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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002224-WC

MICHAEL BROW — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-01268

TIGER TRUCK LINES, INC.;
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND LAMBERT , JUDGES.

CLAYTON, JUDGE: Michael Brow appeals from the decision of the November 7, 2008, Workers' Compensation Board (Board) denying jurisdictional cognizance to his workers' compensation claim against Tiger Truck Lines, Inc., (Tiger Truck),

and reversing the June 16, 2008, Administrative Law Judge's (ALJ) order, which found extraterritorial jurisdiction. After our review, we affirm the decision of the Board.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001, Tiger Truck employed Brow as an over-the-road truck driver. At the time, he was a resident of Tennessee. After responding to a Tiger Truck classified advertisement, Brow went to New Albany, Indiana, where he was interviewed and hired by the owner of Tiger Truck. Although Brow lived in Tennessee when he began working for Tiger Truck, he relocated after a year to Pendleton, Kentucky, where he continues to live.

On September 25, 2006, while dropping a trailer in Lafayette, Georgia, Brow slipped while getting out of the truck and injured his lower back. After making another delivery, Brow called and notified the dispatcher at Tiger Truck in Indiana about the injury. Subsequently, he reported to Tiger Truck in New Albany, Indiana, where a first report of injury was completed and processed through the Board of Indiana.

Brow first sought medical treatment for the effects of his injury on September 27, 2006. On November 16, 2006, Dr. Jonathan E. Hodes, neurosurgeon, performed a lumbar laminectomy and discectomy at L4-5 on him. Shortly after the surgery, Brow began to exhibit bladder problems and erectile dysfunction issues. He then came under the care of Dr. M. Brook Jackson, a urologist, and Dr. Ellen Ballard, a physical medicine and rehabilitation specialist.

As a result of the injury, Tiger Truck paid Brow temporary total disability benefits under its Indiana workers' compensation policy from September 26, 2006, through September 27, 2007. Brow has not returned to work anywhere since September 26, 2006.

Tiger Truck is an Indiana corporation with its principal place of business in New Albany, Indiana. In addition, Tiger Truck has a second New Albany, Indiana, location which is used to park tractors. Tiger Truck does not have and has never had a Kentucky office or location. While Tiger Truck has no workers' compensation coverage in Kentucky, it maintains Indiana workers' compensation with All States Coverage. Finally, with regards to its Indiana business location, all Tiger Truck's drivers were dispatched from its principal office location in New Albany.

Brow testified that on Sundays he usually received his load assignments by telephone at his home from the dispatcher in Indiana. He would then, that same evening, pick up his tractor and trailer from New Albany. Brow was not, however, allowed to begin charging for mileage until he hooked up the load to be delivered, which was often the next day. According to Brow, 90 percent of the time he would be dispatched to General Electric (GE) in Louisville, Kentucky, to hook up his load for deliveries to Tennessee or Georgia. Often, his return deliveries would be to GE and sometimes to the New Albany truck yard.

At the end of the week, Brow stated that typically he was required to return his assigned tractor/truck to his employer's truck yard in Indiana. Regarding

truck maintenance, Brow explained that if his truck broke down while on the road, repairs were made locally; otherwise, all truck maintenance was performed by Tiger Truck at its Indiana truck facility. Furthermore, Brow testified that as part of his employment, he was also required to drop off all invoices, bills of lading, and his log book on Fridays at Tiger Truck's main office in Indiana. Except for the routine described above, Brow only went to the main office when requested to by the dispatcher to deliver or discuss specific bills of lading.

On June 16, 2008, the ALJ ruled that, given the evidence available to him, the language contained in Kentucky Revised Statutes (KRS) 342.670(1) and (5)(d)(1) and (2) extended Kentucky coverage to Brow's injury. The ALJ reasoned in his opinion on page nine as follows:

> Based on the facts not in dispute, plaintiff's claim can only be covered if his employment is localized in Kentucky. Further, his employment can only be localized in Kentucky if it is first determined that KRS 342.670(5)(d)1 does not apply. If so, there is no dispute that KRS 342.670(5)(d)2 would apply because plaintiff lives in Kentucky and spends a substantial part of his working time in Kentucky. Therefore, the entire issue turns on whether KRS 342.670(5)(d)1 is applicable. Specifically, although the parties agree the defendant only has a place of business in Indiana, they dispute whether plaintiff regularly worked "at or from that place of business."

Ultimately, the ALJ determined that Brow did not "work from" Indiana, and therefore, while KRS 342.670(5)(d)(1) was not applicable, KRS 342.670(5)(d)(2) was applicable. Consequently, the ALJ, pursuant to that statute, decided that extraterritorial coverage existed. He reasoned that because Brow lived in

Kentucky and performed a substantial amount of his employment activities in Kentucky, he was covered under Kentucky's workers' compensation act. Furthermore, after establishing jurisdiction, the ALJ went on to find that the erectile dysfunction and bladder problems were compensable as work-related conditions and awarded Brow disability benefits.

Following a motion for reconsideration, Tiger Truck appealed to the Board arguing that Brow's employment was principally localized in Indiana as he regularly worked at or from the Indiana location, and the ALJ erred as a matter of law in finding that Kentucky had extraterritorial jurisdictional over the claim. Further, Tiger Truck contends that the erectile dysfunction and bladder problems were not compensable as work-related conditions.

On July 22, 2008, the Board ruled that the ALJ erred in finding that Brow's employment with Tiger Truck was principally localized in Kentucky and reversed the decision. It based its decision on KRS 342.670(5)(d)(1) and not (d)(2), which the ALJ had relied on. The Board instructed the ALJ, on remand, to dismiss the claim for lack of jurisdiction. Based on the ramifications of its ruling, the Board did not reach the question of whether erectile dysfunction and bladder problems were compensable as work-related conditions. This appeal followed.

ISSUES

Brow maintains that the ALJ's determination that he did not "regularly work at or from" his employer's place of business is mainly a question of fact, and therefore, the Board may not substitute its judgment for that of the

ALJ. KRS 342.285. Whereas, Tiger Truck insists that the controversy concerns the legal interpretation of statutory language, and hence, although the Board has no authority to substitute its opinion as to the weight of the evidence, it does have authority to determine whether "[t]he order, decision, or award is not in conformity to the provisions of this chapter[.]" KRS 342.285(2)(c).

ANALYSIS

The issue in this case rests squarely on whether it is one of fact or law. Obviously, different standards of review are required for questions of fact and questions of law. For questions of fact, a reviewing court must give great deference to the conclusions of a fact-finder, if the facts are supported by substantial evidence and the opposite result is not compelled. When considering questions of law, or mixed questions of law and fact, the reviewing court has greater latitude to determine whether the findings below were sustained by evidence of probative value. *Aetna Cas. and Sur. Co. v. Petty*, 282 Ky. 716, 140 S.W.2d 397 (Ky. App. 1940); *M.H. and H. Coal Co. v. Joseph*, 310 S.W.2d 257 (Ky. 1958).

In the case at hand, we note that there is little or no dispute as to the facts of the case. Generally, whether jurisdiction exists is a question of law if the facts below are substantially undisputed, and is a question of fact if the facts are disputed. *See Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991). Here, we observe that the facts are not disputed but the application of these facts to the existing statute, KRS 342.670(5), has been construed differently by the

ALJ and the Board. Undoubtedly, interpretation of statutory language is a question of law. *Combs v. Kentucky River Dist. Health Dep't.*, 194 S.W.3d 823 (Ky. App. 2006). Therefore, in this case, we find that the issue herein is a legal one, and as such, will be reviewed under the appropriate standard for legal matters.

On appeal, our standard of review of a decision of the Board "is to correct the Board only where the [] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *AK Steel Corp. v. Childers*, 167 S.W.3d 672, 675 (Ky. App. 2005)(quoting *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Because "the interpretation to be given a statute is a matter of law, we are not required to show any deference to the decision of the Board." *Newberg v. Thomas Industries*, 852 S.W.2d 339, 340 (Ky. App. 1993). Similarly, "we review the ALJ's and the Board's application of law to the facts de novo." *White v. Great Clips*, 259 S.W.3d 501, 503 (Ky. App. 2008). The Board's review is based on KRS 342.285(2)(c), which authorizes the Board to reverse the ALJ if "[t]he order, decision or award is not in conformity to the provisions of this chapter[.]" Thus, whether Kentucky has jurisdiction under KRS 342.670 is a matter of statutory interpretation, which we review de novo. Because the review is de novo, we are not required to defer to either the ALJ or the Board.

Initially, we will examine the statutory guidelines for determination of extraterritorial coverage of the Kentucky Workers' Compensation Act. KRS 342.670 states:

> (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.

Here, it is undisputed that Brow's contract of hire was made in Indiana rather than in Kentucky. Thus, subsections (b), (c), and (d) of KRS 342.670(1) are inapplicable as they apply only to contracts of hire made in Kentucky. Thus, Brow's ability to claim Kentucky benefits rests on the language of KRS 342.670(1)(a) – "[the] employment [must be] principally localized in this state[.]" The phrase "principally localized" is defined in KRS 342.670(5)(d) for purposes of extraterritorial coverage as follows:

> 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[.]

Unless Brow meets one of these two statutory definitions, he is not entitled to claim Kentucky workers' compensation benefits on the ground that his employment was principally localized in another state. *See Haney v. Butler*, 990 S.W.2d 611 (Ky. 1999).

Here is the crux of the issue: if KRS 342.670(5)(d)(1) is applicable, then KRS 342.670(5)(d)(2) is not applicable. The ALJ interpreted "works at or from" as not pertinent, and thus, relied on the second subsection. We do not agree with the ALJ's reasoning, but find the Board's reasoning persuasive. Our difference with the ALJ's determination is well-explained in the Board's thorough and carefully crafted decision. We agree with the decision reached by the Board and adopt its analysis into the body of this Court's opinion:

> When an employee is injured while in another state, KRS 342.670, the statute dealing with extraterritorial jurisdiction, provides the conditions under which Kentucky will have coverage over that employee's workers' compensation claim. In undertaking an analysis of this issue, it must first be determined whether Brow falls within the general purview of KRS 342.670 and, if so, which of the four circumstances described in KRS 342.670(1) apply. KRS 342.670(1) provides in pertinent part:

> (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, 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.

It is not at issue that Brow's work-related injury occurred while he was working for Tiger Truck in Georgia, which is well "outside the territorial limits of this state." It is further undisputed that Brow was hired by Tiger Truck in New Albany, Indiana. Hence, according to the express dictates of KRS 342.670(1), Brow does not meet the requirements set out in subsections (b), (c), or (d). The question to be answered then is whether Brow qualifies for coverage under KRS 342.670(1)(a). To that extent, the evidence of record must support the ALJ's finding that Brow's employment with Tiger Truck was "principally localized" in Kentucky.

For purposes of determining where an injured worker's employment is principally localized, KRS 342.670(5) states:

> (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 language makes it clear that in considering the propriety of the ALJ's finding with regard to Kentucky 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 as determined by the ALJ, does the analysis proceed to subsection (5)(d)2. *Id*. at 616. To that extent, we find the court's holding in *Eck Miller Transportation Corporation v. Wagers*, 833 S.W.2d 854 (Ky. App. 1992), to be instructive. In that case, 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 light of those facts, the court concluded that the Tennessee freight terminal constituted a place of business for the employer; the worker regularly worked from the

employer's Tennessee freight terminal; and, regardless of other factors, pursuant to KRS 342.670(5)(d)1, the injured worker's employment was principally localized in Tennessee.

In the case *sub judice*, it is undisputed that at the time of Brow's injury Tiger Truck's only places of business were located in New Albany, Indiana. It is further undisputed that Brow would travel to New Albany on Sundays where he would pick up a truck owned by his employer at the employer's truck yard. Moreover, at the end of each week he was required to return his assigned truck to the same truck yard. Brow was also typically obligated to drop off all invoices, bills of lading, and his log book at Tiger Truck's offices in Indiana on a weekly basis. On other occasions, he was required to report to Indiana when summoned to deliver or discuss specific bills of lading. In addition, Brow received all of his work orders from a dispatcher located in Indiana. Any other proof regarding Brow's work routine when traveling in other states including Kentucky notwithstanding, given these facts we believe the evidence compelled a finding by the ALJ that Tiger Truck had its only place of business in another state and Brow regularly worked at or from that place of business when he was injured in a state other than Kentucky.

Contrary to the ALJ's analysis, the fact that Tiger Truck did not begin to pay Brow mileage until he picked up a load of cargo, whether in Kentucky or elsewhere, has no relevance to the application of KRS 342.670(5)(d)1. It is well established that where work involves travel away from an employer's premises, the worker is considered to be within the course and scope of the employment during the entire trip. *Black v. Tichenor*, 396 S.W.2d 794, 797 (Ky. 1965). Thus, regardless of when and how Tiger Truck chose to calculate Brow's wage for the time he was traveling on company business, Brow's weekly travel to and from the truck yard in Indiana was nevertheless an integral, necessary and regular part of his employment with Tiger Truck. *Haney v. Butler* at 615; *Abbott Laboratories v. Smith*, 205 S.W.3d 249, 254 (Ky. App. 2006).

Consequently, it was error as a matter of law in line with the express language of KRS 342.670(1)(a) and (5)(d)1 for the ALJ to determine that Brow's employment with Tiger Truck was "principally localized in this state," and the ALJ's decision finding that Kentucky had extraterritorial coverage must be reversed. On remand, the ALJ is instructed to issue an order dismissing Brow's claim for lack of jurisdiction.

The opinion of the Board is affirmed.

ALL CONCUR.

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