



ARMSTRONG & PEAKE PLLC

SEPTEMBER 2021 NEWSLETTER

CURRENT DEVELOPMENTS IN KENTUCKY WORKERS' COMPENSATION

UPDATE ON COVID-19 ORDER:

The Kentucky legislature is now in special session, and the Governor of the State of Kentucky and the General Assembly issued a joint resolution ([here](#)) on several issues, one of which extending some of the provisions of the Governor's emergency executive order from April 9, 2020, [executive order #2020-277](#) regarding workers' compensation. The General Assembly has agreed said order shall be in effect until and should expire on January 15, 2022, **except** for provisions in paragraph 3 – regarding presumptions. [Here](#) is a link to the executive order.

Paragraph 3 is the presumption that certain employees are presumed to have contracted Covid through occupational exposure (rebuttable presumption of causation) when removed from work by a physician. The include the following:

- Employees of a healthcare entity
- First-responders of law enforcement, emergency medical services, and fire departments
- Corrections officers
- Military
- Activated National Guard
- Domestic violence shelter workers
- Child advocacy workers
- Rape crisis center staff
- Department for community-based service workers
- Grocery workers
- Postal workers
- Certain child-care workers

In other words, under the Governor's emergency executive order, it appears that the 7-day waiting period required under KARS 342.040 section 1 is still suspended. TTD is payable from essentially day one if there is clear evidence that Covid is due to an occupational exposure.

NOMINATION OF ALJs:

The Nominating Commission for workers' compensation judges met on September 7 and unanimously recommended renomination and reappointment of Judge Roland Case, Judge Greg Harvey, Judge Stephanie Kinney, and Judge John Coleman. I attended the meeting by Zoom, and the Commission unanimously agreed to renominate all those judges.

There will be another special meeting of the workers' compensation nominating committee also by Zoom, and this will be held on Wednesday, October 6, 2021 at 9:00 a.m. EST. They will discuss nominations for two additional Administrative Law Judge positions.

2022 BENEFITS SCHEDULE:

The Department of Workers' Claims recently issued the 2022 workers' compensation benefits schedule which can be found [here](#).

The maximum TTD/PTD rate is now \$1,074.12 with the minimum rate being \$195.29. A maximum wage earner can now receive \$55,854.24 in TTD / PTD per year.

UPDATE ON PROPOSED UTILIZATION REVIEW REGULATION:

Regarding the recently proposed changes to the utilization review regulations found in 803 KAR 25:190 – which can be found [here](#) with comments - it is my understanding that this regulation has been pulled for approval by the Kentucky Senate. This likely means that it probably would not have received Senate approval in the special session during the subcommittee meeting for regulation approval. I doubt this issue will go away, however.

Will Kentucky adopt a medical director for utilization review appeals like Tennessee? That remains to be seen. Likewise, will the current Interim Commissioner, or another Commissioner, press the issue on employers, insurers, and TPAs collecting data on utilization review denials? The plaintiffs' bar wants to know what percentage of treatment is denied under UR. Will the current Interim Commissioner or a future Commissioner continue to press the issue to charge employers, insurers, and TPAs a fee per appeal? Likewise, will they continue to advocate to fine employers, insurers, and TPAs for failure to pay the fee with a civil penalty under KRS 342.990 (7)(e) – which is \$1,000.00 per failure? See [here](#). Again, these issues remain to be seen.

CASE SUMMARIES

Active Care Chiropractic v. Rudd

Case Number: 556 S.W.3d 561 (Ky. 2018), Supreme Court of Kentucky,
September 27, 2018

By: *Matt Brotzge*



Issue: The issue in this claim is whether a claimant's voluntarily retirement for reasons unrelated to the effects of a work injury allow them to receive the double income multiplier. Further, it involves the question of whether the application of the double multiplier in this situation run counter to the intention of the legislature in KRS Chapter 342.

Holding: The Court acknowledges the intention of the legislature was to encourage a return to work following a work injury. However, the Court held the language of the statute was unambiguous, and they must apply the statute as it is written. The Court held the double multiplier applies following the claimant's voluntary retirement.

Facts: This claim involves an injured worker who returned to work earning the same or greater wages. Some time after her work injury, the claimant decided to retire for reasons unrelated to the injury. She and her attorney argued she should be entitled to the double multiplier for PPD benefits because she now earns less money following her retirement.

The Kentucky Supreme Court is analyzing the effects of their decision in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015). Livingood held that KRS 342.730(1)(c)(2) permits a double income benefit during any period that employment at the same or a greater wage cease 'for any reason, with or without cause,' except where the reason is the employee's conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or another. In Livingood the Kentucky Supreme Court overturned its prior decision on exactly this issue as found in the 2009 case Chrysalis House Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009)

Here, the Plaintiff voluntarily retired. She was not fired, and the retirement was unrelated to her alleged work injury. She argued her voluntary retirement constituted a "cessation of employment...for any reason," and did not constitute intentional or reckless misconduct. The Administrative Law Judge agreed and awarded the double multiplier.

The Kentucky Supreme Court referred to KRS 446.080(1) which instructed that all statutes be liberally construed with a view to promote their objectives and carry out the intent of the legislature. The Court acknowledged they must not be guided by a single sentence of a statute but must look to provisions of the

whole statute and its object and policy, citing Cty. Of Harlan v. Appalachian Reg'l Healthcare, Inc., 85 S.W.3d 607, 611 (Ky. 2002).

In Livingood, the Court reviewed the legislative intent of the statute, and found that the intent to be “that an employee should not benefit from his own wrongdoing.” 467 S.W.3d at 258. The Court further noted that they must accord words in the statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion. Id.

In this case, Rudd voluntarily retired. There was no evidence of her international or reckless wrongdoing, and no exception to the unambiguous language of KRS 342.730(1)(c)(2). The Court found voluntary retirement cannot possibly be construed as some sort of malfeasance or misconduct. Instead, voluntary retirement falls, the Court found, squarely within the statute as a “cessation of... employment...for any reason, with or without cause.

The Court found that, when an individual voluntarily chooses to retire, a decision made not solely related to that individual’s work-related injury, that individual is entitled to the two-multiplier listed in KRS 342.730.

This case is interesting progeny of Livingood. In Livingood, the Court noted through dicta that the intent of KRS Chapter 342 was to encourage employees to continue working. Here, Rudd does not do that and then benefits financially from a decision counter to the intent of Chapter KRS 342.

Key Takeaway

Kentucky allows for a liberal application of the double multiplier. Defendants should expect the double multiplier to be applied if the claimant ceases employment with the defendant for any reason, unless they engage in misconduct, even if it is unrelated to a work injury.

Carter v. Toyota Motor Manufacturing of Kentucky,

Claim number 2018-64539, Kentucky Workers' Compensation Board, April 30, 2021

Issue: Did the Administrative Law Judge err in finding that the opinions of Dr. O’Neill should not be given as much weight since they were not in accordance with the 5th Edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment?*

Holding: No. The Kentucky Workers' Compensation Board upheld the judge's decision denying permanent partial disability to the plaintiff Carter because Dr. O’Neill and the plaintiff did not show that Dr. O’Neill's 6% AMA impairment rating was in accordance with the AMA Guides.

Facts: Plaintiff appealed a decision by Judge Coleman who denied plaintiff

By: *Steve Armstrong*



Carter's claim for permanent partial disability benefits. The administrative law judge did award benefits for temporary total disability and medical benefits. Plaintiff alleged a May 18, 2018 injury working on a belt mold when she experienced a pop in her right elbow. She initially treated with a Nurse Practitioner and then was referred to Dr. O'Neill, an orthopedic surgeon at Bluegrass Orthopedics who had previously treated her left elbow. Dr. O'Neill ultimately performed a right elbow surgery including a tendon repair and repositioning of the ulnar nerve. Plaintiff Carter sent a questionnaire to Dr. O'Neill regarding impairment and imminent maximum medical improvement, and Dr. O'Neill stated his opinion that plaintiff Carter should have a 6% whole person impairment rating based on the functional capacity evaluation, but he did not indicate whether it was assessed in accordance with the Fifth Edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* ("AMA Guides"). There were significant restrictions of no lifting more than five pounds occasionally. Plaintiff Carter also filed into evidence the report from the physical therapist who performed the functional capacity evaluation, Robert Pruden physical therapist, who noted that plaintiff Carter passed only 14 of the 23 validity criteria for her evaluation which yielded borderline results.

The employer Toyota filed this functional capacity evaluation summary into evidence noting the questionable validity of the test. Toyota further submitted independent medical evaluation reports from hand surgeon Dr. Ron Burgess.

At the benefit review conference, the parties listed among other issues, whether the impairment ratings were assessed in accordance with the AMA Guides. In this case, Judge Coleman noted in his decision that plaintiff had the burden of proof to show that her injury had caused an impairment rating under the Fifth Edition AMA Guides. In Jones v Brasch-Barry General Contractors, 189 S.W. 3rd 149 (Ky. App. 2006), the Kentucky Court of Appeals found that it was error for an administrative law judge to rely on impairment assessed by a physician who noted in his testimony that the impairment was outside of the express terms of the AMA Guides. In 2018, the Kentucky Supreme Court clarified in Plumley v Kroger, 557 S.W. 3rd 905 (Ky. 2018) that a medical opinion must simply be grounded in the AMA Guides which does not require strict adherence, but rather a general conformity to the AMA Guides. Judge Coleman went on to say, however, that a judge cannot choose to give credence to an opinion of a physician that is not based on the AMA Guides. Judge noted then further that in order to award income benefits, the plaintiff must establish an assessment of impairment rating appropriately under the AMA Guides Fifth Edition.

Judge Coleman stated that because the functional capacity evaluation had questionable validity criteria, and because Dr. O'Neill based his rating on that FCE, Dr. O'Neill's opinion was less credible than the opinion from Dr. Burgess. Judge Coleman noted:

"The AMA Guides themselves indicate that impairment cannot be assessed based upon grip strength when there is a lack of maximum effort. While the plaintiff may have some rigid residual impairment following her injury and surgery, an award of income benefits can simply not be based upon an impairment rating obtained in a manner prohibited by the AMA Guides. The ALJ feels that he has no choice but to dismiss the plaintiff's claim for permanent income benefits at this time."

Plaintiff then filed a petition for reconsideration which Toyota responded to, and the administrative law judge found that he reviewed all the evidence appropriately.

On appeal, the Board cited the usual cases stating that the plaintiff has the burden of proof pre-litigation / pre-settlement and that the administrative law judge has the sole authority to determine weight, credibility and substance of the evidence. The judge has the sole authority to judge all reasonable inferences to be drawn from the evidence as well and may reject testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. See Magic Coal Company v Fox, 19 S.W. 3rd 88 (Ky. 2000).

Kentucky follows the substantial evidence rule, and any evidence of substance can be a basis for a decision of the administrative law judge. Kentucky is unlike Georgia where preponderance of evidence standard is in effect. Board in Georgia can re-weigh the evidence a different decision based on the same evidence that the judge reviewed. In Kentucky, the Board cannot do that because of the substantial evidence standard and because of the discretion afforded to an administrative law judge by statute. The Board noted that substantial evidence supported the judge's determination that plaintiff Carter was not entitled to PPD benefits and noted that the administrative law judge provided a basis for his determination finding that Dr. O'Neill's rating fell outside the necessary requirements for such an assessment in accordance with the AMA Guides.

Key Takeaways

1. Look for validity criteria in FCEs if you use them, or if plaintiff uses them for the AMA rating.
2. Crack open the 5th Edition AMA Guides to see if the plaintiff's expert in accordance with the AMA Guides.

Aggregate Processing Inc. v. Peyton

Claim number 2018-86946, Kentucky Workers' Compensation Board, rendered May 21, 2021

By: *Steve Armstrong*



Issue: Did Administrative Law Judge error in making a determination regarding whether the impairment rating assessed by plaintiff's expert was in accordance with the AMA guides?

Holding: Judge Whalen should have decided and not ignored this listed issue, and the Judge should not have based his determination in part upon his own research.

Facts: The full Kentucky Workers' Compensation Board vacated this decision entirely and remanded the entire decision for determination of all issues to a new judge.

Peyton claimed an injury of March 28, 2018 to his left hand when it became trapped in a steel beam. Plaintiff shifted while installing a cross brace on a platform trapping his left hand under it, and a supervisor had to use a pry bar to release the left hand. After immediate care treatment, plaintiff then treated with Dr. Napolitano, a hand surgeon at Kleinert and Kutz in Lexington.

Ultimately, Dr. Napolitano released Mr. Peyton back to work without restrictions in November 2018 finding no clinical findings consistent with complex regional pain syndrome and assessing a 0% whole person impairment rating under the Fifth Edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* ("AMA Guides"). By contrast, plaintiff's expert, Dr. Owen assessed a 21% whole person impairment rating based on the Fifth Edition of the AMA Guides, all due to the work injury, and assessed restrictions of no lifting, handling, or carrying objects more than 14 kilograms.

Defense also submitted an independent medical evaluation from Dr. Ron Burgess, hand surgeon, who stated that Dr. Owen's impairment rating was not in accordance with the AMA Guides with an explanation of why.

The benefit review conference order specifically listed whether the impairment rating assessed was in **accordance with the AMA Guides**.

In his Opinion and Award, then Judge Whalen, who was not confirmed by the Kentucky Senate ultimately, and who is no longer a judge, stated that he had reviewed medical information from the NIH – National Library of Medicine at NIH.gov. Based in part on his own internet research, he felt that doctors Napolitano and Burgess lacked credibility because they did not report that they performed certain testing discussed in a medical article that Judge Whalen had reviewed. Therefore, he found Dr. Owen's opinions more reliable.

This case illustrates the fight seen in many cases over the AMA impairment rating. In this case, the Judge did not find in favor of the treating physician of a renowned hand institute who assessed a 0% rating, but instead adopted a 21% whole person impairment rating. This is an example of the frequently large gap between AMA ratings – 0% or 21%.

In its appellate decision, the full Board cited the usual cases that show that the plaintiff bears the burden of proving each essential elements of their claim. They also noted that their function is limited to a determination of whether the findings are so unreasonable under the evidence that they must be reversed as a matter of law. Judges in Kentucky have wide discretion as the fact finder.

The Board noted that the Administrative Law Judge did not provide additional findings that support his determination although he was requested to do so by the employer. The Board also noted that the employer reserved the issue of whether the AMA impairment rating assessed by Dr. Owen was

assessed in accordance with the AMA Guides, and the Administrative Law Judge failed to address this in his Opinion and Award, or in the Order denying the petition for reconsideration. The Board therefore vacated the Judge's decision entirely, presumably to a new Judge, on all issues.

Key Takeaway

If there is a question about plaintiff's AMA impairment rating, that issue must be listed in the benefit review conference order and preserved for hearing and for appeal.



ARMSTRONG & PEAKE, PLLC

www.armstrongpeake.com | 502-562-1978



Steve Armstrong

sarmstrong@armstrongpeake.com

Matt Brotzge

mbrotzge@armstrongpeake.com

Troy Peake

tpeake@armstrongpeake.com