

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 6, 2019

CLAIM NO. 201701380

TYLER WHITE

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

EXTREME UNDERGROUND DRILLING;
UNINSURED EMPLOYERS' FUND;
AT&T;
CT CORPORATION SYSTEM; AND
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
REVERSING AND REMANDING

* * * * *

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

ALVEY, Chairman. Tyler White (“White”) appeals from the Opinion and Order rendered August 9, 2019, by Hon. Chris Davis, Administrative Law Judge. The ALJ dismissed White’s claim against Extreme Underground Drilling (“Extreme”) for injuries he sustained on August 2, 2016. The ALJ determined Kentucky does not

have jurisdiction over White's claim. White also appeals from the August 29, 2019 order denying his petition for reconsideration.

On appeal, White argues the ALJ erred in dismissing his claim because Kentucky has concurrent jurisdiction, or extraterritorial jurisdiction over his claim. Because we believe White's employment was not localized in Georgia, we reverse the ALJ's decision, and remand for additional proceedings and a determination on the merits.

White filed a Form 101 on August 4, 2017, alleging he sustained multiple head injuries when he was struck by a "falling or flying object" on August 2, 2016, while working for Extreme in Murfreesboro, Tennessee. There is no dispute regarding the occurrence of the injury in Murfreesboro, Tennessee. Because the issue in this appeal is solely based upon whether the ALJ erred in dismissing White's claim based upon lack of jurisdiction, we will not discuss the medical evidence.

White testified by deposition on October 17, 2017. He was born on September 30, 1985, and is a resident of Albany, Kentucky. White has a GED, but no specialized or vocational training. He testified that Gary Wallace ("Wallace") is his brother-in-law. He worked for Wallace at J3 Natural Resources, an oil company, for over one year prior to working for Extreme. He testified Extreme laid conduit for installing fiber optic cable. White completed a job application for Extreme, and delivered it to Wallace's wife at their residence in Albany, Kentucky. He testified that Wallace's wife acted as the company secretary. She had previously performed the same function for J3 Natural Resources. White testified he lives next door to Wallace in Albany, Kentucky. He testified Wallace operated both J3 Natural

Resources and Extreme from his Albany residence. According to White, Wallace had an office in his residence from which he conducted Extreme's business. Extreme hired White in 2016. He worked for Extreme in Georgia, Tennessee, and Alabama. Extreme required monthly drug testing of its employees, which was always conducted in Albany.

White worked as a utility locator for Extreme. This involved locating existing utilities to avoid boring into them when placing conduit for cable installation. He testified that at the beginning of the workweek, Wallace met Extreme's employees at a gas station in Albany, Kentucky, and they caravanned from there to the job locations. Extreme's first job was installing conduit for a cable job near Atlanta, Georgia. After that job was completed, the next job Extreme worked on was located in Tennessee. The last job he worked on for Extreme was in Alabama. He testified he also performed some repair work on Extreme's equipment in Kentucky. White also testified Extreme provided all tools, except for small wrenches, screwdrivers, and sockets.

On August 2, 2016, White was working for Extreme in Murfreesboro, Tennessee. At the time of the accident, he was straightening some tangled rods. One of the rods struck him in the left side of the face. He was taken to the hospital in Murfreesboro, Tennessee, and eventually treated at Vanderbilt in Nashville, Tennessee. White missed a period of work after the accident. When he returned, Extreme was working on a job in Alabama.

Wallace testified by deposition on April 17, 2018. He organized Extreme in March 2016 with two other partners. One of those left in April 2016.

Wallace testified White was one of Extreme's five employees. He testified Extreme was originally organized in Albany, Kentucky. He testified the company address later changed to Crossville, Tennessee. Wallace testified the Tennessee job was for Westek, Inc. ("Westek"), through a contract dated May 17, 2016. Westek was a contractor for AT&T. He testified White performed no work for Extreme in Kentucky. Wallace also testified that White returned to work six weeks after his accident, with no physical limitations or restrictions. White continued to work until he quit on March 12, 2017. He noted that Extreme stopped doing business on April 7, 2017. He testified that on August 2, 2016, Extreme had workers' compensation insurance coverage in Tennessee.

Wallace noted that his workers' compensation insurer filed a claim in Tennessee for White's injuries. Although he testified that the business address for the LLC eventually moved to Crossville, Tennessee, Wallace acknowledged the registered agent for service of process never changed from his residence in Albany, Kentucky. He acknowledged his wife handled bookkeeping duties for Extreme in Albany. Extreme's payroll was processed through H&H Tax Service in Albany. Extreme's bank account was located in Albany. White was hired in Albany. Extreme did not own or lease property in Crossville, Tennessee, except for hotel rooms for boarding while working on the job. Wallace testified he considered his business office was wherever he was located. Wallace admitted Extreme's crew returned to Albany on the weekends, and met there at the beginning of the week to return to the work locations.

White introduced as evidence a copy of Extreme's 1065 partnership tax return for 2016. The return was filed on April 18, 2017, and listed Extreme's address as 69 Dale Hollow Manor Rd., Albany, Kentucky. In addition to the Form 1065, Extreme's Form 765, Kentucky partnership tax return for 2016 was also filed in the record. That form also indicated Extreme's address was in Albany. White additionally introduced a copy of Extreme's non-disclosure agreement with Westek dated May 10, 2016. The Agreement reflects Extreme's address was in Albany. White additionally introduced a copy of Extreme's contract with Westek dated May 17, 2016. The contract also lists Extreme's address in Albany. White also introduced a copy of the payroll statement filed in the Tennessee claim. Attached to the payroll statement were paystubs listing Extreme with an address in Albany.

The Kentucky Uninsured Employers' Fund ("UEF") was joined as a party because there is no record that Extreme ever had workers' compensation insurance coverage in Kentucky. AM Trust North American ("AM Trust"), Extreme's insurance carrier in Tennessee, entered an appearance in the claim. AM Trust noted it paid over \$17,000.00 in medical benefits pursuant to Tennessee workers' compensation law. It additionally noted it had paid temporary total disability benefits to White at the rate of \$534.17 per week from August 23, 2016 through October 25, 2016, also pursuant to Tennessee workers' compensation law. The UEF filed a motion to join AT&T as a party to the claim since Extreme was installing cable for it in Tennessee. AT&T later filed a motion to join Westek as a party, which the ALJ denied. The ALJ entered an order on January 18, 2018, bifurcating the claim regarding the issue of notice. There is no record that a benefit

review conference was held. The hearing order noted the only bifurcated issue was territorial jurisdiction.

The ALJ rendered an Opinion and Order on August 23, 2018, dismissing White's claim. The ALJ specifically found as follows:

I. Jurisdiction per KRS 342.670

A. Facts not in dispute

While the parties were unable to stipulate to any facts the evidence is not contradicted on several key factors necessary to analyze the issues pursuant to KRS 342.670.

These include that the contract for hire was made in Kentucky; the employee did no work in Kentucky with the possible exception of servicing equipment and driving once a week from Kentucky to Tennessee, and back; that the injury occurred in Tennessee; that from May, 2016, for a period of 4-5 months the Plaintiff worked in Georgia; and that at one point the injured worker was eligible for Tennessee workers' compensation benefits.

These facts are all relevant because, assuming they are all true, and there is no contradictory evidence, a finding of territorial jurisdiction within Kentucky can only be made if I find that the Plaintiff's employment was not localized in any state.

B. Was the Plaintiff's employment localized in any state

First, despite the fact that the Plaintiff has spent a great deal of effort attacking the credibility of Mr. Wallace very little of his testimony, at least the part in dispute, is relevant to the sole issue at hand. The number of partners Mr. Wallace had, whether his wife was the business' Secretary as opposed to performed clerical tasks, who did or did not strike the computer keys when making the articles of incorporation and whether or not the checks were delivered on the work-site in Tennessee or not are irrelevant.

Further, while it is relevant if the Plaintiff is eligible for Tennessee workers' compensation benefits it is not relevant who applied for them, either the Plaintiff, Mr. Wallace or the Defendant's Tennessee counsel. It is only relevant that he was eligible for them.

The only material fact in dispute is whether the Plaintiff assisted Mr. Wallace in servicing equipment at Mr. Wallace's home in Kentucky. However, even this fact is not, by itself, dispositive, it is possible that I could find the Plaintiff occasionally assisted Mr. Wallace in this task *and* that the Plaintiff's work was principally localized in a state other than Kentucky.

Even assuming the facts most favorable to the Plaintiff that he sometimes assisted, in Kentucky, with the maintenance of equipment and once a week drove from Kentucky to the work-site state, and then back, those facts are not dispositive.

What I do find dispositive is that the Plaintiff, by his own testimony, has said that beginning in May 2016 he worked for 4-5 months in Georgia, and then transferred his work site state to Tennessee and was injured sometime between August 2 and August 4, 2016. Of course, the Plaintiff's memory must be less than perfect, a far more rational explanation for his incongruous testimony than fraud. Because it is impossible, that he worked for 4 months, beginning in May 2016, in Georgia, and was then injured on August 2, 2016 in Tennessee. At most, he could have only worked three months in Georgia.

Thus based on the Plaintiff's testimony the entire time he worked for Extreme Underground Drilling he worked in Georgia, with the minor exception of sometimes, maybe, assisting Mr. Wallace with vehicle maintenance, in Kentucky and traveling a short distance in Kentucky twice a week.

Of course taking the totality of the evidence into account it also reflects that maybe the Plaintiff did work only in Georgia prior to being hurt, despite that being one logical conclusion from his testimony. The parties testified that the employees from Kentucky would

caravan to the motel in Tennessee, stay a week, caravan back and then caravan to Tennessee the next week. Since the accident occurred on August 2, 2016, we can infer that the operation was based in Tennessee for at least 2 weeks, maybe more. This would reduce the time spent in Georgia to approximately 2 ½ months, at most.

The point of all this really, though, is that we just don't know [sic] much time the Plaintiff spent working in Georgia, or Tennessee or Kentucky. His testimony, most likely due to his faulty memory, is that starting in May 2016, he worked 4-5 months in Georgia and that he was injured in Tennessee on August 2, 2016 and that most of his work was done in a state other than Kentucky.

Regardless I believe and find that the majority of the Plaintiff's work was localized in Georgia, regardless of his or his employer's intent was going forward.

I also find that, as a matter of law, territorial jurisdiction pursuant to KRS 342.670 is a threshold issue that the Plaintiff must prove. It is not an affirmative defense that the Defendant(s) must disprove.

Due the Plaintiff's inconsistent testimony, which even assumed most favorably to him would still not be persuasive, I find he has not proven that Kentucky at[sic] appropriate jurisdiction.

II. Order

This claim is DISMISSED in its entirety, as to all income or medical benefits, whether past, present or future, temporary or permanent, due to lack of territorial jurisdiction.

White filed a petition for reconsideration noting the ALJ inadvertently mentioned an ACL tear, which was not part of this claim. White additionally requested the ALJ to set forth findings of fact regarding whether Extreme maintained a place of business in Kentucky, and whether he worked from that business. White

additionally requested the ALJ to provide the authority he relied upon to find that White's employment was not localized in any state. On September 10, 2018, the ALJ entered an order deleting the reference to an ACL tear, and denying the remainder of the decision.

White appealed the claim to this Board. On November 20, 2018, this Board vacated this claim, and remanded because the ALJ's decision had not been served on all parties. White appealed this Board's decision to the Kentucky Court of Appeals. White subsequently moved to dismiss the appeal, which was granted. The appeal was dismissed by order entered March 13, 2019.

On August 9, 2019, the ALJ again entered a decision dismissing White's claim for the same reasons set forth in his previous decision. He essentially copied and pasted from his previous decision, including the citation to a knee condition. Interestingly, the ALJ determined, "Regardless I believe and find that the majority of the Plaintiff's work was localized in **Georgia**, regardless of his or his employer's intent going forward." (Emphasis added).

White filed a petition for reconsideration requesting the ALJ to "set forth his findings of fact on the issues of whether, at the time of Plaintiff's injury, Extreme Underground Drilling maintained a place of business in Kentucky, and whether Plaintiff worked from the Employer's place of business." White again requested the ALJ to provide the authority he relied upon.

The ALJ denied White's petition. The ALJ did not provide any additional findings, or provide citations to the law he relied upon in reaching his determination. The order issued August 29, 2019, states as follows:

This matter comes before the undersigned on the Plaintiff's Petition for Reconsideration and the Defendants' Responses thereto. This matter is on Remand wherein the original Opinion did not note service on all parties. I merely re-issued the Opinion. This Petition is substantially [sic] the same as the Plaintiff's Petition originally. I incorporate by reference my September 10, 2018 Order on Reconsideration. The Plaintiff never worked in Kentucky. His claim was covered by the workers' compensation laws of Tennessee. The Petition is OVERRULED.

White bore the burden of proving by substantial evidence all facts necessary to establish Kentucky jurisdiction of his claim. Collier v. Wright, 340 S.W.2d 597, 598 (Ky. 1960). The ALJ concluded the statute did not grant jurisdiction to Kentucky. This Board, on review, can only reverse the ALJ "by determining his findings to be clearly erroneous, and holding the evidence was so overwhelming, upon consideration of the record as a whole, that it compels a finding in [White's] favor." Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky. App. 1984); KRS 342.285(2)(d); Eck Miller Transportation Corporation v. Wagers, 833 S.W.2d 854 (Ky. 1992).

We initially note the relevant portions of KRS 342.670 read as follows:

Extraterritorial coverage

(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

...

(5) As used in this section:

...

(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;

Neither party disputes the fact that White was hired in Kentucky. Therefore, the issue is whether the ALJ erroneously found White's employment was principally localized in Georgia instead of finding it was not principally localized in any state. White argues on appeal that the ALJ erred in determining Kentucky does not have jurisdiction over his claim.

White argues his employment was principally localized in Kentucky, the employer had a place of business in Kentucky, and he regularly worked from that place of business. In the alternative, White argues his employment was not localized in any state. White argues that although Tennessee has concurrent jurisdiction since

the accident occurred there, this does not prevent him from pursuing his claim in Kentucky. White notes his brother-in-law, who lived next door, hired him in Kentucky. He completed a job application, which he turned in to his sister-in-law next door in Kentucky. He was routinely drug tested in Kentucky. He noted that Wallace agreed he was hired in Kentucky.

White noted that Extreme operated as a sole-proprietorship out of Wallace's home in Kentucky, as reflected on the tax documentation filed of record. He argues Wallace admitted listing his personal residence as the Extreme's principal office. He additionally argues Extreme never changed the address of the registered agent for service of process (Wallace at his home in Albany), despite Wallace's testimony that his office changed to a motel in Crossville, Tennessee where his crew stayed during the week while working through the contract with Westek. White also points out the claim filed by Extreme's insurer in Tennessee lists the business address as Albany, Kentucky. White additionally notes Extreme maintained a bank account in Albany, Kentucky, from which payroll checks were issued. The checks issued from that account reflect Extreme's address as Albany, Kentucky. White argues that every document of record lists Extreme's principal office at Wallace's house. "Clearly, the Employer maintained a place of business in Kentucky."

Regarding whether White'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.

Id. at 616, 617.

We agree with White's assertion that KRS 342.670(1) (b) is applicable. Section (1)(c) does not apply, because although White was working under a contract for hire made in this state, his employment was not principally localized in another state whose workers' compensation law is not applicable. In that regard, there is no proof in the record establishing Tennessee does not have jurisdiction of White's claim. We note Extreme's insurer filed a claim in Tennessee, which is apparently still pending. Therefore, the sole inquiry is whether White's employment was principally localized in Georgia (as determined by the ALJ), or not principally localized in any state.

For purposes of determining whether White's employment was principally localized in this state or another state, we must look to KRS 342.670(5)(d). That section specifically defines when a claimant's employment is principally localized in Kentucky or another state.

The only evidence of record establishing Extreme's business location was other than Wallace's residence is his testimony that the business moved to Crossville, Tennessee, despite the fact that all official documentation establishes the address as Albany, Kentucky. In fact, we note the Tennessee claim also lists Extreme's address as Albany. We additionally note that Extreme's crew met in Kentucky at the first of the workweek, traveled to worksites in Georgia, then Tennessee, and later Alabama, returning to Kentucky at the end of the workweek.

We acknowledge the accident occurred in Tennessee, which has concurrent jurisdiction, but there is no evidence of record establishing Georgia has any jurisdiction over White's claim.

Therefore, pursuant to KRS 342.670(5)(d)1, White's employment could not have been principally localized in Georgia since Extreme had no place of business there from which White "regularly works at or from." White merely worked on a job Extreme had in Georgia, and was no longer working there at the time of his injury. That job had ended, and White was working at a jobsite in Tennessee when the accident occurred. Despite Wallace's testimony to the contrary, there is no other evidence establishing the business actually relocated to Tennessee. The documentary evidence establishes Extreme was located in Kentucky, and had jobsites where employees traveled to work during the week.

Since section (5)(d)1 does not permit a finding White's employment was principally localized in Georgia, we must turn to subsection 2 of section (5)(d). Under Subsection 2, since White was not domiciled in Georgia or Tennessee, even though he spent most of his working time in Extreme's service there, his employment could not be principally localized in Georgia, or for that matter, in Tennessee.

Since the facts in this case do not meet the criteria set forth in KRS 342.670 (5)(d)1 or 2, a determination that White's employment was principally localized in Georgia is not supported by the record. Accordingly, the decision of the ALJ determining White's employment was principally localized in Georgia, and Kentucky does not have extraterritorial jurisdiction of his claim, is reversed.

We emphasize the facts in this case differ from the situation in Eck Miller Transportation Corporation v. Wagers, 833 S.W.2d 854 (Ky. 1992). In Wagers, *supra*, the Court of Appeals noted as follows:

The ALJ correctly noted that the key to extraterritorial coverage under the statute is the determination of the situs at which an employee's work activity is 'principally localized.'

Wagers' employer had a terminal in Tennessee and the ALJ determined "Wagers' assignment to the Chattanooga terminal during one and one-half years prior to his accident resulted in his working from Tennessee for statutory purposes." Accordingly, the ALJ determined Wagers' employment was principally localized in Tennessee and he regularly worked at or from Miller's Tennessee terminal. Therefore, Kentucky did not have extraterritorial jurisdiction. Further, the ALJ concluded nothing in the record indicated Wagers would not be eligible for Tennessee workers' compensation benefits. In this case, given the definition of principally localized employment, contained in KRS 342.670(5)(d)1 and 2, White's employment could not be deemed to be principally localized in Georgia, or for that matter, in Tennessee.

We therefore reverse the ALJ's dismissal of White's claim due to lack of jurisdiction. On remand, the ALJ is directed to conduct additional proceedings necessary for the determination of all remaining issues based upon the merits. The ALJ is also encouraged to revisit his denial of the motion to join Westek as a party to this claim.

Accordingly, the opinion and order dismissing White's claim rendered by Hon. Chris Davis on August 9, 2019, and the August 29, 2019 order on

reconsideration are **REVERSED**. This claim is **REMANDED** to the ALJ for entry of a decision on all remaining issues.

ALL CONCUR.

DISTRIBUTION:

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