ARMSTRONG & PEAKE PLLC

# MARCH 2022 NEWSLETTER

## UPDATES IN KENTUCKY'S WORKERS' COMPENSATION

Kentucky Worker's Compensation judges are starting to schedule hearings **in person** now that Covid-19 is waning. While we have not seen a pronouncement on the Kentucky Department of Workers' Claims website on this matter, judges have indicated that they are allowed to schedule in person hearings. At least for the time being, benefit review conferences will continue to be by phone.

Covid-19 expedited hearings are still taking place, and the regulation concerning the statement of emergency for that emergency hearing can be found here. Joint Resolution 1 from the 2021 special legislative session extended some of the emergency executive actions until January 15, 2022, but obviously that date has passed. We are still waiting to see what passes in the 2022 legislative session.

House Bill 69 is a proposal currently before the Kentucky legislature and if passed, would presume that removal of the following workers from work by a physician on or after September 7, 2021 and before January 31, 2023 is due to occupational exposure to Covid-19:

**Employees of a healthcare entity**

**First responders, including law enforcement, emergency medical services, and firefighters**

**Corrections officers**

**Military personnel**

**Activated members of the National Guard**

**Domestic violence shelter workers**

**Child advocacy workers**

**Rape crisis center staff**

**Department for Community Based Services workers**

**Grocery workers**

**Postal service workers**

**Childcare workers permitted by the Cabinet for Health and Family Services to provide child care in a limited duration during the State of Emergency declared in 2020 Executive Order 2020-215 and approved and extended by the General Assembly**

Also introduced as potential legislation in Kentucky is an amendment to KRS 342.0011 to define Covid-19 and to create a new section of KRS Chapter 342 to establish workers' compensation liability where the employer requires a vaccination against Covid-19 as a condition of employment and whether the employee develops an adverse reaction to the vaccine. This would create a rebuttable presumption that the adverse reaction was caused by the vaccine if it was not present prior to this and arises within 14 days of receiving the vaccine to be retrodated to December 14, 2020.

There is also a bill open for discussion to amend the intoxication statute KRS 342.610 to eliminate the presumption of intoxication proximately causing the employee's injury and to allow the Administrative Law Judge to consider whether the employee's intoxication by illegal non-prescribed substances or prescribed substances in excess of prescribed amounts proximately caused the injury. Plaintiffs' groups were upset of this presumption of intoxication and causation in the 2018 statute.

As you may have read before in some of our prior newsletters, it is doubtful that Kentucky currently has a statute that even provides an intoxication defense for alcohol, however. The current statute does not really address alcohol one way or the other. This needs to be fixed.

Further, there is also a proposed amendment to the workers' compensation statues that would remove from exemptions those engaged solely in agriculture and would remove the exemption of those employed as domestic servants in a private home an employer who has less than two employees each regularly employed 40 hours or more a week in the domestic servant employment.

There are several other proposals set forth and discussed at the Kentucky General Assembly website found here. We simply do not know which ones will pass, if any.

# CASE SUMMARIES

## Murray Energy Corporation v. Mark Smith, et al.

Claim numbers 2020-00191, 202000190, 202000189, and 2018-71446

*By: Matt Brotzge*

**Issue:** Whether the Administrative Law Judge (ALJ) can be reversed if they base their findings on incorrect information in the absence of a Petition of Reconsideration.

**Holding:** The Board cannot reverse an ALJ if a petition for reconsideration is not filed, even if the ALJ based his or her opinion on factually incorrect information if there is substantial evidence to support the decision.

**Facts:** Claimant filed a Form 101 alleging an injury to his right knee occurring on June 27, 2018, and cumulative trauma to his left knee, left shoulder, and neck arising on March 2, 2019. The ALJ awarded those benefits.

On appeal, Murray Energy argued the ALJ awarded benefits against the wrong party in violation of a valid stipulation. Murray asserted the stipulation that plaintiff sustained injuries on December 27, 2019, due to cumulative trauma and that date should be the date of manifestation. Murray Energy was not the employer at that time, and therefore believed it should not be liable.

In the Form 101 filed on February 10, 2020, plaintiff alleged an injury on June 27, 2018, while he was working for Murray Energy. Plaintiff slipped and twisted his right knee.

Plaintiff filed a second Form 101 on February 11, 2020, alleging cumulative trauma to his left knee, low back, shoulders, and neck. Plaintiff identified December 27, 2019, as the manifestation date, the same day he was laid off from employment. Plaintiff also filed a hearing loss claim and a black lung claim.

Initially, Murray Energy only defended the right knee injury claim while Muhlenberg County Coal defended everything else. Counsel for Murray Energy withdrew for all clams except the right knee injury claim. Muhlenberg County also filed a “Notice of Correct Employer and Motion to Substitute Employer Name” for the cumulative trauma claims. The ALJ sustained this motion.

Plaintiff worked for Murray Energy until he injured his right knee on June 27, 2018, as a belt examiner in the mines. Thereafter, he returned to work for several week until being put in a

different position until March 2, 2019. Then, he was transferred to Muhlenberg, a subsidiary of Murray Energy. He was in a different location but performed the same job until he was laid off in December 2019.

Plaintiff ultimately had a left knee replacement in March 2020 and a right knee replacement in June 2020. Plaintiff did not treat for his shoulders or neck, and he treated for his low back in 2013 or 2014 with a chiropractor who asserted low back pain was due to work.

Multiple physician reports were filed. Plaintiff filed a report form Dr. Bealle who performed the knee surgeries. Dr. Bealle opined plaintiff had a 3% impairment for the right knee and that he could return to work. Dr. Bealle opined plaintiff had advanced primary osteoarthritis in his left knee.

Plaintiff field a report from Dr. Gilbert who diagnosed bilateral total knee replacements secondary to cumulative trauma; left shoulder degenerative joint disease; pain and weakness; and cervical and lumbar radiculopathy and degenerative joint disease, and he opined these are all related to cumulative trauma.

A report from Dr. Oteham was filed regarding plaintiff's knees. Dr. Oteham opined the bilateral knee issues were causally related to cumulative trauma from working in the mine as well as the right knee injury in the fall. Dr. Oteham opined the years in the mine contributed to no less than 50% of plaintiff's knee issues.

Muhlenberg filed a report from Dr. Thomas O'Brien who opined plaintiff's knee conditions were unrelated to work in the mine or his brief time with Muhlenberg. Rather, the knee issues were due to a progressive natural history of degenerative arthritis.

In his opinion, the ALJ found testimony regarding plaintiff's mine work credible in establishing a causal connection between plaintiff's alleged injuries and cumulative trauma, and he set the manifestation date on March 2, 2019, the date Plaintiff left Murray Energy, despite stipulations that the manifestation date was December 27, 2019.

Murray Energy argued the stipulation was to be followed as no party moved to be relieved from it. However, they did not file a petition for reconsideration.

The issue is that, absent a petition for reconsideration, according to the Board, the Board is limited to a determination of whether substantial evidence in the record supports the ALJ's conclusion. Stated otherwise, where no petition for reconsideration was filed, inadequate, incomplete, or even inaccurate fact-finding on the part of the ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ALJ's ultimate conclusion.

The Board found substantial evidence did exist. However, if Murray Energy filed a Petition for

Reconsideration, they could have potentially enforced the stipulations and spared themselves an award of cumulative trauma.

This case highlights the importance of adjusters and attorneys working well together to review an opinion in a timely fashion. Petitions for Reconsideration have to be filed within 14 days of the opinion of an ALJ (KRS 342.281).

## Key Takeaway

It is important to follow procedure and communicate with your attorney.

## Dixie v. Ford Motor Company

Kentucky Workers' Compensation Board, Claim Numbers 2018-01768, 2017-72355, and 2015-983846
(Opinion entered: June 11, 2021)

*By: Steve Armstrong*

**Issues:**

1. Whether the Judge erred in not finding claimant permanently and totally disabled.
2. Whether the Judge erred by allowing surveillance video as evidence.
3. Whether the judge erred in awarding the triple multiplier for PPD benefits found in KRS 342.730(1)(c)1.
4. Whether the Judge erred in awarding TTD as claimant had returned to doing light duty.

**Holding**: This is an everything but the kitchen sink claim. The Board upheld the judge's determination regarding the triple multiplier, upheld the denial of permanent total disability (PTD) benefits, vacated the judge's decision regarding TTD and remanded for a more detailed analysis. The Board upheld the judge's review of the surveillance video as well.

**Facts:** Plaintiff Dixie alleged multiple work injuries including a specific right shoulder injury of September 9, 2014, specific left shoulder injury of July 14, 2017, a cervical spine claim which was dismissed from a June 14, 2018 alleged specific injury. Plaintiff alleged a safety violation for the right shoulder injury as well of September 9, 2014.

Plaintiff actually did have a right shoulder injury. Employer apparently paid for three right shoulder surgeries by Dr. Mark Smith, two in 2015, and the third in 2016.

At Ford, this man worked more than one job over the course of years. Interestingly, Plaintiff testified he was required to repetitively operate a pneumatic drill of June 2018, and at point, he suffered a neck injury, and then underwent a cervical fusion in April 2019 by Dr. Vemuri. Regarding his alleged safety violation, Plaintiff alleged that Ford had hoists in his section at the time of his 2014 injury, but he could not use them because they were not properly installed nor functional, before he had to manually perform his job duties. It is interesting to note that Dr. Vemuri apparently did state his opinion that Plaintiff did have a cervical spine work injury which resulted in the need for surgery. Judge Harvey did not agree.

The employer also had a private investigator testify and introduced as evidence his license issued by the Kentucky Board of Licensure for investigators with surveillance video. Plaintiff's counsel had apparently moved to strike reports and testimony of the private investigator arguing that he was not a licensed private investigator in Kentucky. Regarding the safety penalty claim, Plaintiff had alleged the general duty violation found in the general duty clause specifically in KRS 338.031(1)(a) but there was no allegation of a specific safety regulation violation. There, the judge noted in his opinion that there is no statute or regulation that required the hoists which were being installed, presumably, for the benefit of the employees to avoid lifting. Waiting on installing safety features alone is not sufficient for the ALJ to find that Defendant Ford acted with any intent that disregarded Plaintiff's safety or any statute or regulation, therefore the safety claim was dismissed.

Regarding the claim for permanent total disability, the judge dismissed as well, and the Board noted that the judge had reviewed the guidance set forth in City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015) in noting that Plaintiff's young age of 48 mitigated against finding of PTD as was the fact he was a high school graduate. The work history also included a history of a sales representative and the Plaintiff had recently attended barber college. The judge also relied on the expert report from Dr. Ralph Crystal, vocational evaluator, who opined that Plaintiff was capable of a wide range of work given his restrictions. Therefore, the judge performed his required analysis for a permanent total disability decision under City of Ashland v. Stumbo, supra.

Regarding the cervical spine claim, Plaintiff apparently pled both a specific injury and a cumulative trauma claim, but the judge did not find him credible and found Dr. Barefoot's causation opinion unpersuasive.

Regarding the safety violation claim, the Board noted that enhanced benefits for the safety violation, a 30% add-on penalty against the employer if proven, do not automatically flow from a showing of a violation of a specific safety regulation followed by compensable injury. Burton v. Foster Wheeler Corp, 72 S.W.3rd 925 (Ky. 2002). Regarding the motion to exclude the private investigator testimony, this case has a good discussion of KRS Chapter 329a which governs private investigators. That is not something we see every day.

Also regarding the review of the many, many physicians opinions who were reviewed in this case by the judge, given that there are three, if not four separate injury claims, the Board noted that the ALJ is not required to afford a treating physician's opinion more weight simply because that doctor is a treating physician rather than an evaluating physician. See Sweeney v. King's Daughters Medical Center, 260 S.W.3rd 829 (Ky. 2008), the ALJ awarded temporary total disability benefits for the right shoulder injury from January 25, 2015 through September of 26, 2017 (note that this is a year-and-a-half of benefits awarded by the judge). Ford argued that the benefits should have ended June 23, 2017, the date that Dr. Smith found MMI, Ford argued that Plaintiff was not entitled to benefits beyond April 8, 2018, in which plaintiff returned to light duty work following his left shoulder injury.

This case, like many others of late, is a progeny of the Kentucky Supreme Court pronouncement in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015) and Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016). Here, the Board did state that the Administrative Law Judge did not provide an adequate analysis concerning entitlement to TTD regarding either shoulder. The Administrative Law Judge awarded TTD the day the plaintiff went off work for surgery September 26, 2017, until he was placed at MMI by Dr. Loeb on May 9, 2018. However plaintiff testified he had returned to light duty work during some of that work time period, and Ford introduced wage records indicating that Plaintiff was paid wages for working after the left shoulder injury. The Board directed no required result on remand and noted that the ALJ may make any determination based on the evidence.

## Key Takeaway

Sometimes judges find the middle ground. The Judge did not award PTD.