

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: February 22, 2019

CLAIM NO. 201801032

DEBRA LYNN STEPHENSON

PETITIONER

VS.

APPEAL FROM HON. W. GREG HARVEY,  
ADMINISTRATIVE LAW JUDGE

RAILCREW XPRESS LLC  
and HON. W. GREG HARVEY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING & REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Debra Lynn Stephenson (“Stephenson”) seeks review of the December 14, 2018, Opinion and Order of Hon. W. Greg Harvey, Administrative Law Judge (“ALJ”), dismissing her claim against RAILCREW Xpress LLC (“RAILCREW”) for an alleged work-related low back injury occurring in Kentucky. The ALJ determined the applicable statute of limitations to be KRS 342.670(2), which mandates Stephenson must have filed her claim within two years from the date of her

injury. Since Stephenson filed her claim “more than two years after the date of injury and she has received Kansas workers’ compensation benefits,” the ALJ ordered her claim dismissed.

On appeal, Stephenson asserts the ALJ erroneously applied the statute of limitations contained in KRS 342.670(2). Stephenson argues the correct statute of limitations upon which the ALJ should have based his decision is KRS 342.185.

### **BACKGROUND**

On July 11, 2018, Stephenson filed a Form 101 alleging a June 26, 2017, lumbar spine work injury occurring in Pembroke, Christian County, Kentucky, while in the employ of RAILCREW. The cause of injury was listed as “[f]all, slip or trip from different level (elevation).” Stephenson asserted she gave notice to her supervisors on July 10, 2017, after “it became apparent that the pain was getting worse and it was not a temporary back strain.”

On July 23, 2018, RAILCREW filed a Form 111 denying the claim. The Form 111 contains a Special Answer in which RAILCREW asserted the “running of periods of limitations or repose under KRS 342.185, 342.270, 342.316, or other applicable statute” barred Stephenson’s recovery. RAILCREW stated the only work incident of which it was aware occurred on June 23, 2016, and Kentucky temporary total disability benefits (“TTD”) were not paid to Stephenson.

On that same date, RAILCREW filed a Notice of Disclosure in which it represented, in part, “Kentucky benefits, including medical benefits, have not been paid on behalf of [Stephenson]. However, pursuant to Kansas law, \$39,223.00 was paid as medical expense on behalf of [Stephenson].” It also represented that “pursuant

to Kansas law, indemnity benefits were paid to [Stephenson] at the rate of \$610.00 for a period of March 8, 2017 through April 2, 2017, for a total of \$2266.00.”

RAILCREW also filed a Special Answer asserting Stephenson’s claim was barred “pursuant to the running of the applicable period of limitation pursuant to KRS 342.185 and KRS 342.270, or other applicable statute.”

On July 31, 2018, Hon. Robert L. Swisher, Commissioner of the Department of Worker’s Claims (“DWC”), provided a letter to Stephenson which stated the DWC had received notice from her employer’s workers’ compensation claims administrator that her claim alleging a work-related injury or disease had been denied. The letter stated in part as follows: “This ‘application’ must be filed within two years after the date your injury occurred or within two years after the last voluntary payment of income benefits to you, whichever event last occurs.” (emphasis in original).

On August 10, 2018, Stephenson was deposed and testified she lives in Deerborn, Missouri, and has never been a resident of Kentucky. RAILCREW’s corporate office is located in Lenexa, Kansas. In addition to transporting railroad crew members, RAILCREW also transports barge crew members, some of which are located in Paducah, Kentucky. Stephenson identified a document evidencing an email she sent on July 10, 2016, to Bryan Taylor (“Taylor”) and Andrew Beck (“Beck”). A copy of the email which also contained the responses of Taylor and Beck was introduced as RAILCREW’S Exhibit 1 to the deposition. In the email, Stephenson stated:

In Casky, I turned wrong and pulled a muscle from lower left back down to upper left thigh. I expected it to get

better with time, but it has only worsened. The pain is pretty severe depending on movement. I will be at work Monday morning, but if pain isn't better when I get up, I will need to see a doctor. Please advise.

The email containing the responses of Taylor and Beck ends with Stephenson stating: "If I remember correctly it was 06/23. Ironically enough I was demonstrating the 3-point contact entering and exiting, on the Expedition."

Stephenson testified she sustained a low back injury on Thursday, June 23, 2016, at the Casky location in Pembroke, Christian County, Kentucky. On that date, she was working as a field manager setting up a RAILCREW operation in Pembroke, Kentucky, at the CSX railroad depot. There, RAILCREW was to transport CSX crew members. Stephenson explained she was demonstrating the proper way to get in and out of a Ford Expedition to two "female new hire employees." In the Expedition, she felt a pop when she twisted her upper torso to the left. She drove to Kansas City the next day, Friday, June 24, 2016. On Sunday, July 10, 2016, she sent the email advising Taylor and Beck she was going to the doctor. She ultimately came under the care of Dr. Travis Foxx. Thereafter she underwent an MRI. She testified "work comp" referred her to Dr. John Ciccarelli, who performed surgery on March 8, 2017. She filed a Kansas workers' compensation claim which is still pending. After filing the Kansas claim, she underwent a "court ordered" physical evaluation performed by a designated physician. Stephenson testified she is not making a claim in two states. Following her surgery, she was paid benefits pursuant to Kansas law while she was off work.

On August 20, 2018, Stephenson filed a motion to amend the injury date alleged in the Form 101 to reflect the injury occurred on Thursday, June 23, 2016, in

Pembroke, Christian County, Kentucky. RAILCREW filed a response stating it did not oppose the motion.

On August 22, 2018, RAILCREW filed a motion to bifurcate, asserting Stephenson's deposition confirmed the alleged injury occurred on June 23, 2016, and "disability income benefits for the incident were paid pursuant to Kansas workers' compensation law" and TTD benefits were not paid pursuant to Kentucky workers' compensation law. RAILCREW asserted Stephenson's Form 101 application was filed more than two years after the June 23, 2016, work incident in question; thus, the claim should be bifurcated in order to adjudicate whether Stephenson's claim for Kentucky workers' compensation benefits is barred by applicable statute of limitations.

On August 31, 2018, the ALJ entered an order allowing Stephenson to amend the Form 101 to allege the correct injury date of June 23, 2016. The ALJ also sustained RAILCREW's motion to bifurcate to first determine whether Stephenson's claim is barred by the statute of limitations. The ALJ also scheduled a telephonic status conference for September 17, 2018.

On September 11, 2018, Stephenson filed a copy of an email from her to her attorney containing a summary of her bank account transactions setting forth the payments, dates, and amounts she received from Liberty Mutual Insurance Company ("Liberty Mutual") in 2017 for her injury.

On September 11, 2018, Stephenson filed three documents. One document styled "DWC business entity registration" reflects RAILCREW's addresses in Lenexa, Kansas. Another document with the notation Kentucky Secretary of State reveals RAILCREW was an active foreign limited liability company in good standing.

This document reveals the initial filing from RAILCREW occurred on August 12, 2015, and the last annual report was filed on June 8, 2018. The name and address of RAILCREW's registered agent within Kentucky was also provided.

On September 16, 2018, Stephenson filed a letter from Liberty Mutual which provided information regarding her claim and payment information which was available on a designated website "24/7." Additionally, it noted she could sign up for "direct deposit of any lost wage benefits [she] may be owed on the claim."

On September 18, 2018, the ALJ entered an Order indicating a telephonic conference was held on September 17, 2018, and the parties waived a hearing on the issue of whether the claim was barred by the statute of limitations and agreed to submit simultaneous briefs on or before October 17, 2018.

On September 24, 2018, Stephenson filed the Employer's First Report of Accident provided to the Kansas Department of Labor which reflects she was injured on June 23, 2016, in Pembroke, Christian County, Kentucky. The document states the injury site was the low back area and the insurance carrier is Liberty Mutual.

On September 28, 2018, Stephenson filed an Authentication Affidavit authenticating the Employer's First Report of Accident, the March 20, 2017, letter she received from Liberty Mutual, the email she provided to her attorney regarding the payments deposited into her bank account by Liberty Mutual, and the March 8, 2017, operative note of Dr. Ciccarelli. Both parties timely filed briefs to the ALJ.

In the December 14, 2018, Opinion and Order dismissing Stephenson's claim, the ALJ entered the following findings and conclusions:

Factually, there is no dispute the injury occurred on June 23, 2016. Stephenson filed her Form 101 on July

18, 2018. Plaintiff argues KRS 342.185 applies to her claim because the injury occurred in Kentucky, no Kentucky first report of injury was filed and the Defendant did not comply with the TTD-related filing requirements of KRS 342.040(1).

Plaintiff argues the Defendant's Form 111 did not specifically identify the statute of limitations in KRS 342.670 and therefore is waived. The Form 111 identifies as affirmative defenses:

“[r]unning of periods of limitations or repose under KRS 342.185, 342.270, 342.316, or other applicable statute.”

She also argues KRS 342.670(2) has never been applied in any case where the injury occurred in Kentucky and cannot apply here because the incident occurred in Kentucky.

Defendant argues KRS 342.670(2) fits the facts of this case and should be applied resulting in dismissal of Stephenson's claim as time barred.

KRS 342.670(2) states:

[t]he payment or award of benefits under the workers' compensation law of another state, territory, province, or foreign nation to an employee or his or her dependents otherwise entitled on account of such injury or death to the benefits of this chapter shall not be a bar to a claim for benefits under this chapter, if a claim under this chapter is filed within two (2) years after that injury or death.

Defendant relies upon the plain language of the above statute and cites the holding in Boyd v. C & H Transportation, 902 S.W.2d 823 (Ky. 1995).

The first question the undersigned must address is whether or not Stephenson's claim is subject to KRS 342.670(2). KRS 342.670 is entitled extraterritorial coverage. Section one refers to employees working outside the Commonwealth who suffer an injury. Subsection two does not, on its face, limit its application

depending on the situs of the injury. Instead, it simply states that where benefits are awarded or paid pursuant to worker's compensation law of a state other than the Commonwealth of Kentucky, the employee may still pursue a Kentucky claim provided she files her application within two years of the date of injury.

Here, Stephenson has readily admitted to being paid benefits pursuant to Kansas law. She has initiated a claim in Kansas and been ordered by a judge in Kansas for an evaluation. The Plaintiff's argument is that despite those facts KRS 342.670(2) does not apply because that statute is intended to apply only to injuries that occur outside the Commonwealth. "Extraterritorial" is defined as "beyond the physical and judicial boundaries of a particular state or country." Black's Law Dictionary, Sixth Edition. That heading alone and meaning does not controvert the plain meaning of the statute. Stephenson clearly received payment of benefits under Kansas workers' compensation law and, on its' face the two year statute of limitation from the date of injury in KRS 342.670(2) applies to her claim.

The Defendant is correct that the more specific statute of limitation in KRS 342.670(2) applies and the undersigned is not persuaded the general statute of limitation in KRS 342.185 applies to this fact situation.

Having determined KRS 342.670(2) is the appropriate statute [sic] of limitations the undersigned will not address the remainder of the Plaintiff's arguments, except, to note the ALJ finds the Form 111 filed by the Defendant was sufficient to preserve and plead the applicable statute of limitations.

### **ANALYSIS**

Because the ALJ applied the wrong statute of limitations in determining Stephenson's workers' compensation claim is barred by Kentucky law, we vacate the ALJ's decision and remand the claim.

KRS 342.670 upon which the ALJ relied in dismissing Stephenson's claim reads, in relevant part, as follows:

(1) If an employee, **while working outside the territorial limits of this state, suffers an injury on account of which the employee, or in the event of the employee's death, his or her dependents, would have been entitled to the benefits provided by this chapter had that injury occurred within this state**, that employee, or in the event of the employee's death resulting from that injury, his or her dependents, shall be entitled to the benefits provided by this chapter, if at the time of the injury: **(emphasis added)**.

...

(2) The payment or award of benefits under the workers' compensation law of another state, territory, province, or foreign nation to an employee or his or her dependents otherwise entitled on account of such injury or death to the benefits of this chapter shall not be a bar to a claim for benefits under this chapter, if a claim under this chapter is filed within two (2) years after that injury or death.

Without question, KRS 342.670 entitled "Extraterritorial Coverage" only applies when an employee is injured while working in the course of his/her employment outside of Kentucky. The title of the statute firmly demonstrates the time limitation for filing a claim contained within the statute only applies where extraterritorial coverage exists, i.e., injuries occurring outside the boundaries of Kentucky. Since there is no dispute the alleged injury occurred in Pembroke, Christian County, Kentucky, the ALJ erroneously determined the applicable statute of limitations was contained in KRS 342.670.

The applicable statute of limitations is KRS 342.185 which reads, in relevant part, as follows:

(1) Except as provided in subsections (2) and (3) 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.

The above statute must be read in concert with KRS 342.270(1) which reads, in relevant part, as follows:

If the parties fail to reach an agreement in regard to compensation under this chapter, either party may make written application for resolution of claim. The application must be filed within two (2) years after the accident, or, in case of death, within two (2) years after the death, or within two (2) years after the cessation of voluntary payments, if any have been made. ...

In Bryant v. Jericol Mining, Inc., 758 S.W.2d 45 (Ky. App. 1988), Bryant, an employee of his twin brother, was injured at the mining job site on property owned and operated by Jericol Mining, Inc., in Harlan County, Kentucky. The work activity involved cutting and removing scrap metal from the mining site. The evidence established Bryant and his brother were Virginia residents, and Bryant was hired by his brother in Virginia to cut and remove scrap metal in Kentucky and then haul it to Virginia. Bryant's brother was an independent contractor hired by Jericol. Bryant filed a claim against his brother and later joined the Uninsured Employers' Fund as a party. The Workers' Compensation Board's dismissal of the claim was affirmed by the

Harlan Circuit Court. The Kentucky Court of Appeals reversed and characterized the issue as follows:

The essential question on appeal is whether a nonresident employee of a nonresident, uninsured employer is covered by Kentucky's Workers' Compensation Act when the employee sustains an injury by virtue of the employment in Kentucky and, more specifically, whether such nonresident is entitled to benefits from our uninsured employers' fund.

Id. at 46.

First determining Bryant was a covered employee pursuant to the statute, the Court of Appeals stated:

KRS 342.630(1), applicable in part, states:

Coverage of employers. The following shall constitute employers mandatorily subject to, and required to comply with, the provisions of this chapter:

(1) Any person [except persons in agriculture] that has in this state one or more employees subject to this chapter.

A plain reading of the statute shows that the only exception applies to agricultural employers. The legislature did not exempt from coverage out-of-state employers, insured or uninsured. We must then say that employer Joe Bryant is a covered employer within the meaning of the Act. For us to judicially exempt him from coverage would obviously be contrary to the plain and ordinary reading of the statute, considering the legislature had specifically carved out one exemption for agricultural employers.

Id. at 46-47

In concluding KRS 342.670 did not apply to an injury occurring in Kentucky, the Court of Appeals stated:

Next, the board cited KRS 342.670, Extraterritorial coverage. Clearly, within this provision, Subsections 1 and 2 do not apply because they address the circumstance where the injury was sustained out of the state, the reverse of our fact situation. Subsection 3 of the statute does not apply, although it concerns an injury sustained in the state and an employer domiciled in another state, because it is procedural in nature and deals with adjustments of payments when made. In conclusion, we see no rational application of KRS 342.670 to the fact pattern herein.

Id. at 47.

The Court of Appeals held that Bryant was covered by Kentucky workers' compensation law because he sustained a work injury in Kentucky. Thus, he was entitled to compensation under the Act through the Uninsured Employer' Fund notwithstanding the fact he and the employer were non-residents and in no way contributed to the fund.

In Traugott v. Virginia Transp., 341 S.W.3d 115, 117 (Ky. 2011), the Kentucky Supreme Court held KRS 342.670 only governs "Kentucky's jurisdiction over workers' compensation claims for injuries that occur outside of Kentucky." Traugott, a resident of Harrodsburg, Kentucky, filed a workers' compensation claim alleging he injured his left arm in Missouri while working for Virginia Transportation which was headquartered in Rhode Island and had no office in Kentucky. This Board dismissed Traugott's claim concluding it did not have extraterritorial jurisdiction as defined in KRS 342.670(1)(a)(d). In affirming the Board's decision, the Supreme Court affirmatively stated KRS 342.670 is only implicated when determining Kentucky jurisdiction for work-related injuries sustained outside Kentucky.

The holdings in Bryant and Traugott unequivocally demonstrate KRS 342.670 has no application to the case *sub judice* since there is no dispute the alleged

injury occurred within Kentucky. Thus, the ALJ erred in dismissing Stephenson's claim pursuant to the limitation of action contained within KRS 342.670.

Further, the ALJ's reliance upon Boyd v. C & H Transportation, 902 S.W.2d 823 (Ky. 1995) is misplaced since Boyd, a Kentucky resident, sustained a right ankle fracture in Tennessee in the course of his employment as a truck driver with C & H Transportation, a Texas company with terminals across the United States. The Court of Appeals determined this Board correctly concluded the applicable statute of limitations was KRS 342.670(2) since Boyd was working outside the territorial limits of Kentucky at the time of the injury. It specifically rejected the premise that the general statute of limitations contained in KRS 342.185 was applicable.

Since there is no dispute the alleged injury occurred in Pembroke, Christian County, Kentucky, the specific statute dealing with extraterritorial coverage is not applicable because the injury did not occur outside the state of Kentucky. KRS 342.670 is unambiguous on its face. A rule of statutory construction long accepted by the Kentucky courts is unambiguous statutes must be applied as written. "[A]bsent an ambiguity, 'there is no need to resort to the rules of statutory instruction in interpreting it.'" Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008) citing Stewart v. Estate of Cooper, 102 S.W.3d 913, 915 (Ky. 2003). The Legislature's intent must be inferred, "from words used in enacting statutes rather than surmising what may have been intended but was not expressed." Id. Neither the ALJ nor this Board are at liberty to interpret a statute at variance with its stated language. McDowell v. Jackson Energy RECC, 84 S.W.3d 71, 77 (Ky. 2002).

Additionally, an established rule of statutory construction is where both a specific statute and a general statute are potentially applicable to the same subject matter, the specific statute controls. Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354 (Ky. 2005). The Kentucky Courts have held, “one of the established rules of statutory construction is that when two statutes deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute prevails.” Land v. Newsome, 614 S.W.2d 948, 949 (Ky. 1981).

KRS 342.670 is clear on its face and specifically sets forth the remedies available only when the work injury occurs outside the state of Kentucky. Since the specific statute is not applicable, the general statute, KRS 342.185, is applicable. Consequently, the ALJ’s decision must be vacated and the claim remanded to the ALJ for a determination of whether KRS 342.185 bars Stephenson’s claim. We are aware the claim was filed on July 11, 2018, more than two years after Stephenson was alleged to have been injured in Pembroke, Christian County, Kentucky. However, based upon the pleadings contained in the record, there appears to be no dispute Stephenson received some form of income benefits from Liberty Mutual, apparently based on Kansas law, due to her injury. On remand, the ALJ must determine whether the payment of those income benefits extended the statute of limitations beyond two years following the June 23, 2016, injury. We know of nothing requiring the income benefits which extend the limitation period contained in KRS 342.185 to be based solely upon Kentucky law.

Accordingly, the December 14, 2018, Opinion and Order dismissing Stephenson’s claim based on the statute of limitations contained within KRS

342.670(2) is **VACATED**. This claim is **REMANDED** to the ALJ for further proceedings and a determination of whether Stephenson's claim is barred by the statute of limitations set forth in KRS 342.185 and KRS 342.270(1) in accordance with the views expressed herein. We add that, before the ALJ, Stephenson argued her claim was not barred based on RAILCREW'S failure to comply with the requirements of KRS 342.038 and KRS 342.040(1), thereby tolling the statute of limitations. Consequently, the ALJ must also determine the merits of this argument on remand.

ALL CONCUR.

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