REL: February 12, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190165

Gina Barfoot Sellers

v.

Venture Express, Inc.

Appeal from Cullman Circuit Court
(CV-17-900316)

HANSON, Judge.

Gina Barfoot Sellers appeals from a judgment dismissing her claim in the Cullman Circuit Court seeking workers' compensation benefits from

her employer, Venture Express, Inc. ("Venture Express"). We reverse and remand.

On September 2, 2017, Sellers filed a complaint naming as defendants Venture Express, Tara Green, Steven Bloomfield, Jr., and On Time Logistics, LLC. Sellers, an Alabama resident, alleged that, on September 3, 2015, she had been involved in an automobile collision in Alabama while operating a tractor-trailer in the line and scope of her employment with Venture Express. Sellers alleged a claim under the Alabama Workers' Compensation Act ("the Act"), Ala. Code 1975, § 25-5-1 et seq., against Venture Express and asserted various tort claims against the remaining defendants. On December 15, 2017, Venture Express moved to dismiss the claim against it, arguing that the only proper forum for Sellers's workers' compensation claim would be a Tennessee court. In support of its motion, Venture Express attached a copy of an agreement signed by Sellers indicating that her employment would be deemed "principally localized in Tennessee" and purporting to provide that any claims for workers' compensation benefits asserted by Sellers against

Venture Express would be governed by Tennessee law ("the agreement").

The agreement provided, in pertinent part, as follows:

> "AGREEMENT AS TO JURISDICTION AND NOTICE AS TO TENNESSEE WORKERS' COMPENSATION LAW
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> "THIS NOTICE CONTAINS LANGUAGE WHICH WILL BECOME PART OF A SEPARATE CONTRACT WHICH YOU WILL SIGN AS A CONDITION OF EMPLOYMENT. THIS NOTICE AND CONTRACT REFERRED TO IN THE PRECEDING SENTENCE EFFECTS YOUR RIGHTS, LIABILITIES AND OBLIGATIONS IN THE EVENT THAT YOU SUSTAIN AN INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF YOUR EMPLOYMENT WITH [VENTURE EXPRESS]. YOU ARE URGED TO READ THIS NOTICE AND CONTRACT CAREFULLY AND IN ITS ENTIRETY.
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> "[Venture Express] is a corporation with a place of business in Tennessee, and licensed to do business in the state of Tennessee. Therefore, a Tennessee employer is hiring you and your employment is principally localized in Tennessee. Although your job duties with and for [Venture Express] may be located in states other than Tennessee and though an injury giving rise to workers' compensation claims may occur in a state other than Tennessee, you hereby agree that any claim you ... submit for workers' compensation benefits will be governed both substantively and procedurally[] by Tennessee law and in accordance with the provisions of Tennessee Workers' Compensation Act. Moreover, you are aware that any and all workers' compensation claims that you may have arising out of employment and/or operation of a motor vehicle with [Venture Express] will be exclusively governed by the law

> of the State of Tennessee, as this is not a seriously inconvenient forum."

(Capitalization in original.)

On June 29, 2018, the trial court entered a judgment dismissing Sellers's workers' compensation claim against Venture Express on the ground that the agreement provided for the courts of Tennessee to serve as the exclusive forum for Sellers's claim for workers' compensation benefits. Sellers ultimately stipulated to the dismissal of the claims against the remaining defendants, and all remaining claims were dismissed on October 8, 2019. This appeal, which relates only to the trial court's dismissal of Sellers's claim for workers' compensation benefits, followed.[1]

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[1]The trial court purported to dismiss the claim "without prejudice." Typically, the dismissal of an action without prejudice "lacks sufficient finality to support an appeal." Edwards v. Hanger, 197 So. 3d 993, 995 (Ala. Civ. App. 2015). Nevertheless, " 'when the applicable statue of limitations would bar a subsequent action, the dismissal becomes, in effect, a dismissal with prejudice.' " Edwards, 197 So. 3d at 995 (quoting Guthrie v. Alabama Dep't of Labor, 160 So. 3d 815, 816-17 n.2 (Ala. Civ. App. 2014)). At the time Sellers's claim against Venture Express was dismissed, any subsequent workers' compensation action, whether filed under Alabama or Tennessee law, would have been barred by the corresponding applicable statute of limitations. Accordingly, based upon

The salient question on appeal is whether the agreement mandated the trial court's dismissal of Sellers's workers' compensation claim against Venture Express because it was asserted in an Alabama court rather than a Tennessee court. Stated another way, we must consider whether the agreement required Sellers to seek workers' compensation benefits only in a Tennessee court and only under Tennessee law despite her having been injured in Alabama. The Act mandates that, because this appeal concerns a question of law, this court must apply no presumption of correctness to the trial court's ruling. Ala. Code 1975, § 25-5-81(e)(1).

In support of its argument that Tennessee was the exclusive forum for Sellers's workers' compensation claim, Venture Express cites subsection (c) of § 25-5-35, Ala. Code 1975. That subsection provides:

> "(c) An employee whose duties require him[2] to travel regularly in the service of his employer in this and one or more other states may, by written agreement with his employer, provide that his employment is principally localized in this or

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Edwards and Guthrie, we consider the trial court's dismissal of Sellers's claim to be a final judgment sufficient to support this appeal.

[2]Pursuant to Ala. Code 1975, § 1-1-2, words used in the Code of Alabama 1975 indicating the masculine gender also "include the feminine and neuter."

> another such state; and, unless such other state refuses jurisdiction, such agreement shall be given effect under this section."

To understand the proper scope of § 25-5-35(c), however, it is necessary to consider that subsection within the context of § 25-5-35 as a whole and to consider the context under which that section was enacted. Section 25-5-35 did not appear in Alabama's workers' compensation scheme as originally adopted; it was added by our legislature in November 1975. Ala. Acts 1975 (4th Special Session), Act No. 86 (p. 2729), § 1. Section 25-5-35 was added to address the "extraterritorial coverage" of Alabama's workers' compensation laws and was an incorporation, in substantial part, of model legislation ("the model act") drafted by the Council of State Governments' Advisory Committee on Workmen's Compensation ("the Council"). The model act was, for its part, drafted to address the problem created by a mishmash of various state conflict-of-laws statutes and jurisprudence, which had too often resulted in situations in which a worker injured while laboring outside the worker's home state was left without a remedy. The classic example of the problem sought to be remedied by the model act is typified by the facts of House v.

State Industrial Accident Commission, 167 Ore. 257, 117 P.2d 611 (1941), in which an employee had made a contract for employment in Oregon and was then sent by his Oregon-based employer to operate a branch office in California but was subsequently killed during a brief trip back to Oregon to attend a branch managers' meeting. Oregon's workers' compensation law was held in House not to apply to the employee's death because that state's law required an employee's regular place of employment to have been located in Oregon, whereas California's workers' compensation law did not apply to the employee in that case because California law required at that time that an employment contract have been formed in California. Thus, the employee's widow could not recover workers' compensation death benefits from either state.

Efforts in the 1960s and 1970s to reform state workers' compensation laws took note of the conflict-of-laws problem illustrated by House. One reform proponent, Professor Arthur Larson, urged a pragmatic solution. In a paper submitted to the National Commission on

State Workmen's Compensation Laws ("the Commission"),[3] Larson proposed:

> "To meet the objective of avoiding lacunae in coverage, there are two relatively forthright solutions, either one of which would ordinarily insure some State would provide coverage, and the combination of which would be a completely reliable guarantee of this result.
>
> "The first measure would simply be to have every State provide that it will always apply its compensation act to any injury occurring within its borders. ...
>
> "....
>
> "The second measure would be to have each State, in its extra-territoriality clause, make its coverage of out-of-State injuries apply to each of the major items of legitimate State interest in disjunctive rather than conjunctive terms. For example, the statute could provide that it applies to an out-of-State injury if the place of contract was in the State, or the employment was localized in the State, or the employee's residence was in the State, or the employer's principal place of business was in the State. ...

[3]The Commission was established by Congress pursuant to 29 U.S.C. § 656, as a part of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., and was instructed to "undertake a comprehensive study and evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation." Pub. L. No. 91-596, § 27(d)(1), 84 Stat. 1590 (1970).

> "By this combination, there will always be one State clearly covering an injury, and almost always two when any out-of-State feature is present."

Arthur Larson, "Conflict of Laws in Workmen's Compensation," in Supplemental Studies for the National Commission on State Workmen's Compensation Laws, 132 (Peter S. Barth and Monroe Berkowitz eds., 1973). The Commission's report, issued in July 1972, included the recommendation "that an employee or his survivor be given the choice of filing a workmen's compensation claim in the State where the injury or death occurred, or where the employment was principally localized, or where the employee was hired." Report of Nat'l Comm'n on State Workmen's Compensation Laws, R2.11 at 48 (1972). The Commission recommended that compliance by the states with its recommendations should be evaluated by July 1, 1975, and urged Congress to take action if the states had not, on their own initiative, addressed the concerns raised in its report.

In response to the Commission's report and findings, the Council published the model act in 1973 for immediate consideration by the states, with the assurance that a state enacting the model act would meet in full

all the recommendations of the Commission. Section 7 of the model act addressed "extraterritorial coverage" and incorporated much of the second alternate proposal suggested by Professor Larson;[4] the model act provided for the application of an adopting state's law to injuries occurring outside that state so long as one of four jurisdictional prerequisites was satisfied. Subsection (d) of § 25-5-35, Ala. Code 1975, constitutes a near-verbatim adoption by our legislature of § 7(a) of the model act. It provides:

> "(d) If an employee, while working outside 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 article [i.e., Article 2] and Article 3 of this chapter had [i.e., the Act] such injury occurred within this state, such employee or, in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this article and Article 3 of this chapter, provided that at the time of such injury:
>
> > "(1) His employment was principally localized in this state;

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[4]Indeed, Professor Larson was the chairman of the Council's Advisory Committee on Workmen's Compensation that had prepared the initial drafts of the model act and is recognized by the Council as having authored the advisory committee's comments published with the model act. The Council of State Governments, Workmen's Compensation & Rehabilitation Law (Revised), ix (1974) (noting Larson's authorship of the commentary to the model act).

> "(2) He was working under a contract of hire made in this state in employment not principally localized in any state;
>
> "(3) He was working under a contract of hire made in this state in employment principally localized in another state whose workers' compensation law was not applicable to his employer; or
>
> "(4) He was working under a contract of hire made in this state for employment outside the United States."

Thus, as the foregoing drafting history indicates, § 25-5-35(d) sets forth parameters under which the substantive provisions of the Act may properly be applied to work-related injuries occurring outside Alabama.

Even as our legislature in 1975 enacted subsection (d) of § 25-5-35, which incorporated the extraterritoriality approach suggested by the Commission, our legislature simultaneously adopted subsection (g) of that statute, a provision not included in the model act emphasizing that work-related injuries occurring inside Alabama will generally be covered under the Act even though a claimant's employment may be principally localized in another state. Subsection (g) provides:

> "(g) If, as a result of an employment principally localized in another state, an employee of an employer who would have been subject to this article or Article 3 of this chapter, had the contract of employment been entered into in this state for performance in this state, suffers injury or death as a result of an accident occurring in this state, compensation and medical, surgical, and hospital benefits on account of such injury or death may be recovered under this article or Article 3 of this chapter."

Thus, our legislature elected to provide, in a manner consistent with the recommendations of the Commission, that, in addition to coverage of certain injuries occurring outside Alabama in situations when this state may be said to have an interest, coverage will extend under the Act to work-related injuries occurring in this state even when the injured employee's employment had not been principally localized in Alabama. See Morgan v. CLM Indus., 628 So. 2d 675, 677 (Ala. Civ. App. 1993) (holding that Alabama court had, under subsection (g) of § 25-5-35, subject-matter jurisdiction over workers' compensation claim filed by truck driver whose employment was principally localized in Texas because his injuries were sustained in Alabama).

Because subsection (g) provides that an Alabama court may entertain an action to recover workers' compensation benefits under the

Act with respect to an injury occurring within this state regardless of the localization of the employment of the injured employee, we next proceed to consider to what extent, if any, an employee and an employer may enter into a preinjury choice-of-law or forum-selection agreement regarding a workers' compensation claim. As set forth above, § 25-5-35(c) allows an "employee whose duties require [the employee] to travel regularly in the service of his employer"[5] to agree in writing that his or her employment is "principally localized" in a particular state. In Heater v. Tri-State Motor Transit Co., 644 So. 2d 25, 27 (Ala. Civ. App. 1994), this court stated that the purpose of § 25-5-35(c) was "to allow parties to confer jurisdiction of the workmen's compensation laws of a particular state in circumstances where ... an employee regularly travels in more than one state." Thus, for example, in Heater, this court held that Alabama workers' compensation law did not apply because the employee in that

[5]We note that no evidence was submitted indicating the amount of time Sellers was required to travel out of state in the course of her employment with Venture Express. For the purpose of this discussion, however, we assume that the extent of Sellers's out-of-state travel was sufficient to support an agreement pursuant to § 25-5-35(c).

case, a truck driver who had suffered an injury in Indiana, had agreed that any workers' compensation claims against his employer, a Missouri-based company, would be governed by Missouri law.

Nevertheless, and notwithstanding the apparent breadth of this court's statement in Heater regarding the scope of subsection (c), that subsection, which was a verbatim adoption of § 7(d)(5) of the model act, does not, and was not intended to, authorize choice-of-law or forum-selection agreements to defeat subject-matter jurisdiction otherwise conferred in the Act; nor may an agreement within the scope of § 25-5-35(c) divest the courts of Alabama of jurisdiction under the Act over work-related injuries occurring within Alabama. This is made plain for two reasons. First, the express language of § 25-5-35(g) specifically authorizes an employee whose employment is "principally localized in another state" to seek compensation under the Act for injuries occurring in Alabama. Second, under subsection (d), the determination of where a claimant's employment is "principally localized" speaks to whether the Act may properly apply to injuries that occur outside Alabama, not within Alabama. As the commentary to the model act explains:

> "[T]he agreement [under the model act equivalent to § 25-5-35(d)] only acts upon the issue whether the employment is 'principally localized' in a particular state. It therefore would act only upon the first two of the four tests of out-of-state coverage[, i.e., the model act equivalent to § 25-535(d)(1) & (d)(2)]."

Council of State Governments, Workmen's Compensation and Rehabilitation Law (With Section by Section Commentary), 100 (1973) (emphasis added). In other words, an agreement between an employer and an employee is determinative only of whether employment is indeed principally localized in a state (§ 25-5-35(d)(1)) or whether a claimant is "working under a contract of hire made in this state in employment not principally localized in any state" (§ 25-5-35(d)(2)). Thus, in this case, the agreement (assuming its recognition under Tennessee law) arguably gave Sellers the right to seek workers' compensation benefits under Tennessee law for injuries sustained in Alabama.[6] The agreement did not, however,

[6]It also potentially limited her ability to seek such benefits in jurisdictions in which her employment might otherwise have been deemed to have been principally localized or, if she had no principal location of employment, where her contract of hire had been made.

deprive Sellers of her ability, as set forth in § 25-5-35(g), to seek workers' compensation benefits under the Act for an injury occurring in Alabama.[7]

At least one jurisdiction that has adopted the model act has also addressed the precise question now presented to this court. In McIlvaine Trucking, Inc. v. Workers' Compensation Appeal Board, 570 Pa. 662, 810 A.2d 1280 (2002), a driver employed by a trucking company had signed an agreement providing that the driver would be bound by the workers' compensation laws of West Virginia should he suffer a work-related injury. The driver later suffered an injury while working in Pennsylvania, and he brought a claim for benefits under the Pennsylvania workers' compensation act. The trucking company moved to dismiss the action, arguing that the claimant was bound by the laws of West Virginia; the trucking company, like Venture Express in this case, relied upon the

[7]That Sellers might have the ability to seek compensation benefits under two state laws is expressly contemplated, and indeed intended, by the Act. See § 25-5-35(e), Ala. Code 1975 (adopted from § 7(b) of the model act and providing that recovery of benefits under the workers' compensation laws of another state shall not bar recovery under the Act).

applicable state law adopting § 7(d)(5) of the model act.[8] The trucking company's motion was denied, and the trucking company appealed. The Pennsylvania Supreme Court noted that Pennsylvania's workers' compensation act expressly conferred upon a particular Pennsylvania tribunal jurisdiction to hear claims arising from in-state work-related injuries and concluded that Pennsylvania's version of § 7(d)(5) did not authorize employers and employees to deprive that Pennsylvania tribunal of subject-matter jurisdiction as to claims arising from in-state work-related injuries. The court in McIlvaine explained:

> "[Pennsylvania's version of § 7(d)(5) of the model act] by its terms does not cognize such a choice-of-law provision; rather, as noted, the statute merely permits contractual designation of principal localization, which is employed solely in the context of the Act's extraterritorial provisions."

McIlvaine, 570 Pa. at 671-72, 810 A.2d at 1285. Accordingly, the McIlvaine court concluded that the parties' choice-of-law agreement was ineffective to divest the appropriate Pennsylvania tribunal of subject-matter jurisdiction. See also L.R. Willson & Sons, Inc. v. PMA Grp., 867

[8]The applicable Pennsylvania statute, 77 Pa. Cons. Stat., § 411.2(d)(5), is nearly identical to § 25-5-35(c).

F. Supp. 335, 338-39 (D. Md. 1994) (noting previous Pennsylvania opinions and indicating that an agreement between an employer and an employee cannot "diminish the applicability of Pennsylvania statutory law when the work and injury take place in Pennsylvania itself").

Finally, we note that, as a general rule, an employee may not validly contract away the employee's right to seek workers' compensation benefits under the Act for a covered accident. See Kennedy v. Cochran, 475 So. 2d 872, 875-76 (Ala. Civ. App. 1985). As Professor Larson explains:

> "Express agreement between employer and employee that the statute of a named state shall apply is ineffective either to enlarge the applicability of that state's statute or to diminish the applicability of the statutes of other states. ... [T]he rule in workers' compensation is dictated by the overriding consideration that compensation is not a private matter to be arranged between two parties; the public has a profound interest in the matter which cannot be altered by any individual agreements. This is most obvious when such an agreement purports to destroy jurisdiction where it otherwise exists ...."

9 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, § 143.07[1] (2018). In this case, because we conclude that § 25-5-35(c) did not authorize the parties to agree to limit the jurisdiction of the Act, we must also conclude that that portion of the agreement purporting to

restrict Sellers's ability to seek workers' compensation benefits under the Act is void as against public policy. Thus, the trial court erred in enforcing that portion of the agreement purporting to establish Tennessee as the exclusive forum for resolution of Sellers's claim for workers' compensation benefits.

Accordingly, we conclude that, notwithstanding the parties' agreement that Sellers's employment was to be principally localized in Tennessee, § 25-5-35(g) gave Sellers the right to seek compensation benefits under the Act for injuries sustained in Alabama, and such jurisdiction could not be divested by agreement of the parties. The judgment of the trial court dismissing Sellers's workers' compensation claim against Venture Express is, therefore, reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Thompson, P.J., and Moore, Edwards, and Fridy, JJ., concur.