ARMSTRONG & PEAKE PLLC

# JULY 2022 NEWSLETTER

## Join Us For One of Our KY Workers' Comp Webinars

**August 25th from 10:00 a.m. - 12:00 p.m. EST**

Learn about initial claims handling, TTD and PPD benefits, Kentucky forms, types of defenses, and settlement v. judicial hearing.

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## UPDATES IN KENTUCKY'S WORKERS' COMPENSATION

Regarding updates in Kentucky workers' compensation, the Toler decision summarized below is the biggest event in recent weeks because it is a Kentucky Supreme Court ruling, which will likely soon be published (and therefore become effective), which disallows opinions of non-treating physicians who are not licensed in Kentucky. Reviewing physicians who are not licensed in Kentucky cannot testify any more. The Kentucky Supreme Court went to great pains to say that it will allow as evidence the testimony of out-of-state **treating** physicians, but that reviewing physicians who are not licensed in Kentucky are not even deemed to "physicians" as a matter of law in Kentucky because they do not have a license in Kentucky. Below is our summary on Toler.

If you are looking for a copy of the emergency utilization review regulation – 803 KRE 25:195E filed with the Legislative Research Commission at June 14, 2022, you can find it here. The old utilization review regulation had a sunset provision and had expired causing the need for this emergency utilization review regulation.

The claim selection criteria for utilization review are still largely the same, specifically being required if:

**A. The medical provider requests pre-authorization of a medical treatment or procedure (i.e. surgery).**
**B. Notice of a surgical procedure is received.**
**C. Total medical costs cumulatively exceed $3,000.**
**D. Total lost workdays cumulatively exceed 30 days. Or,**
**E. An Administrative Law Judge orders a review.**

The time deadlines are very fast for utilization review, and one thing that did change is that on page nine of this regulation, the utilization review decision **shall** be communicated to the medical provider and employee within **seven business days** instead of 10 calendar days of the initiation of the utilization review process. On page 10, the regulation requires that only a "physician" may issue an initial utilization review denial. Is your "physician" licensed in Kentucky? If not, they may not be a "physician" as a matter of law. On page three of this regulation, a physician is defined as a physician in KRS342.0011(32).

Also the Kentucky mileage rates have changed, and you can find them here.

## CASE SUMMARIES

### Esters v. Transit Authority of Central Kentucky

Claim No. 2020-78494, Kentucky Workers Compensation Board Opinion entered June 10, 2022

*By: Matt Brotzge*

**Issue:** Did judge err in finding only a temporary aggravation in a transient condition from which the plaintiff then returned to baseline?

**Decision:** The ALJ's decision was based on substantial evidence, and therefore there was no error.

**Facts:** Plaintiff Esters had a work injury in June 2020 from a motor vehicle accident, and his job involved transporting passengers to medical or other appointments. If you've ever wondered what a temporary aggravation of a preexisting condition award looks like, this is it.

Plaintiff was rear-ended on I-65 below Louisville, his vehicle went across the medium, and he was struck by another vehicle. He was taken by emergency transport to the emergency room, but x-rays and other diagnostic studies did not show significant acute trauma. He had already been diagnosed with arthritis in his upper extremity and, in fact, had already received Social Security disability benefits with a diagnosis of muscular dystrophy. Presumably the employer paid for medical treatment to the upper extremity and the emergency room bills/charges, but they disputed permanent impairment.

The employer obtained an Independent Medical Evaluation report from Dr. Thomas Loeb, who found that plaintiff's motor vehicle accident did aggravate his underlying CMC arthritis in his left thumb, but only on a transient basis. He assessed a 0% impairment rating. Plaintiff filed into evidence a 12% impairment rating. Plaintiff appealed this award and argued that the Administrative Law Judge ignored case law and performed in an inappropriate analysis of the law and facts. On appeal, the Board noted the usual case law in Kentucky that states that the ALJ has wide discretion to determine the quality, character, and substance of evidence, and the Judge can draw reasonable inferences and reject testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness.

Plaintiff's counsel further argued that the Administrative Law Judge should have performed an analysis of the claim under Fawbush v. Gwinn, 201 S.W.3d 5 (Ky.2003) as to whether plaintiff, once having been given an award of permanent partial disability based on a Fifth Edition AMA Guides rating, should receive the double multiplier or the triple multiplier on basic benefits. The Board noted that the double multiplier found in KRS 342.730(1)(c)(2) requires a return to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury.

The Board noted that here, there is no proof in the record that plaintiff Esters ever returned to work earning equal or greater wages. See Bryant v. Jessamine Car Care, No. 2018-SC-000269-WC (Ky. February 14, 2019). ("The Fawbush analysis only comes to fruition if the claimant has, in fact, returned to employment.") It noted then as well that the triple multiplier provision in Kentucky statutes requires finding 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. In this case, Judge Weatherby found plaintiff could return to the job where he was injured, and therefore Fawbush analysis was not required.

Then the Board noted that plaintiff had argued he was entitled to future medical benefits on appeal. The Board noted that Kentucky law is that if an injured worker is found to have a permanent partial

disability, he or she is statutorily entitled to future medical benefits under KRS 342.020, citing Max & Irma's v. Lane, 290 S.W.3d 695 (Ky.App. 2009). But the Board also noted that if the judge finds no permanent impairment, and only finds a temporary aggravation of a preexisting condition, no future treatments are mandated under Kentucky law. Therefore, the Board upheld the ALJ's decision completely.

## Key Takeaway

**Finding prior treatment and preexisting active conditions is a requisite in many claims to convince a judge that plaintiff has returned to baseline after treatment from a temporary work injury.**

## GE Appliances, a Haier Company v. Jacobs

Claim number 2019-80741

Kentucky Workers Compensation Board Opinion entered July 8, 2022

*By: Steve Armstrong*

**Issue:** Was the employer entitled to credit for actual wages paid against award of TTD? Did ALJ perform appropriate review of facts before awarding TTD?

**Holding**: Case remanded by Board to Administrative Law Judge for further findings.

**Facts**: Plaintiff alleged a cumulative trauma injury to the right knee manifesting on February 21, 2019 due to repetitive twisting. Her claim was for TTD, PPD, and medical benefits against GE Appliances in Louisville.

Plaintiff had a long history of working different jobs over the years but began working at GE in 2017 assembling dishwashers. She stated that she moved some 1600 racks per day from left to right, thus, constantly moving her knees left, right, and forward.

After she apparently gave notice of her alleged injury, she was given light duty work sitting and putting parts together, but she was paid the same hourly rate. She admitted that this was actually work that had to be done by somebody (the implication being it was not "make work"). During discovery and before the hearing, GE introduced an AWW-1 indicating plaintiff's post-injury gross wages and stipulated to dates it paid TTD.

The Administrative Law Judge found maximum medical improvement on November 5, 2020, the date that treating surgeon Dr. Griffin placed her at MMI (maximum medical improvement Kentucky

is an MMI state for TTD). The judge therefore awarded TTD from February 21, 2019, the apparent date of manifestation, through November 5, 2020 - even though plaintiff had been given light duty work and was working.

The Administrative Law Judge noted that plaintiff had worked light duty/modified duty from February 21, 2019 through July 9, 2019, and then again August 5, 2019 through December 11, 2019. The judge noted that plaintiff Jacobs conceded that Haier was entitled to a credit under KRS 342.730(7), but the judge indicated that he was unable to calculate that credit. The statute states that the credit shall be equal to "the employee's gross income minus applicable taxes." (See KRS 342.730(7). The judge then stated that he had no information regarding Jacob's net pay, only the gross amount. Judge Davis noted that the amounts listed in the wages are clearly gross pay, not net pay, and therefore he cannot award any credit against TTD for wages paid.

This is a warning to employers that employers generally have the burden of proof to show they are entitled to a credit for anything, and specifically for post-injury actual wages. The solution is that employers really need to supply their defense counsel with wage records that not only show gross pay, but also show net pay and taxes that have been taken out. This can be done with most employers by showing the actual paychecks or the pay stubs and the checks together which generally show all taxes taken out.

To give a bit of background, just a few years ago, there were cases where the appellate courts in Kentucky ruled that even though an employer gave light duty work to an employee at the same hours, same rate of pay and accommodated the employee, that the employer might still have to pay TTD on top of that because the employment given was not "customary" employment. Please keep in mind that this is all pre-MMI claims for TTD because Kentucky is an MMI state, and TTD benefits end at the date that the judge finds that the employee reached maximum medical improvement. In July 2018, the Kentucky legislature intervened to change the statute so that the employer could now receive credit for net pay (employee's gross income minus applicable taxes) against TTD awards. Therefore, if the employee returns to work, which is also key, and earns perhaps $400.00 a week net, but the TTD rate is $500.00 a week, then the employer should receive the credit against the TTD award for the $400.00 a week net pay. That was not awarded here because the judge could not calculate the credit against TTD for wages paid.

Note that in this case, the judge only awarded the 1% AMA impairment rating awarded from Dr. Griffin. Therefore, the bulk of the money awarded to the plaintiff came in the form of TTD.

On petition for reconsideration, the Administrative Law Judge noted that he was unaware of any appellate authority prior to the legislative changes on July 14, 2018 on this particular issue and really unaware of any after. Judge Davis noted that the General Assembly of Kentucky had specifically concluded that when periods of TTD and light duty overlap, the defendant is entitled to a credit owed for gross wages minus taxes against a TTD award.

The Board noted that TTD is statutorily defined as in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement ("MMI") from an injury and has not yet reached a level of improvement that would permit a return to employment." The Board noted that in the 2000 case Central Kentucky Steel v Wise, 19 S.W.3d 657, 659 (Ky.2000), the Kentucky Supreme Court explained, "it would not be reasonable to terminate benefits of an employee when he was released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Thus, being released to perform minimal work does not constitute a return to work under the statute.

The Board further noted that as the party requesting the credit, GE had the burden to produce evidence showing entitlement to the credit. See Millersburg Military Institute v Puckett, 260 S.W.3d 339 (Ky.2008).

The Board vacated the judge's award of TTD benefits and remanded the case to the Administrative Law Judge for additional findings. The Board noted that in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky.2016), the Kentucky Supreme Court clarified when an award of TTD benefits is appropriate where the employee returns to modified duty. It further noted in that case that absent extraordinary circumstances, an award of TTD benefits is not appropriate if an injured employee has been released to return to customary employment i.e. work within her physical restrictions for which she has the experienced training and education, and the employee is actually returned to employment. The Board felt that the Administrative Law Judge did not prepare such an analysis or determination as to whether plaintiff Jacobs returned to light duty work constituted "extraordinary circumstances" thus entitling her to TTD benefits. The Board held that if the Administrative Law Judge found on remand that the return to work did not compromise "extraordinary circumstances" under the trained decision, an award of TTD should not be extended. The question is whether the employees return to work within physical restrictions here meet the "extraordinary circumstances" language found in Tipton v Trane. All of this comes before the issue of whether the employer should receive a credit. In other words, the issue of whether the plaintiff should be awarded TTD or not should be decided appropriately, before a credit can even be given for post-tax/net income paid.

## Key Takeaway

**Modified duty job offers need to meet the test found in Trane Commercial Systems v Tipton and in Livinggood v Transfreight, specifically it is the work being offered within physical restrictions for which the employee has experienced training and education. Then the employer needs to put forth post return to work wage information that shows gross income minus applicable taxes in order to affirmatively claim the credit.**

## Toler v. Oldham County Fiscal Court

Unpublished Kentucky Supreme Court Decision
Case number: 2021-SC-0356-WC (dated June 16, 2022)

*By: Troy Peake*

**Issue:** Should a reviewing physician who is not licensed to Kentucky be allowed to provide evidence in a Kentucky worker's compensation claim? Is a non licensed reviewing physician's testimony admissible evidence in Kentucky worker's compensation claim?

**Holding**: Non licensed reviewing (not treating) physician's report was struck from the record and was not allowed to be deemed as admissible evidence in Kentucky worker's compensation decision.

**Facts**: This is a matter of first impression as to whether physician not licensed in Kentucky meets the definition of "physician" under KRS 342.0011 (32).

Officer Toler is the plaintiff and he suffered a work related injury to his left knee in 2018. He underwent the surgery by Dr. Kenney, who performed a meniscectomy, then returned to full duty work. Plaintiff Toler submitted Dr. Kenney's report into evidence and a report from his expert Dr. Craig Roberts. Dr. Roberts assessed a 4% whole person impairment rating for the surgery, plus an additional 2% for pain, totaling a 6% whole person impairment rating under the Fifth Edition AMA Guides. Remember, Kentucky still mandates the use of the Fifth Edition AMA Guides for permanent partial impairment.

The employer filed into evidence a records review from Dr. Christopher Brigham who did not physically examine officer Toler but did perform a records review. It is unknown by this author as to whether having an in-person examination was prohibited during the peak COVID, but that is a possibility.

After the report from Dr. Brigham was filed into evidence, plaintiff then had Dr. Roberts comment on his records review, and Dr. Roberts noted that the Fifth Edition AMA Guides, in his opinion, fault Dr. Brigham for not examining the patient. Section 18.3 of the Fifth Edition AMA Guides, as Dr. Roberts noted, state as follows:

> **"Thus, if an examining physician determines that an individual has a pain related impairment, he or she will have the additional task of deciding whether or not the impairment has already been adequately incorporated into the rating the person has received on the basis of other chapters of the guides."**
>
> *-Fifth Edition AMA Guides*

Then plaintiff Toler filed an objection to the admission of Dr. Brigham's report as evidence noting that Dr. Brigham had never met or interviewed or examined the plaintiff.

Toler then argued that Dr. Brigham is not a "physician" as defined under Kentucky law. Law judge allowed Dr. Brigham's report as an admissible report on that issue at the hearing. The Kentucky Workers' Compensation Board affirmed the administrative law judge's ruling that allowed the report of Dr. Brigham as admissible evidence. The Kentucky Court of Appeals upheld the Board decision and again, Dr. Brigham's report was allowed as evidence.

At the Kentucky Supreme Court level, however, the Court ruled that because Dr. Brigham was not licensed in the state of Kentucky, he is not a "physician" as is defined in KRS 342.0011 (32). Dr. Brigham's report is therefore not admissible evidence and is not a report that the administrative law judge could have or should have relied upon. The Kentucky Supreme Court noted that "physician" means "physicians and surgeons, psychologists, optometrists, dentists, podiatrists, and osteopathic and chiropractic practitioners acting within the scope of their licensed issued by the Commonwealth." (See KRS 342.0011 (32)).

The Kentucky Supreme Court took precautions stating that this holding does not apply to **treating** physicians. They further note that KRS chapter 342, the worker's compensation statutes, in general hold that an employee is free to choose his or her own treating physician, and that may include a treating non-Kentucky licensed physician. The Court stated bluntly that "thus a treating physician not licensed in Kentucky may provide evidence on behalf of the employee."

Employers, insurers and third-party administrators should be aware of coming arguments that their out-of-state based utilization review physicians or physicians in other states who are providing utilization review opinions or record reviews may need to obtain their Kentucky licenses as soon as possible. Otherwise, their opinions may be stricken from the record either on objection from plaintiff's counsel, or as a matter of law by the Administrative Law Judge. The same holds true for independent medical evaluators out of state.

## Key Takeaway

**Now would be a good time to reach out to any medical vendors or utilization reviewers to see if they have their Kentucky license, and if they do not have their license in Kentucky, can they obtain it. If they cannot or will not obtain it, do you really want to use them for evaluations or for utilization reviews?**