Chesapeake conducted an audit of Employer's records, including payroll records, business locations and business operations descriptions.

Mr. Robinson confirmed that Employer's 2017 payroll records indicate the location of the employees listed on the payroll, including Claimant, as well as the job location for each employee, some of which were in Delmar, Delaware. He agreed that the audit report from July 1, 2016 to July 1, 2017 covers an accident which occurred on June 5, 2017. At the time of the audit report, Chesapeake's insurance agent was Strategic Insurance Partners ("SIP"). Mr. Robinson agreed that



the auditor who performed the audit had confirmed that: Employer had operations outside the State of Maryland; Claimant was on Employer's payroll at the time of the reported claim; the police force provides around the clock service for Employer; and the claim was current and classified properly. Mr. Robinson agreed that the audit showed that several elected officials from Delmar, Delaware were included on Employer's payroll and their salaries were included in the premium. The audit also listed elected officials from Delmar, Maryland, but excluded one Maryland Commissioner and the mayor of Delmar, Maryland. Mr. Robinson agreed that out of the thirteen elected officials included in the policy, nine were Delaware officials and four were Maryland officials.

Mr. Robinson confirmed that part of the premium dollars Chesapeake received for fiscal year 2017 was from Claimant's payroll. Mr. Robinson testified that the audit report indicates that all operations are within the State of Maryland, including the Delaware elected officials. He was unaware if Employer had reported to the auditor that all operations included in the policy are within the State of Maryland. Mr. Robinson acknowledged that Chesapeake had injured joint ventures before.

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On cross examination by counsel for Chesapeake, Mr. Robinson reported that Chesapeake performs audits to insure that it "pick[s] up the premium for the exposure" or set the cost of the premium for the insured. Robinson Deposition Transcript 27:22-23 (July 3, 2019). He testified that audits can be performed before or during the coverage period and audits are sometimes performed to determine if the exposures for individuals are covered by the policy. He confirmed that the only audit that was performed was done during the fiscal year 2017.

On cross examination by counsel for DFIT, Mr. Robinson denied that he was aware of the responsibilities that Delaware elected officials have or whether those elected officials had exposure in Maryland or Delaware. He confirmed that Chesapeake's policy covered police, clerical office and municipality employees for Employer, but did not cover fire department employees (as well as paramedics and EMTs) because those employees were covered by another policy. Mr. Robinson understood that Employer had separate insurance for employees who are considered Delaware employees. Mr. Robinson reported his understanding that if a covered Maryland employee was injured in another state, but filed a claim in Maryland, then Chesapeake would pay benefits for injuries which occurred outside the State of Maryland, but Chesapeake would deny the claim if it was filed in Delaware. Mr. Robinson was unsure of the exact policy language which notifies insureds that their claims will not be covered if they are injured in a state other than Maryland and attempt to obtain benefits in another state. He confirmed that Chesapeake was denying Employer's claim because Claimant is pursuing Delaware workers' compensation benefits. Mr. Robinson agreed that Claimant's work accident occurred just across the street from the Police Department in the State of Delaware. Mr. Robinson reported that Employer's/Claimant's claim would be covered by Chesapeake if the claim had been filed in Maryland. He agreed that the decision on where to file for benefits is Claimant's/the insured's and not Chesapeake's.

On cross examination by Claimant's counsel, Mr. Robinson confirmed that the payroll salaries listed in the audit report are used to calculate the premium amount, but there is no apportionment of those salaries between Delaware and Maryland employees. Chesapeake charges a premium on the total of salaries, including Claimant's. Mr. Robinson testified that he would assume that Claimant works in both Delaware and Maryland.

On re-cross examination by Chesapeake's counsel, Mr. Robinson testified that the policy is a bilateral agreement, which specifies what is covered and what is not.

Sarah Bynum King, Town Manager for Employer, testified on Employer's behalf. Ms. King testified that there are two separate towns of Delmar, with separate mayors and town council/commissioners. Ms. King confirmed that Maryland politicians have no authority to govern in Delaware, nor do Delaware politicians have authority to govern in Maryland. She reported that the towns of Delmar, Maryland and Delmar, Delaware agreed to enter into a joint venture for the police department, which is located in Delmar, Maryland. The public works department is also a joint venture, but it is located in Delmar, Delaware. Ms. King testified that Delmar, Maryland's population is approximately sixty-percent to Delmar, Delaware's forty-percent of the population served by the police force. The police force payroll is considered a Maryland payroll.

Ms. King denied that she ever told Ms. DeSanto that Employer was unable to move payroll.

On cross examination by Chesapeake's counsel, Ms. King agreed that the police have regular activity in both states. She denied that she is directly involved with the purchase of Employer's insurance.

On cross examination by DFIT's counsel, Ms. King testified that as far as she is aware, Chesapeake provides coverage for the police department and DFIT provides coverage for EMTs and firefighters. She explained there is a distinction based on the police being Maryland employees and EMTs and fire fighters being Delaware employees. Ms. King's understanding is that Claimant is covered by Chesapeake.

When questioned by the Board, Ms. King reported that the public works is covered by Chesapeake, but is located in Delmar, Delaware.

Star Conaway, administrative assistant for Employer, testified on Employer's behalf. Ms. Conaway reported that she makes it known that Delmar is a "bi-state town" and she would have notified the auditors of that information during the 2017 audit. Ms. Conaway confirmed that she made clear during the audit that the policy was to cover employees in both Maryland and Delaware and operations in both Maryland and Delaware. She confirmed that there is a unified police department located in Delmar, Maryland and a unified public works department located in Delmar, Delaware, both of which were to be covered by the Chesapeake policy. The public works employees were included in the payroll, which were included in the Chesapeake audit and are covered by the Chesapeake policy.

When Claimant was injured, Ms. Conaway filed a report with Chesapeake Insurance indicating Claimant was injured in Delaware. Ms. Conaway testified that Ms. DeSanto told her directly "don't worry about Keith Heacock's claim, Chesapeake is going to cover it" at a dinner at legislative hall.

On cross examination by Chesapeake's counsel, Ms. Conaway acknowledged that there are two separate policies in effect for Employer. She denied that she is involved in the actual policy examination. She confirmed that payroll has been the same in her seventeen years with Employer.

On cross examination by DFIT's counsel, Ms. Conaway denied that she or any other employee has the ability to switch an employee's payroll from Maryland to Delaware. The only employees who are covered by DFIT are the firefighters. She submitted Claimant's report of injury

to Chesapeake. Her understanding is that Chesapeake would cover police who are injured regardless of the geographic location of the injury and DFIT would cover firefighters who are injured regardless of the geographic location of the injury. Ms. Conaway confirmed that she sent Chesapeake's information to Claimant's providers, along with the claim number and the providers then billed Chesapeake.

When questioned by the Board, Ms. Conaway confirmed that the only employees covered by Employer's DFIT policy are the fire fighters/EMS.

Heather Chandler, supervisor of finances for Employer, testified on Employer's behalf. Ms. Chandler confirmed that it was known that there were employees from two different states combining for a joint venture and one employee identification number, when they were seeking new insurance. In 2016, the Employer changed carriers to Chesapeake, at the recommendation of Ms. DeSanto because they were being dropped by the workers' compensation insurance carrier. At that time, EMS continued to be covered by DFIT, but all other employees were picked up by Chesapeake. Ms. Chandler confirmed that EMTs were included in the joint venture and respond to calls in both Delaware and Maryland.

On September 5, 2017, Ms. Chandler received an email from Ms. DeSanto indicating Claimant should be considered covered by DFIT. Ms. Chandler denied that DFIT ever charged the Employer a premium for police officers. Employer has paid all of Claimant's claims to date (in excess of \$40,000.00) through the fee schedule and they have reinstated his sick leave. Ms. Chandler testified that Employer received a check from Chesapeake after the audit for the 2018 policy (not the policy under which Claimant was injured) as a reimbursement for a credit of the remaining months of the policy.

Ms. Chandler confirmed it is her understanding that Claimant would be covered by one of the policies procured by Employer.

When cross examined by Chesapeake's counsel, Ms. Chandler agreed that coverage was contingent on how the employee was defined by the employee's payroll. She confirmed that Ms. DeSanto explained that the employees would be covered by the Chesapeake policy. She did review the policy and could not recall whether the policy specifically included Delaware, but noted that they have coverage for Delaware also. She confirmed that the coverage Employer has now is one coverage for both jurisdictions.

When cross examined by DFIT's counsel, Ms. Chandler confirmed that fire/EMS personnel are considered Delaware payroll and personnel and they are covered by DFIT. Her understanding is that if an EMS employee is injured in Maryland, that employee will be covered by DFIT. Her understanding is that Chesapeake covers Claimant's accident because he is covered by that policy. Ms. Chandler testified that Claimant brought notice from Chesapeake indicating it was denying coverage when he sought authorization for a surgery. Ms. Chandler acknowledged that Chesapeake is claiming that Employer could be considered an uninsured employer regarding this accident. She explained that there have been public works employees who have been injured in the opposite state of their coverage, but she is unaware of the outcomes of those cases.

Theresa DeSanto, insurance producer for SIP, testified by deposition on Employer's behalf. Ms. DeSanto was involved with providing insurance coverage for Employer beginning in 2010 for both Delaware and Maryland. Ms. DeSanto confirmed that Employer had insurance in both Delaware and Maryland in 2013 and in 2014 Employer joined DFIT for its Delaware payroll. Ms. DeSanto explained that DFIT is a workers' compensation group self-insured program for Delaware

municipalities, which allows groups to form mutual insurance associations to tailor their own insurance needs and exempts them from the Delaware Ratings Bureau. She is a DFIT administrator, with her job duties including explaining to members what the self-insured model entails and what their obligations are, gathering the underwriting information for submission, maintaining underwriting data and assisting DFIT in the purchase of insurance.

In 2014, when Employer was renewing its policies, SIP was moving all of its municipalities into the self-funded model from the group retro plan, which is what Employer had before for its Delaware EMT employees. Because Employer's prior insurance company was not renewing its Maryland policy, Ms. DeSanto sought alternative policies. Prior to 2014, Employer had maintained separate Maryland and Delaware policies. Ms. DeSanto explained that EMTs were the only employee classifications that could be written under DFIT because of the way Employer's payroll is structured. Ms. DeSanto agreed that she recommended that Employer shift all payroll to the DFIT pool, if possible, in an email to Ms. Chandler dated June 30, 2014. She agreed that she had advised Employer not to pay a premium to AmeriHealth for the policy year 2014 to 2015. On July 2, 2014, Ms. DeSanto mailed Ms. Chandler a copy of Employer's Maryland policy. Ms. Chandler confirmed that the only employees covered by the DFIT policy were EMTs and all Maryland payroll employees required a separate policy. She reported that Employer changed the classification code for EMTs from 980 to 985 because 985 was the appropriate code.

Ms. DeSanto agreed that she had contacted Employer on April 15, 2016 to discuss the cancellation of its Maryland policy and the options available to it. She agreed that she informed Employer that the only employees eligible for DFIT coverage were those who were included in the Delaware payroll and that she had commented that "...it would make life so much easier if all their work comp was under Delaware." DeSanto Deposition 31:21-23 (July 3, 2019). Ms. DeSanto

agreed that Employer needed to obtain coverage for its Maryland payroll employees, in addition to the separate DFIT policy, which only covered Delaware payroll employees (EMTs). Ms. DeSanto clarified that Employer's Maryland payroll employees were covered under a separate AmeriHealth policy, which was outside the DFIT retro plan prior to 2014.

Ms. DeSanto agreed that Employer had inquired about workers' compensation coverage with Chesapeake on April 21, 2016. She admitted that she had advised Employer to notify other brokers that they did not have Employer's permission to make any submissions until Employer approved the carrier selection because making a submission without the client's consent is an unethical business practice. Ms. DeSanto testified that Employer is in a somewhat unique situation because it has employees located in two separate states and the only way to insure all employees under one policy is to have all employees on one payroll in one state or the other. She reported that DFIT was disallowed from insuring Employer's Maryland payroll employees in Delaware.

Ms. DeSanto reported that the residual market in each state is a market of last resort, but carriers in that market are required to accept the risk of insureds, including municipalities, which she reported were a greater risk because of the uniformed exposure (police officers and firefighters). Ms. DeSanto agreed that, prior to 2014, Employer had a Delaware policy and a Maryland policy, which together covered all employees in both states. She confirmed that she had discussed with Employer what is required to move the Maryland payroll to Delaware and had forwarded Employer's inquiry to Vince Capaldi for further explanation on May 3, 2016. Ms. DeSanto reported that Employer had inquired about moving both payrolls to one state before, but had never been able to do that because of how its Social Security is administered.



Ms. DeSanto reported that “...the interstate pooling is disallowed for workers’ compensation and liability coverages,” but health insurance pools are allowed. DeSanto Deposition 52:16-18 (July 3, 2019). Ms. DeSanto testified that she had not inquired with the State of Maryland to see if Employer was eligible to move all of its payroll to Delaware because she considers that inquiry to be outside of her professional area. She agreed that Employer notified her on May 3, 2016 that it required coverage for all employees, except EMS, from a Maryland carrier and it did not want to wait and be forced to scramble for coverage later.

Ms. DeSanto testified that her understanding is that Employer requires a Maryland policy for its Maryland payroll employees and a Delaware policy for its Delaware payroll employees. She has never worked with insureds who operate as a joint venture. She agreed that Employer’s police officers serve both Maryland and Delaware, which would be a joint venture. She believes that Delaware law prohibits her from insuring Employer’s police officers in Delaware because their payroll is administered in Maryland. She acknowledged that Delaware allows Employer an exemption from the standard state boundary, which would apply to Employer’s police officers who could be considered Delaware employees.

Ms. DeSanto agreed that she had sent Employer an insurance quote from Chesapeake for coverage for its Maryland employees on June 13, 2016 after Employer was dropped by AmeriHealth. She agreed that she notified Employer that Chesapeake was the only remaining insurer and advised it to accept the quote. Ms. DeSanto acknowledged that she first informed Employer that Claimant’s work accident would be covered by its DFIT policy, but she later learned that the claim was not covered by the DFIT policy because DFIT did not collect premiums from the police officers’ payroll. Ms. DeSanto did not recall telling Ms. Chandler or Ms. Conaway

that Claimant's workers' compensation claim would be covered by Chesapeake while they were attending a dinner together.

On cross examination by DFIT'S counsel, Ms. DeSanto confirmed that Employer's DFIT policy covers EMS employees' workers' compensation benefits because those employees are Delaware payroll employees. She agreed that DFIT would cover a Delaware payroll employee's injury that occurred in Maryland and the injured employee would be entitled to choose in which jurisdiction to pursue benefits (Delaware or Maryland) and DFIT would cover the benefits in whichever jurisdiction the employee chose. She explained that she found Chesapeake for Employer and noted that Chesapeake is the assigned risk plan in Maryland for Employer's Maryland payroll employees. Ms. DeSanto confirmed her understanding that Chesapeake would cover Claimant's workers' compensation claim because he is a Maryland payroll employee who was injured while working in Delaware, with the ability to choose in which jurisdiction he will seek benefits. She testified that she has never seen an insurance company deny coverage across state lines in her sixteen years of experience in the insurance industry. Ms. DeSanto confirmed that requesting Chesapeake to cover Claimant's claim of injury in Delaware was not the same as requesting Chesapeake to write a policy for insurance in Delaware and would not violate any statute of which she was aware.

On cross examination by Chesapeake's counsel, Ms. DeSanto agreed that Employer required two separate insurance policies to cover employees in both Delaware and Maryland, and the employees' payroll was the guide used to determine which employees are covered by which policy. She confirmed that DFIT insures only Employer's Delaware payroll employees, but noted that a standard insurance carrier may insure across state lines, but an assigned risk plan is specific to the state. Ms. DeSanto confirmed her understanding that Employer's Maryland payroll

employees are covered by a separate policy than the DFIT policy. She reported that Employer denied being able to move all of its payroll to Delaware and reported that the payroll classifications were established according to the state in which the payroll is administered. Ms. DeSanto agreed that moving all of its payroll to Delaware would be beneficial to Employer and possibly to DFIT. She denied that Employer would need a Delaware policy if all Employer's employees were listed as Maryland employees, even if Employer had activities in both Maryland and Delaware.

On re-cross examination by DFIT's counsel, Ms. DeSanto confirmed that Employer would not require Delaware coverage if all its employees were moved to Maryland payroll because when an employee who is insured in Maryland is injured in Delaware, the Maryland carrier would cover the loss regardless of where the claim is filed.

On redirect examination by Employer's counsel, Ms. DeSanto denied having been involved in a case where a carrier denied payment, after accepting coverage and compensability, based solely on the jurisdiction in which the claimant chose to file. She confirmed that the carrier's premiums are based on payroll and if an insured fails to report a portion of its payroll, that insured could be subjected to a premium audit and that premium audit could occur retroactively.

On re-cross by Chesapeake's counsel, Ms. DeSanto confirmed that the self-insured pool is different than an insurance carrier and is run by different jurisdictional issues, which prohibit it from pooling across state lines.

Vincent Capaldi, president of wholesale division for Bay Oaks Brokerage, testified by deposition on Employer's behalf. Mr. Capaldi was the broker for Employer's workers' compensation insurance policy with DFIT. Mr. Capaldi was aware that Employer has one police force that served the entire town, but he was unaware of Employer's exact legal structure. Mr.

Capaldi testified that when a private sector employer has locations in two different states, coverage is determined by where that employer is operating, where the payroll is developed and where the employees perform their work. Mr. Capaldi understood Employer's police department to be paid out of the State of Maryland, and to be covered by the State of Maryland for workers' compensation. He explained that some employers obtain one policy to cover all employees, but some employers obtain more than one policy to cover employees, based on the employer's individual circumstances. Mr. Capaldi was unaware of any instances in Maryland or Delaware in which employers had obtained workers' compensation coverage for some employees and not others. Mr. Capaldi explained DFIT as a self-insured workers' compensation program, which is owned and funded by its members, which operates only within the confines of the border of the state. He reported that group self- insurance programs are not legally permitted to cross state lines, but can cover employees who are out of state, as long as those employees are not employed in another state. According to Mr. Capaldi, an employee who is covered by DFIT who is injured while working in another state, will be covered, but an employee who is hired in another state, but performing work in the covered state is not covered. Mr. Capaldi confirmed that if an employee covered by DFIT was injured in another state and filed for benefits in that state, DFIT would pay benefits as determined by the state in which Claimant was injured and/or filed for benefits.

Mr. Capaldi reported his understanding was that Chesapeake would cover Claimant's work accident because DFIT only provides coverage for Delaware employees, which for Employer includes only emergency medical services ("EMS") employees. Mr. Capaldi confirmed that, in his experience, if an insurer has acknowledged that the claim is legitimate, that it has received the premium for the appropriate classification and that the injury is legitimate and occurred in another state, the claim would still be covered by that insurer under the benefit levels of the state of injury.

He confirmed his understanding in all 50 states that the employee has the right to file a claim either where he is employed or where the injury occurred.

On cross examination by Chesapeake's counsel, Mr. Capaldi acknowledged that he expressed to Ms. DeSanto via email that "...bouncing payrolls and employees back and forth across state lines each year will be problematic for everyone." Capaldi Deposition 30-31: 23-24, 1-2 (July 3, 2019). He confirmed that DFIT's prior audits had contained the same EMS employees each year. He explained that an insured's payroll should not be moved from state to state and payroll location is used to assess the insured's exposure and premium rates. Mr. Capaldi explained that he was not involved with Employer's acquisition of coverage for the State of Maryland, but typically a multi-state employer, like Employer, would purchase a workers' compensation policy for the payroll developed in one state and then another policy for the payroll developed in another state. He explained further that payroll is the determining factor for how the policies are written and how the policies are placed. Mr. Capaldi reported that the DFIT policy would cover an EMS employee (employed in Delaware) who was injured while working in Maryland, according to Maryland's benefit regulations, if that employee filed for benefits in Maryland.

On cross examination by DFIT's counsel, Mr. Capaldi confirmed that Employer insured its Maryland payroll employees with Chesapeake and its Delaware payroll employees with DFIT. He confirmed that DFIT would cover a Delaware payroll employee who was injured while working in Maryland, regardless of in which jurisdiction that employee chose to seek benefits. Mr. Capaldi reported that there was no legal prohibition for an insurer to pay benefits in another state, but there are laws prohibiting an insurer from insuring risks in other states.

## **ANALYSIS**

In this case, the primary issue for the Board to determine is whether Employer's Chesapeake Insurance Policy No. 5212588 or Employer's DFIT policy covers Claimant's June 5, 2017 work accident. While the primary issue involved is somewhat novel, based on Employer's unique bi-state operations, the Board finds the law from Delaware and other jurisdictions to be instructive. Most notably, Delaware courts have determined that "[u]nlike tort claims acts, the point of workmen's compensation is to protect workers, not to shield employers." *Bernard v. State*, 642 A.2d 808, 820 (Del. Super. 1992). To effectuate the purposes of workers' compensation statutes, courts have interpreted those statutes liberally and have resolved any reasonable doubts in favor of the employee because the statutes were passed for the employee's benefit. *Hirneisen v. Champlain Cable Corp.*, 892 A.2d 1056, 1059 (Del. 2006). Furthermore, Delaware's workers' compensation statutory law provides that "[n]o agreement, rule, regulation or other device shall in any manner operate to relieve any employer or employee in whole or in part from any liability created by this chapter, except as specified in this chapter." 19 *Del. C.* §2305. Similarly, Maryland's workers' compensation statute provides that "a covered employee or an employer of a covered employee may not by agreement ...: (i) exempt the covered employee or the employer from a duty of the covered employee or the employer under this title; or (ii) waive a right of the covered employee or the employer under this title," and that any contrary agreement "is void to the extent of the violation." Maryland Workers' Compensation Act, § 9-104(a). Thus, under both states' statutory schemes, agreements between employers and employees cannot relieve employers from their duties or deprive an employee of a right as set forth in the statutes.

Delaware's workers' compensation statute also provides that "[t]he payment or award of benefits under the workers' compensation law of another state ...to an employee... otherwise entitled on account of such injury or death to the benefits of this chapter shall not be a bar to a

claim for benefits under this chapter... .” 19 *Del. C.* §2303(b). Furthermore, if an employer’s liability insurance is provided pursuant to laws of another state, employer’s carrier is deemed authorized to write insurance under and be subject to Title 19 of the Delaware Code. 19 *Del. C.* §2303(c)(3)(b). Delaware’s statutory provisions also provide that if an employee’s duties require him/her to travel regularly for employer in more than one state, that employee and that employer may reach an agreement as to where the employee’s employment is principally located. 19 *Del. C.* §2303(d)(5).

Additional caselaw from Delaware and other jurisdictions provides further guidance. In a case factually similar to this case, Delaware’s Superior Court determined that the Maryland carrier’s coverage of the employer, partial payment of an employee’s claim and coverage for employees injured in other states on an incidental basis subjected it to the jurisdiction of Delaware’s courts. *Smack v. Hayden & IWIF*, 2003 WL 21213398 (Del. Super. May 7, 2003). The *Smack* Court concluded that the Maryland carrier, as a business in a bordering state, with sufficient contacts to Delaware, would not be unduly burdened by adjudicating the case in Delaware. The *Smack* Court noted that “...Delaware has an interest in adjudicating the rights of a Delawarean who was injured while performing work duties in Delaware.” *Id.* at 4.

Pennsylvania’s highest court concluded that when a New Jersey resident working for a Pennsylvania company was injured in Pennsylvania, but filed a workers’ compensation claim in New Jersey, the fact that she filed in New Jersey is irrelevant as to the question of the carrier’s liability under Pennsylvania workers’ compensation law. *Weinberg v. State Workmen’s Ins. Fund*, 368 Pa. 76, 81 A.2d 906 (1951). Maryland’s highest court has also determined that the terms of an insurance policy may not exempt the carrier from exposure to awards in foreign jurisdictions, which are not named in that insurance policy. *Kacur v. Employers Mut. Cas. Co.*, 254 A.2d 156

(Md. 1969). The *Kacur* Court cited Professor Larson and noted that the “courts look with disfavor” on such attempts. *Id.* at 161. The *Kacur* Court also noted that “...the decision on what law shall apply is not one that belongs in the hands of the insurer and employer; that decision, on a statute affecting public interest, must be left to the courts.” *Id.* at 161 (quoting Larson, *Workmen’s Compensation Law*, Vol.2 at 464 (1968 Supp.)). “[T]he 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. This is most obvious when such an agreement purports to destroy jurisdiction where it otherwise exists... .” *Id.* (quoting Larson, *Workmen’s Compensation Law*, Vol. 3, sec.87.71 at 395). In addition, Maryland’s highest court determined that a forum selection clause in a professional athlete’s employment contract was counter to basic statutory interpretation principles and noted that Maryland’s relevant statutes prohibited any agreement which waived employer’s duty to pay and an employee’s right to receive workers’ compensation benefits. *Pro-Football, Inc. v. Tupa*, 51 A.3d 544, 549 (2012).

Finally, Delaware courts have determined that payments made by an employer under a “feeling of compulsion” under the Workers’ Compensation Act create an implied agreement as to compensability. *See Tenaglia-Evans v. St. Francis Hospital*, 2006 WL 3590385 at \*3 (Del. 2006); *McCarnan v. New Castle County*, 521 A.2d 611, 616-17 (Del. 1987). On the other hand, payments made by a carrier’s mistake or basic inadvertence do not create an implied agreement and to find otherwise would be “an absurd result.” *Andreason v. Royal Pest Control*, 72 A.3d 115, 125 (Del. 2013). Whether payments made by a carrier are deemed simple inadvertence or made under a feeling of compulsion is a factual finding. A carrier’s payment of medical bills for years following



a work accident are not normally considered a “...gift flowing merely from a generosity of spirits by a carrier.” *Starun v. All American Engineering Co.*, 350 A.2d 765, 767 (Del. 1975).

In this case, there is no dispute that, at the time of his June 5, 2017 work accident in Delaware, Claimant, a Delaware resident, was one of Employer’s Maryland payroll employees, for and from whom Chesapeake accepted workers’ compensation insurance premiums. Ms. Bynum-King, Employer’s Town Manager, confirmed that the towns of Delmar, Maryland and Delmar, Delaware entered into a joint venture to provide police protection in both towns/states, with an office physically located in Maryland. Ms. Bynum-King and Ms. Conaway confirmed that Employer’s public works department, which is physically located in Delmar, Delaware, is also covered by Chesapeake. Ms. Bynum-King reported that Delmar, Maryland’s population is approximately sixty-percent of the population served by Employer’s police force, as compared to Delmar, Delaware’s forty-percent. Ms. Chandler, Employer’s finance supervisor, confirmed that the purpose of the Chesapeake policy was to provide coverage for employees from two different states, as part of Employer’s joint venture to provide public services.

Mr. Robinson, Chesapeake’s premium audit director, confirmed that Employer had both Delmar, Delaware and Delmar, Maryland listed as its locations for the July 1, 2016 coverage dates and the Maryland Workers Compensation Commission website confirmed that as well. Mr. Robinson agreed that Chesapeake’s audit report lists Claimant as a covered employee at the time of his work accident (which was also included as covered in the audit) and also lists nine elected officials located in Delaware as covered employees, with their “department” listed as “Delmar, DE.” (Employer’s Exhibit #3). Additionally, the audit report also lists public works employees, who Ms. Bynum-King testified were physically located in Delmar, Delaware, as covered employees. *Id.* Mr. Robinson also reported that the 2016-2017 audit showed that: Employer had

operations outside the State of Maryland; Employer's police provide around the clock service; and, Claimant's claim was current and properly classified.

In addition, Chesapeake's underwriter, Ms. Wozney, agreed that the policy she underwrote for Employer covered all police officers included in its payroll and confirmed that Chesapeake received payroll deductions from Employer's police officers for its Maryland policy coverage. She confirmed that Chesapeake covers Employer's police department. While Ms. Wozney acknowledged that Employer's Chesapeake policy contains an endorsement, which indicates Chesapeake will promptly pay and defend employees who are working in another jurisdiction, she denied that the endorsement would apply in Claimant's case because "there is Delaware coverage." Ms. Wozney admitted that the terms are not defined in the policy and she assumes the agents review the policies with the clients. Furthermore, Ms. Wozney admitted that she was aware that Employer's policy covered police officers who worked in both Maryland and Delaware, but she did not assess how much of the police officers' time was spent in one jurisdiction or the other.

While Ms. Wozney testified that the endorsement requiring Chesapeake to pay and defend employees working in another jurisdiction did not apply to Claimant because Employer had Delaware coverage, Ms. DeSanto, the insurance producer, testified that she advised Employer that the only employees covered by the Delaware DFIT policy were those on Delaware payroll. Furthermore, Ms. DeSanto testified that DFIT is prohibited from insuring Employer's Maryland payroll employees in Delaware, but confirmed her understanding that Chesapeake would cover Claimant's claim because he is a Maryland payroll employee, who was injured in Delaware. Ms. DeSanto reported that Employer would not require Delaware coverage if all its employees were Maryland payroll because an employee who is insured in Maryland, but injured in Delaware, would be covered by the Maryland policy.

Ms. Wozney acknowledged that a Maryland employee who is injured in Delaware has a right to choose the jurisdiction in which he/she will pursue benefits. Mr. Robinson also agreed that the decision of in which jurisdiction to file for benefits belongs to Claimant/insured and not to Chesapeake. Ms. DeSanto also confirmed her understanding that Claimant has the ability to choose in which jurisdiction to pursue benefits. Like the other three professional insurance witnesses, Mr. Capaldi also agreed that, in all fifty states, the employee has a right to file a claim either where he is employed or where the injury occurred. Mr. Capaldi reported that payroll is the determining factor for how policies are written and there is no legal prohibition for an insurer to pay benefits in another state, although there are legal prohibitions preventing insurers from insuring risks in other states. Thus, the evidence shows Chesapeake knowingly accepted premiums to provide coverage for Maryland payroll employees, like Claimant, who were physically located and working in both Maryland and Delaware.

Despite the insurance professionals' agreement that it is the employee's right to choose where to pursue benefits, Chesapeake now attempts to deny Claimant's claim because he, as a Maryland payroll employee injured in Delaware, has exercised that very right to choose. The Board finds the law and evidence do not support Chesapeake's attempt to deny Claimant that right. Specifically, Delaware has an interest in adjudicating the rights of Claimant, who is a Delaware resident injured while working in Delaware. Furthermore, Ms. Wozney admitted that the terms are not defined in the policy endorsement and that she was aware that Claimant worked in both Maryland and Delaware, but admitted she did not investigate the amount of time Claimant/police officers worked in each state. Thus, Chesapeake's own underwriter agreed that the endorsement terms are undefined and she was aware of the covered Employees' bi-state work at the time she underwrote the policy.

Chesapeake knowingly accepted payments for workers' compensation coverage for employees it knew would frequently cross the state line between Maryland and Delaware while performing their work activities and for employees Chesapeake admits have the right to choose the jurisdiction in which they will seek benefits. Now, through its policy coverage endorsement and subsequent denial of Claimant's claim, Chesapeake is attempting to deprive Claimant of his right to pursue benefits in Delaware, despite the facts that all witnesses agreed that Claimant has such a right and Chesapeake was aware of Employer's bi-state status and coverage needs when it accepted premiums and provided coverage. Chesapeake's own endorsement indicates employees will be covered in other states and Chesapeake cannot require those employees to seek benefits in Maryland, thereby denying those employees' right to pursue benefits in the jurisdiction the employees choose. Chesapeake's knowledge of the employees' unique circumstances when it accepted premiums for coverage leads to two possibilities: either Chesapeake intended to cover those employees for work injuries regardless of in which state they happened to be at any given moment and/or in which state the employee chose to file; or, Chesapeake deliberately took money under false pretenses by never intending to cover Delmar's employees whenever the state line was crossed and/or when/if the injured employee chose to file in Delaware. This Board will not presume, nor does it find, that Chesapeake intended to commit such fraud, so therefore, it must be concluded that Chesapeake intended to cover the employees.

Chesapeake may not deny coverage and capitalize on its own prior knowledge of Employer's bi-state coverage requirements after accepting premiums for those same bi-state employees. While Chesapeake acknowledges that it would cover the claim if Claimant had pursued Maryland benefits, the Board concludes that Chesapeake's attempt to require Claimant to pursue benefits in Maryland in order to receive workers' compensation coverage is impermissibly

restrictive. The Board finds that, to the extent the Chesapeake policy/endorsement attempts to restrict Claimant's right and destroy Delaware's jurisdiction, it is void.

Furthermore, the Board concludes that, at a minimum, there exists an implied agreement based on Chesapeake's acceptance of the claim from its inception until August 30, 2017, when the amount of Claimant's claims exceeded \$2,500.00, which triggered a review by Ms. Baroody, Chesapeake's claims supervisor. In addition to accepting premiums for Maryland employees physically located in both Maryland and Delaware, Chesapeake accepted/acknowledged and paid Claimant's claim from June 2017 to August 2017 (when Claimant sought authorization for surgery) in an amount totaling more than \$8,000.00. Ms. Baroody confirmed that Employer reported Claimant was an employee who was injured in Delmar, Delaware immediately following Claimant's June 5, 2017 work accident. She admitted that, in a letter dated June 7, 2017, she directed Employer to submit all Claimant's medical bills to Chesapeake for payment, after Employer had notified Chesapeake initially that the claim occurred in Delaware. Even though Ms. Baroody testified that the location of the work accident had no bearing on Claimant's coverage, she confirmed that a nurse at Chesapeake had issued Employer a letter (dated September 25, 2017) in which the nurse reported Claimant's claim was denied because it was in a jurisdiction other than Maryland. Ms. Baroody confirmed that a claims adjuster (Jen Conlon) had issued a letter on September 18, 2018, indicating Chesapeake had re-opened Claimant's claim. She acknowledged that Claimant is "...covered for Maryland benefits no matter where he is. So we're not denying the claim... . [W]e are no longer responding to the claim because he's pursuing a claim – through another jurisdiction." Baroody Deposition 48:17-24, 49:1-3 (July 3, 2019). Ms. Baroody acknowledged that Chesapeake paid more than \$8,000.00 in expenses between June 5, 2017 and August 16, 2017, but stopped those payments in late August, 2017. Ms. Chandler

reported that Claimant received notice indicating Chesapeake was denying his claim when he sought authorization for a surgical procedure.

The Board concludes that Chesapeake's written confirmation of acceptance of the claim, coupled with its numerous payments of Claimant's medical expenses, over the course of more than two months (totaling more than \$8,000.00) were paid under a feeling of compulsion and certainly were not a "gift flowing merely from a generosity of spirits" by Chesapeake. Moreover, the Board concludes that the evidence shows Chesapeake's payment of benefits to Claimant from June 2017 to August 2017 was not a mistake. Most notably, Ms. Baroody, Chesapeake's claims supervisor, admitted that the payments Chesapeake made for Claimant's claim from June 2017 to August 2017 were not a mistake. In fact, she testified that the Chesapeake policy did cover and continues to cover Claimant's claim. Therefore, the Board concludes that there is an implied agreement that Chesapeake Policy No. 5212588 covers Claimant's work accident.

#### **ATTORNEYS' FEES & INDEMNITY**

A successful claimant in workers' compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." 19 *Del. C.* § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to \$10,888.40. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). The Board is permitted to award less than the maximum fee and consideration of the Cox factors does not prevent the Board from granting a nominal or minimal fee in an appropriate case, so long as some fee is awarded. See *Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at \*6

(August 9, 1996). A “reasonable” fee does not generally mean a generous fee. *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. By operation of law, the amount of attorney’s fees awarded applies as an offset to fees that would otherwise be charged to Claimant under the fee agreement between Claimant and Claimant’s attorney. 19 *Del. C.* § 2320(10)a.

Claimant has achieved an award of coverage by the Chesapeake policy. Claimant’s counsel submitted an affidavit stating that approximately 12.2 hours were spent preparing for the hearing, which itself lasted approximately 4 hours. Claimant’s counsel has significant experience in workers’ compensation litigation, a specialized area of law. His initial contact with Claimant with respect to this matter was in July of 2017, so the period of representation was roughly one year at the time of hearing. This case involved some unusual and/or difficult questions of law or fact. It required only average skill to present the case properly. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances. There is no evidence that counsel was actually precluded from accepting other employment because of his representation of Claimant, although naturally he could not work on other matters at the exact same time that he was working on this one. Counsel’s fee arrangement with Claimant is on a thirty percent contingency basis. Counsel does not expect to receive compensation from any other source with respect to this particular litigation. There is no evidence that the employer lacks the financial ability to pay an attorney’s fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant’s counsel and the factors set forth above, the Board finds that an attorney’s fee in the amount of \$4,800.00 is reasonable in this case. The Board is satisfied that

this amount adequately reflects the value of any non-monetary benefit that may potentially arise from this decision. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

Based on Chesapeake's failure to provide continued coverage of Claimant's claim, Employer's counsel has requested fees, pursuant to 19 *Del. C.* 2320(8), and full indemnity for the amounts Employer has paid out of pocket, pursuant to 19 *Del. C.* §2354(b). Employer's counsel has submitted an affidavit of attorney's fees, but has requested that he be allowed to supplement that affidavit once the Board has issued its decision. DFIT's counsel has also requested an attorney's fee award, but has requested that he be allowed to submit a complete attorney's fee affidavit following the issuance of the Board's decision.

The Board is cognizant that the provisions of the Act are to be construed liberally in favor of the injured worker, *see Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 346 (Del. 1993), and the Act provides that "[c]osts legally incurred may be taxed against either party or apportioned between parties at the sound discretion of the Board, as the justice of the case may require." 19 *Del. C.* § 2320(8). The Board notes that the so-called "American Rule" in litigation indicates that the parties are expected to bear their own costs. Under this Rule, costs may be awarded when there is expressed legislative authority authorizing such an award or where the litigation results in the creation of a common fund to the benefit of non-parties, neither of which is applicable to Employer's request. The Board may also award costs when there has been egregious conduct on the part of the losing party or there is evidence of bad faith by a party resulting in increased costs in the litigation. *See Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997)(citing *Barrows v. Bowen*, Del. Ch., No. 1454-S, Allen, C., 1994 WL 514868 (September 7, 1994)), *aff'd sub nom, Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542 (Del. 1998). While the Board found Chesapeake's denial of Claimant's coverage



impermissible, that denial does not rise to the level of egregious conduct or bad faith litigation. Accordingly, this Board finds no basis to award attorneys' fees for Employer or DFIT.

Based on the Board's conclusion that Chesapeake Policy No. 5212588 covers Claimant's work accident, the Board does, however, find that Employer is entitled to full indemnity pursuant to 19 *Del. C.* § 2354(b) for the compensation it has provided to Claimant during the pendency of this claim.

**STATEMENT OF THE DETERMINATION**

Based on all the above, the Board finds Employer's Chesapeake Insurance Policy No. 5212588 covers Claimant's June 5, 2017 work accident. Having found Employer's Chesapeake policy covers Claimant's work accident, the Board finds that DFIT is dismissed from the action, as there is no evidence that DFIT provided coverage for Claimant or his work accident. Chesapeake shall indemnify Employer for the amounts Employer paid out of pocket to Claimant pursuant to 19 Del. C. § 2354(b). Claimant is awarded an attorney's fee.

IT IS SO ORDERED THIS 26<sup>th</sup> DAY OF JULY, 2019.

INDUSTRIAL ACCIDENT BOARD


/s/Patricia Maull  
PATRICIA MAULL

/s/Gregory Fuller  
GREGORY FULLER

I, Heather Williams, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

  
HEATHER WILLIAMS

Mailed Date: 7/30/19

  
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OWC Staff

cc: Joseph Andrews, Esquire for the Town of Delmar  
John J. Klusman, Esquire for DFIT  
Geoffrey S. Lockyer, Esquire for Chesapeake Insurance  
Walter F. Schmittinger, Esquire for Claimant