

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 28, 2022

CLAIM NO. 202001449, 202001373, 202001296 & 202001293

KEMI

PETITIONER

VS.

APPEAL FROM HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE

LEWIS HICKS;
SOUTHEASTERN LAND, LLC;
UNINSURED EMPLOYERS' FUND; AND
HON. THOMAS G. POLITES
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

MILLER, Member. KEMI appeals from the March 28, 2022 Opinion and Award, the June 10, 2022 Order on Petition for Reconsideration, and the July 19, 2021 Interlocutory Opinion rendered by Hon. Thomas G. Polites, Administrative Law Judge ("ALJ"). This appeal solely concerns the ALJ's finding that Kentucky has

jurisdiction over Lewis Hicks' ("Hicks") claim based on the extraterritorial jurisdiction statute, and KEMI is liable for the benefits awarded. The ALJ awarded temporary total disability benefits ("TTD"), permanent partial disability ("PPD") benefits for injuries to Hicks' neck, right shoulder, and psychological condition, along with medical benefits related to a January 10, 2019 injury. The ALJ also awarded permanent partial disability ("PPD") benefits for a cumulative trauma claim to the left shoulder along with medical benefits. The ALJ dismissed his claim for coal workers' pneumoconiosis ("CWP") and did not award permanent partial disability benefits for occupational hearing loss, though medical benefits were awarded. For the foregoing reasons, we affirm.

BACKGROUND

KRS 342.670 is the statute at the core of this dispute. Because this appeal strictly revolves around extraterritorial jurisdiction, we will not discuss the medical evidence relating to the injuries. The award of indemnity and medical benefits has not been appealed.

Hicks testified by deposition on December 4, 2020, at the hearing on May 19, 2021 regarding the bifurcated issue of jurisdiction, and at the Final Hearing on January 26, 2022. Hicks is 51 years old and possesses a high school degree and numerous mining certificates. He has been domiciled in Kentucky throughout his life, residing in Prestonsburg, Kentucky. He began working for Southeastern Land, LLC ("Southeastern"), previously Booth Energy, in 1996 as an equipment operator, and progressed to foreman, and superintendent at various underground coal mines. Southeastern's headquarters is in Debord, Kentucky. His primary location was the

Eagle mine in Kentucky. Hicks' daily work consisted of running equipment, maintenance, upkeep, management, and budgeting. Hicks worked for Southeastern and its predecessor, Booth Energy, continuously for 23 years. Southeastern's mines were located in Kentucky except one, the Alma mine in West Virginia.

In August 2017, Hicks was transferred to the Alma mine in Williamson, West Virginia. He performed physical manual labor every day for the last two years of his employment. Hicks worked 60 hours per week until his injury on January 10, 2019 at this West Virginia location. He noticed a miner cable hung across the belt line and he attempted to take it down when a splice in the conveyor belt caught his jacket and he was pulled down the beltline, suffering injuries to his right arm and shoulder.

Though Hicks was a superintendent at the Eagle mine in Kentucky, he was transferred to West Virginia in August 2017 to work as a foreman and oversee a new type of mining process. Hicks is well versed in ventilation of the mines. He was told the transfer was temporary and he would eventually be allowed to return to work in Kentucky, and he remained in contact with his mine in Kentucky. At the hearing on the bifurcated issue of jurisdiction, Hicks was asked about the transfer and testified as follows:

Q: Who exactly told you that you had to go to West Virginia?

A: Ryan Wilson, Paul Horne, and Ted McGinnis.

Q: And those folks are whom, and what position do they hold?

A: Ryan Wilson is the HR director. Paul Horne is the CEO, and Ted McGinnis is one of the owners.

Q: When you were asked to go over there and open that mine, did you agree to go on a temporary basis, or did you agree to a permanent transfer?

A: I first denied, and then I was told that my help was needed, and they wanted me to reconsider, to go help for a temporary basis to get that section up and running and get the ventilation established.

Q: Was it represented to you that the replacement there would only be temporary in nature and you could return to Kentucky?

A: Yes, most definitely.

Hicks drove to West Virginia to work and continued living in Prestonsburg. He testified he remained in contact with Les Combs, the supervisor of the Kentucky mines, including the Eagle mine, which was still operating after his transfer. During his time working in West Virginia, Hicks testified he went to Southeastern's office in Debord for insurance issues, to drop off and pick up equipment, and to meet with the HR supervisor and other people in authority who executed plans for the Kentucky and West Virginia mines. He also stated he went to the mine supply store and the mine safety office to drop off or pick up items.

Hicks also was part of the mine rescue team for Southeastern and he trained at the mine rescue facility in Warfield, Kentucky. He visited each Southeastern mine in Kentucky as part of his mine rescue training. At the deposition, he testified he entered the mines in Pike and Perry Counties on a "regular basis" for familiarization.

While at the Alma mine in Williamson, West Virginia, Hicks worked six days a week, 60 hours per week, and went underground each day. He performed

pre- and post-shift inspections as an underground foreman and prepared paperwork for the authorities in West Virginia. There were two doublewide trailers, one for the foreman and one for the men. Hicks did not work after his injury, and he was never brought back to the mines in Kentucky. The mines are now closed.

Hicks' tax returns reflect he was employed by Southeastern and did not contain any deductions from the state of West Virginia, nor did he pay any taxes in West Virginia. His W-2s for 2018 and 2019 show Southeastern Land, LLC as located in Kentucky, Hicks resided in Kentucky, and he paid state taxes to Kentucky.

Hicks filed claims on September 23, 2020, alleging acute right shoulder and neck injuries occurring at work on January 10, 2019, as well as a hearing loss claim. He later filed two additional claims, one alleging injuries to multiple body parts caused by cumulative trauma, and a CWP claim. The claims were consolidated by Order on February 9, 2021. The claim was bifurcated by Order on May 4, 2021 sustaining KEMI's motion on the issue of whether KEMI had insurance coverage for Hicks on the date of injury. KEMI insured Southeastern's locations in Kentucky while Zurich American Insurance ("Zurich") insured the mine in West Virginia. A hearing was held on May 19, 2021. The ALJ issued an Interlocutory Order on July 19, 2021, finding Kentucky had jurisdiction over the claim.

Following proof from the parties, the ALJ held a Final Hearing on January 26, 2022 on the remaining issues. The ALJ awarded TTD and PPD benefits for injuries to Hicks' back and shoulders, along with medical benefits, dismissed his claim for CWP, and awarded only medical benefits for the occupational hearing loss claim.

Southeastern filed a Petition for Reconsideration, arguing the ALJ erred in finding an extension of extraterritorial coverage per KRS 342.670(1)(a) by concluding Hicks' employment is principally localized in Kentucky. The ALJ overruled Southeastern's Petition for Reconsideration by Order on June 10, 2022.

KEMI now appeals, arguing neither subsection KRS 342.670(1)(a) or (1)(b) applies to the facts of this claim. It believes that extraterritorial jurisdiction cannot be found, as Hicks was working 60 hours per week in West Virginia at the time of his injury. KEMI also argues the mine in West Virginia where Hicks was injured is insured by Zurich not KEMI.

ANALYSIS

As the claimant, Hicks bears the burden of proving each essential element of his claim. Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 928 (Ky. 2002). Therefore, Hicks must prove by substantial evidence the facts necessary to establish Kentucky had jurisdiction over his claim. Collier v. Wright, 340 S.W.2d 597, 598 (Ky. 1960); Eck Miller Transportation Corp., v. Wagers, 833 S.W.2d, 854, 858 (Ky. App. 1992). Because Hicks was successful in that burden before the ALJ, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence.

Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

On appeal, KEMI argues it does not have coverage for the location at which Hicks was injured and that Kentucky does not have jurisdiction over the claim. KEMI particularly argues its insurance coverage started on January 1, 2019, a mere 10 days before the injury, and there is no evidence Hicks worked in Kentucky during those 10 days. Hicks was working in West Virginia on January 10, 2019, the

date of his injury and his last day of work at Southeastern. The question is whether jurisdiction extended to Kentucky by way of the extraterritorial jurisdiction statute.

KRS 342.670(1) provides:

(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.

With respect to the extraterritorial jurisdiction issue, the ALJ found as follows:

The evidence in this claim is essentially undisputed. As noted in KEMI's brief, Plaintiff was working at the Defendant's Alma mine in West Virginia at the time of his injury, the Defendant is a Kentucky corporation with its main office located in Debord, Kentucky, Plaintiff is a resident of Kentucky and was hired in Kentucky by the Defendant in approximately 1996 and worked full-time in Kentucky for approximately 20 years, and that Plaintiff was asked to temporarily transfer to the Defendant's Alma mine in West Virginia

sometime in 2017 to assist in developing a new mining technique that was consistent with his particular mining expertise. In addition, Plaintiff submitted W-2's for 2018 reflecting payment in the amount of \$83,359.94 and 2019 in the amount of \$6,148.28 with the employer's name listed as Southeastern Land, LLC, 81 Enterprise Dr., Debord Ky. 41214. Also, the parties stipulated an employment relationship on the day of injury.

Given these undisputed facts, the question is whether Plaintiff's injury that occurred in West Virginia comes within the provisions of the extraterritorial jurisdiction statute contained in KRS 342.670. This statute provides that Kentucky jurisdiction can be extended to cover out-of-state injuries if certain requirements are met, as follows:

(1)(a) His or her employment is principally localized in this state; or

(1)(b) He or she is working under a contract of hire made in this state in employment not principally localized in any state.

There are 2 other provisions, (c) and (d) but all parties agree they do not apply in this instance.

In addition, principal localization is defined as follows:

(5)(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. 18

In applying the facts of this claim to the above statutes, it is hereby concluded that KRS 342.670(1)(a) applies in

this claim and as such, jurisdiction is appropriate under Kentucky law.

In support of this determination it should first be noted that the aggregate facts of this claim wholly support a finding that Kentucky jurisdiction of Plaintiff's claim is appropriate. As noted above, it is undisputed that Plaintiff is a Kentucky resident, the Defendant is a Kentucky corporation with its headquarters in Debord, Kentucky, that Plaintiff has worked for the Defendant for approximately 23 years with approximately 20 years working in Kentucky, that Plaintiff was working for the Defendant on January 10, 2019, the day of his injury per the parties stipulation, that the only reason his injury occurred in West Virginia is that Plaintiff was asked to go to temporarily work in or be loaned to the Defendant's West Virginia mine to assist in a new mining operation with the understanding that he would return to Kentucky to work, and that the Plaintiff's W-2s for 2018 and 2019 reflect that his employer was Southeastern Land, located in Debord, Kentucky, which the parties also stipulated. Given these agreed upon facts, it cannot be disputed that there are substantial, significant, and ongoing contacts between Plaintiff and Defendant in terms of their employment relationship supporting a conclusion that it was formed in Kentucky, was performed primarily in Kentucky, continued to be in existence as of the day of Plaintiff's injury, January 10, 2019, and that Plaintiff was working in West Virginia only on a temporary basis as a loaned employee with the expectation that he was to return to work in Kentucky.

KEMI contends the ALJ misapplied KRS 342.670 and relied on facts not supported by substantial evidence. KEMI specifically argues, though Southeastern has a location in Debord, Kentucky, Hicks' occasional visits to Kentucky while working at the Alma mine in Williamson, West Virginia were insufficient to be considered "principally localized" in Kentucky.

Accordingly, we must determine whether there was substantial evidence that Southeastern had a place of business in Kentucky and Hicks regularly

worked at or from there, or in the alternative, that Hicks is domiciled in Kentucky and spends a substantial part of his working time in the service of Southeastern in Kentucky.

The Kentucky Supreme Court has construed the term “has a place of business” as used in the extraterritorial coverage provision to mean, “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 611 (Ky. 1999). As previously stated, Southeastern is a Kentucky corporation with its main office in Debord, Kentucky. All of Southeastern’s mines were located in Kentucky except the Alma mine in West Virginia. The question then is whether the ALJ erred in finding Hicks regularly worked in Kentucky. The evidence demonstrates Hicks was hired in Kentucky and worked at the Eagle mine in Kentucky from 1996 until 2017 when he was transferred to the Alma mine in West Virginia to spearhead a new mining technique. Hicks was a superintendent at the Eagle mine at the time and he testified the transfer happened quickly and there was no one to assume his position. A supervisor, Les Combs, stepped into the role in his absence, but his position was never replaced. Hicks also testified he initially had daily phone conversations with Combs for three to four months and continued to have conversations with foremen in Kentucky periodically.

KEMI correctly points out we must determine whether there was substantial evidence that Hicks’ employment was “principally localized” in Kentucky *at the time of his injury*, and whether he worked in Kentucky in the past is not dispositive. See Amax Coal Co. v. Smith, 748 S.W.2d 158, 160 (Ky. App. 1988).

Hicks testified the transfer to West Virginia was temporary and Southeastern offered no contrary evidence. After his transfer to West Virginia, Hicks testified he still came to the Kentucky office for human resource purposes, to drop off and pick up equipment, like dust pumps, and to meet with the HR supervisor who directed plans for both the Kentucky and West Virginia mines. He also stated he would go to the mine supply store and the safety office to turn in gas detectors and anemometers.

Hicks continued to be part of the Kentucky mine rescue team. He attended trainings in Warfield, Kentucky and visited each Southeastern mine in Kentucky for mine rescue trainings. He stated he went to the mines in Pike and Perry County mines regularly. While not dispositive, Hicks also stated he had had recent discussions before his injury about returning to Kentucky and working at Southeastern's Perry County mine.

The ALJ found Southeastern had an office in Debord, Kentucky. He noted Hicks was hired in Kentucky, and his 2018 and 2019 W-2s reflected payment from Southeastern's Kentucky address. In finding KRS 342.670(1)(a) applied to the claim, he relied on Hicks' continuing work activities in Kentucky and placed particular emphasis on Hicks' credible testimony, unrebutted, that the work in West Virginia was temporary. There was no evidence of a hiring in West Virginia. Further, Hicks had continuing contacts with Southeastern's Kentucky located office both in regular phone discussions, but also going to the site to pick up equipment or talk with personnel in HR. In addition, the mine safety training and visits to mines located in Kentucky all showed regular work in Kentucky. The ALJ found

Southeastern had a place of business in Debord, Kentucky and Hicks regularly worked from that place of business pursuant to KRS 342.670(5)(d)(1).

The evidence discussed above constitutes substantial evidence supporting the ALJ's determination Hick's employment was principally localized in Kentucky. He maintained regular contact with employees in Kentucky, attended trainings, and conducted other work activities regularly in the state. The ALJ found the transfer to West Virginia was on a temporary basis. Further, the ALJ also noted subsection 5(d)(2) applied even if the evidence was found not sufficient for KRS 342.670(5)(d)(1) applicable. In Davis v. Wilson, 619 S.W.2d 709 (Ky. App. 1980), the injured worker was a Kentucky resident and was hired in Kentucky but was injured in Tennessee. At the time of the injury, he had been employed for a total of 11 weeks, working two weeks in Kentucky and nine weeks in Tennessee. Id. at 710. The 'old' Workers' Compensation Board had denied extraterritorial coverage. Id. at 709. Addressing KRS 342.670(4)(d)1, the prior version of the statute, the Court of Appeals determined that, 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. Id. at 711. The present claim is factually similar. Hicks was domiciled in Kentucky and though he was injured in West Virginia, he still spent a substantial part of his time working for Southeastern in Kentucky.

KEMI argues neither KRS 342.670(1)(a) nor (1)(b) apply to the facts of this claim. KEMI relies on there being an active mine in West Virginia where Hicks was working 60 hours per week and was supplied an office trailer there. KEMI also

notes the mine owned by Southeastern in West Virginia was insured by Zurich, who paid Hicks' TTD benefits and medical benefits for this injury. Hicks was not given an explanation about the benefits he received and never filed a claim in West Virginia. He had no idea how his employer insured its mines. The checks came from Chicago.

KEMI claims the business is principally localized in West Virginia, not Kentucky and, hence, KRS 342.670(1)(a) is not applicable. It contends, while contract of hire occurred in Kentucky, the business had a principal location in West Virginia, so (1)(b) is not applicable. From there, KEMI argues the definition of principally localized requires a finding of where Hicks regularly worked. KRS 342.670(5)(d)(1). Further, it argues because Hicks regularly worked in West Virginia at the employer's mine there, and since this section is applicable, the ALJ cannot look to subsection 5(d)(2).

KEMI also argues there is no evidence Hicks worked in Kentucky during its applicable policy period, which began on January 1, 2019, through his injury on January 10, 2019; however, this point does not determine whether Kentucky had proper jurisdiction over the claim. The claim is filed against Southeastern. Whether the insurer had been insuring the employer for a long period of time or, as in this case, a mere 10 days is of no consequence. The fundamental issue is whether Kentucky had jurisdiction over this claim on the specific date of injury. So long as there is substantial evidence that the requirements pursuant KRS 342.670 were met on the injury date, the duration of the insurance contract is not controlling.

The ALJ was fully aware of KEMI's arguments and believed the evidence in the claim was "essentially undisputed." He ultimately found that extraterritorial coverage per KRS 342.670(1)(a) is appropriate. The ALJ found Hicks' testimony that he was a loaned employee to the Alma mine in West Virginia on a temporary basis was credible and never rebutted. The ALJ found Hicks was hired in Kentucky, was paid in Kentucky, and he continued to have contacts with the main office in Debord, Kentucky on a regular basis. Certainly, his work in West Virginia was not exclusive. The ALJ found Hicks' continued work in Kentucky was enough to be considered "regularly working" in the state and found his employment was principally localized in Kentucky.

KRS 342.670 is "to be construed liberally to effectuate 'the munificent, beneficent and remedial purposes of the Workers' Compensation Act.'" Ky. Assoc. Gen'l Contractors Self-Insurance Fund v. Tri State Crane Rental, Inc., 240 S.W.3d 644 (Ky. App. 2007) (citing Coal-Mac, Inc. v. Blankenship, 863 S.W.2d 333, 335 (Ky. App. 1993); Beale v. Shepherd, 809 S.W.2d 845, 849 (Ky. 1991)).

The Board recognizes this claim presents a unique set of facts. Hicks was successful in proving that Kentucky has jurisdiction of his claim. The ALJ thoroughly analyzed the evidence in determining Kentucky has jurisdiction of this claim, even though the injury occurred out of state. Substantial evidence as outlined previously supports this award and will not be disturbed.

Lastly, KEMI argues that KRS 342.395 as discussed by the ALJ in support of his finding of jurisdiction in Kentucky is a misplaced reliance on the statute. We agree this statute requires all employers in Kentucky to have worker's

compensation insurance and provides the necessary steps for a worker to opt out of the system if they voluntarily wish to leave open potential rights in the tort system. While this statute does not answer the question of whether extraterritorial jurisdiction applies in this case, the facts as found by the ALJ are relevant to the inquiry required by KRS 342.670. The place of hire was in Kentucky and there is no evidence of any hiring in West Virginia. The pay stubs and taxes all show Hicks was an employee of Southeastern and relate to Kentucky. As previously stated, the ALJ found the transfer to be temporary based on Hicks' unrebutted testimony.

This Board may not second guess the ALJ unless his decision "is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record." KRS 342.285. In this claim, substantial evidence supports the ALJ's finding that jurisdiction extended to Kentucky pursuant to KRS 342.670(1)(a). KEMI insured Southeastern's Kentucky locations at the time of Hicks' injury on January 10, 2019. Therefore, KEMI is the responsible insurer. The evidence does not compel a different result.

Accordingly, the March 28, 2022 Opinion and Award, the June 10, 2022 Order on Petition for Reconsideration, and the July 19, 2021 Interlocutory Order rendered by Thomas G. Polites, Administrative Law Judge are **AFFIRMED**.

ALL CONCUR.

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