ARMSTRONG & PEAKE PLLC

JUNE 2022 NEWSLETTER

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June 14th and July 7th 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

Kentucky has a new Commissioner of the Department for Workers' Claims, specifically Honorable Scott Wilhoit. My understanding is that former Commissioner Walker was not approved by the Kentucky Senate, but that he has agreed to stay on as Deputy Commissioner for a little while longer.

In-person hearings have started. We have already had hearings in Louisville and Frankfort live and in-person, note not with Zoom. Our understanding is that Zoom hearings are optional if **all** parties request Zoom.

Kentucky's utilization review regulation expired due to a sunset provision in the regulation. The Department of Workers' Claims set forth a new emergency utilization review regulation in order that the state would have utilization review regulation, they can be found here in 803 KAR 25:195E.

A public hearing was to be held May 31, 2022, the emergency regulation, and a public hearing is scheduled to be held on June 23, 2022, at 10:00 AM regarding the proposed ordinary regulation. Here is the information for the upcoming public hearing on for regulation 803 KAR 25:195 (which can be found here).

Of several bills put forth in the Kentucky legislature in 2022, only two passed. Here is a link to what passed and what did not pass.

CASE SUMMARIES

Moore v. West Kentucky Correctional Complex, et al.

Claim number 2019-90564, Kentucky Workers Compensation Board Opinion

By: Matt Brotzge

Issue: Whether the Administrative Law Judge (ALJ) erred in finding the termination was not related to his injury; 2) whether the ALJ erred in finding TTD benefits were not due; 3) whether the ALJ erred in failing to enhance PPD benefits via the three-multiplier; 4) and whether the ALJ erred in denying plaintiff's motion for sanctions.

Holding: The ALJ acted within her judicial discretion in determining the impairment rating, denying the application of the three-multiplier, and denying sanctions. However, additional findings were needed on the issue of TTD.

Facts: Plaintiff appealed the decision of the ALJ who awarded a 10% impairment with no multiplier, and the ALJ did not award any Temporary Total Disability benefits.

Plaintiff worked for Defendant as a safety coordinator. The work injury occurred when plaintiff was asked to train cadets as the normal training officers were out sick. He was suffered an injury to his left wrist and forearm. Plaintiff went to the emergency room and was released to work with restrictions of no use of his left hand or forearm.

Plaintiff continued to work for the next six weeks, and he testified he was able to do his job. Plaintiff was terminated on April 23, 2019, for reasons Defendant was deemed inappropriate actions involving inmates, but plaintiff believed he was terminated due to his injury.

The Deputy Warden of Security testified extensively to plaintiff's job duties as a safety coordinator. Some facts were subject to disagreement, but the job did include inspection of all fire extinguishers, classification of inmates on the farm equipment, conducting training for employees on safety issues, and serving as a liaison to outside emergency agencies. Plaintiff testified he check 700 fire extinguishers every week and he had to shake them. He testified some weighed 10lbs, some 20lbs, and others up to 50lbs.

Plaintiff also testified he worked on the firing range and as an armor. Plaintiff testified those duties were mandatory, but the Deputy Warden testified those roles were voluntary. Plaintiff could not return to the firing range or as an armorer after the work injury, thus whether those roles were

voluntary or mandatory became critical. Plaintiff filed this appeal for specific findings on whether he could perform his pre-injury job. The ALJ specifically listed why the two-multiplier did not apply, along with why she found the termination to be unrelated to the work injury.

However, the Board stated plaintiff was, in essence, trying to re-litigate the claim. The ALJ relied upon Dr. Thomas Gabriel regarding the lack of work restrictions and the treating physician, Dr. David Tate. The ALJ relied upon Dr. Jeffrey Fadel for the impairment rating. Further, the ALJ relied upon plaintiff's testimony he could perform his standard job with one hand. The ALJ was persuaded the firing range and armorer roles were voluntary.

The Board then spoke at length about the ALJ's ability to determine the quality and character of the evidence. It is her job to weigh the evidence and decide the claim as she sees fit. The Board may not usurp the ALJ's role as factfinder by superimposing its own appraisals of the weight and credibility of the evidence or by noting reasonable inferences which otherwise could have been drawn from the record.

The Board did not find any flaws in the ALJ's decision which would lead to overturning the claim outright. The Board affirmed the decision to not award the three-multiplier.

On appeal, plaintiff raised the issue of sanctions for the alleged wrongful termination. The Board, however, did not need to review the matter. Plaintiff failed to raise the issue of sanctions in its Petition for Reconsideration. The Board held that, when no petition for reconsideration is filed, the ALJ's award or order is conclusive and binding to all questions of fact. KRS 342.285(1). The Board did opine it would not have disturbed the ALJ's decision on the issue because it was well-explained by her, and the decision on the issue was entirely within her discretion.

The Board offered somewhat the same treatment to plaintiff's appeal ALJ's denial of TTD benefits. But, on this issue, the Board ordered additional findings were necessary, the findings were incomplete. Had the ALJ made those findings, her opinion would have been binding.

TTD is when an employee is unable to return to their customary employment or has not attained maximum medical improvement following the injury. If one of those conditions is not met, then no TTD is payable.

The ALJ failed to make findings of whether plaintiff was entitled to TTD benefits following a surgery which occurred on August 24, 2020. The Board held an ALJ must make sufficient findings to inform the parties of the basis for her decision to allow for meaningful review. The IME physicians assigned an MMI date in October 2020 and in February 2021, respectively. In this regard, the claim was remanded for findings on entitlement to TTD following the August 2020 surgery.

Key Takeaway

There are several key takeaways in this claim. First, the ALJ has considerable discretion as factfinder in a claim. An appeal will fail if a party is simply asking the Board to re-evaluate the facts of the case, unless the ALJ made egregious mistakes in applying the facts. The second takeaway is that, if a party wants to file an appeal to the Board, they must raise all the issues they want to appeal in the Petition for Reconsideration. Otherwise, the ALJ's decision is binding. Third, a defendant must pay TTD for medical procedures which take the plaintiff out of maximum medical improvement or cause a cessation in work. This is true even if the procedure occurs later in time, after the injury.

Mattingly v. NSU Corp.

Claim number 2019-58379

Kentucky Workers Compensation Board Opinion entered May 20, 2022

By: Steve Armstrong

Issue: The administrative law judge erred finding that the employer met the burden of proving merit of defense found in KRS 342.165(2) - that plaintiff misled the employer into hiring him with a false statement of his medical condition during the employment application process.

Holding: The full Workers' Compensation Board affirmed the judge's dismissal of this claim based on the judge's finding that plaintiff Mattingly's willful representations on his application barred his claim for a September 17, 2019 work injury.

Facts: Plaintiff's Form 101 hearing request filed in June 2021 alleged a September 17, 2019 low back injury the employer. Plaintiff's job included running a spot welder and grinding using a hand grinder. But while the lifting for this job was not heavy, there was lifting and was somewhat physical.

In his discovery deposition, plaintiff admitted having prior back treatment several years ago and treating with a few doctors in the early 1990s. Plaintiff claimed that he had returned to normal after some treatment, and had no need for restrictions. He denied having an MRI or a CT scan before being hired. The key to this case is that while being interviewed during the employment process, plaintiff was interviewed by an advanced practical registered nurse in 2018 and plaintiff told that nurse practitioner that he was not experiencing back problems. A full pre-employment physical was obtained as a condition of the pre-employment post-offer process.

Defense counsel compared the statements made by plaintiff to the nurse practitioner in the pre-employment physical examination to the medical history that plaintiff gave to his chiropractor and doctors set forth in those medical records. Apparently, plaintiff told the nurse practitioner in the physical examination one history, and told his treating physicians another.

The employer in this case made the sensible decision to depose the human resources director at the employer. Discussed at length the fact that they relied on the medical history found in the pre-employment physical examination in hiring this man.

The human resources manager testified that she relied on the nurse practitioner's recommendation to hire the plaintiff, which was based on the incomplete medical history that the plaintiff had given to the nurse practitioner. The employer argued that it would not have hired plaintiff had he disclosed his prior back problems and his lower back pain and further argued that his back pain after the alleged date of injury caused by his prior back conditions, not by the alleged work injury.
The statute in question, KRS 342.165(2), provides as follows:

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 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 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.

Plaintiff argued that he was not having any back pain at the time of his application or examination, and therefore, he truthfully denied he had back pain at that time. The case turned on APRN Logston's report, however. Her testimony was that she specifically asked if the plaintiff had ever had back pain, and plaintiff denied ever having had back pain. Fact, plaintiff had back pain approximately 60 days prior to his application for employment based on the medical records obtained by defense counsel. Plaintiff then argued that his statements to the APRN were not to the employer because she was not part of the employer, she was simply an agent in the employer.

The administrative law judge held that Kentucky law did not support that argument because the pre-employment physical examination was considered part of the employment application under Kentucky law citing Gutermuth v. Excel, 43 S.W.3d 270 (KY.2001). The judge noted that in Gutermuth, a claimant underwent a pre-employment physical examination by a third-party physician, and as in the case here, based on the plaintiff's misrepresentation, the ALJ dismissed the claim based on the false representation. The administrative law judge here also found that

based on the HR director's testimony, that the employer relied on plaintiff's misrepresentations in the employment application and hiring the plaintiff. Please note that this type of case requires employer testimony, most likely from an HR director as was found here. It is an affirmative defense, one that the employer has to prove.

Regarding the last element of the false employment application defense, the administrative law judge also found a causal link between the falsely represented condition in the alleged work injury. Here Judge Roarke used an unpublished Kentucky Supreme court case as a template, but not as authority, Daniels v BR&D Enterprises, Inc, NO. 2005-SC-0652-WC, 2006 WL 734407 (KY.2006), where the court pointed out that it is significant that when a false representation in the subsequent injury both involved the same portion of the body. The employer had produced an expert witness from Dr. Russell Travis, a neurosurgeon, who stated that there was a causal connection between the false representation made during the pre-employment physical examination and the alleged low back injury of September 2019. Dr. Travis further stated that the current back problems are simply a continuation of the chronic prior low back problems.

Based on Dr. Travis' opinions, Administrative Law Judge Roark found that a "causal nexus exists between the employment application misrepresentations and the alleged work injury."

Upon appeal, the plaintiff argued that the employer's argument should fail because it did not even call the APRN as a witness and simply relied on the APRN reports.

On appeal, the Board stated that the employer should have been apprised of plaintiff's longstanding low back problems prior to making a determination regarding an offer of employment. The Board stated that KRS 342.165 is designed to ensure that the employer has all relevant information regarding the health of a potential employee prior to making a determination as to whether to offer the individual this employment. Therefore, the Board upheld plaintiff's dismissal of plaintiff's claim.

Key Takeaway

If you have a pre-employment physical examination and you believe that the employee lied about his / her condition, send this to your defense attorney immediately for a complete investigation in order to meet the form 111 filing deadline.