



ARMSTRONG & PEAKE PLLC

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UPDATES IN KENTUCKY'S WORKERS' COMPENSATION

As we wrap up 2022 and look forward to 2023, we at Armstrong and Peake PLLC wish you a very happy, happy holiday season and a Merry Christmas.

Below is a case review on PPD. The Kentucky Department of Workers' Claims just recently published the 2023 discount rate order and tables for lump sum commutation of settlements, which can be found [here](#).

For the discount rate for lump sum settlements of future periodic payments and weekly benefits that are over \$40 is 2.75%. 425 weeks equates on that chart to a present value figure of 380.6478. I want to remind you that you can find the 2023 Workers' Compensation benefit schedule [here](#).

Our understanding is that as of the writing of this update, Kentucky will have a new Board member, specifically Jeff Roberts from Murray, Kentucky who has been a plaintiff's attorney and assistant county attorney for many years. The Kentucky Department of Workers' Claims also welcomed Judge Kenneth Smith as a new Judge recently as well. Our Governor recently appointed Lucretia Johnson as Deputy Commissioner to the Department of Workers' Claims as well. Lastly, as we mentioned to you in prior updates, Kentucky's prior utilization review regulation had a sunset provision, and Kentucky currently has Regulation 803 KAR 25:195E (emergency regulation) as the current utilization review regulation which can be seen [here](#).

Our understanding is that the proposed utilization review regulation 803 KAR 25:195 is not yet active.

As always, if we can assist you in any way, feel free to email us or call us. If you would like one of our cheat sheets, email me at sarmstrong@armstrongpeake.com.

CASE SUMMARY

Stakeholder Payroll Services, LLC v. Gervis

Claim #s 2020-00400 and 2018-82763,
Workers' Compensation Board decision issued July 23, 2021

By: *Steve Armstrong*



Issue: Whether the judge should combine psychiatric and physical AMA impairment ratings for application of the triple multiplier on basic benefits pursuant to the permanent partial disability statute, KRS 342.730.

Holding: The Board found that the triple multiplier should apply if the plaintiff does not retain the "physical capacity" to return to the job she was doing at the time of the injury even for psychiatric conditions for which there may be no physical restrictions.

Facts: The plaintiff Gervis worked as a certified nursing assistant assisting elderly residents, and while working in April 2018 lifting a 350-pound patient, plaintiff heard a pop and felt the onset of immediate low back pain. She sought immediate treatment and was diagnosed with a lumbar back strain. Over the next year, she testified that she began experiencing anxiety and depression for the loss of ability to perform her regular work activities. A year and a half later she started treating for psychological/psychiatric physicians for depression and anxiety.

The plaintiff was then released to return to light duty work, and even the defense expert gave her physical restrictions of no lifting more than 20 pounds.

This meant that the administrative law judge almost had to award the triple multiplier on basic benefits under KRS 342.730. The applicable portion of KRS 342.730 states as follows:

“(c) 1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments;”

This is at the heart of many Kentucky Workers' Compensation claims- whether the plaintiff should receive the basic benefit, the double multiplier, or in most circumstances- should the plaintiff be awarded the triple multiplier on basic benefits? Most permanent partial disability claims revolve around that very question, whether the plaintiff has a strong argument for the triple multiplier. For those uninitiated in Kentucky Workers' Compensation claims, if the plaintiff is given a set of

such as in this case where the plaintiff can no longer lift more than 20 pounds, and the plaintiff's job description from the employer states that they have to lift 50 pounds, then the judge deciding the case compares the restrictions to the job duties. If the employer terminates the employment of the claimant due to the fact that he or she can no longer perform the job duties, it is almost always an open and shut case that the judge is going to award the triple multiplier. This means a \$30,000.00 claim quickly becomes a \$90,000.00 claim for partial disability, and obviously this does not include any waivers of future medical, waivers of vocational rehabilitation, or waivers of the right to reopen.

One question that has frequently arisen is this very issue, specifically whether the plaintiff should receive the triple multiplier for permanent partial disability on the psychological/psychiatric aspect of the claim. For instance, here there seemed to be no evidence that the anxiety or the depression of the plaintiff in and of itself led to a set of physical restrictions. The physical restrictions would seem to be connected to the lumbar spine only. Having said that, for instance, we can certainly envision a case where due to psychological or psychiatric conditions, a plaintiff was put in situations where he or she could not perform the job such as a stressful job from a psychological standpoint or a job that involves some physical danger to the employee such as being in a job where he or she might be robbed. Still, the judge did not even weigh that type of argument and the judge simply noted that the defendant had not produced any case law suggesting that the triple multiplier should be apportioned.

On review by the Board, the Board upheld the judge's decision and noted that the statute, KRS 342.730(1)(c) does not distinguish, nor apportion, the benefits to a specific injury preventing the return to work "and it simply allows the effects of the injury, in total, to be considered in making this determination." The Board noted that had the legislature intended such an apportionment to occur, "it would've declared it, but it did not."

Key Takeaway

If you find yourself with a psychological or psychiatric claim, be sure to perform discovery on plaintiff's prior psychological or psychiatric issues. Where has he or she treated in the past 10 years or before for psychological or psychiatric issues, and what kind of medications have they been taking pre-injury for psychiatric conditions?

Happy Holidays

FROM ARMSTRONG & PEAKE