



ARMSTRONG & PEAKE PLLC

JUNE 2021 NEWSLETTER

UPDATE ON KENTUCKY DEPARTMENT OF WORKERS' CLAIMS COVID POLICY

Former Commissioner of the Kentucky Department of Workers' Claims Robert Swisher left unexpectedly last month, and the reason is still unknown. On June 14, 2021, the Interim Commissioner of the Kentucky Department of Workers' Claims Hon. Robert Walker issued the attached update on the continued state of emergency. Kentucky Governor Andy Beshear rescinded many of the state's emergency orders regarding COVID on June 11, 2021. This update for workers' compensation claims from Interim Commissioner Walker indicates however that there is a continuing state of emergency. (Click [here](#) to view the email from Interim Commissioner Walker.)

Essentially the emergency orders from the spring of 2020 remain in effect. These include the presumptions as follows:

- "1. An employee removed from work by a physician due to occupational exposure to COVID-19 shall be entitled to temporary total disability payments pursuant to KRS 342.730(1)(a) during the period of removal even if the employer ultimately denies liability for the claim. In Order for the exposure to be "occupational," there must be a causal connection between the conditions under which the work is performed and COVID-19, and which can be seen to have been followed as a natural incident to the work as a result of the exposure occurred by the nature of the employment;
2. The limitations in KRS 342.040(1) [seven day waiting period] are suspended and temporary total disability payments made pursuant to this Order shall be payable from the first day the employee is removed from work;
3. For the purpose of this Order, it shall be presumed that removal of the following workers from work by a physician is due to occupational exposure to COVID-19: employees of a healthcare entity; 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; and child care workers permitted by the Cabinet for Health and Family Services to provide childcare in a limited duration center during the State of Emergency.

4. This Order shall apply to all insurance carriers writing policies providing workers' compensation insurance coverage in the Commonwealth of Kentucky, self-insured groups, and any employer carrying its own risk and authorized to self-insure in the Commonwealth of Kentucky; and

5. Payment by the employer or its payment obligor pursuant to this Order does not waive the employer's right to contest its liability for the claim or other benefits to be provided."

We note that ultimately, the employee still retains the burden of proof on all issues however, and these presumptions can be challenged.

CASE SUMMARIES

Termination for Good Cause is not a Defense to Triple Multiplier for PPD

Tractor Supply Company v. Wells,

Kentucky Workers' Compensation Board, Claim No. 2019-88426 (opinion February 12, 2021)

Issue: Whether termination for good cause, such as termination for falsifying documents, is a defense to the triple multiplier on permanent partial disability benefits.

By: Steve Armstrong

Holding: No. Termination for good cause is not a basis for a judge to deny the employee the triple multiplier on PPD.



Tractor Supply appealed the award of Judge Stephanie Kinney. Tractor Supply argued the application of the statute which triples the basic permanent partial disability benefits for an employee should not apply in situations where the employee is terminated for good cause.

Plaintiff complained of a work injury in August 2018 to the neck, right shoulder, and right arm after lifting boxes. There were conflicting medical opinions from each side regarding the AMA impairment rating under the Fifth Edition AMA Guides to Impairment (which Kentucky still mandates the use of), and regarding restrictions. Plaintiff's job duties required her to lift 75 to 100 pounds, unload trucks and sort pallets.

Judge Kinney sided with the plaintiff and found that plaintiff no longer retained the physical capacity to perform the type of job duties she had at the time of the injury which involved and required lifting in between 75 to 100 pounds, finding that this inability was caused by the work injury.

Regarding permanent partial disability, KRS 342.730(1)(c)1 states that if due to an injury, the employee does not retain the physical capacity to return to the type of work the employee performed at the time of the injury, the benefit for permanent partial disability shall be multiplied by three times the amount of the basic weekly benefit. The Board then noted that in a situation where the claimant does not retain the physical capacity to return to work but does so, earning equal or greater wages, then the ALJ must perform an analysis under Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) to determine if the claimant will be able to perform the job at equal or greater wages into the indefinite future.

Tractor Supply argued both to the judge and on appeal to the Board that it was legislative intent that an employee should not benefit from her own wrongdoing, and that but for her wrongdoing, Plaintiff Wells would have returned to work at equal or greater wages and the 3.2 multiplier would not be applicable. Tractor Supply further argued that the holding of the Supreme Court in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015) should be extended to cases where the triple multiplier is sought to prevent a worker from benefiting from their own wrongdoing. Thus, this was a public policy argument put forth by the employer, not an argument based primarily on the statutes.

The Kentucky Workers' Compensation Board, the three-person first line appellate court, reviewed Kentucky law in depth including Supreme Court decisions and could find no such concerns addressed by the legislature or the Supreme Court regarding the effect of injured worker wrongdoing leading to termination on awards of permanent partial disability. The Board in this case stated, "This leads one to believe if the application of the three multiplier, in an instance such as we are confronted with in this case, were a matter of public concern, the legislature or Supreme Court would have addressed it, but they have not."

Tractor Supply argued that it fired plaintiff Wells due for lying on company documents, which if true, was good cause.

The Board in Tractor Supply v. Wells noted that the Kentucky Supreme Court stated in the Livingood decision that KRS Chapter 342 evinces a legislative intent that an employee should not benefit from his own wrongdoing. The Kentucky Supreme Court noted that in Livingood that KRS 342.165 bars compensation where:

1. an employee knowingly and willfully makes a false representation regarding his physical condition or medical history in writing at the time of entering employment.
2. an injury or death was caused by voluntary intoxication (KRS 342.610).
3. where horseplay caused the injury
4. where unreasonably fails to submit to or follow any competent surgical treatment or medical aid or advice.

There were several other examples that the Board recited in this case from the Kentucky Supreme Court's prior decisions. However, the board noted that in Livingood, the Kentucky Supreme Court had mentioned that employee bad behavior can be a bar to an award of the double multiplier based on the plain language of the statute found in KRS 342.730(1)(c)2.

Here the Board refused to take this ruling a step further on the triple multiplier and stated:

“In Livingood, the Court placed significance on the fact KRS 342.730(1)(c)1 included the language 'if due to an injury'. In the Court's opinion, the use of this language by the Legislature presumes they acted intentionally and purposefully in the inclusion of this language in KRS 342.730(1)(c)1 as compared to the intentional and purposeful exclusion of the same language in KRS 342.730(1)(c)2. This clearly evidences a decision by the Legislature not to include the language in KRS 342.730(1)(c)2. It is clear to this Board that the holding in Livingood concerning the application of the two-multiplier is not inclusive of a situation where the claimant has proven they do not retain the physical capacity to return to work at the job they were performing at the time of the accident as a result of the injury. Therefore, the argument set forth by Tractor Supply fails. This Board is not aware of any statutory authority or case law extending Livingood to KRS 342.730(1)(c)1 and declines to extend the holding based on the facts of this case.”

This is actually consistent with other decisions put forth by Kentucky appellate courts who have noted that bad behavior is no bar to TTD or PPD. For example, in Lexington-Fayette Urban County Government v. Bright, unpublished Kentucky Court of Appeals Decision 2013-CA-000553-WC, rendered: November 8, 2013, the Kentucky Court of Appeals affirmed an ALJ award of TTD and PPD for plaintiff who was on administrative leave for alleged employee misconduct. Likewise, in Board decision Quality Woodworks v. Davidson, Kentucky Workers' Compensation Board Claim No. 2003-74877, Opinion entered: May 25, 2007, the Board noted that a plaintiff's incarceration is not a bar to receiving TTD or PPD.

KEY TAKEAWAY: To sum up, Board found that Kentucky law is blind to employee bad behavior for awards the triple multiplier on permanent partial disability benefits.

PPD / Triple Multiplier

Ruan Transportation v. Grier,

Kentucky Workers' Compensation Board, Claim No. 2018-67710 (opinion February 5, 2021)

By: Matt Brotzge



Issues:

1. Does the evidence support the ALJ award of the triple multiplier on basic permanent partial disability benefits?
2. Was there an excuse for the employer not filing a timely form 111 denial?
3. Did the ALJ error in not applying Cepero Fabricated Metals Corp, 132 S.W. 3rd 839 (KY. 2004) – a case where the physician's opinion on impairment was impeached due to the incorrect medical history being given to the physician by the plaintiff?

Holding: The Board found ample substantial evidence for the ALJ award, found no excuse for the late filing of the form 111, and did not find that plaintiff had misled his physicians or the Court.

The most common (and successful) defense in a Kentucky Workers' Compensation claim is "causation". In Ruan Transportation v. David Grier, the Kentucky Workers' Compensation Board outlines an unsuccessful causation defense along with defining what substantial evidence is. This case provides guidance on the facts necessary for the application of the triple-multiplier when an ALJ awards permanent partial disability benefits. The triple-multiplier, by statute, applies when a claimant cannot return to his pre-injury job due to the effects of a work injury. KRS 342.730(1)(c)(1).

In Ruan, the plaintiff, David Grier, alleged a right shoulder injury occurring on July 31, 2018, while securing a load on his trailer. Evidence showed Grier was required to push/pull up to 125 pounds, lift up to 55 pounds, climb, crouch, bend, kneel, and reach overhead. On the day of the alleged work injury, Grier was preparing to secure a load with chains and binders. One of his chains was stored in a side box on his truck. Grier testified the lid was stuck, and when he pulled to open the lid, felt a pop and pain in his right shoulder.

Grier was eventually diagnosed with avascular necrosis in both shoulders. The left shoulder developed symptoms subsequent to treatment for the right. Evidence was later submitted showing Grier had a right shoulder condition consistent with avascular necrosis as early as 2013, but Grier did not treat for that condition and continued to work. Following an eventual total shoulder replacement in both shoulders, Grier was assigned lifting restrictions of no lifting more than 30 pounds and no more than two hours of overhead reaching per day.

Plaintiff's counsel filed two impairment ratings into evidence. First, the treating physician, Dr. Krupp, assigned a 17% impairment rating which was submitted. Plaintiff also filed an IME report from Dr. Richard Holt who assigned an 18% impairment rating. Both physicians acknowledged the pre-existing avascular necrosis but still attributed impairment to the work injury. Grier testified he could no longer work at Ruan but began working a less strenuous job at another company, earning \$1,000 per week less than his wages at Ruan.

In defense, counsel submitted evidence Grier treated for a right shoulder injury in 2013, and they submitted an IME report from Dr. Michael Best. Dr. Best noted that x-rays from 2013 demonstrated the signs of avascular necrosis at that time, but did note that the work injury of July 31, 2018, likely aggravated that pre-existing condition. Dr. Best opined Grier's avascular necrosis was likely caused by his use of corticoid steroids, citing the conditions presence in both shoulders as evidence. Dr. Best forcefully opined that the avascular necrosis was not work related.

ALJ Stephanie Kinney awarded the claim to the plaintiff. She first noted the defendant did not timely file a Form 111 denial of the claim and failed to present reasonable grounds for excusing the delay. Not filing a timely Form 111 denial can be fatal to defenses of a claim. However, the ALJ did then decided the claim on the merits. Judge Kinney awarded the 17% impairment for the right shoulder assigned by Dr. Krupp. Further, the ALJ relied on Dr. Krupp and Dr. Holt in determining Grier could no longer meet the physical requirements of his job.

On appeal, defendant argued substantial evidence and case law do not support the ALJ's determinations. Specifically, the defendant argued "the ALJ erred in assuming that the evidence indicated work-relatedness." In sum, defendant argued there was no work-related simply based on claimant's treatment in 2013 and evidence of a pre-existing condition.

Second, defendant argued Grier was not entitled the triple multiplier for PPD benefits because he continues to work as a truck driver and because he will earn a higher average weekly wage (AWW). The defendant argued Grier would eventually make more money due to progressive raises common in the trucking industry.

In looking at causation and work-related vis-à-vis substantial evidence, the Board first defined the term. "'Substantial evidence' is defined as evidence of such relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971)." The Board noted KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. See Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 735 (Ky. App. 1984). In an appeal, the Board's function is to determine whether the ALJ's findings were so unreasonable under the evidence that they must be reversed as a matter of law. Here, the Board affirmed the ALJ's decision on causation.

The Board cited McNutt Construction/First General Services v. Scott which held, "where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury." McNutt, 40 S.W.3d 854, 859 (Ky. 2001). The Board found that such evidence existed here. Both of plaintiff's physicians noted avascular necrosis to be present in claimant's shoulders, but that the condition was dormant until the work injury. Further, the ALJ noted that information and noted Grier did not receive medical treatment for his shoulder in the five years leading up to the work injury. The ALJ also noted the left shoulder's subsequent symptom development did not diminish the claimant's right shoulder impairment.

With the regard to the triple-multiplier, the Board determined substantial evidence existed to support the ALJ's award. The ALJ noted Grier lacked the physical capacity to return to his job and was thus entitled to the triple-multiplier. The ALJ based her decision on the opinions of Drs. Krupp and Holt. Specifically, the ALJ relied on the physical restrictions imposed by Dr. Krupp.

The defendant's assertion that the triple-multiplier should not apply based on claimant's current of future earnings was based on a misunderstanding of the law. The Board noted in Fawbush v. Gwinn, the Kentucky Supreme Court directed when the two-multiplier and the three-multiplier are found to be applicable to a claim, the ALJ "is authorized to determine which provision is more appropriate to the facts." Fawbush, 102 S.W.3d at 12. The Board noted the two-multiplier is inapplicable in this claim

because Grier never returned to work at equal or greater wages subsequent to his work injury.

Ruan argued against the triple multiplier, but the Board noted that KRS 342.730 (1)(c)1 allows the triple multiplier on basic benefits for permanent partial disability where the employee does not retain the physical capacity to return to the type of work performed at the time of the injury. In Ford Motor Co. v. Forman, 142 S.W. 3rd 141, 145 (KY. 2004), the Kentucky Supreme Court held that “when used in the context of an award that is based upon an objectively determined functional impairment, ‘the type of work the employee performed at the time of the injury’ was most likely intended by the legislature to refer to the actual jobs that the individual performed.” Forman at 145. Many trucking jobs require loading and unloading which is often more than 50 pounds. Here, the Administrative Law Judge had substantial evidence from the treating physician, Dr. Krupp, that plaintiff should no longer lift more than 30 pounds.

The Board further noted that the ALJ enjoys authority to give substantial weight to the claimant’s own testimony regarding his physical capacity, and a claimant’s post-injury testimony as also competent evidence regarding whether s/he retains the physical capacity to return to the type of work performed at the time of the injury. Carte v. Loretto Motherhouse Infirmary, 19 S.W. 3rd 122 (KY. App. 2000).

Judge Kinney rejected plaintiff’s argument that plaintiff’s experts were impeached because in a manner similar to that found in Cepero Fabricated Metals Corp., 132 S.W. 3rd 839 (KY. 2004). In Cepero, the plaintiff gave a false medical history to the testifying physician, and therefore the underlying opinions of the physician were dismissed as being not credible. The Board noted that the Cepero case was unusual because it involved not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant prior injury. The ALJ here appears to have found plaintiff’s lack of memory about the prior treatment in 2013 as not prejudicial to him.

Pre-Existing Active Apportionment

Yahagi America Molding Inc. v. Craine,

Kentucky Workers' Compensation Board Decision, Number 2017-88379 (opinion January 15, 2021)

Issue: Whether Administrative Law Judge (ALJ) failed to perform proper analysis regarding pre-existing active lumbar spine condition.

Ruling: Board affirmed ALJ's denial of carve-out/apportionment for pre-existing active condition.

By: Steve Armstrong



Employer Yahagi America Molding Inc., appealed an award from Judge Tonya Clemons for a low back injury resulting in a fusion surgery. Plaintiff alleged that she reached into a box in March 2017 and injured her back lifting items at work. This resulted in severe back pain, and ultimately a two-level lumbar fusion surgery. She initially testified that she did not have a low back injury or symptoms after her prior 2014 motor vehicle accident, but after records were found that showed that she did suffer low back pain after the 2014 motor vehicle accident, she later admitted that she did have back problems in 2014 and actually underwent an MRI after the non-work-related motor vehicle accident. She had treated in July 2016 through December 2016 and reported back pain, but testified that she had worked without restrictions through and until the March 2017 work injury.

Plaintiff underwent a spine fusion surgery in June 2018 and testified that she could no longer perform her lifting activities at her job at Yahagi.

It appears on reading of this decision that the defendant performed a very thorough investigation of plaintiff's prior medical history and filed into evidence multiple notes from 2014 through 2016 evidencing plaintiff's lumbar spine symptoms that she initially did not recall. There appeared to be ample evidence of substantial treatment from 2014 through 2016 of the lumbar spine, but plaintiff also produced countervailing testimony from her experts that showed that her lumbar spondylolisthesis progressed after the March 2017 work injury.

The Board noted that the plaintiff alleged an aggravation of her pre-existing condition that subsequently led to a two-level spine spinal fusion. The defendant argued that plaintiff had returned to baseline from the minor and temporary aggravation of the pre-existing condition within a few weeks after the alleged work injury, and the Board noted that there was conflicting evidence on this issue. The Board noted that under Robertson v. UPS, 64 S.W. 3d 284 (Ky. 2001), a judge could award only temporary TTD and temporary medical benefits if the judge found that there was no permanent change in the human organism that qualified for permanent disability or permanent medical benefits. But in Kentucky, the judge has wide discretion to make such findings.

The Board upheld the judge's award benefits and disagreed with Yahagi that the ALJ incorrectly applied the law found in Finley v DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007) regarding an apportionment / carve out of pre-existing active disability. To be characterized as an **active** pre-existing condition, the underlying condition must be symptomatic **and** ratable under the AMA Guidelines immediately prior to the occurrence of the work injury. (See Finley). The burden of proving the existence of the pre-existing condition falls on the employer. Id., at 265.

The Board stated as follows:

“The test to determine whether an injured worker suffers from a preexisting active condition was set forth in the case of *Finley v. DBM Technologies*, supra. It is a two-part test that places the burden on the employer to submit proof showing two things. First, it must prove that the worker retained an impairment to the body part alleged to have been injured in the work incident. Second, it must prove the pre-existing condition was also symptomatic.”

The Board further noted that plaintiff Crane did have pre-injury symptoms in her low back, but stated that those symptoms and treatment were episodic at best. The Board noted that there was a gap in treatment between October 2014 and treatment records showing reoccurring symptoms in May 2016. Further, as the Kentucky Court of Appeals noted in Finley, the pre-existing symptoms must be immediately before the work injury which is a hard burden for the employer to bear in any claim. This begs the question of what does the Court mean by “immediately”?

The key takeaway here is that in Kentucky, aggravations of preexisting conditions are often found compensable by judges, and the case law puts the burden of proof on the employer to show treatment fairly immediately before the work injury - in the week before or the month before, before the judge will make a finding of a pre-existing active apportionment. The better defense is often to argue that the plaintiff's condition is simply not caused by the work injury if that argument can be put forth. The pre-existing active defense should still be asserted because employers never win a defense that they do not put forward.



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