OPINION ENTERED: January 11, 2013

CLAIM NO. 201200062

OSIE DANIEL GOODGAME, JR. PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

CONSOL OF KENTUCKY, INC.
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING
* * * * * *

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

STIVERS, Member. Osie Daniel Goodgame, Jr. ("Goodgame") appeals from the August 13, 2012, opinion and order by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") in which the ALJ dismissed Goodgame's claim for benefits due to a lack of jurisdiction. Goodgame also appeals from the order dated September 5, 2012, denying his petition for

reconsideration. As the issue on appeal is a narrow one, a limited portion of the record will be discussed.

The Form 101, filed on January 17, 2012, alleges on January 19, 2010, Goodgame was injured within the scope and course of his employment with Consol of Kentucky ("Consol") in the following manner:

> Prior to January 19, 2010, I had performed work as an underground coal miner that produced cumulative trauma injuries to my upper and lower extremities, and to my entire spine. These impairments rendered me unable to do my job at the time.

The Form 101 asserts the cumulative trauma injury occurred in the city of Deane in Letcher County, Kentucky, and Goodgame provided notice by certified mail on January 12, 2012. The Form 101 indicates Goodgame was employed by Consol from 1992 through 2010. At the hearing, Goodgame testified that all of his employment with Consol was in Kentucky other than the final five and a half months he worked in Virginia.

Attached to the Form 101 is a Form 107-I completed by Dr. Robert C. Hoskins and an addendum, both dated December 21, 2011, less than one month before Goodgame filed his Form 101 on January 17, 2012. After examining Goodgame, Dr. Hoskins provided the following diagnoses: "1. Left hip pain-likely osteoarthritic; 2.

Bilateral patellofemoral osteoarthritis; 3. Bilateral median sensory neuropathy- mild." Dr. Hoskins opined as follows: "Mr. Goodgame's impairments were caused by years of cumulative trauma and repetitive strain associated with the physical job demands encountered through his employment as a coal miner for approximately 35 years." Dr. Hoskins assessed a 10% whole person impairment rating.

The June 14, 2012, benefit review conference ("BRC") order lists the following contested issues: "benefits per KRS 342.730; work-relatedness/causation; notice; average weekly wage; unpaid or contested medical expenses." Handwritten under "other" is the following: "SOL/jurisdiction/compensability, whether the entire award, if any, can be assessed to Δ/E Consol." Under stipulations is handwritten the following: "last day of work was 1/19/2010 in Virginia."

The August 13, 2012, opinion and order, set out in its entirety, is as follows:

> This is an injury claim in which the Plaintiff, Osie Daniel Goodgame, Jr., claims disability resulting from cumulative trauma to his "upper and lower extremities, and to my entire spine" while in the employ of the Defendant/employer, Consol of Kentucky Inc. Plaintiff claims an injury date of January 19, 2010 and notice to Defendant/employer by certified mail on January 12, 2012 and a filing date of

January 17, 2012 of the Application for Resolution of Injury Claim (Form 101) with the Department of Workers' Claims. A Benefit Review Conference was held June 14, 2012. A Formal Hearing [sic] June 27, 2012, at which time the Plaintiff appeared and testified. There were no witnesses at the hearing for the Defendant/employer.

STIPULATIONS

At the BRC the parties agreed to the following stipulated facts:

1. Coverage under the Kentucky Workers' Compensation Act.
2. An employment relationship existed between the Plaintiff and Defendant/employer at all times herein relevant remained at issue.
3. Plaintiff sustained alleged work-related injury(ies) on 1/19/2010.
4. Whether the Defendant/employer had due and timely notice of Plaintiff's injury(ies) remains at issue.
5. No temporary total disability benefits were paid.
6. The Defendant/employer has paid no medical expenses.
7. Plaintiff's average weekly wage was $1,500.00 (stipulated at Hearing)
8. Whether the Plaintiff retains the physical capacity to return to his former work remains at issue.
9. Plaintiff's last day of work was January 19, 2010 in Virginia
10. Plaintiff's date of birth is September 22, 1954.
11. Plaintiff' has a 12th grade education.
12. Plaintiff' has no specialized or vocational training.

CONTESTED ISSUES

The only issues remaining for the decision of the undersigned are:

1. Benefits per KRS 342.730.
2. Work-relatedness/causation.
3. Notice.
3. Unpaid or contested medical expenses.
4. SOL/jurisdiction/compensability.
5. Whether the entire award (if any) can be assessed to Defendant/employer.

SUMMARY OF THE EVIDENCE

The Plaintiff, Osie Daniel Goodgame, Jr., is a 57-year-old high school graduate with no specialized training. He is 5'8" tall and weighs 165 pounds. His work history includes 35 years as an underground coal miner. The last eighteen years he was employed by the Defendant/employer, Consol of Kentucky Inc.

During the 18 years of working for the Defendant/employer the Plaintiff worked primarily on a segmented haulage system commonly known as a "pig". The system hauled coal from the face of the mine to the mobile bridge/beltline. Plaintiff ran the front segment of the pig. Additionally, he testified he moved cable, hung curtains, shoveled rock dust, installed belts, and shoveled heavy pieces of coal that might interfere with the operation of the haulage system. He testified he had to continuously use his upper extremities operating the pig through a series of levers, including flexing his wrists continuously. He routinely lifted 60 to 80 pounds alone. (Hearing Transcript "HT" pp. 14-18). He testified he worked in 42 inch coal and had to keep his knees flexed at all

times. He sat in a slumped/reclining position and manipulated the pig through a series of foot pedals and levers. Id.

Plaintiff began working for the Defendant/employer in 1992. He applied for his position at the Defendant/employer's Kentucky location in Hindman. After 17 years of working in Kentucky, the Plaintiff was informed that the Defendant/employer was closing its Kentucky operations on July 31, 2009. (HT p. 10). At the Consol office in Hindman, Kentucky he was "invited to go to another mine and stuff" by the Human Resources person, Craig Campbell. The invitation to transfer to other mines was extended to all the employees at the Kentucky mine site. They were given three options: mines in West Virginia, Pittsburgh or Virginia. (HT p. 11). Plaintiff testified that all he had to do was sign up to go to Buchanan County, Virginia. (Id.) He was not required to submit an application and was not required to pass a physical examination. He was going to be doing "general inside general labor". In order to work in the mines in Virginia, Plaintiff was required to apply and receive an underground certificate for Virginia. (HT p. 12)

Plaintiff began working in the Virginia mine on either July 31, 2009 or August 1, 2009. (Plaintiff's Depo., p. 11). His job was different in Virginia and not what he expected. He testified he did not realize that his job would be different in Virginia. (Plaintiff's Depo. pp. 16-17). Instead of running a pig, he had to work the long wall with different duties: "shovel belt and GI work and worked on the long wall. . . on the scoops and stuff moving sections and then I was head gate operator." (HT

p. 13). Plaintiff continued to live in Kentucky and carpooled every day to the Virginia mine. (HT p. 19). The commute was about an hour and forty-five minutes one way. (Id.)

Plaintiff testified he stopped working on January 19, 2010 because: "Well, my body just couldn't handle it anymore. Because it ached and stuff, and I couldn't move as fast as I normally could . . . And lifting, my back, it was – I had to lift so many heavy things like belt structure and stuff by myself. And I just couldn't do it anymore." (Plaintiff's Depo., p. 18).

In responding to the question whether any doctor told him that his physical complaints were caused from working in the mines, he responded he "never really did, you know, complain because I knew I was going to have to go to work anyway, and there wasn't no use to complaining about it. But it was there, you know. (Plaintiff's Depo., pp. 18-19)

ANALYSIS FINDINGS OF FACT AND CONCLUSIONS OF LAW

The contested issues will be discussed in the order most reasonable to the undersigned.

1. The facts as stipulated by the parties.

2. SOL/jurisdiction/compensability
Fundamental to this claim is a finding that Kentucky has jurisdiction in this case. As acknowledged by the Plaintiff in his brief:

> It is undisputed, Goodgame last worked in Kentucky on

> August 31, 2009 more than two years prior to filing his claim. He last worked for the defendant in Virginia on January 19, 2010, less than two years before filing his claim on January 17, 2012. Hence, the issue of whether Kentucky may exercise extraterritorial jurisdiction over Goodgame's Virginia employment is critical to the outcome of his claim. (Plaintiff's Brief to ALJ p. 11).

The Plaintiff argues that KRS 342.670(1) applies and Kentucky retains jurisdiction because Plaintiff's employment was principally localized in the state of Kentucky. KRS 342.670 (1) (a) through (d) provides as follows:

> (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 resulting from that injury, 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
>
> (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.

The Plaintiff avers his employment was principally localized in Kentucky and thus Kentucky has jurisdiction pursuant to KRS 342.670(1)(a). The term "principally localized" has been further defined by statute. KRS 342.670(5)(d)1. and 2., which reads as follows:

> (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;

As the Supreme Court has made clear in Haney vs. Butler, 990 SW2d 611 (Ky. 1999), a review of the provision makes it clear that a particular set of facts must be considered, first, in view of subsection (5)(d)1. Only if that provision does not apply, does the analysis proceed to subsection (5)(d)2. It may be concluded that a particular employment is not principally localized in any state only after a determination that both subsections (5)(d)1. and (5)(d)2. do not apply. In Haney vs. Butler, the statutory provision was KRS 342.670(4)(d)(1) and (2) and later revised to KRS 342.670(5)(1) and (2).

The Plaintiff relies upon the holding in Davis vs. Wilson, 619 SW2d 709 (Ky.App.1980) where the Court of Appeals found Kentucky jurisdiction applied. In Davis, *supra,* 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 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, even if it were assumed 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).

I do not find the holdings in Davis vs. Wilson, *supra*, dispositive or applicable to the case at bar. In Davis the employee had only worked a short period of time for the employer. The Court found that because the employee lived in Kentucky AND spent a substantial amount of time working in Kentucky – the extra-territorial provision applied, even though he had been injured in another state. Here, the employee previously worked in Kentucky, continued to live in Kentucky and avers he was injured in Kentucky. However, the evidence is clear the Defendant/employer no longer had operations in Kentucky after August 1, 2009. There was a distinct and clear

choice made by Plaintiff to go to work for the Defendant/employer in Virginia. It was not a matter of his work transcending two states. At no time did Plaintiff work in both Kentucky and Virginia. It is true he was originally hired in Kentucky in 1992, agreed to be transferred to Virginia while in Kentucky in 2009, and continued to live in Kentucky. However, there is no question that his work and place of employment was Virginia beginning in August 2009. He never went back to Kentucky to work.

The Plaintiff asserts his claim is for one of cumulative trauma and involves injuries of an ongoing nature. Plaintiff avers his 17 years in Kentucky versus his 6 months in Virginia should be considered in the same light as the court's apportionment in Davis vs. Wilson. However, the Davis claimant was going back and forth between two states at the time of his injury – this is not the fact scenario in the case at bar.

The Plaintiff's argument per KRS 342.670(5)(d)(1) is dealt a fatal blow by the following holding in Haney vs. Butler, *supra*.:

> 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**. (Emphasis ours).

I find KRS 342.670(5)(d)(1) does not apply to the case at bar.

The Plaintiff's argument per KRS 342.670(5)(d)(2) presents a more complicated issue. The Plaintiff remained domiciled in Kentucky. He previously spent a substantial part of his working time in the service of his employer in Kentucky. However, he was now working for the Defendant/employer in Virginia. He also testified his work in Virginia was substantially different than his work in Kentucky. He admitted that the work in Virginia was more physically difficult than his work in Kentucky. He testified it was the work in Virginia he felt he was unable to continue.

I find no direct legal authority on the mixed question of extra-territorial jurisdiction for a cumulative trauma injury. In the case at bar, <u>when</u> a plaintiff was injured will be determinative of <u>where</u> the plaintiff

was injured. The Plaintiff's Application for Resolution of Injury Claim (Form 101) claims an injury date of January 19, 2010. The claimant was working in Virginia on January 19, 2010 doing different work than he was doing when he last worked in Kentucky. Although the Form 101 avers the injury occurred at Deane, Letcher County, Kentucky, I find that the provisions of KRS 342.670 provide that his work on that date was principally localized in Virginia.

As noted above, I find that the work performed by the Plaintiff in Kentucky was substantially different than the work performed in Virginia as it relates to the cumulative trauma averred by the Plaintiff. There is no evidence of substance that the cumulative trauma (alleged to have occurred while the Plaintiff worked in Kentucky) continued after he began working in Virginia. Therefore, at the very latest, Plaintiff would have been injured in Kentucky on his last day of work, August 1, 2009.

The undersigned is aware of the recent holdings regarding the statute of limitations in cumulative trauma. The mixed question of jurisdiction and statute of limitation makes this claim difficult. The Plaintiff last worked in Kentucky on August 1, 2009. He last worked for the Defendant/employer in Virginia on January 19, 2010. After considering all of the evidence of record, I find that the 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. I find that the extra-territorial provision of KRS 342.670 et.al. does not apply and, therefore,

> Kentucky has no jurisdiction over any injury sustained after August 1, 2009.
>
> The remainder of the contested issues are moot and will not be considered by the undersigned.

Goodgame filed a petition for reconsideration requesting the ALJ to reconsider dismissal of his claim based on a lack of jurisdiction. Goodgame asserted that while the ALJ found it significant he was working in Virginia on January 19, 2010, when he could no longer work, "that fact is irrelevant" if Kentucky has extraterritorial jurisdiction. Additionally, Goodgame asserted he worked under a Kentucky contract and then transferred to Virginia. Thus, "[h]is employment was localized in neither state" and "Kentucky has jurisdiction" under KRS 342.670(1)(b).

In the September 5, 2012, order denying the petition for reconsideration, the ALJ stated:

> The Plaintiff avers an error regarding application of the facts to the statutory provision per KRS 342.670(4)(d)(1). Specifically, the Plaintiff states the authority of Haney vs. Butler, 990 SW2d 611 (Ky. 1999) could be relied upon to find Kentucky has jurisdiction because "Plaintiff's employment was localized in neither Kentucky or Virginia". I do not find Plaintiff's argument persuasive.
>
> Haney, supra, states:

> **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.**

> Here there is no evidence the Defendant leased or owned a location in Kentucky after August 1, 2009 from which it regularly conducted its business affairs and from where the Plaintiff regularly worked. There is testimony from the Plaintiff after making his decision to move to the Virginia mine he regularly commuted from his Kentucky home to the Defendant's Virginia operation. Virginia was the only place he worked, or expected to work, at the time of the averred injury. There is no evidence in the record that the Plaintiff's job in Virginia was temporary or he expected to return to Kentucky. The facts are simply not analogous to Haney.

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 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 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 resulting from that injury, 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
>
> (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)
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> . . . .
>
> (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[.]

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.
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> 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 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 localized 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 19, 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 he car pooled with a friend to Consol's Virginia 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 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 injury is "when the disabling reality of the injuries becomes **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 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 views expressed herein.

ALL CONCUR.

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