ARMSTRONG & PEAKE PLLC

JULY 2021 NEWSLETTER

TOP 10 THINGS TO KNOW ABOUT THE NEW PROPOSED UTILIZATION REVIEW REGULATIONS IN KENTUCKY *PART I*

The Interim Commissioner at the Kentucky Department of Worker's Claims has proposed a new set of utilization review regulations (click here to see). The typical first step in disputing medical treatment in Kentucky on the basis that the treatment is not reasonable and necessary is obtaining a utilization review (UR) through the employer's/insurer's utilization review vendor. This is absolutely necessary in post-award or post-settlement claims where future medical is left open because regulations will not even allow a form 112 medical dispute to be filed without a utilization review decision if the issue is reasonableness and necessity of treatment.

Kentucky's utilization review regulation, 803 KAR 25:190, was last amended in 2007, and this regulation where the rubber meets the road on utilization review and medical bill audit programs. Key points of the existing regulation include the following:

- That utilization reviewers be appropriately qualified
- That treatment rendered to an injured worker should be medically necessary and appropriate
- That statements from medical services not be disputed without reasonable grounds
- That carriers (employers/insurers) must provide the Commissioner a written plan regarding utilization review and medical bill audit
- That carriers who contract with an approved vendor must submit their plan for approval every four years

The existing regulation includes detail regarding elements of what a utilization review and medical bill audit plan submitted for approvement must include. The claim selection criteria for a utilization review are largely the same as they have been since the 1990s, specifically stating that unless the carrier denies the claim in good as non-compensable, medical services reasonably related to the claim shall be subject to utilization review if:

a. A medical provider requests pre-authorization of medical treatment or procedure;
b. Notification of the surgical procedure or resident placement pursuant to a treatment plan under 803 KAR 25:096 is received;
c. Total medical costs accumulatively exceed $3,000.00;
d. The total lost workdays accumulatively exceed 30 days; or
e. An arbitrator or Administrative Law Judge orders a review

The existing regulation has deadlines that flip back and forth for that you are a UR vendor and the treatment provider. Reconsideration is an option for an aggrieved party, typically the employee or the employee's doctor, and if reconsideration is requested, the appeal is reviewed by a board-eligible or board-certified physician in the appropriate specialty or subspecialty which generally is through the utilization review vendors' contracted physicians. For example, a physiatrist or family practitioner could deny a surgical procedure initially, but the appeal would likely have to be reviewed by a surgeon.

PROPOSED CHANGES:

1. The newly proposed regulation changes from 4.5 pages to no less than 29 pages.

2. There are two phases to this regulation, the first one changing the regulation from the date it is approved – if approved – through June 1, 2022. The second phase would take place on or after June 1, 2022. For the purpose of this review, this review only concerns the first phase through June 1, 2022. Sections 3-9 of this proposed regulation apply to utilization reviews and medical bill audits conducted before June 1, 2022 if passed. That is the focus of this review. In our next newsletter, we will discuss the proposals for utilization reviews and medical bill audits on or after June 1, 2022.

3. The new proposed regulation makes distinctions between business days and calendar days. A business day meaning any day except Saturday, Sunday or any day that is a legal holiday. A calendar day means all days in a month including Saturdays, Sundays and any day which is a legal holiday.

4. In section 6, subsection 12, there is a new requirement that the vendor provide assurance that medical treatment guidelines (see regulation) (see ODG webinar) adopted by the Commissioner previously shall be incorporated into the plan as the standard for utilization review medical decision making (see page 8). The prior discussion of the acute low-back pain practice parameter is omitted.

5. The claim selection criteria stay the same – for now.

6. The initial utilization review decision shall be communicated to the provider and employee within two business days, and this a change from "working days".

7. The initial utilization review decision shall be communicated to the medical provider and employee within **10 calendar days** unless additional information is required. This is a change from the prior regulation.

8. The initial utilization review decision shall be rendered within **two business days** following receipt of any requested information from the treating physician, and this is a change from "working days" (see page 10).

9. Written notice of denial must be provided no more than **10 calendar days** from the initiation of the utilization review process.

10. We will provide an update regarding the proposed changes for after June 1, 2022 in our next newsletter. We can tell you that the big ticket on the new proposal is to do away with the in-house appeal with the subspecialist physician in the UR vendor's plan. The proposal is to send utilization review appeals to an in-house medical director at the Kentucky Department of Worker's Claims appointed by the Secretary of Labor of the State of Kentucky. That medical director would wield enormous power in determining what treatment is reasonable and necessary. Likewise, the proposal is that the department charge a fee of $400.00 for each appeal submitted to the medical director (see page 24). The fee would be paid by the medical payment obligor, which means the employer or insurer. You can imagine that employees and doctors will be appealing UR denials under this plan

More later in our next newsletter!

CASE SUMMARIES

Papineau v. Trans Ash, Inc.,

Unreported Supreme Court of Kentucky Case Number: 2020-SC-02960-WC

By: Matt Brotzge

Issue: Whether or not an ALJ's decision to award permanent partial disability benefits was supported by substantial evidence when the report the ALJ relied upon is factually incorrect for a cumulative trauma claim.

Holding: Yes, the Kentucky Supreme Court overruled the Kentucky Court of Appeals denial of the claim and reinstated the award of the ALJ despite the inaccurate history from the employee's expert physician.

Facts: The claimant, Papineau, worked thirty-five years as a heavy equipment operator in the coal mining industry. The claimant's work history is at issue in this case. However, it was undisputed that claimant worked as a dragline operator with Smith Coal from 1981-1995; as a dragline operator with Black Diamond Mines from 1995 to 1998; for himself as a heavy equipment operator from 1998 to 2013; for GMS from June 2013 to June 2014; for Patriot Coal from 2014 to February 2015; from March 2015 to October 2015 for Kiewit; and finally for Trans Ash from October 26, 2015, to November 20, 2015, and again from February 2016 to November 1, 2016.

Claimant filed a Form 101 Application for Claim Resolution on February 3, 2018, alleging cumulative trauma to his lower back and bilateral shoulders with a date of injury for November 1, 2016. Attached with the Form 101 was a physician's report dated August 2, 2017, wherein the physician opined claimant's low-back and bilateral shoulder conditions were caused either wholly or in part by his job activities.

Following the initial filing, claimant submitted another report from Dr. Stephen Autry. It went undisputed that Dr. Autry misstated claimant's work history, writing claimant continued working for Trans Ash until April 2017. Additionally, Dr. Autry misstated claimant's job duties with Trans Ash, and he failed to list a manifestation date for the cumulative trauma. Dr. Autry's report and the initial medical filings were the only pieces of medical evidence introduced by the parties.

In making her decision, the Administrative Law Judge (ALJ) relied extensively on Dr. Autry's report. Specifically, the ALJ ruled that, because cumulative trauma case develop over time, the employer at the last time of hazardous exposure is liable.

The employer argued that Dr. Autry's support was insufficient to support a claim for cumulative trauma, in part, because Dr. Autry was mistaken concerning the amount of time claimant worked at Trans Ash, and when his employment ended. The employer argued that was critical because Dr. Autry did not list a manifestation date. The ALJ found that irrelevant because Dr. Autry opined the employment at Trans Ash caused the cumulative trauma and Trans Ash was the last employer.

Thereafter, the Defendant argued Dr. Autry's report further flawed because he listed claimant's job with Tran Ash as being a dragline operator. Again, the ALJ dismissed this argument finding Dr. Autry was listing the claimant's work history in general and it was consistent with claimant's testimony.

The employer appealed the ALJ's award and the Workers' Compensation Board unanimously upheld the ALJ finding Dr. Autry's error to be harmless.

However, the employer again appealed to the Court of Appeals vacated and remanded the ALJ's opinion and award. The Court of Appeals recited case law that "when a physician's opinion is based on a history that is substantially inaccurate or largely incomplete, that opinion cannot constitute substantial evidence (see Cepero v. Fabricated Metals Corp., 132 S.W.3d 839, 842 (Ky. 2004)).

Claimant appealed to the Kentucky Supreme Court, arguing Dr. Autry's report was substantial evidence and claimant met their burden of proof. The Supreme Court agreed with claimant.

The Supreme Court defined substantial evidence as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." Further, the Supreme Court reinforced the law enshrining the ALJ as the sole fact-finder in the claim with the sole discretion to determine the quality, character, and substance of the evidence…" The Supreme Court would not substitute its judgment for the ALJ's.

Even so, the Supreme Court found Dr. Autry's report met the substantial evidence requirement. Specifically, the Supreme Court used its decision in Hale v. CDR Operations, Inc., 474 S.W.3d 129 (Ky. 2015). In Hale, the Supreme Court held that when an employee alleging a work-related cumulative trauma injury had worked for multiple employers, the employer on the date of manifestation of the injury bears the full burden of paying workers' compensation benefits. As the Kentucky Supreme Court in Hale, "the employee is entitled to the same amount of compensation whether he worked for one employer or many. **An employee who sustains a harmful change in his human organism due to cumulative trauma over many years working for the same employer is entitled to compensation to the full extent of his resultant disability."** See Hale, Id., at 138.

Therefore, the Court found, it did not matter that Dr. Autry did not provide an accurate timeline of claimant's work for Trans Ash because Dr. Autry reported claimant's injuries came into disabling reality during the time he worked for Trans Ash. Thus, Trans Ash bore the burden of paying any workers' compensation benefits awarded to claimant. Also, Dr. Autry's errors did not rise to the level of substantial inaccuracy.

James Ray Foley v. Pegasus Transport/CRST International,

Claim number 2020-00322, Kentucky Workers' Compensation Board
opinion entered: June 11, 2021

By: Steve Armstrong

Issue: Was plaintiff, a trucking company recruit, actually an employee when he sustained a motor vehicle accident on the way to a trucking company's recruiting training center for orientation?

Holding: No. Plaintiff was still merely a recruit and still had to pass a road test along with an onsite DOT drug test before considered hired.

Facts: Plaintiff Foley appealed the denial of to the claim by Administrative Law Judge Thomas Polites, dismissing his claim finding no employment relationship between Foley and the defendant Pegasus Transport. Foley was injured in a motor vehicle accident on March 11, 2018, in a vehicle that Pegasus rented for him to drive from his home in Corbin, Kentucky, to the Pegasus terminal in Louisville. While driving, Foley attempted to answer his cell phone, and rear-ended a bus that had stopped at a railroad track, causing alleged injuries to the neck and back, and traumatic brain injury. In this case, the Board addresses a host of cases regarding when employment actually begins Kentucky and under what circumstances. This case also points out the obvious conflict between employment recruiters for trucking companies and the actual operations managers for trucking companies.

Foley found a job opening with Pegasus on the internet, called a recruiter, and completed an application online on March 7, 2018, just four days before his accident. He completed paperwork online

and underwent a drug screen near his home. He believed he was hired the very day he contacted the recruiter and all that remained was to pick up his truck in Louisville. It is significant that Pegasus rented a vehicle for Foley to drive to Louisville a three-hour drive from his home.

Pegasus countered plaintiff's testimony with safety manager for Pegasus who testified that driver recruits are not employees until they undergo a road test at their site in Louisville, have an onsite drug test approved by the DOT, and until other final in-person steps are completed. Pegasus' safety manager testified that orientation at the Louisville terminal site takes three to four days. The manager further testified that recruits are not deemed employees until they undergo motor vehicle records checks, criminal background checks, and CDL checks. All of this supported Pegasus' argument that Foley was not an employee because he never arrived at the Louisville terminal for the onsite drug screen, orientation or the road test.

When Foley did not arrive, Pegasus simply closed his file and moved on. They were no doubt surprised when he filed the workers' compensation claim against them. It is also significant that Pegasus' safety supervisor testified why Pegasus paid for the rental vehicle - specifically that renting the vehicle for a candidate was to make Pegasus an attractive potential employer.

Pegasus would not have won this decision before Judge Polites had it not produced the safety manager as an employer witness. **Employers who refuse to provide an employer witness to rebut the testimony of a plaintiff do themselves a grave disservice.**

Judge Polites cited applicable provisions of KRS 342.650 the statute that discusses when persons are deemed employees. It is clear that Judge Polites agreed with the defense theory of the case finding that actions that Foley had performed were simply steps in the right direction toward being hired, and that he was not actually hired.

Judge Polites further discussed the prior Kentucky Supreme Court ruling Graham v. TSL, Ltd., 350 S.W.3d 430 (Ky. 2011) where the question was whether the claimant's contract of hire was made in Kentucky, and therefore jurisdiction in Kentucky was proper, or whether plaintiff hired in Missouri where his trucking company was based. In the Graham case, the Kentucky Supreme Court ruled that the employment contract was not formed until the claimant completed various requirements in Missouri based again on employer testimony under oath that completing the requirements was a mandatory prerequisite to any contract of hire being entered into and approved by that employer.

Additionally, Judge Polites cited Rahla v. Medical Center at Bowling Green, 483 S.W.3d 360 (Ky. 2016), where Kentucky Supreme Court held that a claimant injured during a pre-employment physical was not yet an employee because again, the defendant in that case had made a tentative offer of employment that required completion of a successful physical examination and drug screen prior to formal employment. The recruit in Rahla did not complete his pre-employment physical, and therefore, he was not an employee.

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.

In his decision, Judge Polites differentiated those cases from the Kentucky Supreme Court ruling in Hubbard v. Henry, 231 S.W.3d 124 (Ky. 2007) where the employment relationship was found when the plaintiff was actually performing timber cutting work to demonstrate to a prospective logging employer his competence to perform the job.

The Board noted that there are alternative bases for establishing an employment relationship found in KRS 342.650 in Kentucky. This is the point of Hubbard v. Henry – that when a prospective employee shows up and is injured during a trial of employment, performing the specific acts of the job, that can lead to a finding that there is an employment relationship. The Board also distinguished the facts in Foley from those in Gaines-Gentry Thoroughbreds/ Fayette Farms v. Mandujano, 366 S.W.3d 456 (Ky. 2012) where the employee was injured on the way back to Kentucky from New York. That case was decided on different grounds, specifically the going and coming rule.

Lastly, the Judge and the board addressed Plaintiff Foley's claim that promissory estoppel applied and that Foley was an employee because a recruiter told him that he was an employee. The Board discussed at length the elements required for promissory estoppel in the workers' compensation context finding that there was no promissory estoppel based on Plaintiff Foley's subjective belief that he was hired based on statements made to him by recruiters.

Key Takeaways: Employers should have clear criteria in writing as to exactly when a recruit becomes an employee, and should communicate that in writing to the recruit. Employers should have witnesses ready to be able to testify to defend their company and rebut accusations made by recruits. One wonders whether the phone calls between recruits and the recruiters are recorded and if so, what statements are being made by the recruiters regarding when a recruit becomes an employee. It would be helpful to potential employers like Pegasus if they sent a document to the recruit stating exactly when they become an employee, and telling them that they are not an employee until all of their recruiting elements are met, i.e. they pass the road test, pass the drug screen, attend training classes onsite and that only when they show up to the terminal to actually drive a truck do they become an employee. This decision is not final, and this writer would expect it to be appealed to the Kentucky Court of Appeals.

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