[Cite as *Hendricks v. Kilbarger Constr., Inc.*, 2009-Ohio-6488.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

IRA HENDRICKS, II,	:	
Plaintiff-Appellant,	:	Case No: 09CA13
v.	:	
KILBARGER CONSTRUCTION, INC. et al.,	:	**DECISION AND JUDGMENT ENTRY**
Defendants-Appellees.	:	File-stamped date: 12-8-09

APPEARANCES:

Steven G. Thomakos, New Philadelphia, Ohio, for Appellant.

Sara L. Rose and Mary L. Pisciotta, Pickerington, Ohio, for Appellees.

Kline, P.J.:

{¶1} Ira Hendricks, II appeals the judgment of the trial court below granting summary judgment in favor of Kilbarger Construction, Inc. On appeal, Hendricks contends that the trial court erred in granting the summary judgment based on its finding that his employment was not sufficiently localized for him to recover workers' compensation for his injuries. We agree. The Ohio Workers' Compensation Act is to be construed liberally in favor of employees, and we find that a reasonable fact finder could determine Hendricks's employment was sufficiently "localized" in the state of Ohio for him to recover Workers' compensation benefits. Accordingly, we reverse the judgment of the trial court and remand this cause to the trial court for further proceedings consistent with this opinion.

I.

{¶2} Kilbarger is an Ohio corporation with its principal offices in Logan, Ohio. Hendricks is an Ohio resident who lives in Stillwater, Ohio.

{¶3} In January of 2006, Hendricks received an offer from Kilbarger to work on Rig 12 (drilling for oil or gas), essentially a worksite in Pennsylvania. Hendricks did have to pass a drug screen test at the company's headquarters located in Logan, Ohio before Kilbarger would hire him. According to Hendricks, he was hired by an Ohio corporation, not by the particular drilling team for which he worked, and he filled out a job application at Kilbarger's main offices in Logan, Ohio. However, according to Kilbarger, Hendricks was hired in Pennsylvania by his Pennsylvania supervisor for the job in Pennsylvania. We note that there does not appear to be any material factual differences between most of Hendricks's or Kilbarger's account, instead they ascribe different inferences or interpretations to the same facts.

{¶4} Initially, Hendricks worked exclusively in Pennsylvania, and he rarely came back to Ohio even for personal reasons. He stayed with a coworker in Pennsylvania. During this period of his employment, Kilbarger paid for Pennsylvania Workers' Compensation coverage, withheld state income taxes for Pennsylvania on Hendricks's paycheck, and delivered the paychecks to the work site in Pennsylvania. Hendricks did state that he only filed an Ohio income tax return, and notwithstanding withholding, he filed no return in Pennsylvania.

{¶5} On February 1, 2006, Hendricks injured his knee when an air hose struck him. Hendricks had to immediately stop working and visit a Pennsylvania Hospital. Following this injury, a claim for workers' compensation was filed in Pennsylvania. The record is unclear on who filed this claim, but Hendricks denies filing it himself and in the

context of a summary judgment motion, he is entitled to a reasonable inference that Kilbarger filed it.

{¶6} Hendricks was unable to work for two and one half months following this injury. Once Hendricks returned to work for Kilbarger, he was reassigned, per his request, to Rig 11 in Cleveland, Ohio. Eventually, Hendricks took another job with a different company because he thought that job would be easier on his knee. However, in March 2007, Hendricks went back to work for Kilbarger, this time he was assigned to work at Rig 17 in Holmes County, Ohio. On November 23, 2007, Hendricks suffered another industrial accident. At some time after this accident, Hendricks filed claims for Ohio Workers' Compensation for both accidents.

{¶7} The district hearing officer allowed Hendricks's claims. Kilbarger appealed the decision, but the industrial commission refused to hear Kilbarger's appeal. Kilbarger then filed an appeal to the Hocking County Court of Common Pleas. On April 30, 2009, the court granted summary judgment for Kilbarger.

{¶8} The entirety of the trial court's decision is as follows: "Defendant Kilbarger Construction Inc.'s motion for summary judgment is sustained, and dismissal is granted. The court finds that all disputed matters are concluded and there is no just cause for delay."

{¶9} Hendricks appeals and assigns the following assignment of error: "THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT."

II.

{¶10} Hendricks's assignment of error requires this court to review the trial court's entry granting summary judgment. "Because this case was decided upon summary judgment, we review this matter de novo, governed by the standard set forth in Civ.R. 56." *Comer v. Risko* (2005), 106 Ohio St.3d 185, 186.

{¶11} Summary judgment is appropriate only when the following have been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C). See, also, *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the opposing party's favor. *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531, 535.

{¶12} The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294, citing *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). See, also, *Dresher* at 294-295.

{¶13} In reviewing whether an entry of summary judgment is appropriate, an appellate court must independently review the record and the inferences that can be

drawn from it to determine if the opposing party can possibly prevail. *Morehead* at 411-412. "Accordingly, we afford no deference to the trial court's decision in answering that legal question." Id. at 412. See, also, *Schwartz v. Bank-One, Portsmouth, N.A.* (1992), 84 Ohio App.3d 806, 809.

{¶14} Kilbarger contends that Hendricks's employment did not have sufficient localized contacts with Ohio for Hendricks to qualify for coverage under Ohio's Workers' Compensation Act.

{¶15} "The workers' compensation system is designed to avoid the adversarial character of the civil justice system, allowing workers to recover for injuries they suffer on the job without having to undertake the risk and expense of a civil trial. In return, employers are protected from large civil damage awards." *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717, at ¶49. "The Act operates as a balance of mutual compromise between the interests of the employer and the employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability." *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608, 614. Ohio's Workers' Compensation Act should be "liberally construed in favor of employees and the dependents of deceased employees." R.C. 4123.95.

{¶16} To this end, "'an employee injured *outside* the state may recover under the Ohio act if the employing industry and his relationship thereto are localized in Ohio.'" *Bridges v. National Engineering and Contracting Co.* (1990), 49 Ohio St.3d 108, 113 (emphasis sic), quoting *Prendergast v. Industrial Comm. of Ohio* (1940), 136 Ohio St.

535, 543. In order to determine whether employment is sufficiently localized, courts generally consider the following factors: "(1) the place of contract of employment, supposedly carrying with it, as a part of the contract, the law of the state in which the contract was made; (2) the specific provisions of the [Workers'] Compensation Act of the state of the employer with reference to its extraterritor[i]al operation; (3) the state in which the employee's name and pay are included in payroll reports submitted by the employer; (4) the place of accident; (5) the residence or domicile of the employee; (6) the place of the employee's activities or performance of the work assigned; (7) the right of recovery outside of the state of employment; (8) the relation of the employee's activities or performance of assigned work to the employer's place of business, or situs of the industry; and (9) the place or state having supreme governmental interest in the employee, as affecting his social, business and political life." *Prendergast* at 538-39.

{¶17} In *Prendergast*, the claimant was a manager and service engineer for the company's St. Louis district, which comprised Missouri, southern Indiana, and southern Illinois. Id. at 536. The Supreme Court of Ohio held that the claimant could recover from Ohio Workers' Compensation on the basis of the following factors: the situs of the business employer was in Ohio; his contract of employment was made in Ohio; his reports were constantly made to the main office in Ohio, and his paychecks were sent out to him from the Ohio Office; he was not employed in a particular place, but his employment took him out on the roads throughout his territory; his residence was not a matter of his own choice but a matter of convenience for his work; and he was not covered as to his accident either by the compensation laws of Missouri, where he

resided, or by those of Indiana, where the accident occurred. See *Prendergast* at 542-43.

{¶18} The *Prendergast* Court distinguished its case on the facts from a previous case where the Supreme Court of Ohio had held "[t]he Ohio [Workers'] compensation fund is not available to an employee injured while engaged in the performance of a contract to do specified work in another state, no part whereof is to be performed in Ohio." *Industrial Comm. of Ohio v. Gardinio* (1929), 119 Ohio St. 539, at the syllabus. The *Prendergast* court distinguished the *Gardinio* case on the facts, but did note that in *Gardinio*: "Gardinio was injured in the course of his employment in Pennsylvania and recovered compensation in accordance with the laws of that state. His case before the commission and this court was an attempt to secure double, or, at least, additional compensation. This court stressed the fact that no part of the duties of the employee was to be performed in Ohio." *Prendergast* at 541. The *Prendergast* Court also approvingly considered a prior case where it held that an individual hired by an Ohio employer to serve as a porter on a bus engaged in interstate commerce and who was injured while the bus was operating in the state of Michigan, was entitled to compensation under the laws of Ohio. Id., citing *Hall v. Industrial Commission* (1936), 131 Ohio St. 416.

{¶19} Hendricks contends that the enactment of R.C. 4123.54 "has taken discussion of 'sufficient contacts' out of the equation." Hendricks's brief at 5. This section of Ohio's Workers' Compensation Act provides, in part, that any amount of workers' compensation benefits recovered under the laws of another state "shall be credited on the amount of any award of compensation or benefits made to the employee

or the employee's dependents by the bureau." R.C. 4123.54(H)(2). Hendricks contends that when *Prendergast* and *Guardino* were decided "an injured worker was in an 'either/or' predicament about which state law applied to a particular injury[.]" Hendricks's brief at 5. Hendricks argues that preclusion of recovery for workers' compensation requires that the employer comply with R.C. 4123.54(H)(1).

{¶20} We are not persuaded. The Supreme Court of Ohio in other cases has reemphasized the "localization" question. *State ex rel. Bailey v. Krise* (1969), 18 Ohio St.2d 191, 192; *Bridges*, supra. In any event, the *Gardinio* opinion expressly noted that the fact the employer had secured workers' compensation insurance coverage in the other state does not bar a recovery from the Ohio fund supposing the worker was "otherwise entitled to compensation[.]" *Gardinio* at 543.

{¶21} Therefore, even when *Gardinio* was decided, it was possible that a claimant might have an additional recovery even if he had already received compensation from another state's workers' compensation system.

{¶22} R.C. 4123.54(H)(1) does provide a means for an employer to avoid the issue of localized contacts by specifying which state's workers' compensation system is applicable. It is uncontested by either side that the specific procedures of this section were not followed, and so we find it is not relevant to our consideration of the present case.

{¶23} We turn our attention to each factor raised by the *Prendergast* Court.

{¶24} The first factor is "the place of contract of employment, supposedly carrying with it, as a part of the contract, the law of the state in which the contract was made[.]" *Prendergast* at 538. Hendricks contends that he filed his application for

employment at Kilbarger's offices in Logan, Ohio, and he also notes he was required to undergo a mouth swab drug test at the Logan offices. Hendricks, at his deposition, testified that he was hired by Kilbarger generally and not for a specific rig. Kilbarger, in contrast, argues the supervisor of the Pennsylvania rig offered Hendricks employment for the specific purpose of working at the Pennsylvania rig.

{¶25} There is some support for the proposition that the place of contract here is Ohio. However, as *Gardinio* made clear, "where a contract made in one state is to be performed in another, the rule is equally well established * * * that the law of the place of performance governs the contract." *Gardinio* at 544. Therefore we find that this factor weighs in favor of Pennsylvania.

{¶26} The second factor is "the specific provisions of the [Workers'] Compensation Act of the state of the employer with reference to its extraterritor[i]al operation[.]" *Prendergast* at 538. There is no specific provision of the Ohio Workers' Compensation Act that expressly creates its extraterritorial operation. Rather it is a judicial interpretation of the legislature's intent. See id. at 539-40. We do not consider this factor significant to the resolution of the present case, except insofar as Ohio courts have previously laid out the standards for the extraterritorial operation of Ohio's Workers' Compensation Act.

{¶27} The third factor is "the state in which the employee's name and pay are included in payroll reports submitted by the employer[.]" Id. at 538-39. There is no question but that Kilbarger withheld Pennsylvania taxes and paid for Pennsylvania workers' compensation.

{¶28} The fourth factor is "the place of accident[.]" Id. at 539. Here, the injury occurred in Pennsylvania.

{¶29} The fifth factor is "the residence or domicile of the employee[.]" Id. Hendricks resided with a co-worker in Pennsylvania for most of the month he worked at Rig 12. Kilbarger argues that this indicates that this factor weighs in favor of Pennsylvania. However, there is no suggestion in the record that Hendricks resided in Pennsylvania as anything other than a convenience based on where he was required to work. There is no suggestion or indication that his residence there was likely to lead to any sort of a permanent change. Therefore, construing these facts in favor of Hendricks, we agree with him that his residence or domicile remained in Stillwater, Ohio.

{¶30} The sixth factor is "the place of the employee's activities or performance of the work assigned[.]" Id. For a month or so prior to Hendricks's accident, he worked at Rig 12 in Pennsylvania. But when Hendricks returned to work after his injury, he worked at Rig 11 in Cleveland, Ohio, albeit at his own request. The application of this factor is unclear in the present case, and we therefore find it unhelpful in our consideration of the present issue.

{¶31} The seventh factor is "the right of recovery outside of the state of employment[.]" Id. The *Prendergast* Court noted that this factor entered into its analysis, but did not clearly explain how. However, in context, we believe that the *Prendergast* Court was considering the fact that in that case neither the state where the employee was injured nor the state of the employee's residence provided

compensation. As such, this factor does not weigh in favor of Hendricks's employment being "localized" in Ohio, because Pennsylvania has provided compensation.

{¶32} The eighth factor is "the relation of the employee's activities or performance of assigned work to the employer's place of business, or situs of the industry[.]" Id. Hendricks's immediate supervisor was in Pennsylvania, but from the record it appears that Kilbarger's headquarters were in Logan, Ohio. The record demonstrates that Kilbarger's principal place of business was in Ohio, but Hendricks was not directly supervised from that location. We do not find this factor to be helpful in the present case.

{¶33} The ninth factor is "the place or state having supreme governmental interest in the employee, as affecting his social, business and political life." Id. Kilbarger contends that this factor militates in favor of Pennsylvania. However, there is no evidence in the record that demonstrates Hendricks had any intent that his residency in Pennsylvania be anything other than temporary and solely for the purpose of his employment. As such, we find that the state with the supreme governmental interest in his social, business, and political life is Ohio. Kilbarger contends that "[b]ecause Pennsylvania collected state and local income and unemployment taxes, and workers' compensation premiums for Hendricks's employment and paid his medical benefits and lost time compensation Pennsylvania had the primary interest in Hendricks." However, if this were the case, this factor would be superfluous as little more than a duplication of the third factor (where the employer submits payroll reports).

{¶34} No single factor in this test is dispositive. And we cannot simply count the factors and determine that Hendricks's employment was localized in Ohio or

Pennsylvania. Having reviewed the factors, we find them fairly evenly matched in this particular case. Therefore, we construe the act in favor of the employee as required by law. And we find a reasonable fact finder could determine Hendricks's employment was sufficiently "localized" in the state of Ohio for him to recover Workers' compensation benefits.

{¶35} Accordingly, we sustain Hendricks's sole assignment of error and reverse the judgment of the trial court. We remand this matter to the trial court for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and this CAUSE BE REMANDED to the trial court for further proceedings consistent with this opinion. Appellee shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Dissents.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.