

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001272-WC

GEORGE MILLER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-00170

AMERICAN STAFFING, INC.;
HONORABLE JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,¹ SENIOR JUDGE.

DIXON, JUDGE: George Miller seeks review of a Workers' Compensation Board decision affirming an Administrative Law Judge's opinion, which dismissed Miller's workers' compensation claim for lack of jurisdiction. In his petition for review, Miller contends that the ALJ erred by concluding that the employment

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

contract was not made in Kentucky. Our review indicates that the ALJ's decision was supported by substantial evidence; accordingly, we affirm.

Miller was born January 28, 1968, and he resides in Paducah, Kentucky. Prior to the events at issue here, Miller traveled around the country working as an electrician on construction projects for various employers. In January 2007, while working on a job at a coal mine in Arkansas, Miller filled out employment paperwork for American Staffing, Inc., a West Virginia-based industrial staffing firm. Thereafter, American Staffing placed Miller on a demolition project in Mississippi for Corky Wells Electric, Inc., (CWE), an electrical contractor based in Ashland, Kentucky. In late February, Miller sustained an injury while at work in Mississippi. Miller filed an injury report with American Staffing, and he sought medical treatment when he returned to Paducah in March 2007. Thereafter, Miller filed a workers' compensation claim in West Virginia against American Staffing and ultimately received a lump-sum settlement.

In February 2009, Miller filed a workers' compensation claim in Kentucky against CWE and American Staffing, alleging that CWE was his employer at the time of the injury in Mississippi. On November 16, 2009, CWE moved the ALJ to dismiss it as a party, contending that Miller was an employee of American Staffing who had been assigned to perform work for CWE. In response, Miller objected to the dismissal of CWE, arguing that American Staffing was not an independent entity, but was merely the payroll division of CWE. On December

16, 2009, the ALJ granted CWE's motion and dismissed it as a party, finding that Miller was not an employee of CWE at the time of his injury. Thereafter, the ALJ held a final hearing on the contested issues between Miller and American Staffing.

On February 16, 2010, the ALJ issued an opinion dismissing Miller's claim. The ALJ concluded that, while Miller's employment was not localized in any state, the hiring process had not occurred in Kentucky; consequently, there was no jurisdiction for the claim under Kentucky law.² On June 3, 2010, the Board affirmed the ALJ's decision, and this petition for review followed.

Miller asserts that Kentucky had jurisdiction over his claim pursuant to KRS 342.670, which provides extraterritorial coverage of the workers' compensation act for employees injured outside of this state. Specifically, Miller contends jurisdiction was proper under KRS 342.670(1)(b), which states in relevant part:

(1) If an employee, while working outside the territorial limits of this state, suffers an injury on account of which the employee . . . shall be entitled to the benefits provided by this chapter, if at the time of the injury:

* * *

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

It is undisputed that Miller's employment was not principally localized in any state; accordingly, jurisdiction in Kentucky was proper if Miller's "contract of

² American Staffing filed a petition for reconsideration seeking clarification of certain findings, which the ALJ sustained in a subsequent opinion. Miller did not file a petition for reconsideration with the ALJ.

hire” was made here. Miller opines that “all matters” relating to his hiring and employment were handled through CWE’s office in Ashland, Kentucky, and that he was an employee of CWE. Miller cites *Trinity Universal Ins. Co. v. Mills*, 293 Ky. 463, 169 S.W.2d 311, 314 (1943), for the proposition that “a contract is made at the time when, and at the place where, the final act necessary for its formation is done.” Further, “in contracts made by telephone, the place where the acceptor speaks his acceptance is the place where the contract is made.” *Id.*

After careful review, it is apparent that the record contains conflicting evidence regarding when and where Miller was hired. At his deposition, Miller testified that he arrived at the job site in Arkansas after finishing a project in Arizona. Once in Arkansas, his foreman helped him complete an employment application for American Staffing. Miller testified that his foreman faxed the paperwork to CWE’s office in Ashland, Kentucky. Miller also testified that he received paychecks from American Staffing during the course of his employment. Exhibits introduced at the deposition included a copy of the American Staffing employment application and a “West Virginia Certificate of Nonresidence” income tax withholding form. At the final hearing, Miller’s testimony contradicted his earlier deposition testimony. Miller testified that he was at home in Paducah when he received a message from Shannon Wells, the owner of CWE, regarding the Arkansas job. Miller stated that, while in Paducah, he returned the call to Wells and accepted the job.

Miller, as the party with the burden of proof, was required to produce sufficient evidence to establish jurisdiction in Kentucky. *Eck Miller Transp. Corp. v. Wagers*, 833 S.W.2d 854, 858 (Ky. App. 1992). Where, as here, the claimant was unsuccessful before the ALJ, the question on appellate review is “whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.” *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). The ALJ, as the fact-finder, “had the right to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party’s total proof.” *Caudill v. Maloney’s Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

In the case at bar, the evidence supported the ALJ’s finding that Miller was an employee of American Staffing and “leased out” to CWE. The record clearly reflects that Miller gave conflicting testimony regarding the sequence of events leading to his employment with American Staffing, and the ALJ had “the authority to determine the quality, character and substance of the evidence[,]” *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). In its opinion, the Board pointed out that Miller did not file a petition for reconsideration, despite his arguments relating to the ALJ’s interpretation of the evidence. The Board noted:

[T]he testimony is that a job application was completed in Arkansas for American, located in West Virginia. * * * [T]he record contains conflicting evidence concerning whether Miller received a call either in Arkansas or Kentucky, or whether he received a call at all. * * * Although Miller argues the ALJ erred in finding Kentucky has no jurisdiction of this claim, the only evidence to support his assertion is his own conflicting, self-serving testimony.

After careful review, we conclude the record supported the ALJ's decision and the evidence did not compel a different result. We affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark Edwards
Paducah, Kentucky

BRIEF FOR APPELLEE,
AMERICAN STAFFING, INC.:

Judson F. Devlin
Louisville, Kentucky