FEBRUARY 2024

DEFENSE DEBRIEF:
INSIGHTS ON WORKERS' COMP

Official Newsletter of Armstrong & Peake PLLC

We hope that you had a great set of holidays and are enjoying the new year! We have two new judges appointed in Kentucky effective January 1. Judge Philipe Rich is one of the new judges who we have known for many years, and we also welcome a newcomer, Judge Kimberly O'Bryan. They were both appointed by our governor, Andy Beshear, who was reelected in November. Judge McCracken and Judge Rice-Smith were not reappointed. Click here to learn more.

In this newsletter, you'll find information about the 2024 maximum benefit rates published by the State of Kentucky as well as information about the 2024 lump sum discount rate, also published by the State of Kentucky. Both of which can be found here on our website. We also have two case summaries. The first is a Board Decision which contains a primer on average weekly wage summarized below. Also herein is a summary of the Kentucky Supreme Court decision Farley v. P & P Construction regarding the 45-day rule that medical providers, doctors, and hospitals must abide by. Until the Farley decision discussed below, the Board refused to enforce the 45-day rule pre-litigation.

This issue:

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General Motors, LLC v. Woods

Kentucky Workers' Compensation Board Opinion (entered December 22, 2023), Claim No. 2022-91822

FACTS: The vast majority of times the average weekly wage is stipulated to by the parties. On occasion, the judge has to decide the issue. In this particular Board decision, the Board gives us a primer on key cases regarding the average weekly wage calculation.

First, we start with the statute KRS 342.020, which is complicated enough, and it states:

Issue

Did the ALJ calculate the AWW correctly? This claim involves solely the calculation of the average weekly wage, which is a rare case.

"The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows:

(a) The wages were fixed by the week, the amount so fixed shall be the average weekly wage;

(b) The wages were fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve (12) and divided by fifty-two (52);

(c) The wages were fixed by the year, the average weekly wage shall be the yearly wage so fixed divided by fifty-two (52)

(d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury;

(e) The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his or her average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he or she would have earned had he or she been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation; and

(f) The hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where the services are rendered by paid employees." (KRS 342.140)

The Board notes that the Plaintiff is entitled to the highest of the four 13-week quarters immediately before the alleged injury. In other words, the statute requires an employer, or a plaintiff to put forth evidence of the gross wages for the 52 weeks before the work injury and the plaintiff receives the benefit of the highest of those four quarters. Plaintiff gets the benefit of the gross hours, but not the gross wages, and overtime hours are counted, but not the gross overtime actual wages. Here the Board cites Professor Larson's treatise:

> "In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but anything of value received as consideration for the work, as, for example, tips, bonuses, commissions and room and board, constituting real economic gain to the employee."
>
> Larson's Workers' Compensation Law (2012) §93.01[2][a].

The Board also noted that under Rainey v Mills, 733 S.W.2d 756, 758 (Ky. App. 1987), the Kentucky Court of Appeals determined that fringe benefits such as employer pension plan contributions, health insurance benefits, and life insurance premiums are not to be included in the definition of wages. Premium pay (as opposed to output pay) and profit-sharing bonuses are not to be included in calculating AWW. See Denim Finishers, Inc. v. Baker, 757 S.W.2d 215, 216 (Ky. App. 1988).

Simple bonuses based upon target performance goals and received in addition to regular pay are also to be included since it is payment for services rendered. Hubbard v. ADESA, Claim Number 2010-69276, rendered September 23, 2013.

Pre-injury calculations for hourly paid workers must be based on 13 consecutive weeks when the employee has worked for the employer for more than 13 weeks. Even if there is a week where no wages were earned, that week is included in the computation. Belcher v. Manpower of Indiana, 492 S.W.3d 156 (Ky. App. 2016).

The Board noted that in Jewell v. Ford Motor Co., 462 S.W.3d 713 (Ky. 2015), unemployment benefits were not to be considered as wages, because they were paid for by the state, but supplemental unemployment benefits paid by Ford during the same period as an unemployment benefit *were* deemed wages by the Court of Appeals.

The Board points out that it is not whether the benefit was taxed that proved determinative, but who paid the benefit and the purpose behind the payment.

By contrast, vacation pay, which is earned, is treated as regular income for tax purposes, therefore constitutes wages and should be included in the calculation of the average weekly wage.

In this particular case, the plaintiff received a payment marked as a "vacation payout" for over $1,300 and the Board refused to deviate from prior rulings finding that it should be part of the average weekly wage. The real question here was whether this vacation payout should be spread across the entire year, or just the quarter in which it was paid out.

There was no testimony provided from the employer as to what the wage records represented, so the judge had the discretion to take the notations on the wage records at face value. The Board further noted that the intent of the average weekly wage statute, KRS 342.140 is to estimate a realistic assessment of wages earned by the employee, and the goal was to be fair to both the employee and the employer, citing C & D Bulldozing v. Brock, 820 S.W.2d 482 (Ky. 1991). The Board noted that the ALJ had the discretion to tailor the average weekly wage calculation to the facts and circumstances of each case citing Huff v. Smith Trucking, 6 S.W. 3d 819 (Ky. 1999).

The Board distinguished this case from the Brooks case, supra, where the vacation pay was spread out over the full year, by noting that in Brooks there was employer testimony regarding how much vacation pay in lieu of time off the claimant received. Here it appeared to the Board that the claimant took the vacation pay and received it in the fourth quarter, and there was no additional evidence outlining how many hours of vacation pay plaintiff received, making it difficult to prorate the payout over the full year.

Key Takeaway

The moral of this story is that if an employer wants to argue that the vacation payout should be rated over the year, the employer is probably going to have to produce a witness state on the record to state why that should happen. Records can be construed however the Judge wants to construe them within limits.

Farley v. P&P Construction Inc.

Kentucky Supreme Court Decision #2022-SC-0350-WC (August 24, 2023) (to be published)

HOLDING: The Kentucky Supreme Court has overturned a series of decisions where the Board would not enforce the 45-day rule pre-litigation. The 45-day rule now applies pre-litigation and at all times.

The question in this case is whether the medical providers, including doctors and hospitals, have to abide by the 45-day rule set forth in KRS 342.020. The statute itself speaks plainly enough and says exactly that - submit your bills within 45 days, or they may not be compensable. KRS 342.020 (4) states in pertinent part:

Issue

Does the plain language regarding the 45-day rule requirement that medical providers submit bills to insurers, self-insureds, and TPAs within 45 days actually apply pre-litigation?

"The provider of medical services shall submit the statement for services within forty-five (45) days of the day treatment is initiated and every forty-five (45) days thereafter, if appropriate, as long as medical services are rendered."

This author has always wondered why doctors, hospitals, physical therapists and chiropractors cannot get bills out the door within 45 days of service. This statute has been around for the 1990s, but in a series of rulings from years ago, the Board and appellate courts would not enforce the 45-day rule pre-litigation.

In this case, the Board affirmed the ALJ determination that medical providers did not have to submit their billings until ***after a determination of liability***. Here the Kentucky Supreme Court noted that employers and insurers are not responsible for payments of medicals that have been contested, which have not yet been awarded/adjudicated by an administrative law judge. The Kentucky Supreme Court overruled the Board and found though that medical providers have no such right to delay tendering their billings. Kentucky Supreme Court agreed with the Court of Appeals that under the unambiguous language of KRS 342.020 (4), medical providers are required to submit their billings within 45 days of service, regardless of whether a determination of liability has been made or not, and employers and their insurance carriers are not responsible for payment of billings submitted to them after the 45-day period. This ruling overturns a unpublished Board decisions Workers' Compensation practitioners had been following for the past many years.

For instance, in Transit Authority of River City v. Florence, claim number 2010-87602, Board decision (Opinion entered June 12, 2012), noted on numerous occasions that it had ruled that the 45-day rule for submission of statements for services in KRS 342.020 had no application in a pre-award situation.

FACTS: Plaintiff Farley was injured when an air hose for a mine pump exploded, fracturing his left leg, causing the need for three subsequent surgeries. His claim was accepted. His employer's Workers' Compensation carrier, KEMI, began paying the claim and TTD benefits. KEMI rejected multiple billings from ARH Daniel Boone Clinic though due to the late tender date by ARH. The claim for the most part was then settled except that it was left open for the left leg injury. The additional issue of unpaid and contested medical expenses was preserved as an issue for hearing. KEMI's counsel had filed a formal 112 medical dispute, joined ARH and Graham Resources, noting that their billings had previously been denied by KEMI as being untimely filed.

The ALJ determined that consistent with prior unreported Board decisions, the 45-day rule did not apply until after an award was made. The Board upheld the ALJ's decision, again noting that a 45-day rule had not been applied pre-litigation or during litigation, but only applied in post litigation.

In its analysis, the Kentucky Supreme Court discussed the plain language of the statute noted that under prior case precedent Vandertoll v. Commonwealth, 110 S.W.3d 789 (KY. 2003), the term, "shall means shall." The 45-day rule statute states point-blank that the provider of medical services ***shall*** submit state for services within 45 days of the treatment is initiated. This is KRS 342.020 (4). The Kentucky Supreme Court here then discusses the differences in similarities in this case and its ruling in Wonderfoil,

in Wonderfoil, Inc. v. Russell, 630 S.W.3d 706 (KY. 2021) which dealt with the time limits that employees must submit medical bills reimbursement request to the employer for repayment under 803 KAR 25:096, section 11, not KRS 342.020. The Kentucky Supreme Court stated point-blank that:

> "To permit some, if not all medical providers to withhold their billings for indefinite periods of time from consideration and payment by the employer, it's insurer, the ALJ, and even their patients, would upend the statutory and regulatory framework of our workers' compensation adjudicatory process, the billing processes for providers and the adjustment process for obligors."

Some may question then, does the plaintiff have to pay these bills? The answer is no, and the Kentucky Supreme Court addressed that as well, stating that the regulation 803 KAR 25:096 section 10 (3) already states that the medical provider shall not bill a patient for services which had been denied by the payment obligor for failure to submit bills following treatment within 45 days "as required by KRS 342.020 in section six of this administrative regulation."

In other words, if the medical provider does not submit them, neither the employer/insurer/TPA, nor the plaintiff have to pay them. This does not address whether some other health insurer has to pay them or not. Likewise, this does not address ERISA liens, government liens, Medicare liens, etc.

This author has also been told by at least one administrative law judge that in some circumstances it may be necessary to file a medical dispute form 112 and motion reopen if a carrier/insurer/TPA receives a set of medical bills post or after 45 days.

Key Takeaway

Hospitals, doctors, physical therapists and medical providers in general need to abide by the 45-day rule and frankly never veer from it. Employers, insurers and TPAs now have a much stronger hand in denying bills received after 45 days from service.

Check out past newsletters and learn more about how we can help you at www.armstrongpeake.com

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