;Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 26, 2015

CLAIM NO. 201459185

KENNETH WILLIAMS PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, CHIEF ADMINISTRATIVE LAW JUDGE**

CONSOL OF KENTUCKY, INC.
and HON. ROBERT L. SWISHER,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Kenneth Williams ("Williams") appeals from the February 12, 2015, Order of Hon. Robert L. Swisher, Chief Administrative Law Judge ("CALJ") dismissing his coal workers' pneumoconiosis ("CWP") claim against Consol of Kentucky, Inc. ("Consol") finding it was barred by the statute of limitations.

On appeal, Williams challenges the CALJ's decision asserting Consol is a foreign corporation doing business in Kentucky, is active and in good standing, and has a registered agent in Frankfort, Kentucky. He represents the Department of Workers' Claims' ("DWC") website reflects Consol has been and continues to be insured by Zurich American Insurance Company.

Williams contends he was hired in Kentucky to work for Consol and worked until August 1, 2013, in Kentucky and West Virginia coal mines. He also represents he was working under a contract of hire made in Kentucky and therefore Kentucky must have jurisdiction. Williams asserts there is no provision in the Act which mandates the date of last exposure to coal dust must take place in Kentucky. He notes KRS 342.316(4)(b) specifically provides that benefits resulting from CWP shall not be payable unless the employee has been exposed to the hazards of pneumoconiosis in the Commonwealth over a continuous period of not less than two years during the ten year period immediately preceding the date of his last exposure to pneumoconiosis or for five of the last fifteen years immediately preceding the date of his last exposure. Therefore, based upon Consol's acknowledgement of his date of hire, Williams argues he clearly meets the requirements

and is entitled to Kentucky benefits. We disagree and affirm.

Williams' November 21, 2014, Form 102-CWP alleges he contracted CWP on June 28, 2013, and his last date of exposure was at Naugatuck, Mingo County, West Virginia.

On January 14, 2015, Consol timely filed a special answer raising the statute of limitations as a bar to the claim. It also filed a motion to amend asserting Williams' employer was Consol of Kentucky, a subsidiary of Consol Energy, Inc., from April 26, 1993, through August 1, 2013. It represented Williams was never an employee of Consol Energy, Inc.[1]

On January 23, 2015, Consol filed a motion to dismiss asserting it is a subsidiary of Consol Energy, Inc., an entity involved in coal mining and the gas production business. It stated Consol operated coal mines in Kentucky for a number of years but ceased all coal mining operations in Kentucky in April 2010. Consol represented that since then its coal mining operations have been in other states. Based on the affidavit of Craig Campbell ("Campbell"), attached to its motion, Consol

[1] Even though a separate Order was not entered sustaining the motion, we find the CALJ sustained the motion since the February 12, 2015, Order lists Consol of Kentucky as Williams' employer.

asserted Williams was hired on April 26, 1993, in Kentucky and after that date worked in Kentucky as a heavy equipment operator until January 12, 2006, when his employment in Kentucky ended.[2] Consol represented that on January 12, 2006, Williams accepted an offer to transfer his employment to the Wiley Strip Mine located in West Virginia. Thereafter, Williams worked continuously for Consol in the state of West Virginia and never performed any work in Kentucky. Williams' employment ended when he retired from the Twin Branch surface mine in West Virginia on August 1, 2013.

Consol stated that Williams' Form 102-CWP listed June 28, 2013, as the date of development of the disease and identified Naugatuck, Mingo County, West Virginia, as the place of last exposure. Therefore, Consol submitted KRS 342.316(4)(a) bars Williams' claim since he failed to file his claim within five years of his last date of exposure to coal dust in Kentucky. It maintained Williams should have filed a claim on or before January 11, 2011.

Anticipating Williams would rely upon KRS 342.670 pertaining to extra-territorial coverage, Consol asserted

[2] Campbell's affidavit states he is the manager of Human Resources for Consol at the Miller Creek Operation.

the relevant portions of the statute do not confer jurisdiction upon Kentucky.

The February 12, 2015, Order dismissing Williams' CWP claim reads as follows:

> The affidavit submitted by the defendant/employer in support of its motion to dismiss establishes that plaintiff was hired by Consol in Kentucky in 1993, worked in Kentucky until January 12, 2006, when he transferred to Consol's surface mining operations in West Virginia where he continued to work until he retired on August 1, 2013. Plaintiff does not dispute that historical information provided in the affidavit. Moreover, the affidavit establishes that after January 12, 2006, plaintiff did not conduct any work for Consol within the Commonwealth of Kentucky, an assertion which, again, is not refuted by plaintiff. While plaintiff may have been exposed to coal dust in the employ of Consol within the Commonwealth of Kentucky prior to January 12, 2006, the uncontroverted evidence establishes that he was not further exposed to coal dust in Kentucky after that date. Plaintiff's application indicates that he was last exposed to occupational hazard of coal dust at Naugatuck, Mingo County, West Virginia. The application also reflects that plaintiff is a Kentucky resident, residing in West Liberty. As a result of plaintiff's last exposure to coal dust occurring in West Virginia, his claim for workers' compensation benefits in Kentucky is only viable to the extent that the Kentucky Department of Workers' Claims has extra-territorial jurisdiction pursuant to KRS 342.670. That statute provides, in pertinent part, that:

(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.

In responding to the motion to dismiss, plaintiff contends that since he was working for the defendant/employer "under a contract of hire made in Kentucky," Kentucky has jurisdiction of his claim. That plaintiff is a resident of the Commonwealth of Kentucky is a relevant,

but not dispositive factor. In *Amax Coal Co. v. Smith*, 748 S.W.2d 158 (Ky. App. 1988), the Court of Appeals addressed the dismissal of a claim with facts similar to those presented herein. Specifically, the claimant worked in the coal mining industry in several states, including Kentucky where he worked from 1969 to 1979. In 1979 the employer sold its Kentucky properties and claimant was allowed to transfer to a mine in Indiana where he worked from December 1979 until his last day of mining employment on April 30, 1983. It is undisputed that his legal domicile was in Kentucky the entire time he worked for the employer. The Workers' Compensation Board entered an award in favor of plaintiff finding extra-territorial coverage pursuant to KRS 342.670(4)(d) having determined that plaintiff's employment was principally localized in Kentucky. The Court of Appeals reversed the Board, however, finding that the Board's decision was based on the fact that plaintiff spent a substantial part of his working history for the employer in Kentucky. For that reason, the Board had determined that plaintiff's employment was primarily localized in Kentucky, but the Court of Appeals found that reasoning to be faulty noting that the statute refers to the present tense, and not the past. Of relevant consideration in the present matter is the Court's pronouncement in *Smith* as follows:

> It may be that Smith's pneumoconiosis was caused by all of his exposure to coal dust and that he sustained many "injuries" while breathing Kentucky coal dust, and coal dust in other states, but we can only

> conclude that the last injurious exposures were clearly received in Indiana. The disabling effects of the disease did not become disabling until years after Smith received additional continuous exposure in Indiana. Furthermore, if his claim is to be based on any "injuries" in Kentucky, we would not be attempting to apply Kentucky extra-territorial coverage. For Kentucky's extra-territorial coverage to apply to an injury, the injury must occur outside of Kentucky to a Kentucky resident who principally works in Kentucky at the time of the "injury." The exposure and injury did occur outside of Kentucky in Indiana, and we cannot use the previous Kentucky exposure when applying the extra-territorial statute.

Like the Court of Appeals in *Smith,* the CALJ finds that the extra-territorial jurisdiction provisions of the Kentucky Workers' Compensation statute are not applicable. For the purpose of this analysis, it is inferred that plaintiff's injury occurred while working out of state, i.e., when he was exposed to coal dust while working in West Virginia. Plaintiff's Form 102-CWP specifically identifies the place of last exposure at Mingo County, West Virginia. Under KRS 342.670(1)(a), a determination must be made as to whether plaintiff's employment is principally localized in this state. According to KRS 342.670(5)(d), a person's employment is

principally localized in this or another state when:

(1) the 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 was 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.

Under this definition in order for plaintiff's employment to be principally localized in Kentucky, the employer must have a place of business in Kentucky at or from which plaintiff regularly works or, if not, plaintiff must be domiciled and spend a substantial part of his working time in the service of the employer in Kentucky. Based on the facts presented in the affidavit in support of the employer's motion to dismiss, neither condition is satisfied. While the defendant/employer may be listed as a foreign corporation in good standing with the Secretary of State of the Commonwealth of Kentucky, it is clear from the affidavit in the record that Consol's principal place of business in relation to plaintiff's claim is in West Virginia, not Kentucky, and that, in any event, as of the alleged date of last exposure, plaintiff was not regularly working at or from any place of business of Consol within the boundaries of the Commonwealth of Kentucky. Likewise, plaintiff, although a domiciliary of Kentucky, spent all of his time working in the service of the employer in West Virginia for the last seven and a half years he worked.

> Subparagraph (1)(a), therefore, does not apply.
>
> With respect to subparagraphs (b) and (c), although it is apparently conceded that plaintiff was working under a contract of hire made in Kentucky, subsection (b) does not apply because plaintiff's employment was principally localized in another state, i.e., West Virginia. Moreover, the CALJ takes judicial notice that West Virginia is not a state whose workers' compensation law is not applicable to the claimant's employer with respect to coal mining operations conducted in West Virginia. Thus, subsection (c) does not apply. Finally, subsection (d) does not apply as plaintiff was not working outside of the United States. Accordingly, the CALJ finds that KRS 342.670 does not provide extra-territorial coverage so as to render plaintiff's claim for coal workers' pneumoconiosis compensable in Kentucky.

The CALJ also determined Williams was last exposed to coal dust in Kentucky in 2006. Therefore, KRS 342.316(4)(a), which acts as a statute of repose as well as a statute of limitations, bars Williams' claim. Since Campbell's affidavit establishes Williams' last potential injurious exposure in Kentucky occurred in 2006, the CALJ found Williams' claim for CWP benefits must have been filed no later than January 11, 2011. Since Williams did not file his claim within that time, his claim must be dismissed.

No petition for reconsideration was filed.

We emphasize that since Williams did not file a petition for reconsideration, we are bound by the findings of fact entered by the CALJ. Pursuant to KRS 342.285, an award or order of the ALJ as provided in KRS 342.275 shall be conclusive and binding as to all questions of fact if a petition for reconsideration is not filed as provided for in KRS 342.281. KRS 342.281 provides for the filing of a petition for reconsideration "[w]ithin fourteen (14) days from the date of the award, order, or decision" of the ALJ. Because Williams did not file a petition for reconsideration as provided for in KRS 342.281, the ALJ's decision is conclusive and binding as to all questions of fact. Notably, Williams did not file a countervailing affidavit disputing the accuracy of the facts set forth in Campbell's affidavit. Campbell's affidavit establishes Williams was hired by Consol in Kentucky on April 23, 1993, and last worked in Kentucky for Consol on January 12, 2006. Thereafter, until he retired in 2013, Williams worked entirely in West Virginia.

KRS 342.670(1)(a) through (d) reads 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.

KRS 342.670 Section 5(d)(1) and (2) defines principally localized employment:

> (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.

Based on the above statutes, extra-territorial coverage of Williams' CWP claim is not conferred upon Kentucky. KRS 342.670(1)(a) is not applicable as Williams' employment was not principally localized in Kentucky. Similarly, even though Williams was working under a contract of hire in this state his employment was principally localized in West Virginia. Thus, KRS 342.670(1)(b) is not applicable. In the same vein, KRS 342.670(1)(c) is not applicable. Although Williams was working under a contract for hire made in this state and his employment was principally localized in another state, the CALJ took judicial notice West Virginia's workers' compensation law was applicable to Consol of Kentucky. Williams does not dispute this fact. KRS 342.670(1)(d) is not applicable since Williams' employment was not outside the United States.

The definition of "principally localized" contained in KRS 342.670 Section (5)(d) does not support a finding Williams' employment was principally localized in Kentucky. Rather, (d)(1) of Section (5)(d) directs Williams' employment was principally localized in West Virginia as Consol had a place of business in West Virginia and Williams exclusively worked at or from that place of business. Consequently, to be viable Williams' claim for

CWP must have been filed within five years of the last date of exposure to coal dust in Kentucky. As found by the CALJ, the claim must have been filed on or before January 11, 2011.

In Haney v. Butler, 990 S.W.2d 611, 617 (Ky. 1999), the Kentucky Supreme Court held:

> 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.

Based on the above definition Williams' employment was not principally localized within Kentucky. Rather, his employment was principally localized in West Virginia thereby divesting Kentucky of extra-territorial coverage of his CWP claim.

In Amax Coal Co. v. Smith, 748 S.W.2d 158 (Ky. 1988), the Court of Appeals dealt with this very issue. It held:

> Smith worked exclusively in Indiana after December 1979. His claim was not filed until 1985. We find no such words as "was" or "did" in the statute. We are concerned with where he was at the time of the injury. His employment is principally localized where he *spends* a substantial part of his working time in the service of his

> employer in this state. The key word is "spends." It does not read "spent" or "did spend."
>
> It may be that Smith's pneumoconiosis was caused by all of his exposure to coal dust and that he sustained many "injuries" while breathing Kentucky coal dust, and coal dust in other states, but we can only conclude that the last injurious exposures were clearly received in Indiana. The disabling effects of the disease did not become disabling until several years after Smith received additional continuous exposure in Indiana. Furthermore, if his claim is to be based on any "injuries" in Kentucky, we would not be attempting to apply Kentucky's extraterritorial coverage. For Kentucky's extraterritorial coverage law to apply to an injury, the injury must occur outside of Kentucky to a Kentucky resident who principally works in Kentucky at the time of the "injury." The exposure and injury did occur outside of Kentucky in Indiana, and we cannot use the previous Kentucky exposure when applying the extraterritorial statute.

Id. at 160.

Since the relevant portions of KRS 342.670 do not confer extra-territorial coverage upon Kentucky, Williams' claim is barred by the statute of limitations as he did not file his CWP claim within five years of his last injurious exposure to coal dust in Kentucky.

Finally, Williams' reliance upon KRS 342.316(4)(b) is misplaced as that statute merely provides the minimum number of years the employee must be exposed to the hazards of CWP in Kentucky over the ten or fifteen year period he has exposed to CWP while working in more than one state. That statute does not address the statute of limitations, but rather the period during which the employee must be exposed to the hazards of coal dust in Kentucky during his employment over a ten or fifteen year period in multiple states.

Accordingly, the February 12, 2015, Order of the CALJ is **AFFIRMED**.

ALL CONCUR.

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