



ARMSTRONG & PEAKE PLLC

SEPTEMBER 2022 NEWSLETTER

UPDATES IN KENTUCKY'S WORKERS' COMPENSATION

The Commissioner of the Department has recently published the 2023 Workers' Compensation Benefits Schedule which can be found [here](#).

The maximum temporary total disability and the maximum permanent total disability rate for 2023 will be \$1,118.43. The 2023 discount rate and order in tables have not yet been published, however.

Below are two case summaries regarding recent Board decisions.

CASE SUMMARIES

Lynn v. Webster County Coal LLC

Claim No. 2021-01079, Workers' Compensation Board Opinion entered August 19, 2022

By: *Steve Armstrong*



Issue: Did the Administrative Law Judge commit error by determining plaintiff did not meet burden of proof of cumulative trauma?

Holding: The Board found that the Administrative Law Judge's opinion was based on substantial evidence and refused to overturn the judge's decision.

Facts: Plaintiff worked as an underground coal miner until this mine shut down on January 16, 2019. He began working as an inspector for the State of Kentucky Division of Mine Safety three days later on January 19, 2019, instead of accepting an offer with his employer at Webster Coal to

move to another site. He admitted apparently in his deposition and probably at the final hearing as well that he had not missed any work due to his alleged injuries, and his claim listed multiple body parts as being injured by cumulative trauma for this 54-year-old person. He testified that his job required him to kneel, stoop, crawl and walk all day, lifting 50 to 60 pound bags of rock dust.

Plaintiff put forth an expert opinion from Dr. John Gilbert, a Lexington neurosurgeon from August 2021, approximately a year and a half after the cessation of work for Webster Coal. Dr. Gilbert assessed a 34% whole person impairment rating, 18% for cervical radiculopathy, 10% for bilateral shoulder problems, and 10% for bilateral knee problems under the Fifth Edition AMA Guides.

Defense put forth an independent medical evaluation report from Dr. Russell Travis who assessed no impairment for the cervical spine, 2% for both shoulders, 4% for the right elbow, 0% for the left elbow, and 0% for both knees for a combined impairment rating of 6% whole person. Dr. Travis believed that plaintiff could return to work with no restrictions at all, and gave the employer a defense to cumulative trauma stating that his belief that there was no injury at all from cumulative trauma. Kentucky law defines "injury" as "any work-related traumatic event or a series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the approximate cause producing a harmful change in the human organism evidenced by objective medical findings" (KRS 342.0011(1)).

Plaintiff's counsel also filed into evidence a questionnaire from plaintiff's chiropractor indicating that plaintiff's neck and right shoulder conditions are due to cumulative trauma and also filed records from Baptist Health showing bilateral elbow pain with history of injections in the elbows.

The employer listed work-relatedness / causation, whether there was an injury as defined by the act, entitlement to medical benefits, and ability to return to work as contested issues in the claim.

The Administrative Law Judge held a hearing in April 2022 and thereafter dismissed plaintiff's claims for cumulative trauma stating that she believed, based on Dr. Travis's report, that there was insufficient medical evidence of an injury, and that the medical evidence really only showed degenerative changes consistent with plaintiff's age. She also noted plaintiff's admission that he had never missed work, had mild complaints, and receives only chiropractic care.

On appeal, the Board noted that because plaintiff was unsuccessful in his burden, the question of appeal was whether evidence compels a different result citing Wolf Creek Collieries v. Crum, 673 S.W.2d 753 (KY. APP. 1984). The Board noted that "compelling evidence" is defined as evidence that is so overwhelming, that no reasonable person could reach the same conclusion as the Administrative Law Judge. REO Mechanical v. Barnes, 691 S.W.2d 224 (KY. APP. 1985). The Board then noted that as the fact finder, the Administrative Law Judge has the sole authority to determine the weight, credibility, and substance of the evidence. (Citing Square D v. Tipton S.W.2d 308 (KY. 1993)).

One of the key differences in practicing in Georgia, where this author practiced for almost four years, is the different evidentiary standard. In Kentucky, any evidence of substance will sustain an appeal in most cases, unless there is some other issue. In Georgia, by contrast, the Board there could overturn a judge's decision if the preponderance of evidence was in the appellant's favor.

In this case, the Board noted that there were conflicting medical opinions as to the degree of plaintiff's injuries and regarding causation. The Board did state however:

"Injuries occasioned by a cumulative trauma are compensable if it is found that the nature and duration of the work probably aggravated a degenerative condition to the degree that it culminated in an active physical impairment sooner than would have been the case had the work been less strenuous." (citing Haycraft v. Corhart Refractories Co., 544 S.W.2d 222, 225 (KY. 1977)).

In this case, the Board noted that the Administrative Law Judge stated that she did not believe that plaintiff's expert Dr. Gilbert explained how he arrived at the diagnosis of injuries were caused by work-related cumulative trauma. By contrast, Dr. Travis discussed that an injury caused by a cumulative trauma is proven by degenerative changes more advanced than would be anticipated for the age of the particular individual in question. Dr. Travis noted that because no imaging studies were available, specifically no cervical MRI or X-rays, shoulders or knees for that matter, that there was no evidence of injuries caused by a cumulative trauma.

The decision of the judge dismissing the claim therefore was affirmed.

Key Takeaway

If the facts in your case support that the degenerative conditions are no more advanced than would be present for a person of this age, then argue that plaintiff has not met the burden of proof of showing a cumulative trauma condition. Good expert testimony is key on this issue.

Henry v. Paschall Truck Lines, Inc.

Claim number 2019-64871

Kentucky Workers' Compensation Board Opinion, claim numbers 2020-01320 & 2019-54871 entered July 27, 2022

Issue: Did the Administrative Law Judge commit error in dismissing claims to both shoulders?

Holding: Administrative Law Judge's decision dismissing claims for shoulder injuries was based on substantial evidence, with no compelling evidence to the contrary, and therefore the dismissal was upheld.

Facts: Plaintiff alleged a work injury to the neck and right shoulder of October 31, 2019, and a second alleged injury date of May 30, 2020 to the left shoulder and neck. Pursuant to Kentucky law, the Administrative Law Judge consolidated both claims because under KRS 342.270, all ripe claims must be adjudicated at once. Separate injuries require separate impairment ratings and separate awards, however, pursuant to Plumley v. Kroger, 557 S.W.3d 905 (Ky. 2018). Separate smaller AMA ratings are almost always better for an employer than one large, combined AMA rating.



As for the first alleged injury to the right shoulder and neck, plaintiff alleged that he was lowering the landing gear on his trailer while in the course and the scope of employment when he felt a pinch and the side of his forehead started hurting. His neck started stiffening up, and he testified that his right shoulder and head were pulsing. He thought he was having a stroke. He ultimately underwent a right shoulder surgery July 26, 2020.

Then regarding the second claim, this alleged injury took place in Topeka, Kansas and he testified that he was disconnecting his trailer from his tractor using his left shoulder because his prior right shoulder injury precluded him from using the right shoulder as much. At hearing, he amplified his previous testimony regarding the right shoulder stating that he was in New York winding his landing gear and he felt a “pop” in his shoulder with pain that shot up into his neck. Did he testify previously that he felt a “pop”, or was this testimony at hearing new and embellished?

The defense obtained an independent medical evaluation from Dr. Robert Jacob who testified that he did not believe that the plaintiff sustained a harmful change in the human organism for his right shoulder, but he did assess a 7% impairment rating given the facts of the case except that he felt that none of that rating was due to the effects of any work injury. Dr. Jacob also found symptom magnification and noted a near normal MRI on the left side on the left shoulder but regardless of causation, assessed a 3% whole person impairment rating for the left shoulder. Again, he did not find believe that any impairment was caused by work, however. He disagreed with Dr. Frank Burke, a Lexington orthopedic surgeon who routinely performs plaintiff independent medical evaluations. The employer also obtained a second independent medical evaluation from Dr. Ronald Burgess also in Lexington who gave different AMA impairment ratings on the shoulders, but who also stated that he did not feel that there was any impairment due to any work injury.

The following issues were listed in the benefit review conference order:

1. Benefits pursuant to KRS 342.730.
2. Work-relatedness causation.
3. Notice.
4. Unpaid or contested medical expenses.
5. Injury as defined by the act.
6. Temporary total disability.
7. Unreasonable failure to follow medical advice.
8. Temporary versus permanent injury.
9. MMI date.
10. Compensability of recommended surgery.

Due to the fact that there were two separate injuries, the Administrative Law Judge set forth his opinions regarding each injury first finding based on the records of Dr. Jacob that there was no right shoulder injury as defined by the act. Specifically, the judge found that the plaintiff had failed to satisfy his burden to establish a work-related harmful change to the human organism. This is a requirement for a finding of an “injury” under KRS 342.0011(1). Regarding the second injury, specifically for the left shoulder, he also found that the plaintiff had not met the burden of proof of showing a harmful change to the human organism due to a work injury but for different reasons.

The Board noted that plaintiff had the burden of proof, and that since he was unsuccessful in satisfying that burden, the question on appeal is whether the evidence compelled a different result. See Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App.1984). The Board further noted that under the Kentucky Workers' Compensation Act, the Administrative Law Judge as fact finder has the sole discretion to determine the quality, character and substance of evidence citing AK Steel Corp v. Adkins, 253 S.W. 3d 59 (Ky. 2008). The Administrative Law Judge may draw reasonable inferences from evidence, reject any testimony, and believe or disbelieve parts of the same evidence, regardless of whether it comes from the same witnesses or the same adversary parties total proof citing Caudill v. Maloney's Discount Stores, 560 S.W. 2d 15, 16 (Ky. 1977).

In this case, on appeal, it appears that plaintiff was *pro se*, and one wonders why he did not have an attorney at this point and whether he fired his attorney. It is unlikely that he obtained an independent medical evaluation from Dr. Burke without an attorney. It also appears that the Administrative Law Judge found defense experts more reasonable and more credible than the plaintiff's expert in part due to the plaintiff's own differences in descriptions of injury in his deposition and perhaps at hearing.

Key Takeaway

Obtain all the medical records that you can on a claimant like this just as fast as you can from all sources that you can. These may show prior injuries and prior conditions including degenerative conditions. You are entitled to a Form 106 medical authorization from day one of the injury until it concludes.



ARMSTRONG & PEAKE PLLC
www.armstrongpeake.com | (502) 562-1978