ARMSTRONG & PEAKE PLLC

AUGUST 2022 NEWSLETTER

UPDATES IN KENTUCKY'S WORKERS' COMPENSATION

The Kentucky Department of Workers' Claims has set forth a new workers' compensation medical fee schedule for physicians found in 803 KAR 25:089E. On page 12 of the summary of material incorporated by reference is the nitty gritty detail on how some medical services are charged. Along with this is a notice for a public hearing regarding the new emergency amendment for this updated medical fee schedule for physicians.

The case summaries below discuss Kentucky Rules of Evidence which is not all that common of an issue in Board decisions.

CASE SUMMARIES

Hall v. BPM Lumber LLC

Claim No. 2018-00635, Workers' Compensation Board Opinion entered July 22, 2022

By: Matt Brotzge

Holding: The ALJ's decision striking portions of expert testimony and other testimony based on lack of chain of custody was upheld. The ALJ's findings regarding why he did not accept the presumptive opinions of the university evaluator were remanded for additional details.

Issue: Whether the Administrative Law Judge erred in

1. Striking expert testimony and other testimony due to a lack of chain custody
2. Whether the ALJ failed to provide sufficient basis in rejecting the university evaluator report and opinions which are afforded presumptive weight under KRS 342.316(2)

Facts: Plaintiff appealed the dismissal from Judge Weatherby of a claim for neurocognitive occupational disease conditions. Plaintiff began working for the defendant lumber company in 2000 and worked as a slab sawer until he was terminated in 2015 due to a failed drug test. He then filed a Form 102 Occupational Disease Claim almost three years later in 2018. The testimony was that he worked inside an air-conditioned enclosed cab, enclosed with metal and glass so he could see the front and TV monitors of the stranding area. He claims that he and other employees lubricated the saw, a 50/50 mixture of hydraulic fuel and diesel fuel. He claimed that this mixture of lubricant came into his enclosed area, that he breathed it, and that it caused him tremors, headaches, neurological dysfunctioning, chronic obstruct pulmonary disease, and skin rashes.

Plaintiff acknowledged that he smoked a little less than a pack of cigarettes a day for 20 years.

In this case, multiple employees and a manager testified by deposition. The manager testified that the employer used BioLube to lubricate the saws instead of the hydraulic and diesel fuel mixture. The employer also wisely, in this author's opinion, had the plant manager testify as to the reason that the Plaintiff was terminated. This gave a counter factual rebuttal to Plaintiff's claims.

Because of the occupational disease allegation including chronic obstruct pulmonary disease (COPD), Plaintiff was referred to Dr. Bob Moldoveanu for a university evaluation pursuant to KRS 342.315. Dr. Moldoveanu performed testing including an allergy test which showed that Plaintiff was allergic to Bioban found in hydraulic fluid. Dr. Moldoveanu assessed at 10% whole-person impairment rate due to loss of pulmonary function and found no prior active impairment.

Dr. Moldoveanu further found that Plaintiff did not retain the physical capacity to return to the type of work he performed at the time of the injury, which supported Plaintiff's claim for the triple multiplier on basic benefits found in KRS 342.730. There was a discrepancy in the history given by the plaintiff to Dr. Moldoveanu in that Dr. Moldoveanu reported a seven-pack-year history of tobacco use, but in his deposition, Dr. Moldoveanu stated he meant to state that the plaintiff had a 30-year smoking history. Defense counsel dredged up all sorts of prior medical records on the plaintiff which were probably also very helpful in convincing the judge to dismiss the claim.

Plaintiff on the other hand produced an expert report from Dr. Barry Klein who testified that Plaintiff had a 97% whole-person impairment rating, in part based on a spectrographic of the lubricant. The employer moved to strike that portion of Dr. Klein's report arguing that the sample could not be properly authenticated, and this is where this case gets really interesting.

Plaintiff Hall argued that Judge Weatherby's act of striking the lab results and rejecting the university evaluator's findings without a proper basis was error. We do not often see evidentiary disputes of this nature in Kentucky Workers' Compensation claims. Judge Weatherby clearly struck references from the record of Dr. Klein's lab report which contained results regarding a sample that Hall had allegedly obtained from the employer without them knowing about it. The Board here

notes that the Kentucky Rules of Evidence are specifically incorporated by reference to the administrative regulations accompanying KRS Chapter 342, while noting that "it is recognized that the presentation of proof in Workers' Compensation proceedings is somewhat more indulgent than in civil court actions." (Citing Manns v Topy Corp., claim number 2003-01987; 803 KAR 25:010 section 14.) The Board noted that Kentucky Rule of Evidence 901 states that "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

In Kentucky Workers' Compensation claims, the administrative law judge is the gatekeeper and arbiter of evidence both procedurally and substantively. See Dravo Lime Company Inc v Eakins, The Board noted in this case:

> "The ALJ is empowered under KRS 342.230(2) to "make rulings affecting the competency, relevancy and materiality of the evidence about to be presented and upon motions presented during the taking of evidence as will expedite the preparation of the case." KRS 342.033 permits the introduction of direct testimony through written medical reports that become part of the evidentiary record subject to the right of the adverse party to object to the admissibility of the report and to cross-examine the reporting physician. "

Simply put, Plaintiff's sample that he said he took from BPM at some point did not meet the judge's standards for appropriate evidence. BPM argued against authentication of material in any expert report based on that, noting that the fluid that plaintiff Hall obtained without authorization sat in his garage for three years. Plaintiff did not offer a chain of custody regarding how it reached the lab, nor was there any testimony from lab personnel. The Board stated:

> "Though Mrs. Hall testified she and her husband brought the sample to the deposition, Hall did not offer any chain of custody regarding how it reached the lab, and there has not been any testimony from lab personnel. The lack of specific evidence as to the authentication of the mixture itself, the chain of custody to the lab, or lab personnel describing the testing performed and instruments used support the ALJ's decision to strike reference to the lab report." See Haste v. Kentucky Unemployment Insurance Commission, 673 S.W.2d 740 (Ky. App. 1984)

Clearly the Board felt that the Administrative Law Judge did not abuse his discretion in striking any reference to the lab report.

Regarding rejecting university evaluator's report, the Board noted that KRS 342.315(2) creates a rebuttal presumption that allows the Administrative Law Judge to reject a finding or opinion of the university evaluator. That statute does require the Administrative Law Judge to specifically state reasons for doing so however. The Board has cited Magic Coal Company v Fox, 19 S.W. 3d 88, 94-95 (Ky.2000) by stating "[t]o the extent that the university evaluator's testimony favors a particular party, it shifts to the opponent the burden of going forward with evidence which rebuts the testimony. If the opponent fails to do so, the party whom the testimony favors is entitled to prevail by operation of the presumption."

The Board further noted that this university evaluator presumption statute, KRS 342.315, is governed by Kentucky Rule of Evidence 301 which states as follows:

> "In all civil actions and proceedings when not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

The Board did remand this case to the Administrative Law Judge to state specific findings as to why he did not accept the opinions of the university evaluator regarding causation. The Board stated that the Administrative Law Judge "must review the complete reports and deposition of the university evaluator and specifically all mentions of the smoking history of Hall and how the evaluator's understanding of this history affected his ultimate opinion." The ALJ will likely be able to support his decision with just a few more sentences.

Key Takeaway

If the employer has a chain of custody argument, go ahead and make it and file a motion to strike all or a portion of the plaintiff's expert testimony. Plaintiff has the burden of proof of the claim including a proper chain of custody.

BlueLinx v. Estate of David Williams

Claim number 2019-64871

Kentucky Workers Compensation Board Opinion entered July 27, 2022

By: Steve Armstrong

Issue: Did substantial evidence support a finding that injured workers' death was caused by effects of ankle surgery? What evidentiary challenges to an expert's opinion be successful in Kentucky?

Holding: The Board found that the judge's opinion was based on appropriate evidence and ruled against the employer.

Facts: Plaintiff sustained a work-related ankle injury in September 2018 resulting in an ankle surgery October 25, 2019. Plaintiff then died October 27, 2019 and the Administrative Law Judge found that Plaintiff's death was a direct and natural consequence from his ankle surgery. The ALJ concluded that the decedent's death resulted from a sudden cardiac event "approximately caused by the work-related surgical procedure".

In Kentucky, there are two separate causes of action for death claims. First, the estate has to be paid a lump sum death benefit that increases every year.

Second, the statutory beneficiaries, in this case a minor child, have a separate independent claim. See KRS 342.750. The Administrative Law Judge also awarded temporary total disability benefits to the estate for just over a year from September 20, 2018 through October 15, 2019. This case is also interesting from a civil procedure standpoint in the that the decedent's sister became the executrix of the estate, and she was appointed as the decedent's child's court appointed conservator. Undersigned counsel has seen cases where the estate was represented by one Plaintiff's attorney and the child or children who were represented by separate attorneys. The decedent's sister testified regarding her knowledge of his pre-injury medical conditions and her conversation with him after the surgery.

The estate relied on the report of Dr. Steven Wunder, a physiatrist. Dr. Wunder noted that the death certificate indicated the cause of death was complications of congestive heart failure, and St. Elizabeth hospital records from 2014 revealed that Williams had been admitted with the diagnosis of congestive heart failure, obviously some four years before the alleged work injury. Then in his ultimate opinion, Dr. Wunder stated that but for the work-related surgery of October 25, 2019, Mr. Williams would not have succumbed to congestive heart failure on October 27, 2019 or a reasonable time thereafter.

The employer countered with an opinion from an interventional cardiologist in Cincinnati, Dr. John David Corl. Note that Kentucky law does not give presumptive weight to a specialist such as Dr. Corl who clearly has more of an expertise in the field of cardiology than Dr. Wunder. Under Kentucky law, the Administrative Law Judge determines the weight and credibility of various experts. Dr. Corl found in his opinion that there was no direct cause or relationship between the successful and uncomplicated elective outpatient ankle surgery in the sudden cardiac death two days later. Defense counsel deposed Dr. Corl who noted Plaintiff's multiple comorbidities, including high blood pressure, diabetes, morbid obesity, and sleep apnea. Further, Dr. Corl disagreed with the diagnosis of congestive heart failure as the cause of death contained in St. Elizabeth's emergency department note from October 27, 2019.

This case really is a battle of the experts, the Board took liberty of reciting both physicians' findings at length. Push came to shove when Dr. Wunder cited and attached to his one of his reports an article from the *New England Journal of Medicine* supporting the idea that non-cardiac surgery can precipitate complications such as death from cardiac causes. The Administrative Law Judge did find causation for the Plaintiff/estate and did award benefits. He noted that the injurious consequences of a work-related injury are compensable citing Coleman v. Emily Enterprises, Inc., 58 SW3d 459 (Ky. 2001). The judge acknowledged that the cardiologist had superior qualification on cardiac issues but noted that Dr. Wunder responded and effectively rebutted the cardiologist's opinions.

From the award of benefits, the employer appealed starting first with a 23-page petition for reconsideration observing that the *New England Journal of Medicine* article was not applicable as it

discussed cardiac complications arising from major non-cardiac surgery, not from minor non-cardiac surgery. The employer further argued that plaintiff's Expert, Dr. Wunder was not qualified to render his opinions under Daubert v. Merrell Dow Pharm., 509 U.S. 579, 593-594 (1993). It argued that comparative evidence must have sufficient scientific validity to be admissible under Daubert, and that Dr. Wunder's opinions did not suffice.

The Board noted that the counsel for the employer did not raise a Daubert challenge at the benefit review conference, nor at the hearing, and did not raise the issue prior to submission of post-hearing briefs. The Board also noted that 803 KAR 25:010 allows a party to object to the filing of a medical report within 10 days of the filing of the notice of the expert report. No objection was filed to Dr. Wunder's report or the attachment of the *New England Journal of Medicine* article referenced by Dr. Wunder. This decision then goes on to discuss recent court of appeals decisions and other appellate decisions for Daubert challenges of experts. The Board noted as well that Workers' Compensation administrative regulations adopt the Kentucky Rules of Evidence put forth by the Kentucky Supreme Court including Kentucky rule of evidence KRE 103 which mentions that parties need to object or move to strike in a timely manner if they want to strike an opinion or a report. Thus the Board seems to have shielded the Administrative Law Judge from having to even look at a Daubert challenge to Dr. Wunder's opinions because of the procedural issues.

Then the Board goes on to note that Kentucky still follows the substantial evidence standard, meaning that if an opinion of a doctor is supported by any credible evidence, then the judge's decision will not be reversed. This is quite different than the preponderance of evidence standard found in Georgia. The Board notes that "substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. See Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367 (KY. 1971). The Board further notes that if a plaintiff has a work-related surgery that leads to or results in sudden cardiac death, then the death can be found work-related/caused by arising out of the work injury. Keep in mind that this appears to be a routine ankle surgery, but plaintiff had multiple comorbidities. The Court stated that the premise that any direct natural consequence from a work injury including from a surgery or work-related condition can be found compensable even death under Elizabethtown Sportswear v. Stice, 720 S.W.2d 732 (KY. APP. 1986). The court even stated "Thus at first blush it appears the opinions of Dr. Corl, the cardiac expert, trumped the opinions of Dr. Wunder. However, the ALJ enjoys the sole discretion to determine the medical evidence upon which he will rely."

The Board further noted that it is permitted *sua sponte* to reach issues even if unpreserved, and it noted that because the party stipulated that decedent Williams sustained a work-related ankle injury, as a matter of law, the award of medical benefits was statutorily mandated. The Board noted this because the judge's award failed to award medical benefits for treatment of Williams work injury.

We rarely see Daubert motions in Kentucky Workers' Compensation claims because the average

claim does not lend to them. Even when they are filed, the judge still operates as the gatekeeper of evidence and is both the gatekeeper and the trier of fact. Note that in Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615 (KY. 2004), the employer put forth a Daubert motion against plaintiff's expert, but the ALJ determined in that case that Daubert did not apply to that proceeding because the judge was the gatekeeper of evidence. In the Upchurch decision, the Kentucky Supreme Court seemed not to want to apply Daubert to Workers' Compensation claims but that was 18 years ago. We have an entirely different Kentucky Supreme Court now. Only time will tell how this Court views Daubert in workers' compensation claims. Regarding Daubert, in the Upchurch case, the Court noted that:

> "While acknowledging that the trial court must function as a gate keeper to assure that only reliable expert scientific testimony is admitted, Daubert construed the rule as adopting a more flexible approach than the "general acceptance" standard. The goal of the rule was twofold: first, to protect the jury from being unduly influenced by "junk science," the introduction of which might give it an aura of scientific respectability in the eyes of the jury and, second, to avoid imposing a repressive scientific orthodoxy that would inhibit the search for truth. Among the factors for the trial court to consider when determining the reliability of proffered evidence under Daubert were: 1.) whether the theory or technique has been tested; 2.) whether it has been subjected to peer review and publication; 3.) the rate of error for the technique; and 4.) whether the technique has found acceptance within the relevant scientific community. As the Court emphasized later in Kumho Tire Company v. Carmichael, 526 U.S. 137, 140-41, 119 S.Ct. 1167, 1171, 143 L.Ed.2d 238, 246-47 (1999), the test of reliability is flexible and grants the trial court the same broad latitude when deciding how to determine reliability as it receives with respect to its ultimate determination." (Upchurch at 620 -621)

The Upchurch Court went on to say:

> "In a workers' compensation proceeding, unlike a jury trial, the ALJ is both gate keeper and trier of fact. Therefore, concerns about the effects of cloaking evidence in an unwarranted aura of respectability are absent. In any event, a finding that favors the party with the burden of proof must be based upon substantial evidence and, therefore, be reasonable in order to survive on appeal. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986)."

Key Takeaway

Only time will tell if we see successful Daubert challenges to expert opinions. The Board's ruling implies strongly that defense attorneys should object to opinions beyond the scope of practioners' expertise which can be challenged on a scientific basis.