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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000281-WC

CONSOL OF KENTUCKY, INC. APPELLANT

PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-12-00062

OSIE DANIEL GOODGAME, JR.;
HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD APPELLEES

AND

NO. 2013-CA-000389-WC

OSIE DANIEL GOODGAME, JR.. CROSS-APPELLANT

CROSS-PETITION FOR REVIEW OF A DECISION
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CONSOL OF KENTUCKY, INC.;
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BOARD CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND STUMBO, JUDGES.

LAMBERT, JUDGE: The petition for review by the employer, Consol of Kentucky, Inc. (Consol), and the cross-petition for review by the employee, Osie Daniel Goodgame, Jr., concern Kentucky's jurisdiction over an alleged work-related injury that occurred in Virginia and the application of the statute of limitations to a claim of cumulative trauma injury that purportedly occurred in Kentucky. The Workers' Compensation Board (the Board) concluded that Kentucky lacked jurisdiction over the Virginia injury, thereby upholding in part the decision of the Administrative Law Judge (ALJ), but found that the statute of limitations for the Kentucky cumulative trauma injury did not begin to run until the injury became manifest, thereby vacating in part the ALJ's decision. We affirm the Board's decision.

Goodgame, born September 22, 1954, worked in the coal mining industry beginning in 1975. In 1992, he began working for Consol as a laborer in its

underground coal mines. He worked exclusively in Consol's Kentucky operation from 1992 until approximately July 31, 2009, performing a variety of jobs that required demanding physical labor. Goodgame represented that in his last several years of employment with Consol, he began to experience symptoms of injury but did not seek medical treatment.

In 2009, Consol closed its Kentucky operation. Employees were given the opportunity to transfer to another of Consol's mines. Goodgame chose to work at Consol's operation in Virginia, and he began working at the new location on or about August 1, 2009. His job duties continued to include physical labor.

Goodgame left his employment with Consol on January 19, 2010. He claimed his physical ailments caused by his employment prevented him from continuing to work. More specifically, Goodgame reported that he was no longer able to work due to pain in his hip, back, and knees as well as due to numbness and pain in his hands.

On January 17, 2012, Goodgame filed a Form 101 application for resolution of injury claim to initiate his workers' compensation action, listing an injury date of January 19, 2010. He alleged that he had sustained cumulative trauma injuries to his upper and lower extremities as well as to his spine. In support of his application, Goodgame attached a December 21, 2011, medical evaluation by Dr. Robert C. Hoskins. Dr. Hoskins stated that the physical ailments that had caused Goodgame to leave his employment were the result of cumulative trauma and

repetitive strain associated with the physical job demands from his thirty-five years of labor in underground mines. Consol contested the claim.

After the benefit review conference, the following contested issues remained: extent and duration; work relatedness and causation; notice; average weekly wage; unpaid or contested medical expenses; statute of limitations, jurisdiction, and compensability; and whether the award, if any, could be assessed against Consol. The ALJ conducted a final hearing on June 27, 2012, at which Goodgame testified. The parties filed post-hearing briefs arguing their respective positions, and the ALJ entered an opinion and order on August 13, 2012, dismissing Goodgame's claim. The ALJ concluded that Kentucky lacked jurisdiction over Goodgame's claim of injury that had arisen from his employment in Virginia, finding that the extraterritorial provision of Kentucky Revised Statutes (KRS) 342.670 did not apply. The ALJ also ruled that the statute of limitations for Goodgame's claim arising from his employment in Kentucky began to run from his last day of employment in Kentucky, August 1, 2009, and that therefore his claim was barred by the applicable statute of limitations because he did not file his claim within two years of that date. Goodgame's petition for reconsideration was denied, and he appealed to the Board. The Board affirmed in part related to the extraterritorial coverage issue, vacated in part on the statute of limitations issue, and remanded the matter to the ALJ for further proceedings. Consol's petition and Goodgame's cross-petition for review now follow.

On appeal, Consol contends that the Board erroneously construed the applicable law by holding that the statute of limitations began to run on the date of the manifestation of Goodgame's injury rather than from his last day of employment in Kentucky. On cross-appeal, Goodgame argues that the Board erroneously determined that Kentucky lacked extraterritorial jurisdiction over his claim arising from his employment in Virginia.

Our standard of review in workers' compensation appeals is well-settled in the Commonwealth. "The function of . . . review of the [Board] in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). We shall proceed with this standard in mind.

Because we have determined that the Board's opinion correctly analyzed and decided the issues before this Court, we shall adopt the analysis portion of the Board's opinion as our own:

> On appeal, Goodgame asserts Kentucky has extraterritorial jurisdiction over his claim because his employment was principally localized in Kentucky. Goodgame also asserts the "tangential findings" made by the ALJ that Goodgame did not "experience cumulative trauma in Virginia and, therefore, his statute of limitations expired on the last date he worked in Kentucky, are incorrect."
>
> When an employee is injured while in another state, KRS 342.670, dealing with extraterritorial

jurisdiction, provides the circumstances under which Kentucky will have coverage over the employee's workers' compensation claim. KRS 342.670[1] provides, in pertinent part, as follows:

> (1) If an employee, while working outside the territorial limits of this state, suffers an injury on account of which the employee, or in the event of the employee's death, his or her dependents, would have been entitled to the benefits provided by this chapter had that injury occurred within this state, that employee, or in the event of the employee's death resulting from that injury, his or her dependents, shall be entitled to the benefits provided by this chapter, if at the time of the injury:
>
> > (a) His or her employment is principally localized in this state; or
> >
> > (b) He or she is working under a contract of hire made in this state in employment not principally localized in any state; or
> >
> > (c) He or she 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 or her employer; or
> >
> > (d) He or she is working under a contract of hire made in this state for employment outside the United States and Canada.
>
> . . . .
>
> (5)
>
> > . . . .

[1] We shall use the most current version of the statute rather than the version the Board cited in its opinion.

> (d) A person's employment is principally localized in this or another state when:
>
> > 1. His or her employer has a place of business in this or the other state and he or she regularly works at or from that place of business, or
> >
> > 2. If subparagraph 1. foregoing is not applicable, he or she is domiciled and spends a substantial part of his or her working time in the service of his or her employer in this or the other state[.]

A review of the above statutory language makes it clear that in considering the propriety of the ALJ's finding with regard to Kentucky's jurisdiction, the record must first be examined in view of subsection (5)(d)1. *Haney v. Butler*, 990 S.W.2d 611, 616 (Ky. 1999). Only if that section does not apply does the analysis proceed to subsection (5)(d)2. *Id*. at 616.

The issue of extraterritorial coverage has been addressed by the Kentucky appellate courts in a number of decisions. In *Haney*, the Supreme Court provided a detailed annotation of Kentucky extraterritorial jurisdiction cases. Butler, a Tennessee resident employed by a Kentucky business, was killed while working in Alabama. The court addressed the definition of "principally localized" in the context of KRS 342.670(5)(d)(1) and stated as follows:

> Here, the ALJ determined that the decedent's employment was principally localized in Alabama pursuant to subsection (4)(d)1., so the question on appeal is whether there was substantial evidence that the employer "ha[d] a place of business" in Alabama and substantial evidence that the decedent regularly worked at or from that place of business. We are aware of no decision which construes the phrase "has a place of business" for the purpose of determining if a worker's

employment is principally localized in a particular state.

In *Eck Miller Transportation Corporation v. Wagers*, Ky.App., 833 S.W.2d 854 (1992), the injured truck driver was a Kentucky resident; there was evidence that he did a substantial amount of work-related activities (paperwork, vehicle maintenance, etc.) at his home in Kentucky; the employer had a freight terminal in Kentucky; and the worker's paychecks were drawn on a Kentucky bank. Although the worker was notified of his hiring in Kentucky, the necessary paperwork was done at the employer's principal office which was located in Indiana, and he was subsequently assigned to the employer's freight terminal in Tennessee. It was from the Tennessee terminal that he essentially received all his work orders, and he was injured in Tennessee. In reinstating the ALJ's decision, the court concluded that the worker regularly worked from the employer's Tennessee freight terminal and that, regardless of other factors, there was substantial evidence that his employment was principally localized in Tennessee pursuant to KRS 342.670(4)(d)1. There, it was undisputed that the Tennessee freight terminal constituted a place of business for the employer.

In *Davis v. Wilson*, Ky.App., 619 S.W.2d 709 (1980), the employer purchased junked cars and crushed them with a mobile car-crusher. He lived in Kentucky and conducted the business from a location in Pineville, Kentucky, but the car-crushing device was used both in Kentucky and in Tennessee. The injured worker was a Kentucky resident and was hired in Kentucky but injured in Tennessee. At the time of the injury, he had been employed for a total of eleven weeks, working two weeks (18% of the total) in Kentucky and nine weeks (82% of the total) in Tennessee. The "old" Workers' Compensation Board had denied extraterritorial coverage. Addressing KRS

> 342.670(4)(d)1., the Court of Appeals determined that, even if it were assumed that the employer had a place of business in both Kentucky and Tennessee, there was no steady or uniform practice of working in either state. In other words, the injured worker worked sporadically in both states but "regularly" in neither; therefore, the court concluded that subsection (4)(d)1. did not apply on those facts. However, because the worker was a Kentucky resident and spent a substantial amount of time working in Kentucky, the evidence compelled a determination that the employment was principally localized in Kentucky pursuant to subsection (4)(d)2. As a result, the claim was held to come within the requirements of KRS 342.670(1)(a).
>
> As is apparent, neither case sheds light on what the legislature intended by the phrase "has a place of business;" furthermore, neither does Larson, *Larson's Workers' Compensation Law*, § 87.40, *et. seq*., although it is instructive concerning the principles of extraterritorial jurisdiction. We observe, however, that the use of the word "has" denotes possession. *Webster's New Collegiate Dictionary*, 1975 edition. Having considered KRS 342.670 in its entirety, the arguments of the parties, and the opinions of the tribunals below, we conclude that for an employment to be principally localized within a particular state for the purposes of KRS 342.670(4)(d)1., the employer must either lease or own a location in the state at which it regularly conducts its business affairs, and the subject employee must regularly work at or from that location.

Haney at 616, 617.

The court in *Haney* rejected the notion that the place of business was in Alabama because there was not substantial evidence indicating Haney maintained a place of business in Alabama despite the fact work was performed at various ports.

In the case *sub judice*, the ALJ determined Goodgame's employment was not principally located in Kentucky pursuant to KRS 342.670(5)(d)(1) and (2). With respect to Goodgame's cumulative trauma claim which led him to cease working on January 19, 2010, we agree Kentucky does not have jurisdiction. However, with respect to Goodgame's alleged cumulative trauma injury occurring up until he stopped working in Kentucky on July 31, 2009, Kentucky may well have jurisdiction, and the ALJ must determine, based on the law regarding cumulative trauma injuries, whether the statute of limitations for that claim has yet to expire.

We will first discuss that portion of Goodgame's cumulative trauma claim which culminated in Goodgame ceasing work for Consol on January 19, 2010. With respect to that portion of Goodgame's cumulative trauma claim, an analysis under KRS 342.670(a) and KRS 342.670(5)(d)(1) and (2), indicates the ALJ correctly determined Goodgame's place of employment on January 18, 2010, was principally localized in Virginia.

Regarding KRS 342.670(5)(d)(1), the record is consistent with the ALJ's findings in the August 13, 2012, opinion and order that Consol "no longer had operations in Kentucky after August 1, 2009." This is in accord with Goodgame's testimony at the hearing which is as follows:

> Q: What was the last date that you worked in Kentucky for Consol?
>
> A: I believe it was July 31st of '09.
>
> Q: And what happened at that time that made you stop working in Kentucky for Consol?
>
> A: They closed the Consol operation of Letcher County down.
>
> Q: Did they close all their operations in Kentucky?

A: Yes, they did.

As the Court stated in *Haney*, *supra*, for employment to be principally localized in a particular state pursuant to KRS 342.670(4)(d)(1), "the employer must either lease or own a location in the state at which it regularly conducts its business affairs, and the subject employee must regularly work at or from that location." *Id*. at 617. However, as stated by the ALJ in the September 5, 2012, order on reconsideration, the record contains no proof Consol "leased or owned a location in Kentucky after August 1, 2009 from which it regularly conducted its business affairs from where the Plaintiff regularly worked." The record reveals Goodgame made a deliberate choice to continue to work for Consol at its Virginia mine after it closed operations in Kentucky, and from approximately August 1, 2009, through January 19, 2010, Goodgame worked *exclusively in Virginia*. Indeed, Goodgame testified at the hearing [that] he car pooled with a friend to Consol's Virginia's mines for an hour and forty-five minutes one way. As stated by the ALJ in the August 13, 2012, opinion and order, this is "not a matter of his work transcending two states. At no time did Plaintiff work in both Kentucky and Virginia." Thus, pursuant to KRS 342.670(5)(d)(1), Consol does not have a place of business in Kentucky **and** Goodgame did not "regularly work at or from that place of business" from approximately August 1, 2009, through January 19, 2010. KRS 342.670(5)(d)(1).

Alternatively, Consol does have a place of business in Virginia and Goodgame did "regularly work at or from that place of business" from approximately August 1, 2009, through January 19, 2010. KRS 342.670(5)(d)(1). Thus, substantial evidence supports the ALJ's determination that pursuant to KRS 342.670(5)(d)(1), Goodgame's place of employment was not principally localized in Kentucky and his employment was principally localized in Virginia. Therefore, KRS 342.670(1)(a) and (b) are inapplicable. Further, Section (1)(c) is also inapplicable as Goodgame

failed to prove Virginia's workers' compensation law is not applicable.

Since section KRS 342.670(5)(d)1 did not permit a finding [that] Goodgame's employment was principally localized in Kentucky, the ALJ turned to KRS 342.670(5)(d)(2). The record indicates that while Goodgame still resides in Kentucky, he does not spend a "substantial part of his working time in the service of his employer" in Kentucky. KRS 342.670(5)(d)(2). Thus, since the facts in the case *sub judice* do not meet the criteria set forth in KRS 342.670(5)(d)(1) or (2), the ALJ's determination Goodgame's employment was not principally localized in Kentucky and was principally localized in Virginia is supported by the record.

However, regarding that portion of Goodgame's alleged cumulative trauma injury claim extending up to the date he ceased working for Consol in Kentucky on July 31, 2009, the ALJ must determine whether that portion of Goodgame's claim is still viable. In the August 13, 2012, opinion and order, the ALJ determined as follows: "[T]he statute of limitation for the Plaintiff's claim would have been two years from his last day of work in Kentucky, that being August 1, 2011." We disagree as the law pertaining to cumulative trauma injuries is entirely different.

A cumulative trauma injury must be distinguished from an acute trauma injury where a single traumatic event causes the injury. In *Randall Co. v. Pendland*, 770 S.W.2d 687, 688 (Ky. App. 1989), the Kentucky Court of Appeals adopted a rule of discovery with regard to cumulative trauma injuries holding the date of injuries is "when the disabling reality of the injuries become **manifest**." (emphasis added). In *Special Fund v. Clark*, 998 S.W.2d 487 (Ky. 1999), the Supreme Court of Kentucky defined "manifestation" in a cumulative trauma injury claim as follows:

> In view of the foregoing, we construed the meaning of the term 'manifestation of disability,' as it was used in *Randall Co. v. Pendland*, as

> referring to physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained.

Id. at 490.

In other words, a cumulative trauma injury manifests when "a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." *Alcan Foil Products v. Huff*, 2 S.W.3d 96, 101 (Ky. 1999). A worker is not required to self-diagnose the cause of a harmful change as being a work-related cumulative trauma injury. *See American Printing House for the Blind v. Brown*, 142 S.W.3d 145 (Ky. 2004). Rather, a physician must diagnose the condition and its work-relatedness.

In cumulative trauma injury claims, the date upon which the obligation to give notice is triggered by the date of manifestation. *Special Fund v. Clark*, *supra*. Pursuant to KRS 342.185(1), a claimant has two years "after the date of the accident" or following the suspension of payment of income benefits to file a claim. The Court of Appeals, in *Randall Co./Randall Div. of Textron, Inc. v. Pendland*, *supra*, stated as follows regarding the clocking of the statute of limitations in the case of a cumulative trauma claim:

> We therefore conclude that in cases where the injury is the result of many mini-traumas, the date for giving notice and the date for clocking a statute of limitations begins when the disabling reality of the injuries becomes manifest.

In cumulative trauma injuries then, a claimant has two years after the "manifestation of disability" or the cessation of temporary total disability ("TTD") benefits to file a claim for income and medical benefits.

In his Form 101, filed on January 17, 2012, Goodgame alleged a cumulative trauma injury. The record also reveals Goodgame was employed by Consol

from 1992 through January 19, 2010, and spent the entirety of that time working in Kentucky except for the last five and a half months. With respect to that portion of the alleged cumulative trauma injury claim culminating in Goodgame's final day of work for Consol in Kentucky on July 31, 2009, the ALJ's determination the statute of limitations for Goodgame's claim would have been two years from that date is erroneous. Therefore, that portion of the ALJ's decision determining Goodgame's cumulative trauma claim must have been filed within two years of July 31, 2009, must be vacated.

On remand, the ALJ is to determine the date of manifestation of his cumulative trauma injury – i.e. when Goodgame first learned from a physician the nature of his disabling injury and that the injury is work-related – based on the medical evidence in the record. *See Alcan Foil Products v. Huff*, 2 S.W.3d 96 (Ky. 1999). We will not engage in inappropriate fact-finding by carrying out this analysis. However, we note Dr. Hoskins' Form 107-I, dated December 21, 2011, attached to Goodgame's Form 101, appears to be the first diagnosis of a work-related cumulative trauma injury. The ALJ must determine if Goodgame filed his Form 101 within two years from the date he received a diagnosis of a work-related cumulative trauma injury. *If so, Goodgame's claim for a cumulative trauma injury in Kentucky is still viable.* The ALJ must then resolve all other contested issues related to Goodgame's claim for income and medical benefits for the cumulative trauma injury Goodgame sustained in Kentucky while working for Consol and which culminated on his final day of employment in Kentucky on July 31, 2009.

Accordingly, the August 13, 2012, opinion and order and September 5, 2012, order on reconsideration are **AFFIRMED** in part, **VACATED** in part, and this claim is **REMANDED** to the ALJ for further proceedings and a decision consistent with the view expressed herein.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

STUMBO, JUDGE, CONCURS.

ACREE, CHIEF JUDGE, CONCURS IN PART AND DISSENTS IN PART.

ACREE, CHIEF JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority's ruling that Kentucky lacks extraterritorial jurisdiction over Goodgame's claims arising from his employment in Virginia. However, I respectfully disagree with the majority's analysis of the cumulative trauma injury claim Goodgame suffered in Kentucky. That claim is time-barred by KRS 342.185(1). I would reverse that portion of the Board's opinion.

In *Manalapan Mining Co., Inc. v. Lunsford*, 204 S.W.3d 601 (Ky. 2006), our Supreme Court held that "KRS 342.185(1) imposes a two-year period of limitations" just as the circuit court and majority hold. However, in *Lunsford* the Supreme Court also held that the statute "imposes a two-year period of repose . . . for gradual injuries and acknowledge[d] that such a claim may expire before the worker is aware of the injury." *Id.* at 604-05. There is a significant difference between a statute of limitation and a statute of repose. "A statute of limitations limits the time in which one may bring suit after the cause of action accrues, while a statute of repose potentially bars a plaintiff's suit before the cause of action accrues." *Coslow v. General Elec. Co.*, 877 S.W.2d 611, 612 (Ky. 1994). In my view, the latter is what occurred here.

Application of the two-year repose period does not turn on the worker's knowledge of the cumulative injury. *Lunsford*, 204 S.W.3d at 605. Operating as a statute of repose, KRS 342.185(1) bars a cumulative injury claim if the claim is not filed within two years from the claimant's last exposure to the Kentucky work condition giving rise to the injury, even if the injury is not discovered until later. *Id.*

In this case, the only portion of Goodgame's claim to which Kentucky law may apply is that which occurred in Kentucky. His last exposure in Kentucky to injury-causing labor covered by KRS Chapter 342 occurred on his last day of employment in Kentucky. We determined that date to be on or about August 1, 2009, when his employment was relocated to Virginia. The two-year repose period of KRS 342.185(1) began on that date and ended on or about August 1, 2011, extinguishing his Kentucky cumulative injury claim. Goodgame filed his claim in January 2012, several months after the period of repose had expired. His claim was untimely.

I would apply *Lunsford* and reverse the portion of the Board's order which held Goodgame's claim for benefits arising from pre-August 1, 2009 employment in Kentucky is not time-barred. I believe it is. Goodgame failed to bring his claim within two years of his last exposure to the harmful work condition he experienced in Kentucky and, applying KRS 342.185(1), he has been barred from bringing it since August 2011.

In all other respects I concur in the majority opinion.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:	BRIEF FOR APPELLEE/CROSS-APPELLANT:
A. Stuart Bennett Lexington, Kentucky	Sherry Brashear Harlan, Kentucky