ARMSTRONG & PEAKE PLLC

MARCH 2021 NEWSLETTER

WHAT'S NEW IN KENTUCKY WORKERS' COMPENSATION CLAIMS?

The Kentucky Department of Workers' Claims held a hearing on February 23, 2021 regarding a proposed new mediation program coming to the Kentucky Department of Worker's Claims. They have issued a new regulation, 803 KAR 25:300, regarding mediation. Chief Judge Doug Gott has been performing a number of mediations in the past year or two, and before that, mediation was used from time to time in Kentucky Workers' Compensation claims with private mediators.

Now with COVID-19 forcing even technologically challenged attorneys, claimants, and employers to be accessible by Zoom, Skype, Microsoft Teams, and other web-based conference centers, video mediation is becoming a norm.

Under new regulation 803 KAR 25:300 Section 3, the Chief Administrative Law Judge can now designate one or more Administrative Law Judges to serve as a mediator on a rotating basis. Judge Gott is doing that now with three judges a month.

Parties in litigated claims, where a Form 101 hearing request has been filed, must file a motion requesting mediation and must identify the issues to be mediated. The parties may file a joint motion to refer the file to mediation as well. Chief Judge Gott has recently indicated to me by phone that he and Commissioner Swisher are trying to have employer representatives and/or claims representatives attend mediations by video. This is their express goal – attendance by video. They appear no longer to want to approach mediation with simple phone calls.

Kentucky's medical treatment guidelines are effective January 1, 2021.

The Kentucky Department of Worker's Claims previously adopted ODG by MCG Health medical treatment guidelines pursuant to legislative enactment in House Bill 2 effective July 14, 2018, which mandated implementation treatment guidelines. Here is a link to 803 KAR 25:260 regarding treatment guidelines. Here is an on-demand webinar to ODG training for the State of Kentucky. Defense practitioners have already seen some doctors changing their methods, reducing narcotic prescriptions unilaterally. Kentucky adopted the ODG drug formulary as well, and this is the likely reason for reduction in at least some narcotic prescriptions.

REBUTTABLE PRESUMPTION OF COMPENSABILITY

In Kentucky, there have been no legislative enactments regarding rebuttal presumptions, but our Governor, Andy Beshear, issued executive order 2020-277 that states an employee removed from work by a physician due to occupational exposure to COVID-19 shall be entitled to temporary total disability payments immediately removing the seven-day waiting period.

In the same executive order, our Governor put forth a rebuttal presumption for certain types of employees that presumes that removal of certain workers from work by a physician is due to occupational exposure of COVID-19. These include the following types of workers:

- **first responders (law enforcement, emergency medical services, fire departments)**
- **corrections officers**
- **military**
- **activated National Guard**
- **domestic violence shelter workers**
- **child advocacy workers**
- **rape crisis center staff**
- **Department for Community Based Services workers**
- **grocery workers**
- **Postal Service workers**
- **child care workers**
- **child care workers permitted by the Cabinet for Health and Family Services to provide childcare in a limited duration during the State of Emergency**

In general, the employee still has the burden to prove on a causation. The Commissioner of Department Workers' Claims soon issued guidance later in April 2020 confirming that the presumption of causation from work is rebuttable. The presumption is not the final word, and Kentucky Rule of Evidence 301 on rebuttable presumptions likely still applies.

CASE SUMMARIES

By: Matt Brotzge

Issue: False Statement Employment Application

Appeal of an ALJ's dismissal of claim. Claimant alleged the ALJ erred in finding a causal connection between the false representation on her pre-employment medical questionnaire and the alleged work injury.

In this claim, Claimant McGhee alleged she sustained an injury to her low back and her neck as a result of being hit by a forklift. The Employer raised a special defense of a false statement on the employment application pursuant to KRS 342.316(7) and/or KRS 342.335 and asked the ALJ for a complete dismissal of the claim.

KRS 342.165(2) states that:

"No compensation shall be payable for work-related injuries if the employee at the time of entering the employment of the employer by whom compensation would otherwise be payable falsely represents, in writing, his or her physical condition or medical history, if **all** of the following factors are present:

> **(a) The employee has knowingly and willfully made a false representation as to his or her physical condition or medical history;**
> **(b) The employer has relied upon the false representation, and this reliance was a substantial factor in the hiring; and**
> **(c) There is a causal connection between the false representation and the injury for which compensation has been claimed."** (Emphasis added)

For her part, claimant testified that she had prior work injuries while working at Waffle House, she fell while leaving, leading to a knee surgery. She also testified she was previously in a car wreck which led to a cervical fusion surgery in 2009. Claimant testified she had issues with pain, numbness, and paralysis going into her arms prior to her cervical fusion surgery. Claimant testified those issues improved following her cervical fusion.

From there, claimant was asked if she would have indicated if she had neck or back problems when filling out the pre-employment questionnaire, if asked. Claimant indicated she would answer truthfully and write down she had a prior cervical fusion.

Prior to her employment with Defendant, claimant was given a pre-employment physical at Ergo Science. As part of that evaluation, claimant was asked to complete a medical history and prior medical issues questionnaire. In filling out that questionnaire, claimant indicated she never had a bulging, herniated or prolapsed disc prior to her employment with the Defendant, and she wrote she never had surgery at any point. Upon questioning, she admitted that would be a false statement.

Claimant went on to testify that she did not have any neck or back problems prior to the alleged injury, and she was able to perform all of her housekeeping duties.

Then, defense counsel took the testimony of the Employer's facility manager, Jamie Golden. Golden testified Leadec is concerned about hiring people with prior cervical issues due to the physical nature of the job. Golden testified he would not hire an individual who had a prior cervical fusion.

Finally, the pre-employment questionnaire was introduced. The Board noted that question 13 asks, "At any point in time, have you undergone surgery?" To all the relevant questions, Claimant checked "no."

After the Hearing, the ALJ issued an Opinion and Order which found Claimant made multiple false representations and omissions, frustrating the purpose of the pre-employment physical examination. That pre-employment physical examination is considered part of the employment application under Kentucky law. The ALJ found claimant knowingly made a false representation about her medical condition. With regard to causation, the ALJ relied on an unpublished Supreme Court decision which held that medical evidence establishing a causal connection between false representation and the subsequent injury is helpful but not per se necessary. The Judge found it sufficient that claimant had a prior neck surgery and that the same body part was the subject of this claim.

In their review, the Board affirmed the ALJ in part and vacated in part. It should be noted claimant failed to file a petition for reconsideration, and the Board was limited to a determination of whether substantial evidence in the record supports the ALJ's conclusion. *Eaton Axle Corp. v. Nally*, 688 S.W.2d 334 (Ky. 1985); *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327 (Ky. App. 2000).

In their analysis, the Board found the ALJ appropriately relied upon *Gutermuth v. Excel*, 43 S.W.3d 270 (Ky. 2001) wherein the Supreme Court held that the pre-employment physical examination is part of the employment application. The Board further found the ALJ to be correct in relying on *Daniels v. B.R. &D. Enterprises Inc.*, No. 2005-SC-0652-WC, 2006 WL 734407 (Ky. 2006). Daniels is the case where the Supreme Court found medical evidence to be helpful but not necessary in establishing a causal connection between a false statement on the pre-employment application and the alleged work injury. The Board found that case to be instructive, citing:

> "Although medical evidence may be a means for proving such a (causal) connection, it is not the sole means for doing so. As in *Gutermuth*…it is significant that the false representation and subsequent injury both involved the same portion of the body."

Thus, the Board found the omissions and false statements on the pre-employment medical questionnaire to be directly relevant to her alleged work-related neck injury.

The Board recognized the ALJ, as fact-finder, has the sole authority to determine the weight, credibility and substance of the evidence, *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993), and the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329 (Ky. 1997). The Board found the ALJ's determination was supported by substantial evidence, and the affirmed the dismissal of the alleged work neck injury. It was sufficient to base the dismissal upon the fact the pre-employment omissions were of the same body part alleged to be injured.

The Board vacated the ALJ's decision of dismissing the entire claim and remanded for additional findings. The Board noted there to be an alleged low back injury. The Board found the low back injury to be separate from the neck, and remanded with instructions to make additional findings and a determination for the low back.

Rockhampton Energy LLC v. Helton, Kentucky Worker's Compensation Board Opinion entered November 13, 2020, claim number 2020-00095, 2019-01427, 2019-01426

Issue: Can ALJ Award Double Multiplier on PPD if Employee Never "Left" Employment?

By: Steve Armstrong

Facts:
Employer appealed from award of Judge Davis who awarded PPD for cumulative trauma to low back and neck, awarding the double multiplier found in KRS 342.730(1)(c)2. The Board upheld the award of permanent partial disability for low back and neck claim for cumulative trauma, but overturned Judge Davis' award of the double multiplier. Judge Davis had awarded the double multiplier from the date that the employer had laid plaintiff off from work.

Issues:

1. Did the judge have an adequate basis to award the double multiplier even though plaintiff had never returned to work, and therefore had never ceased to work, pursuant to *Fawbush v. Gwinn*, 103 S.W. 3rd 5 (KY. 2003) and pursuant to unpublished Kentucky Supreme Court decision of *Jessamine Car Care v. Bryant*, 2009 WL 1173003, 2018-SC-000265-WC (KY.) (February 14, 2019) (unpublished).
2. Did the judge error in not awarding future medical benefits for occupational hearing loss which the Board reviewed *sua sponte?*

Held:

1. No, Plaintiff never "returned" to work, therefore the double multiplier could not be awarded.
2. Yes. The Board can order conformity with the workers' compensation act on its own, even if no one raised the issue, *sua sponte*.

Analysis:
Claimant's last day of work was September 2, 2019, and he stopped working for the employer on that date due to a layoff. He then filed his Form 101 hearing request just two and a half months later. He also filed a Form 103 occupational hearing loss claim as well, and the timing of the facts implies that plaintiff would not have filed these claims had he not been laid off. Judge Davis found that plaintiff was not permanently and totally disabled, and relying upon the medical testimony from Dr. William Kennedy, Judge Davis awarded a 5% AMA impairment rating for the low back and neck. Judge Davis did not award income benefits for plaintiff's hearing loss claim pursuant to KRS 342.7305 since the University evaluator assessed an impairment rating below the 8% threshold, and he mentioned future medical benefits for the hearing loss but did not award it.

The judge awarded permanent partial disability from November 16, 2018 forward during a period based on the evidence that the judge felt that the disability or the cumulative trauma manifested.

The Board reversed the ALJ determination of the award for the double multiplier for reasons other than argued by the employer. The Board noted that KRS 342.730(1)(c)(2) provides as follows:

> "If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During **any period of cessation of that employment**, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection." (Emphasis added)

The Board noted that the Kentucky Supreme Court in the *Jessamine Car Care* case, *supra*, held that in order to receive an award of the double multiplier, the employee must "return to employment following a cessation followed by a resumption of employment."

As the Kentucky Supreme Court stated in the unpublished *Jessamine Car Care* decision, in determining the two multiplier was not applicable:

> "Additionally, the ALJ erred in determining the 2 multiplier applied under KRS 342.730(1)(c)(2). That multiplier only applies if the claimant returns to work after the injury. After Bryant was terminated, he did not return to work. ALJ Coleman cited to Bryant's June 2013 injury but that he continued to work until September. However, this continuation of work is not a return to work under KRS 342.730(1)(c)(2). To qualify as such a "return," there must be a cessation followed by a resumption. Bryant simply continued on in his regular employment until he was discharged. Since that time, ALJ Coleman made no finding of a "return" to employment at a wage equal to or greater than his average weekly wage at the time of injury. The 2 multiplier has no bearing on Bryant's case." (Id. at 7.)

In this *Rockhampton v. Helton* case, *supra*, it was undisputed that plaintiff continued to perform his regular job after his low back and neck symptoms rose, and that he only ceased working when he was laid off due to a mine closure on September 2, 2019. The Board ruled that therefore, as in *Jessamine Car Care v. Bryant*, *supra*, there was no "return to work" pursuant to KRS 342.730(1) (c)(2) because there was no cessation of work followed by a resumption of work. Plaintiff simply continued in his regular employment until he was laid off. Therefore, the Board reversed the ALJ determination that the double multiplier was applicable. The Board remanded the decision to direct Judge Davis to amend the award of income benefits accordingly.

The Board further noted that it has the power *sua sponte* to reach issues even if unpreserved but not raised on appeal. *George Humfleet Mobile Homes v. Christman*, 125 S.W. 3rd 288 (KY. 2004). Since there was no award of future medical benefits for the hearing loss claim, the Board remanded as well requiring the judge to enter an award of medical benefits for the occupational hearing loss.

This is a Board decision, and not a binding reported decision from the Kentucky Supreme Court. The ruling overturning the award of the double multiplier in this case is helpful to employers, but this author believes this is not the last word on this type of case. Sooner or later, the Kentucky Supreme Court will likely make a more definite ruling.

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Helpful Links

Kentucky Department of Workers' Claims

KY Department of Workers' Claims Forms

KY Department of Workers' Claims Medical Treatment Guidelines

KY Department of Workers' Claims PPD Calculator

Kentucky Legislature 2021 Workers' Compensation