OPINION ENTERED: April 19, 2013

CLAIM NO. 201200862

DAVID ALLEN WARD PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

ARAMARK
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

STIVERS, Member. David Allen Ward ("Ward"), *pro se*, appeals from the September 14, 2012, order of Hon. John B. Coleman, Administrative Law Judge ("ALJ") finding he was not an employee of Aramark at the time of the alleged injury, and his claim is barred by the statute of limitations. Accordingly, the ALJ dismissed Ward's claim

against Aramark. Ward also appeals from the October 9, 2012, order denying his petition for reconsideration.

On July 2, 2012, Ward filed a Form 101 alleging an injury on May 1, 2008. Ward alleged while in the Kentucky State Reformatory his injury occurred as follows:

> I was what Aramark call [sic] Line Backer and my job was to keep food out on the serving line while serving the other inmates their meal. I went to check on how much food was on the other food serving line. I step [sic] in some soup and fell.

As a result, Ward alleged his neck, head, and upper back were injured. Ward attached his work history and a limited medical history. He also attached a Form 107 medical report which was not filled out by a physician but by Ward. In addition, Ward attached an x-ray report and a report concerning an MRI of the cervical spine performed on December 16, 2011. Ward also attached a three page letter addressed "To Whom It May Concern" in which he stated he needed help in filling out the forms because he did not know how to fill out the claim form and he has a fifth grade education. Ward explained the problems he experienced in filing the claim and why he needed to file the claim before July 15, 2012.[1]

[1] Although we sympathize with Ward, we know of no statutory or regulatory provision which permits the Board to appoint counsel for Ward.

On July 23, 2012, Aramark filed a Form 111 denying the claim on the basis Ward was not its employee on the date of the alleged injury, but was an inmate at the Kentucky State Reformatory. Thus, his injury did not arise out of and in the course of his employment with Aramark. Aramark also asserted Ward's claim was barred by the statute of limitations.

On August 6, 2012, Aramark filed a motion to dismiss arguing Ward was not its employee but an inmate at the Kentucky State Reformatory in LaGrange. Citing Tackett v. La Grange Penitentiary, 524 S.W.2d 468 (Ky. 1975) and Com., Dept. of Educ., Div. of Surplus Properties v. Smith, 759 S.W.2d 56 (Ky. 1988), it asserted Ward is a prisoner and not an employee of Aramark. Aramark maintained it does not employ inmates, Ward was not hired by Aramark, and he was never paid by Aramark. Therefore, Aramark is not liable for Ward's injury. Aramark also asserted Ward's claim was barred by the statute of limitations. It attached the affidavits of Meghan Dalton ("Dalton"), one of its employees, and Sharon Burdell ("Burdell"), an employee of Sedgwick Claim Managements Services, the third party administrator for Aramark Correctional Services.

In her affidavit, Dalton identified herself as the Regional Human Resources Manager, State Systems. She

stated she is familiar with Aramark and its involvement with the Kentucky penal system and in providing meal services to various prisons and reformatories. To her knowledge, at no time had Ward been an employee of Aramark. Further, based on her review of the Kentucky Department of Corrections public website, Ward was an inmate at the Kentucky State Reformatory, in La Grange. She stated at no time did Aramark pay any wages to or on behalf of Ward.

In her affidavit, Burdell stated she had reviewed Aramark's employment roster and did not find Ward was an employee of Aramark. She stated Ward was an inmate at the Kentucky State Reformatory at La Grange and he had not been paid by Aramark. Further, at no time had Aramark or she provided workers' compensation benefits to Ward. Specifically, Burdell stated no temporary total disability ("TTD") benefits had been paid to Ward as he was not an employee of Aramark.

By order dated August 30, 2012, the ALJ granted Ward twenty days to show cause why Aramark's motion should not be sustained.

On September 4, 2012, Ward filed the following motion: "Motion to Submit some affidavit to tried [sic] to argue the fact that Aramark Ran the Kitchen and that I took all of my orders from Aramark and that Know [sic] one Else

gave me any order [sic] Beside Aramark and that Aramark was my Boss." Ward stated all of his orders came from Aramark during the three years he had worked for Aramark. Accordingly, he asserted Aramark was his boss and he works for it. Attached to his response were two affidavits both dated August 23, 2012, and signed by Ward. In one affidavit, Ward stated he worked for Aramark in the kitchen, all of his orders came from Aramark's supervisor, and he answered to Aramark and no one else. He identified his supervisor and stated she was the one who told him everything to do. He explained Aramark completely ran the kitchen, and there were two officers in the kitchen at one time and their job was to keep Aramark's supervisors safe while the inmate workers were working in the kitchen. The officers were also to make sure the inmate workers did not steal anything or run off.

Ward stated Aramark had a program to help the inmates work in the food business such as Aramark. He stated he hoped he could find work when he got out of the penitentiary. He described his neck and upper back pain and indicated his medication had been taken away from him. Ward stated he had been retaliated against for filing a grievance and a lawsuit against Aramark. He concluded by stating since Aramark had total control over the kitchen

operations and those who work in the kitchen, Aramark was his boss.

In the other affidavit, Ward stated he had worked for Aramark as an "'inmate kitchen worker' for about three years." For the first year and half he worked in a position called "line backer," and his job was to keep the food on the "food serving line." He explained he was performing that job when he fell. After he fell and for the next year and a half, Aramark had him putting napkins around spoons. Ward explained this was a very simple and easy job, but because his pain and headaches became so severe and he had difficulty obtaining medication, he quit work in July 2010. He explained that was the last time he received payment from Aramark. Ward stated during the three years he worked for Aramark, "not one order came from the Department of Corrections." Aramark ran the kitchen and told all inmate kitchen workers what and how to do their assignment. Therefore, Ward asserted this made Aramark "the boss over all the worker [sic]."

On September 4, 2012, Ward also filed a "Motion to Submit a True Statement to try to get the facts Right. and also to try to Explain How the Plaintiff got Serious hurt and why the Plaintiff file this Claim." He again reiterated he only received his orders from Aramark. He

maintained if the food line stopped for longer than five minutes, Aramark would be fined by the Department of Corrections. Therefore, Aramark was always causing him to rush. He again asserted he always did what he was told by Aramark because he wanted to work for Aramark when he got out of the penitentiary. Ward indicated on the day he was injured, he was performing a job when he slipped on some soup and fell. Ward asserted he is not getting needed medical care.

Ward attached the report prepared by Rachel Davis, an LPN, with the Kentucky State Reformatory, which indicated she was called to the cafeteria because Ward had "slipped in soup" and fell. He also filed a motion to submit various reports which included the reports concerning an x-ray and MRIs of the head and cervical spine.

On September 14, 2012, Ward filed a Motion/Statement explaining why the statute of limitations did not apply. Ward maintained he was last paid by Aramark on July 15, 2010, for working in the kitchen. He contended he had two years from the last payment to file his claim. Ward maintained Aramark did not follow the safety rules because it did not have wet floor signs out and did not

provide safety shoes. Ward cited to federal statutes and cases in support of his position.

On September 14, 2012, the ALJ entered the following order dismissing Ward's claim:

> Upon Motion and being sufficiently advised, it is hereby ORDERED that the within-styled action be and hereby is DISMISSED. The Administrative Law Judge has reviewed this matter and has determined based on the Affidavits in the record, that David Allen Ward is not an employee of Aramark but instead is an inmate in the Kentucky penal system. Further, the statute of limitations has run.
>
> Therefore, since the claimant is not an employee of Aramark and the claim is time barred, the within-styled action workers' compensation claim is hereby DISMISSED.

On September 19, 2012, Ward filed a "Motion to Submit Answer" explaining why he did not think his claim for workers' compensation should be dismissed. Ward asserted that during the time he worked as a kitchen worker, his orders came from Aramark and thus it was his boss and supervisor. Ward cited the definition of "boss" contained in Webster's II New College Dictionary. Ward described his physical problems in depth. He also argued Aramark knew the condition of the cafeteria floor when wet, and the boots the state provided to the kitchen workers were unsafe and hazardous. Ward concluded by arguing

Aramark, the supervisor of the inmate kitchen workers, did not train them properly. He contended many other workers had fallen in the kitchen because they did not have the proper footwear.

On October 1, 2012, Ward filed a motion asking the ALJ to reconsider and not dismiss his claim. He argued the ALJ's order was erroneous as he had not looked at all the evidence, facts, and case law. He went on to explain why his response to the show cause order was filed late. Ward also relied upon considerable federal authority in support of his motion.

In his October 9, 2012, order denying the petition for reconsideration, the ALJ stated as follows:

> This matter is before the ALJ on a motion filed by the plaintiff which the ALJ considers as a petition for reconsideration of the order of September 14, 2012 dismissing the claim. While the ALJ is sympathetic with the plaintiff's situation, the petition does not point to any patent errors in the September 14, 2012 order dismissing the claim for lack of proof of the employer/employee relationship and failure to file the claim and the statutory timeframe set forth in KRS 342.185. Therefore, the plaintiff's motion is DENIED.

On October 12, 2012, Ward also filed a motion seeking to submit an argument that he was an employee of Aramark and requested the ALJ look at the application which

he attached as an exhibit. Ward stated all the inmates had to sign this application. He indicated the exhibit when signed was a legal contract, therefore he was an employee of Aramark. Ward maintained since he signed an application and agreed to do what Aramark wanted him to do, this was a legal contract between he and Aramark. Significantly, the document attached is styled "Food Service Application Kentucky State Reformatory." It contains the "Kentucky Unbridled Spirit" logo in the upper left corner and Aramark's logo in the upper right corner. The application requested certain personal information and contains the following notation:

> NOTE: THOSE EMPLOYED BY THE FOOD SERVICE MUST BE WILLING TO PERFORM ALL DUTIES REQUESTED OF THEM BY THE FOOD SERVICE STAFF. INMATE WILL BE EXPECTED TO WORK A FULL SHIFT AND PERFORM A VARIETY OF TASKS. MUST HAVE AT LEAST 3 MONTHS CLEAR CONDUCT.
>
> BY SIGNING BELOW I DECLARE MY INTEREST IN WORKING IN THE FOOD SERVICE DEPARTMENT AND AGREE TO ALL RULES AND REGULATIONS.

At the bottom is the signature line and a line for the date signed.

On October 12, 2012, Ward filed a motion attempting to explain why the two year statute of limitations does not bar his claim.

In an October 18, 2012, order, the ALJ explained he had already considered the arguments contained in Ward's pleadings. The ALJ noted the claim had been previously dismissed and an order on reconsideration was entered on October 9, 2012. Accordingly, the ALJ overruled Ward's additional motions and stated Ward's only remedy at this point is to file an appeal to the Workers' Compensation Board.

On November 2, 2012, Ward filed a notice of appeal. On appeal, Ward states he had gotten a job in the kitchen working for Aramark as the "line backer" and explains his job. He maintains he stepped in some soup and slipped and fell hitting his head "really hard" and injuring his neck and upper back. Ward asserts Aramark was willful, wanton, negligent, and acted in reckless disregard of his safety. Ward contends Aramark had a duty to provide a safe place, and safe appliances, tools, and equipment for work. He argues Aramark had a duty to warn of any dangers of which the employee "might reasonably" be unaware. Ward contends Aramark had a duty to provide a sufficient number of "suitable fellow servants" and to promulgate and enforce rules for the conduct of employees which would make the workplace safe. He asserts Aramark provided assurances of safety. Ward contends he was not required to assume the

risk by continuing to work in the kitchen. Ward maintains there have been “a lot of other inmates” who have fallen because the “states boot was real bad” when walking on the wet floor. He asserts Aramark did not have any safety shoes when he fell and there were no visible signs warning of a wet floor.

Further, he argues the application which he had to sign required him to agree to do whatever Aramark told him. That application set out the number of days and hours he worked and he was being paid $2.00 per day. Ward asserts this document was a contract of hire. He also explains why the statute of limitations does not apply to him. Ward requests oral argument.

As a prisoner in the Kentucky State Reformatory at La Grange, Ward is obviously under a disability. Therefore, the Board has closely reviewed CR 17.04 regarding the necessity of appointing a guardian ad litem for Ward. CR 17.04 reads as follows:

> (1) Actions involving adult prisoners confined either without or without the State may be brought or defended by the prisoner. If for any reason the prisoner fails or is unable to defend an action, the court shall appoint a practicing attorney as guardian ad litem, and no judgment shall be rendered against the prisoner until the guardian ad litem shall have made defense or filed a report stating that

> after careful examination of the case he or she is unable to make defense.

We have also reviewed the Court of Appeals' holding in Davidson v. Boggs, 859 S.W.2d 662 (Ky. App. 1993) which deals with the applicability of CR 17.04(1). The civil rule and Davidson, supra, only require the appointment of a guardian ad litem when the prisoner fails or is unable to defend an action. Neither applies in situations where the prisoner has brought the action. Specifically, CR 17.04(1) states adult prisoners confined either within or without the state may bring an action. However, when the prisoner is a defendant, a guardian ad litem must be appointed before a judgment may be rendered. Thus, Davidson and CR 17.04 do not require a guardian ad litem be appointed for Ward before the Board may consider the merits of the appeal and issue a decision.

With that in mind, we find no error in the ALJ's order dismissing Ward's appeal. Ward alleged a work injury occurring on January 5, 2008, and filed the claim on July 2, 2012, almost four and a half years after the injury. KRS 342.185, the applicable statute of limitations, reads as follows:

> (1) Except as provided in subsection (2) of this section, no proceeding under this chapter for compensation for an injury or death shall be maintained

> unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident, or in case of death, within two (2) years after the death, whether or not a claim has been made by the employee himself or herself for compensation. The notice and the claim may be given or made by any person claiming to be entitled to compensation or by someone in his or her behalf. If payments of income benefits have been made, the filing of an application for adjustment of claim with the department within the period shall not be required, but shall become requisite within two (2) years following the suspension of payments or within two (2) years of the date of the accident, whichever is later.

Since Ward alleged an injury on January 5, 2008, and he did not receive income benefits at any time, his claim must have been filed within two years after July 5, 2008, the date of the alleged injury. Therefore, since Ward did not file a claim within that period his claim was untimely filed and is barred by the statute of limitations.

Further, the fact Ward is a prisoner under a disability did not toll the statute of limitations. A similar situation occurred in Steadman v. Gentry, 314 S.W.3d 760 (Ky. App. 2010) where Steadman, while housed in the Barren County Detention Center, *pro se*, filed a

complaint against a number of parties. Steadman sought to amend his complaint to join an additional party. Because the amendment was not timely filed the trial court dismissed Steadman's lawsuit against the individual named in the amended complaint as it was barred by the statute of limitations.

In addition, the ALJ correctly concluded Ward was not an employee of Aramark. Although, Ward asserts he was an employee of Aramark and had been paid by Aramark at the rate of $2.00 per day, we believe the $2.00 per day, if received by Ward, was paid by the Department of Corrections. The document which Ward insists created a contract between he and Aramark appears to be the Kentucky State Reformatory's form which it requires prisoners to complete and sign in order to work in the food service department of the Kentucky State Reformatory. Although the Aramark and Kentucky logos appear at the top of the form, the document is entitled "Food Service Application Kentucky State Reformatory" and states the inmate is working in the food service department. The application states by signing, the inmate agrees to all the rules and regulations of the food service department. It does not indicate the individual is being employed by Aramark. The mere fact Aramark operates the food service for the prison and may

direct the inmates working within the food service department does not create an employer/employee relationship between Aramark and the inmates. Certainly, the payment of $2.00 per day by Aramark would violate any number of wage and hour administrative regulations.

In addition, as Ward was not an employee of Aramark, the ALJ correctly dismissed Ward's claim pursuant to Com., Dept. of Educ., Div. of Surplus Properties v. Smith, supra. There, it was undisputed that Smith, the inmate, while working for the Commonwealth Department of Education Division of Surplus Properties sustained a bodily injury. Smith filed a workers' compensation claim and the Supreme Court ordered the claim dismissed holding as follows:

> The Workers' Compensation Board denied Smith's claim for workers' compensation in reliance upon Tackett v. La Grange Penitentiary, Ky., 524 S.W.2d 468 (1975) wherein we held that a state prisoner working inside the prison was not an employee of the Commonwealth and the Commonwealth was not liable for workers' compensation for injuries sustained by him at work. On appeal, the Franklin Circuit Court reversed the Board, and the Court of Appeals affirmed the circuit court. We granted discretionary review.
>
> . . .
>
> It matters not that at the time of his injuries Smith was working outside

> the prison walls, nor that he was not guarded by prison guards. He was a prisoner of the state working for an agency of the state under the supervision and control of agencies of the state, and regardless where the work was performed, he, as a prisoner of the Commonwealth, could not contract with the Commonwealth for the use of his services or the terms under which he worked.
>
> . . .
>
> A prisoner of the Commonwealth, even though he performs some work for the Commonwealth, is simply not an employee of the Commonwealth under the statutes as they presently exist.

Id. at 57-58.

In Tackett v. La Grange Penitentiary, supra, the Supreme Court after reviewing the provisions of KRS 342.740(1) and (3) determined as follows:

> KRS 197.070(1) commands the Department of Corrections to provide employment for all prisoners in the penitentiaries and to exhaust every resource at its command to provide employment for all prisoners in its custody. We do not construe the use of the word 'employment' to mean that prisoners are thereby constituted 'employees as that word is commonly understood. It is simply a direction that the department shall make work available to occupy the time of prisoners rather than to allow them to remain idle.
>
> . . .

> Although KRS 342.004 commands liberal construction of questions of law pertaining to Workmen's Compensation, we cannot read into our present statute any language which would transform a prisoner working inside a prison industry during the term of his confinement into an employee of the state.

Id. at 469.

Although Ward maintains otherwise, we believe the record overwhelmingly establishes he was not an employee of Aramark, but was an inmate working in the food service department of the Kentucky State Reformatory, and, as such, was not entitled to file a workers' compensation claim.

Accordingly, the order September 14, 2012, order dismissing and the October 9, 2012, order denying the petition for reconsideration of the ALJ are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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