ARMSTRONG & PEAKE PLLC

NOVEMBER 2021 NEWSLETTER

UPDATES IN KENTUCKY WORKERS' COMPENSATION

It is with sadness that we must inform our readers that Judge Scott Borders has passed away earlier this month. He was an Administrative Law Judge for many years, and most recently he was a Worker's Compensation Board member at the State of Kentucky. He will be missed. As of this publication date, it is unknown who the next board member will be.

The Kentucky Department of Workers Claims recently issued the yearly order regarding the lump sum settlement discount rate for the year 2022. Click here to view.

The discount rate for lump sum settlements where the periodic benefit is a weekly amount greater than $40.00 is fixed at 0.75%. Kentucky tracks the 10-year treasury bill for its lump sum discounts on workers' compensation settlements. Statutorily, the vast majority of permanent partial disability awards are for the standard 425-week award period. Where the AMA impairment rating is over 33%, that award period is extended to 520 weeks. All permanent partial disability benefits are capped at age 70 or four years, whichever provides a greater benefit length. This means that for a person say, age 65 for example, the PPD benefit will be more than four years, but will be less than the usual statutory 425-week award period. The table is therefore extremely helpful in determining the present valued lump sum discount for a settlement either for the standard 425-week award period, or some other period.

On page 15 of the 2022 discount rate order and table, the 425 weeks equates to a present value figure of 412.2418.

CASE SUMMARIES

Bergon v. AMEC Foster Wheeler

Case Number: 2014-58676, Kentucky Workers' Compensation Board Decision,
(Rendered October 25, 2021)

By: Steve Armstrong

Issue: Did the Judge appropriately deny temporary total disability benefits to claimant pursuant to Livingood v. Transfreight, LLC, and Trane Commercial Systems v. Tipton line of cases?

Holding: The Board upheld the Judge's denial of TTD because the plaintiff had not met his burden of proof.

Facts: Bergeron alleged a low back injury on November 20, 2014, but worked almost a year after the injury, and only had low back surgery in 2018. The case was bifurcated by the Administrative Law Judge on the the issues of the existence of an injury, entitlement to TTD, and whether due and timely notice of the alleged injury was given by the plaintiff. The plaintiff won the interlocutory relief and was awarded medical treatment and temporary total disability benefits (TTD)- but only as of his 2018 surgery date, not from his last date of work in 2015.Thus, plaintiff was not awarded approximately the two and a half years of TTD that he was seeking. Plaintiff alleged a low back injury while operating a forklift and had a prior lumbar fusion in the 1990s for which he was off work for four to five years. He stated that he was injured November 20, 2014 while working as a forklift operator. He testified that he gave notice to his supervisor.

His testimony was that he did not need to see a doctor for quite some time thereafter and moved to Texas in 2016. He worked for the employer AMEC for almost a full year after the alleged work injury. He testified that he worked at light duty for the employer, doing activities other than operating a forklift, which included operating a leaf blower and other activities. He was then laid off by the employer in November of 2015, when AMEC's local job was completed. He was not taken out of work at that time in November 2015 due to the effects of the work injury, and was still allowed to work at light duty, but his employer simply laid him off.

Plaintiff then claimed and received unemployment benefits. Judge McCracken noted that the plaintiff was capable of being employed, and then when filing for unemployment plaintiff admitted that has capable of working. The introduction of the unemployment records seems to be a key factor in Judge McCracken's decision.

Judge McCracken did award TTD from the date of the surgery performed by Dr. Harry Lockstadt in Lexington in May 2018, because at that time plaintiff had provided evidence from his treating physician, Dr. Lockstadt, who had taken him out of work at that time in order to recuperate from the second lumbar spine surgery.

Plaintiff testified that after his alleged injury, he never operated a forklift again but that he was then part of a safety team. In this light duty job, he would walk around to see if anything was unsafe or needed to be fixed. He also worked in a tool room where he would hand out tools that others may need. this case is one of the many progenies of Trane Commercial Systems v. Tipton, 481 S.W. 3d 800 (KY.2016) and Livingood v. Transfreight, LLC, 467 S.W. 3d 249 (KY.2015).

In Kentucky, an employer can suspend or deny TTD upon a finding of maximum medical improvement by a physician.

KRS 342.0011(11)(a) defines temporary total disability as follows:

"Temporary total disability means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment."

Statutorily, TTD is compensable until someone reaches maximum medical improvement, unless they can return to employment. In 2004, the Kentucky Court of Appeals held in Magellan Behavioral Health v. Helms, 140 S.W. 3d 579 (Ky. App. 2004) that the second prong of the statute operates to deny TTD to employees who "though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered." The Court noted that in a case from the year 2000, Central Kentucky Steel v. Wise, 19 SW 3d 657 (KY.2000) Kentucky Supreme Court held that it is not reasonable to terminate TTD benefits of an employee when he is released to "perform minimal work but not the type that is customary or that he was performing at the time of his injury." (Id. at 659). The term "customary employment" is not found in a statute.

The Central Kentucky Steel v. Wise case is why we want to obtain a work history on every plaintiff and every litigated claim - so that we can know what type of work was "customary" for that employee. Perhaps they worked two or three different types of jobs in their life, and if they can return to one of those, then the employer has an argument to suspend TTD.

Then in 2005, in Double L Construction, Inc. v. Mitchell, 182 S.W.3d 509 (KY 2005), the Kentucky Supreme Court elaborated on the standard for awarding TTD, stating that unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform "any type of work." In 2015 in the Livingood case, *supra*, the Supreme Court of Kentucky stated that their prior decisions do not "stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD." (Livingood at 254)

In the Livingood case, the employee was a forklift driver who could not operate a forklift due to his light duty work restrictions. He was given light duty work restrictions where he changed forklift batteries, monitored bathrooms for vandalism, and checked to make sure a freight was correctly placed around the facility. Plaintiff had performed those tasks before, and the judge determined that these tasks were not

make-work projects. Besides, in Livingood, the evidence appears to be that plaintiff was paid normal wages at normal hours. This is not like job that have to pay at Goodwill. In Livingood, the plaintiff was not awarded TTD.

Then a year later in Trane Commercial Systems v. Tipton, *supra*, plaintiff was given a different job after her injury, not her customary job, but which required no additional training. In that case the court noted that plaintiff was given a job handling a different product, which did not require significant additional training and that was not beyond her intellectual capabilities. Likewise, in Tipton, the plaintiff was given regular pay.

The Tipton court stated "…it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of the injury." (Tipton at 807)

The Tipton court further stated that it is "Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if the injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee is actually returned to employment." (Tipton at 807)

Key Takeaway

This Bergeron case follows Tipton and illustrates the fact that offering work to an employee post-injury, even if light duty, can be a defense to temporary total disability. Further, cross-training employees and having them do multiple different types of job duties pre-injury can be of benefit as well. Having a good job history from the employee in the interview process and having the job history on the employee from the actual written application is important as well so that defense counsel can establish a baseline of what "customary employment" is for that particular employee.

Patrick v. Hanson Transportation

Claim number 2019-54743, Kentucky Workers Compensation Board Decision
(Rendered October 1, 2021)

Issue: Did the Administrative Law Judge err in denying the triple multiplier to plaintiff Patrick by finding that he retained the physical capacity to return to the type of work he performed at the time of the injury?

Holding: The Board upheld the ALJ's decision finding substantial evidence supporting the Administrative Law Judge's ruling denying the triple multiplier.

By: Steve Armstrong

Facts: Plaintiff alleged an injury to his right biceps on November 11, 2019 while throwing lines over his flatbed tractor trailer. He worked as a truck driver hauling flatbed trailers. Had previous driven various types of trucks, driving wrecker, grease trucks, even owning and operating his own tractor trailer.

As a driver for Hanson, plaintiff was required to pull chains or straps, use binders, drag tarps, and secure loads and climbing on top of trailers to pull heavy tarps.

On the day of his injury, he felt a pop in his right arm, immediate pain in his right shoulder to his right elbow while throwing straps overhead to secure a load. He was treated at the emergency room, and then by Dr. James Baker at Orthocincy in Northern Kentucky.

It is important to note that Dr. Baker the treating physician released plaintiff to full duty without restrictions in March 2020. Despite that, plaintiff did not return to work for the employer and began driving a different type of tractor trailer for a different employer in May 2020.

In Kentucky, the judge can triple the basic unenhanced benefit for permanent partial disability if the judge finds that the employee does not retain the physical capacity to return to the type of work he or she performed at the time of the injury (see KRS 342.730(1)(c)1). This case shows the usual disparity in AMA impairment ratings of the Fifth Edition AMA Guides from each side's experts. The employer filed a 0% rating from Dr. Robert Jacob, while the plaintiff filed a 14% rating from Dr. Steven Wunder. Dr. Bonnarens also issued a 0% impairment rating for the employer.

Then plaintiff submitted in evidence a 16% rating from Dr. Jules Barefoot. Predictably, plaintiff's experts stated their opinions that Mr. Patrick no longer retained the physical capacity to perform the type of job activities he performed at the time of the injury including operating the truck, working at heights, pulling down tarps, etc.

The Administrative Law Judge chose the middle ground. Here, Judge McCracken awarded a 9% rating assessed by Dr. Barefoot for strength loss, but apparently did not adopt the entire rating from Dr. Barefoot. Judge McCracken noted that plaintiff testified that his right arm strength was decreased by 70%, but the treating physician's records, Dr. Baker's records, and those of the physical therapist, were inconsistent with his statements. Judge McCracken also noted that plaintiff may have had different variations on the job as a truck driver, but that he is still a truck driver, who had a successful surgery, who was released by his treating physician to return to work at full duty.

The Board, again as usual, notes that Kentucky law is that the Administrative Law Judge's decision must be upheld if there is substantial evidence supporting that decision. Compelling evidence is required to overturn a judge's decision.

The Board did note the prior 2004 decision of Ford Motor Company v. Forman, 142 S.W. 3D 141 (Ky. 2004, where the Kentucky Supreme Court held that the type of work that the employer performed at the time of the injury "was mostly likely intended by the legislature to refer to the actual jobs that the individual performed." (Forman at 145). The Board again noted that here there was conflicting testimony from various physicians, and the Board noted that the judge was not required to find plaintiff credible. Plaintiff had the burden of proof and simply was apparently not the most persuasive plaintiff.

Key Takeaway

Some judges really look to the treating physician regarding restrictions, and that appears to be the deciding factor in this case.

Tokico (USA), Inc. v. Kelly

281 S.W.3d 771 (Ky. 2009)

By: Matt Brotzge

Issue: Can an ALJ agree with a physician's diagnosis if that diagnosis does not follow the diagnosing criteria of the 5th Edition of the AMA Guides?

Procedural History: In the original decision, the Administrative Law Judge found the claimant to have a 39% impairment rating, a combination of a right arm rating and a psychological rating. The Workers' Compensation Board affirmed on appeal, as did the Court of Appeals. On appeal to the Supreme Court, the employer argued the ALJ erroneously awarded benefits for a condition that was not diagnosed in accordance with the Fifth Edition of the AMA Guides, and for deficits that were not assessed in accordance with the Guides, and for an injury that had not reached maximum medical improvement (MMI). The Supreme Court ultimately affirmed.

Facts: Claimant worked for the defendant as a machine operator. On February 11, 2004, her right hand slipped and hit the side of a machine as she attempted to pull an improperly-place bolt pin from a brake caliper assembly. A sharp pain shot up into her arm immediately and caused her to become nauseated. She stated her hand became sore and swollen. Claimant was initially diagnosed with cellulitis. That diagnosis was revised to reflex sympathetic dystrophy (RSD), also known as complex regional pain syndrome (CRPS), after a subsequent bone scan revealed findings consistent with that diagnosis.

Thereafter, claimant began treating with Dr. Burgess in March 2004. He received a history of the work-related hand injury, diagnosed early dystrophy, and began to treat the claimant. He diagnosed CRPS-1

in January 2005. In June 2006, he found claimant to be at MMI. Dr. Burgess assigned a 11% impairment rating based on range of motion and 3% for pain. Dr. Burgess later wrote he did not think rating impairment due to loss of grip strength would be inappropriate.

Claimant treated with a Dr. Lester who assigned a 18% based on loss of grip strength in April 2006.

A Dr. Kriss evaluated the claimant in January 2007. He concluded claimant had “an absolutely classic” case of Type 1 CRPS as confirmed by the history of trauma and a delayed onset of persistent edema, skin color changes, hyperpathia, allodynia, disuse atrophy, non-focal osteopenia, objective temperature change, a dramatic and unequivocal response to sympathetic blockade, plain film joint changes, increased update on bone scan, partial response to steroids, and persistent and severe neuropathic pain out of proportion to the trauma. Dr. Kriss acknowledged that the claimant met only seven of the eleven diagnostic criteria found in Table 16-16 of the Guides rather than the required eight, but he stated he had no doubt claimant suffered from “some definite form” of the condition.

Using that diagnosis, Dr. Kriss assigned a 28% impairment rating. Dr. Burgess issued a supplemental report wherein he opined claimant did not meet the criteria for diagnosing CRPS under the AMA Guides. Similarly, Dr. Lester issued a supplemental opinion indicating CRPS was not appropriate based on the AMA Guides.

A psychological impairment rating was given by a Dr. Sprague and a Dr. Ruth. Dr. Sprague gave a 4% and Dr. Ruth assigned a 2%.

The ALJ relied upon Dr. Kriss, Dr. Burgess, and Dr. Sprague and assigned a 39%. On appeal, the employer asserts this impairment rating does not conform to the AMA Guides. The Supreme Court disagreed with the employer.

The Court pointed out KRS 342.730(l)(b) bases partial disability benefits on a permanent impairment rating, which KRS 342.0011(35) defines as being the “percentage of whole-body impairment” that an injury causes “as determined by” the latest edition of the AMA Guides. The Court noted neither statute refers to the physician’s diagnosis. The Court also pointed out Chapter 1 of the Guides acknowledges some medical syndromes are poorly understood and that physicians must clinical judgement in combining the art and science of medicine in making their diagnoses. Further, Chapter 342 of KRS does not require a diagnosis to conform to the criteria listed in the Guides.

The employer relied upon Jones v. Brasch-Berry General Contractors, 189 S.W.3d 149 (Ky. App. 2006) which concerned an ALJ’s authority to rely on a physician who conceded that a worker’s back condition fell within a particular impairment category but disagreed with the percentages called for in the Guides. The Supreme Court found this case instructive but distinguishable. In Brasch-Berry, the physician diagnosed based on the Guides but did not use the Guides for an impairment rating. In the instant case, the physician did not make a diagnosis based on the AMA Guides but did assign an impairment rating conforming to the AMA Guides.

The Court noted the proper diagnosis of a medical condition, and the proper interpretation of the Guides are medical questions, an ALJ must decide on the legal significance of conflicting medical evidence. But the ALJ is under no obligation to find a diagnosis based on the criteria of the AMA Guides, only the impairment rating.

Consequently, the Supreme Court affirmed the ALJ's decision and award.

Key Takeaway

KRS Chapter 342 requires an ALJ to rely upon a physician who assigns an impairment rating based on the Guides, but it does not require a diagnosis based on the AMA Guides.