Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 27, 2013

CLAIM NO. 201172990

KENTUCKY EMPLOYERS' MUTUAL INSURANCE PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

FRED BURNETT,
DECK DOKTOR, INC.,
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

AND

DECK DOKTOR, INC. PETITIONER

VS.

FRED BURNETT,
KEMI,
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Deck Doktor, Inc. ("Deck Doktor") seeks review of the decision rendered March 20, 2013 by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), awarding Fred Burnett ("Burnett") permanent total disability ("PTD") benefits beginning September 30, 2011, and medical benefits. Deck Doktor also appeals from the order denying its petition for reconsideration issued April 23, 2013. Kentucky Employers' Mutual Insurance ("KEMI"), also appeals from the ALJ's opinion, and the order on reconsideration.

On appeal, Deck Doktor argues the ALJ's award of PTD benefits was neither requested by Burnett, nor supported by substantial evidence. KEMI argues the ALJ erred in holding Kentucky has jurisdiction over the September 29, 2011 accident which occurred in Indiana. We disagree as to both, and affirm.

Burnett testified by deposition on September 27, 2012, and at the hearing held January 28, 2013. James David Stillwell ("Stillwell"), the sole shareholder of Deck Doktor, testified by deposition on November 5, 2012. The facts are not in dispute. Both Burnett and Stillwell are residents of Indiana, where the accident occurred. Both agree the majority of the work Burnett performed for Deck

Doktor occurred in Kentucky. Both also agree Burnett was hired in late February, 2009. Stillwell admitted Burnett was hired at the Hometown Pizza in LaGrange, Kentucky.

Burnett and Stillwell attended school together. Although they did not see each other for several years afterward, they became reacquainted after Burnett moved back to Indiana. Stillwell incorporated Deck Doktor in Kentucky in 2000. Stillwell contacted Burnett occasionally to temporarily assist him on specific jobs. In February 2009, Stillwell contacted Burnett to assist him on a specific, temporary job in LaGrange, Kentucky. Upon completion of the job, Burnett and Stillwell had dinner at Hometown Pizza in LaGrange, Kentucky. During dinner, Stillwell offered Burnett a permanent, full time job which he accepted. Burnett estimated ninety percent of Deck Doktor's work was in Kentucky. Stillwell agreed the majority of work was in Kentucky.

Burnett continued to work for Deck Doktor thereafter until the September 29, 2011 accident. At the time of the accident, Burnett was working on a cabin in New Albany, Indiana. He fell from the roof of the cabin landing on his feet. Burnett testified he has not worked since the accident due to the injuries he sustained, which included right and left calcaneal fractures. Burnett

testified he has difficulty with prolonged standing or walking.

In support of his Form 101, Burnett filed the September 29, 2011 emergency room record from the Floyd Memorial Hospital in New Albany, Indiana, reflecting he fell several feet landing on his feet, resulting in swelling of the feet and ankles. Additional records from the Floyd Memorial Hospital were filed, including those of Dr. John Connor, reflecting calcaneal fractures to both ankles, requiring surgery on the left.

Burnett filed the October 10, 2012 report of Dr. Jules Barefoot, who noted the history of the fall, with resulting surgery of the left calcaneous. Burnett complained to Dr. Barefoot of ongoing pain and swelling in both feet. Dr. Barefoot diagnosed bilateral calcaneal fractures, and status post ORIF of a severely comminuted left calcaneal fracture. Dr. Barefoot assessed a 4% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), of which he attributed 3% to the left foot, and 1% to the right. In an addendum dated November 29, 2012, Dr. Barefoot revised the impairment rating to 21% based upon the AMA Guides. Dr. Barefoot advised Burnett to avoid ladders, scaffolding and

climbing or descending stairs. He also advised against prolonged standing, walking or carrying heavy loads.

Deck Doktor filed Dr. Thomas Loeb's October 23, 2012 report. Dr. Loeb diagnosed, "status post bilateral os calcis fractures with intra-articular components, healed, with persistent heel pain." He assessed a 19% impairment rating pursuant to the AMA Guides. He also recommended treatment with braces and over-the-counter medication. Dr. Loeb noted Burnett may develop subtalar arthritis.

A Benefit Review Conference ("BRC") was held on October 31, 2012. In the BRC order and memorandum, the parties designated the contested issues to be decided were benefits per KRS 342.730, work-relatedness/causation, average weekly wage, unpaid or contested medical expenses, TTD, and "whether this claim fall[sic] under the jurisdiction of Indiana or Kentucky, contract of hire, extraterritorial coverage". At the hearing held on January 28, 2013, the list of contested issues was reviewed and confirmed by the parties.

In his March 20, 2013 opinion, the ALJ determined Kentucky has jurisdiction over this claim stating as follows:

> In this case, the Administrative Law Judge finds that KRS 342.670(1) is applicable, specifically KRS 342.670

(1)(b). The evidence reflects Mr. Burnett and Mr. Stillwell, in his capacity as the owner of the Defendant Employer, entered into a contract of hire made in the Commonwealth of Kentucky. The contract of hire was negotiated and agreed to during a meeting held between these parties in February of 2011 while they were eating dinner at the Hometown Pizza in LaGrange, Kentucky. This fact is evidenced from the testimony of both Mr. Burnett and Mr. Stillwell who were in agreement that the decision of Mr. Burnett becoming a full-time employee of Deck Doktors[sic] was reached as a result of this meeting which is when the contract of hire was entered into.

In addition, the Administrative Law Judge finds that the employment Mr. Burnett was hired to perform was not principally localized in any state. In fact, Mr. Stillwell testified the Defendant Employer is incorporated under the laws of the Commonwealth of Kentucky, and that he performs the majority of his jobs in the Commonwealth of Kentucky. Mr. Stillwell testified that while he resides in Indiana, that his business does not have a set office location in either Indiana or Kentucky, and as he described it is a mobile business that he runs from his truck primarily using his cell phone and taking calls while he is either on the road or in restaurants.

In addition, Mr. Burnett testified that 90% of the Defendant Employer's work is performed in the Commonwealth of Kentucky with the remaining 10% being performed in the state of Indiana. Therefore, the Administrative Law Judge finds that KRS 342.670 (5)(d)(1) is not applicable as the Employer does not

> have a place of business in this or any other state and does not regularly works[sic] at or from that place of business. Instead the Administrative Law Judge finds KRS 342.670 (5)(d)(2) is applicable as the Plaintiff is domiciled in Indiana but spends a substantial part of his working time in the service of his Employer in Kentucky. Therefore, Kentucky has jurisdiction over this claim.

The ALJ determined Burnett is permanently totally disabled due to his work injuries.

Deck Doktor argues the ALJ's award of PTD benefits is not supported by substantial evidence. Authority has long acknowledged in making a determination granting or denying an award of PTD benefits, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560

S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

The ALJ based his determination upon the medical evidence, as well as Burnett's testimony regarding continued ankle and leg swelling, and difficulty performing any activity. The ALJ also noted Burnett's injuries preclude him from climbing or heavy lifting which he engaged in prior to the accident. Specifically, the ALJ found:

> In so determining, the Administrative Law Judge believes that the likelihood that Mr. Burnett will be able to find work consistently under normal employment conditions with his current limitations and chronic pain complaints is highly unlikely.

The ALJ's determination is supported by the opinions of Drs. Barefoot and Loeb. Deck Doktor argues Burnett is not precluded from all work, and is not prevented from performing all activities. Deck Doktor also argues Burnett did not argue he was entitled to PTD benefits, and therefore the ALJ was precluded from making such award.

Deck Doktor has set forth an insufficient basis for setting aside the ALJ's determination. By preserving the issue of benefits pursuant to KRS 342.730 in the BRC order and memorandum, it was within the ALJ's discretion to

determine the extent of Burnett's disability, including whether he was partially or totally disabled. After reviewing the evidence, it is clear the ALJ's determination Burnett is permanently totally disabled was in accordance with the Kentucky Supreme Court's holding in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Taking into account Burnett's age, education and past work experience, in conjunction with his post-injury physical status and the medical evidence, the ALJ was persuaded due to the effects of the work-related injury, he is totally disabled. Because the ALJ's determination is supported by substantial evidence, we are without authority to disturb his decision on appeal. *See* KRS 342.285; Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). For that reason, we cannot say the outcome arrived at by the ALJ finding Burnett entitled to an award of PTD benefits is so unreasonable under the evidence the decision must be reversed.

Likewise, we do not believe the ALJ erred in finding Kentucky has jurisdiction of this claim. KRS 342.670, the statute concerning extraterritorial coverage provides in pertinent part:

> (1) If an employee, while working outside the territorial limits of this state, suffers an injury on

account of which he, or in the event of his death, his 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 his death, his dependents, shall be entitled to the benefits provided by this chapter, if at the time of the injury:

(a) His employment is principally localized in this state, or

(b) **He is working under a contract of hire made in this state in employment not principally localized in any state, or** (emphasis added)

(c) He 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 employer, or

(d) He is working under a contract of hire made in this state for employment outside the United States and Canada.

. . . .

(5)

. . . .

(d) A person's employment is principally localized in this or another state when:

1. His employer has a place of business in this or the other state and he

> regularly works at or from that place of business, or
>
> 2. If subparagraph 1. foregoing is not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or the other state[.]

The issue of extraterritorial coverage has been addressed by the Kentucky appellate courts in numerous decisions. It is apparent that KRS 342.670, much like KRS 342.140 the average weekly wage statute, is not drafted to contemplate every fact situation. *See* Huff v. Smith Trucking, 6 S.W.3d 819 (Ky. 1999) and C & D Bulldozing Co. v. Brock, 820 S.W.2d 482 (Ky. 1991). As the Court in Brock lamented, though it is unfortunate there is not a provision which is more narrowly tailored to accommodate a particular fact situation, the statute must be applied as best it can to varying circumstances.

The ALJ's determination Burnett was hired in Kentucky is supported by the testimony of both Burnett and Stillwell. Despite Burnett having performed specific day labor jobs for Deck Doktor previously, it was reasonable for the ALJ to conclude the offer and acceptance of those

temporary, day labor positions did not result in permanent employment.

Regarding Burnett's hiring on a permanent basis, Stillwell testified as follows:

> And then in February of '09, I got a bigger job in LaGrange, I think that's considered LaGrange, Kentucky, and that's when I called him to see if he would want to go up there and work on the - - job for me.
>
> We talked about the possibility of him, you know, depending on how he liked the work and how we worked out together and everything, if he would want to work more hours, more time with me.
>
> And so he went up there to that deck and we worked on it together and each evening - - we were working late in the evening, so each evening we would typically eat dinner somewhere there in LaGrange. And the actual night he was hired I guess we had finished and we went there to the Hometown Pizza and we kind of lined everything out on paper as far as, you know, what his pay would be, how many hours a week, and dreamt a little bit as to what could go on.
>
> And that night is distinct, I remember, because we never drank or bought beer or anything like that, but that night we got a pitcher of beer there at that restaurant, kind of in celebration. And so that was the actual, yes, I want to work, here's the pay, here's the hours, yada-yada-yada, so that would have been when he became employed.

Despite some discussion of permanent employment, no such offer was made until Burnett and Stillwell were at

the Hometown Pizza in LaGrange, Kentucky. As the ALJ determined, it was at that time Stillwell made the offer of permanent employment, which Burnett accepted. The ALJ's determination the contract of hire was made in Kentucky pursuant to KRS 342.670(1)(b) was therefore not erroneous because it was supported by substantial evidence.

Regarding whether Burnett's employment was principally localized in any state, we note in Haney v. Butler, 990 S.W.2d 611 (Ky. 1999), the Kentucky Supreme Court provided a detailed annotation of Kentucky extraterritorial jurisdiction cases. The definition of "principally localized", as defined by KRS 342.670, was outlined as follows:

> Fourth, is the question of whether Kentucky has extraterritorial jurisdiction over this claim. The employer argues that because the decedent worked most of the time in Alabama and was injured in Alabama, public policy favors Alabama jurisdiction over the claim. We observe, however, that such considerations were presumably taken into account by the legislature in the drafting of KRS 342.670. As was recognized by the tribunals below, an analysis of whether the Kentucky Act applies to an extraterritorial claim turns upon the definition of the term 'principally localized' which is provided in KRS 342.670(4)(d)1. and 2. A review of the provision makes it clear that a particular set of facts must be considered, first, in view of

subsection (4)(d)1. Only if that provision does not apply, does the analysis proceed to subsection (4)(d)2. It may be concluded that a particular employment is not principally localized in any state only after a determination that both subsections (4)(d)1. and (4)(d)2. do not apply.

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, 619 S.W.2d 709 (Ky. App. 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 v. Butler, 990 S.W.2d at 616, 617.

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

After reviewing the applicable statutory and case law, we conclude the ALJ did not err in determining the issue of extraterritorial jurisdiction. Clearly, Burnett

was hired in Kentucky. Burnett and Stillwell are both Indiana residents, and the accident occurred in Indiana. Stillwell testified the majority of Deck Doktor's business is in Kentucky. Stillwell also testified Deck Doktor has no office, and the majority of his business is conducted from the front seat of his truck, or wherever he happens to be at the time. Therefore, it was not erroneous for the ALJ to determine Burnett's was working under a contract of hire made in Kentucky, and the work was not localized in any state. Considering the specific circumstances of this claim, the ALJ's conclusion comports with applicable statutory and case law. We are therefore without authority to direct a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the decision rendered March 20, 2013 by Hon. R. Scott Borders, Administrative Law Judge, and the order on reconsideration issued April 23, 2013, are hereby **AFFIRMED**.

ALL CONCUR.

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