ARMSTRONG & PEAKE PLLC

JANUARY 2022 NEWSLETTER

UPDATES IN KENTUCKY'S WORKERS' COMPENSATION

Judge Scott M. Miller has been appointed as a new Board member to the Kentucky Workers' Compensation Board. As you may be familiar, the Workers' Compensation Board is the first line of appeals from workers' compensation administrative law judges. The Workers' Compensation Board is a three judge panel that handles all initial appeals in Kentucky workers compensation claims. Kentucky follows the substantial evidence rule, meaning that if there is any evidence of substance, the Judge's decision will stand unless the evidence to the contrary is overwhelming and compelling. This is unlike Georgia which follows the preponderance of evidence standard on the initial appeal. Judge Miller was recently appointed and Judge Alvey was reappointed as the Chairman of the Board. Additionally, Judges Stephanie Kinney, Greg Harvey and Roland Case were reappointed and sworn in, along with new Judges Gregory Allen and Samuel Bach. Judge Allen was previously an administrative law judge.

Here is a link to the 2022 Kentucky Workers' Compensation Benefit Schedule.

A FEW WORDS ON KENTUCKY'S WORKERS' COMEPNSATION MEDIATION PROGRAM

Back in late 2020, then Commissioner Robert Swisher put forth a proposal for a mandatory mediation program for Kentucky workers' compensation claims with a new administrative regulation. Chief Judge Gott had been doing mediations on a voluntary basis at least for a couple of years by that time with good success. The proposed mediation regulation 803 KAR 25:300 was put forth and after review and consideration, it became effective July 6, 2021. You can find a copy of that **here**. Likewise, you can find a copy of the proposed regulation along with the comments **here**.

It is my understanding that the official position with the Kentucky Department of Workers' Claims is that a judge can now order mediation if the judge feels mediation is appropriate. Section 4(5) of the legislation states that an Administrative Law Judge may refer a claim or part of a claim to mediation at any time after being assigned the claim.

The mediating judge is a different judge than the presiding judge. Judges perform the mediations on a rotating basis.

Representatives for the employer / insurer / third-party administrator have to attend on video such as Zoom with the camera on. If you remember the old days where many claims were settled at the pre-hearing conference, it was sufficient to simply have a claims representative available via phone. That is not the case with mediation, and I have mediated multiple claims during Covid-19 with the claims representative or the employer representative who was working at their dining room table. Professional attire is necessary. Note that Section 4(7)(b) requires that a representative with full authority to negotiate on behalf of the entity and recommends settlement to the decision-making body of the entity be present. I mediated six claims in 2021, most of which were with Chief Judge Gott, all six of them settled sooner or later.

EXPEDITED HEARINGS FOR COVID-19

There is a new fast-track Covid-19 hearing process. **Here** is the new regulation to 803 KAR 25:305E. Our governor issued emergency executive order regarding Covid-19 back in 2020, and the Kentucky legislature extended some of that emergency order through January 15, 2022, but not all of it. Some of the governor's orders were found non-constitutional by the Kentucky Supreme Court which is why the legislature set forth the joint resolution in late 2021. As I understand it, all of the provisions of Governor Beshear's executive order 2020-277, dated April 9, 2020, were agreed to through January 15, 2022 by the legislator **except** for paragraph 3 of that order which gave the presumption that removal from work by a physician due to Covid-19 was due to occupational exposure to Covid-19. Employees included in these were healthcare personnel, first responders, childcare workers, and grocery workers. As I understand it, that presumption no longer exists. This is the reason for the new expedited hearing process for Covid-19.

CASE SUMMARIES

Trane Co. v Barnet et al.

Claim number 2020-00411, Kentucky Workers Compensation Board Decision
Opinion Entered October 1, 2021

By: Matt Brotzge

Issue: Are short, one-word answers by a physician enough to establish a causal relationship between alleged pain and cumulative trauma through work?

Holding: Whether the Administrative Law Judge's decision to award Permanent Partial Disability (PPD) benefits for alleged cumulative trauma was supported by substantial evidence, despite said evidence being short and unexplained.

Facts: Plaintiff Barnet filed a Form 101 alleging he sustained work-related injuries to his neck, back, shoulders, and knees caused by cumulative trauma on October 25, 2019. Additionally, he alleged he sustained work-related hearing loss from "repetitive exposure to loud noise in the workplace."

In his deposition, plaintiff described at length the number of positions he held with the defendant and the physical demands of each of them. Plaintiff was terminated from his position because the plant he worked at closed. He testified he was "trying to find a way out" at the time of the plant closure due to his pain. At the time of the deposition, plaintiff alleged he was experiencing pain in his neck, knees, and lower back with associated radiculopathy.

Notably, at the time of his termination, he was not on any work restrictions. He also admitted he was searching for another job in the same field with another employer, and he got a degree since his termination.

Plaintiff submitted an IME report from Dr. Guberman who opined plaintiff had work-related cumulative trauma, and Dr. Guberman opined plaintiff had separate 8% impairment ratings for his cervical spine and for his lumbar spine. Dr. Guberman also opined plaintiff could not return to his job with defendant. Plaintiff also submitted notes from plaintiff's chiropractor who opined plaintiff's alleged pain were work-related. The chiropractor's opinion was given in a one-word answer to the following question: "Do you believe that his present medical issues to his [handwritten "neck, back, shoulder, knees"] is caused, either wholly or in part, by his job activities?"

With regard to causation, Dr. Guberman's analysis was no longer than one sentence followed by a one-word answer to three questions on a questionnaire sent by plaintiff's counsel.

Defendant filed an opinion from Dr. Stacie Grossfeld to counter the reports from Dr. Guberman and the chiropractor. Dr. Grossfeld found no work-related cumulative trauma to plaintiff's lumbar spine, cervical spine, or bilateral knees. Dr. Grossfeld found no anatomical reasons for plaintiff's subjective complaints of pain.

In her opinion, the ALJ found plaintiff's evidence to be persuasive, awarding PPD benefits and the application of the triple multiplier. The defendant appealed and asserted Dr. Guberman's reported "offers little to no value in the causation analysis." The defendant also asserted the chiropractor gave no analysis of how plaintiff's job duties caused his injuries.

In their opinion, the Board's reviewed whether the opinions of Dr. Guberman and the chiropractor constituted substantial evidence for the ALJ to rely upon. In this instance, the Board determined that the opinions of Dr. Grossfeld were merely conflicting evidence, and they could not second guess the ALJ's reasoning for relying upon Dr. Guberman. Thus, the ALJ acted within her discretion and her opinion held. The same was true for the application of the triple multiplier.

The Board did remand this claim on the issue of TTD and the ALJ's failure to follow case law analysis.

This case instructive because it highlights one of the challenges employers face in defending workers' compensation claims, whether they involve cumulative trauma or other injuries. These decisions come down to the ALJ's opinion on the matter, and the ALJ may rely upon little evidence so long as it is "persuasive".

In this case, there was almost no evidence on whether the alleged pain was related to cumulative trauma. There was no explanation of how plaintiff's job caused his injuries. No explanation of how the movements he performed were related to his alleged pain. But the ALJ believed one sentence and four one-word answers, and the Board was unwilling to set aside the ALJ's decision.

Key Takeaway

To establish a causal relationship between work and an alleged cumulative trauma injury, a plaintiff does not need to explain how their job caused cumulative trauma. The plaintiff just needs the ALJ to be persuaded by an IME physician. A poor, conclusory or superficial opinion still counts as substantial evidence for an ALJ to rely upon.

Waste Management v Maddox

Unreported Kentucky Court of Appeals, decision number 2020-CA-1492-WC
(Rendered August 27, 2021)

By: Steve Armstrong

Issue: Did plaintiff Maddox fail to give timely notice of a cumulative trauma injury?

Holding: The Kentucky Court of Appeals overturned the Board's reversal of the Administrative Law Judge's denial of the claim and remanded for additional findings. The Court of Appeals noted that there was substantial evidence to support the Judge's inference that plaintiff's physician advised him that the injury was work related six months before he filed his claim, but agreed with the Board that the Judge failed to properly consider and decide whether plaintiff's delay was excusable given plaintiff's diminished intellect.

Facts: Plaintiff Maddox worked for the employer Waste Management for many years lifting garbage, sometimes with the machine, but sometimes by hand. He alleged a cumulative trauma injury that he says manifested December 10, 2016, but filed his Form 101 on November 17, 2018, almost two years later.

One of the key issues in this case was plaintiff's mental capacity, and the judge even acknowledged that plaintiff suffered from some intellectual deficiency, and even one of his supervisors apparently admitted that. That certainly plays into the question of whether plaintiff had a **reasonable excuse** in order to delay notice of the alleged cumulative trauma injury. At the outset, it should be noted that lack of due and timely notice is something that the employer generally has to prove. (KRS 342.185) If the employer proves lack of doing timely notice however, the burden then shifts onto the employee to explain why the late notice was reasonable.

The stakes were high because the plaintiff underwent a lumbar fusion at L5-S1, and Dr. Nazar even assessed a 27% whole person impairment rating.

The employer put forth as a witness the district operations manager who testified at the hearing that employees are advised on a yearly basis of the requirement to report all injuries immediately. Further, this particular plaintiff was written up in 2001 for failing to report an injury immediately. This gave the employer an additional initial argument that plaintiff knew of the requirement to report all injuries immediately. This district operations manager further testified that the employer did not receive notice of the cumulative trauma injury until plaintiff filed his Form 101 Hearing Request in November, 2018, and thus the allegation from the employer was that the filing of the actual claim with the state by plaintiff's counsel was the first notice that they had. Frankly, this is pretty good evidence for the employer if true.

The Administrative Law Judge listened to the testimony from multiple witnesses, but ultimately found plaintiff's statements that he could not recall when he had been informed of the existence of a cumulative trauma injury by his doctors not to be credible. Plaintiff apparently repeatedly stated he could not remember much. At the same time, Plaintiff apparently remembered alleged details of a specific incident in December 10, 2019 quite well. The Administrative Law Judge further had at least three years of records from a treating physician that seemed to imply notice that plaintiff's work was causing him back pain. Thus in some respects, this claim boiled down to credibility.

Specific to this employer, this employer had a policy on notice in writing that specifically addressed cumulative trauma which stated:

"Similarly, if you experience pain from reporting repetitive motion tasks, you must report it immediately. Repetitive motion disorders, if not treated promptly, can result in months of lost time from work."

This may have been one of the clinchers for the Administrative Law Judge to find that notice was not due and timely given that the plaintiff waited at a minimum five months to report his alleged injury.

At the outset, it should also be noted that KRS 342.185 requires notice of an accident shall be given, "as soon as practicable." In cumulative trauma claims, the date for giving noticing and for the clocking of the statute of limitations is triggered by the date of manifestation. (See Special Fund v. Clark), 998 S.W.2nd 487 (KY. 1998).

As an aside, the Court of Appeals in this case also pointed out that an Administrative Law Judge may refuse to accept even uncontradicted evidence in the record. (See Collins V. Castleton Farms, Inc., 560 S.W. 2nd 830, 831 (Ky. App. 1977)). In such cases however, the fact finder must state her/his reasons for rejecting the only evidence in the record, for example - that the testimony was inherently improbable or so inconsistent as to be incredible, that the witness was interested or biased, or that his testimony on point at that issue was impeached by the falsity in his statements on other matters. From a practical standpoint, it is rare that uncontradicted evidence is not accepted which is why we dispute facts with real human witnesses when we can.

The Court of Appeals also noted that in the absence of some explanation furnished the disregard of all uncontradicted testimony in the record, the fact finder's conclusions will be reversed as arbitrary and unsupported. (Collins V. Castleton, Id.,)(citing 3A. Larson, Workman's Compensation Law, Section 80.20 (9th Edition 1976)). (See also Franklin Insurance Agency, Inc. V. Simpson, number 2007-SC-0000748-WC, 2008 WL5051613 (KY. November 26, 2008).

The Board actually overturned the Administrative Law Judge's decision on lack of notice whereupon and remanded to the Judge to make an award. The employer appealed to the Court of Appeals who clearly disagreed with the Workers' Compensation Board.

Key Takeaway

If the employer can produce a management witness who can testify that that no notice was given despite repeated trainings to an employee in writing about the need to give immediate notice, the employer has a much stronger defense on the lack of notice defense.

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