ARMSTRONG & PEAKE PLLC

OCTOBER 2021 NEWSLETTER

NEW DEVELOPMENTS IN KENTUCKY WORKERS' COMPENSATION

UPDATE ON COVID-19 PROPOSED EMERGENCY REGULATION:

The Kentucky Department of Workers' Claims has issued a proposed emergency regulation to have expedited hearings for certain essential employees who contracted COVID-19 due to occupational exposure, specifically those essential workers listed in Governor Beshear's Executive Order 2020-227 (April 9, 2020). The emergency regulation states that this is necessary pursuant to Joint Resolution 1 from the 2021 special legislative session found here - in order to provide for emergency expedited hearings due to occupational exposure to COVID-19 for particular essential workers. You can find a copy of this proposed regulation, 803 KAR 25:305E with the signature of Governor Beshear and Interim Commissioner Robert, Walker, both dated September 24th, 2021 here. This is a separate track for the specific essential workers who allege contraction of COVID-19 due to occupational exposure, particularly for temporary total disability benefits. In order to be eligible for the emergency hearing, the plaintiff must certify that she/ he works in one of the following occupations:

Employees of a healthcare entity
Law enforcement personnel
Emergency medical services personnel
Fire department personnel
Corrections officer
Military personnel
Activated National Guard personnel
Domestic violence shelter worker
Child advocacy; rape crisis center staff
Department of community-based services worker
Grocery worker
Postal service worker
Childcare workers permitted by the cabinet for health and family services to provide childcare in a limited duration center during the state of emergency

An eligible plaintiff can file a motion to expedite hearing with a new Form 101-COV, which is a hearing request. The regulation requires that the matter will be set for hearing within 10 calendar days following the date of the assignment to the administrative law judge, but it does not state how long parties have to submit evidence. It is unknown how much time the parties with have to submit evidence before a hearing.

A public hearing on this emergency administrative regulation will be held November 23, 2021 at 10 AM by video conference, and the site for that, if you want to attend, can be found on the Kentucky Department of Workers' Claims website here.

JUDGE APPOINTMENTS:

Governor Andy Beshear has reappointed Judge Roland Case, Judge Greg Harvey, Judge Stephanie Kenny, and Judge John Coleman. Governor Beshear is scheduled to appoint two additional judges in coming weeks. Judges have to be confirmed by the Kentucky Senate, however, and the Senate majority is of a different party than our Governor.

VACANCY FOR BOARD POSITION - THE KENTUCKY DEPARTMENT OF WORKERS' CLAIMS COMPENSATION:

The Kentucky Department of Workers' Claims also issued a notice of vacancy for Workers' Compensation Board Member as well for a term expiring January 4, 2026. Applications must have been submitted before October 22, 2021, and the minimum requirement for a Workers' Compensation Board Member position includes that the applicant must be a licensed attorney for a minimum of eight years and must have the same qualifications required of an Appeals Court Judge except for residency in a district.

Be sure to check out the new 2022 weekly benefits schedule here.

CASE SUMMARIES

Wonderfoil Inc. v. Russell

Case Number: 2020-SC-301-WC, Supreme Court of Kentucky,
(unpublished decision September 30, 2021)

By: Matt Brotzge

Issue: Whether the 60-day rule for plaintiff to submit unpaid medical bills applies pre-litigation or during litigation, or only after an interlocutory decision or final award has been entered.

Holding: The 60-day rule is only enforceable under this decision post award / post settlement. The Kentucky Supreme Court refused to enforce the 60-day requirement for Plaintiffs to submit medical bills into evidence as found in 803 KAR 25:096, §11 in pre-litigation claims or during litigation.

Facts: Plaintiff sustained a work-related injury with the Defendant on November 10, 2014. This case was decided at hearing by Judge Grant Roark, who awarded permanent partial disability benefits to plaintiff Russell, but found that certain medical expenses were submitted untimely and were therefore not compensable pursuant to 803 KAR 25:096, §11 (2). That administrative regulation (not a statute) states in pertinent part that "expenses occurred by an employee for access to compensable medical treatment for a work injury ... shall be submitted to the employer or its medical payment obligor within 60 days of incurring the expense." (See 803 KAR 25:096, §11(2)). Judge Roark found that despite having ample time to obtain these unpaid medical bills and file them into evidence and/ or submit them to the employer or its insurer, the plaintiff simply did not do that. Therefore, in his ruling from April 29, 2019, Judge Roark found these unpaid medical expenses were not compensable as not being timely submitted for payment.

The Defendant had initially denied the claim on the basis of causation and work-relatedness, occurrence of “injury” as defined by the KRS 342.0011(1), liability for contested or disputed medical benefits, [and] potential medical dispute issues. Defendant later stipulated Plaintiff sustained an injury and that no medical benefits were paid. Those stipulations were filed four months after the initiation of litigation.

The Benefit Review Conference was held, and unpaid medical treatment was listed as a contested issue, but the parties stipulated to the occurrence of a work-related injury, but the claim was not ready for adjudication. A year later, in March 2018, Plaintiff filed a status report indicating he was gathering his medical bills for submission. Three months after that, Plaintiff submitted unpaid medical bills containing dates of services in 2014 and 2015.

Defendant / Employer Wonderfoil also argued that KRS 342.020 (4) requires medical bills to be submitted within 45 days of treatment, although that statute is aimed at medical providers.

Here, Judge Roark (ALJ) agreed with the Defendant and found the bills were not compensable. The ALJ pointed out the Plaintiff had 60 days to submit the bills from the date of treatment since he was not the provider.

Plaintiff filed a petition for reconsideration stating he was relieved of that duty since the claim was not accepted as compensable and that causation was in dispute. The ALJ denied the petition and the claim was appealed to the Workers’ Compensation Board. There, Plaintiff argued the 60-day rule only applies following an interlocutory award or final award. The Board agreed and ruled the 60-day rule contained in 803 KAR 25:096, §11 is not applicable until an award has been entered finding the claim is compensable. Defendant filed an appeal to the Court of Appeals, and the Court of Appeals affirmed the Workers’ Compensation Board. Defendant then appealed to the Supreme Court.

In their analysis, the Supreme Court found 803 KAR 25:096, § 11 to be patently unclear as to when the rule applies. Thus, they evaluated the intent of the Commissioner of the Department of Workers’ Claims in promulgating the regulation. In their review, the Court found it clear that the regulatory scheme anticipates, expects, and in fact requires medical expenses will be submitted while the claim is being litigated.

In this case, the Kentucky Supreme Court noted that in R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915 (Ky. 1993), the Kentucky Supreme Court held the 30-day rule found in KRS 342.020 requiring employers and insurers to pay medical expenses is not enforceable until a judge decides the case with an opinion and award, or the case is settled. Implicit here is that the Kentucky Supreme Court is saying what is good for the goose is good for the gander. The Kentucky Supreme Court even states that their interpretation of the 60- day rule found in 803 KAR 25:096, § 11 is a "natural and logical extension of Haddix ..."

The Kentucky Supreme Court further noted that there is already precedent on post-award /post-settlement claims to enforce the 60-day rule in post-award post-settlement decisions found in Garno v. Solectron USA, 329 S.W.3d 301. In the Garno case, the judge concluded that since the medical bills were submitted well after the 60 days in a post-award decision, and since the plaintiff offered no reasonable excuse for failure to submit them timely, the Kentucky Supreme Court upheld the judge's decision to deny compensation for such late medical bills.

In Wonderfoil here, the Kentucky Supreme Court still noted that a plaintiff is still required to submit medical expenses they wish to have paid pursuant to 803 KAR 25:010, §§ 7 and 13. It further noted that medical expenses must be included in a plaintiff's notice of disclosure that must be filed within 45 days after the scheduling order. (See 803 KAR 25:010, § 7(2)(e)7. Then it further noted that plaintiffs are required to bring expenses of unpaid medical bills and expenses to the benefit review conference pursuant to 803 KAR 25:010, § 13(9)(a). There are, in theory, additional grounds upon which a Judge could deny payment of medical bills.

Accordingly, the 60-day rule for employees to submit medical expense found in 803 KAR 25:096, §11 only applies post-award under this decision.

Key Takeaway

The Defendant Employer needs to be able to obtain a copy of all unpaid medical bills that plaintiff will be submitting at hearing long before the hearing, and must request those early. Then at the BRC and hearing, the Employer needs to raise specific grounds for objection to plaintiff's requests for medical payment in order to establish the record.

Marshall v. Beckum and Uninsured Employers Fund,

Claim number 2019-01169, Kentucky Workers' Compensation Board (rendered July30, 2012)

Issue: Was Plaintiff Beckum an independent contractor? Or was he a statutory employee entitled to benefits?

Holding: The Board upheld the ALJ decision finding the plaintiff was an "employee" as defined by law and awarding benefits.

By: Steve Armstrong

Facts: A Lexington company Marshall Investors LLP hired one James Beckum to perform real estate rental renovation work, and Marshall believed and argued that Beckum was as an independent contractor in 2019. As Marshall did not have workers' compensation insurance, Marshall argued that there was no employment relationship with Beckum, but lost. Beckum suffered a work-related right hand injury February 29, 2019 operating a saw cutting his right hand and fingers. ALJ Polites found an employment relationship, and awarded benefits after the Uninsured Employers' Fund was joined as a party.

Marshall's business was renovating and renting homes in Lexington. The Kentucky Workers' Compensation Board listed a litany of evidence in this matter, but one key factor was that Mr. Marshall (owner of Marshall Investors LLP) admitted that there was never a conversation about whether Mr. Beckum was an independent contractor or whether Beckum was working as an employee. There was no written contract and no written set of documents outlining or defining the relationship.

Further, Mr. Marshall did not file a timely Form 111 notice of claim denial. This is almost invariably fatal to special defenses such as the employment relationship as there are good facts against finding an employment relationship. In Gray v. Trimmaster, 173 S.W.3d 236 (Ky. 2005), an employer failed to file a form 111 denying the claim, and the Court ruled that all allegations in the plaintiff's form 101 application for were admitted, leaving only extent and duration of occupational disability as issues. All other defenses were waived as a matter of law. This is equivalent of a default judgment in a civil suit, and in both this case and in Trimmaster, the employer should have obtained counsel sooner.

At the benefit review conference, the Uninsured Employers Fund was joined as a party defendant, and this is a fund that is administrated by a branch of the Kentucky Attorney General's Office regarding employers who do not have workers compensation insurance. This is known as the "UEF," and it can pay some or all of the claim to or on behalf of the plaintiff/employee, but it requires repayment by the defendant employer.

The Administrative Law Judge noted that KRS 342.650(2) contains exemptions to coverage under the Kentucky Workers' Compensation Act, and that one such exemption is that there is no employment relationship for individuals hired for less than 20 days of work performing maintenance, repair, remodeling or similar work on the **private home** of the employer. Obviously, this exemption would not apply in a situation where the injured individual was working on a business property as was alleged here.

Judge Polites noted in a prior claim Crush v. Kaelin, 419 S.W.2d 142, (KY. 1967), an individual who was building his own vacation home enlisted the assistance of a carpenter, but the Court there noted that the homeowner was rather a consumer working on his own personal home, rather than a producer/ business.

Oddly, in this case the Board noted that there was little argument made by Marshall that Beckum was an independent contractor. We can only guess why this defense was not asserted by Marshall pursuant to the test found in Ratliff v. Redmon, 396 S.W. 2nd 320 (KY. 1965). In that case, the Court issued the following test, pursuant to Larson's Workmen's Compensation Law for employment relationships or listed the multiple factors as listed below:

> **"In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:**
> **(a) the extent of control which, by the agreement, the master may exercise over the details of the work;**
> **(b) whether or not the one employed is engaged in a distinct occupation or business;**
> **(c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;**
> **(d) the skill required in the particular occupation;**
> **(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;**
> **(f) the length of time for which the person is employed;**
> **(g) the method of payment, whether by the time or by the job;**
> **(h) whether or not the work is a part of the regular business of the employer; and**
> **(i) whether or not the parties believe they are creating the relationship of master and servant." (Ratliff v. Redmon, 396 S.W. 2nd at 324-325).**

In later years, the Ratliff v. Redmon test regarding whether the injured individual is an employee or versus an independent contractor was modified in Uninsured Employers' Fund v. Garland, 805 S.W.2d 116 (Ky. 1991). That Court focused on the following main factors for determining whether an injured person is an employee versus an independent contractor.

> **"The proper legal analysis consists of several tests from Ratliff and requires consideration of at least four predominant factors:**
> **(1) the nature of the work as related to the business generally carried on by the alleged employer;**
> **(2) the extent of control exercised by the alleged employer;**
> **(3) the professional skill of the alleged employee; and**
> **(4) the true intent of the parties." Uninsured Employers' Fund v. Garland, at 118-119.**

It is also important to note that from the canceled checks introduced into evidence, it appeared that Beckum was being paid via personal check and not by a check drawn on by Marshall Investors LLP. This would seem to be a foolish error on Marshall's part.

The Board noted that KRS 342.640 defines what constitute employees subject to the provisions of the act, and states as follows, in pertinent part:

(1) Every person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer;

And,

(4) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury." KY Rev. Stat. 342.640 Coverage of employees (Kentucky Revised Statutes (2021 Edition))

KRS 342.650 places an affirmative burden on the person claiming the exception to establish that the individual employee is exempt from workers' compensation coverage. There are at least 12 statutory exemptions listed in KRS 342.650, but only one possible exemption in this case found in subsection 2 below:

(2) Any person employed, for not exceeding twenty (20) consecutive work days, to do maintenance, repair, remodeling, or similar work in or about the private home of the employer, or if the employer has no other employees subject to this chapter, in or about the premises where that employer carries on his or her trade, business, or profession; (KRS 342.650(2)) (emphasis added).

Had this claim been tried on the issue, whether the plaintiff was an independent contractor or not, we can only speculate as to how the result may have differed.

The classic independent contractors are plumbers and electricians, people who have licenses – and indeed have to have licenses to do their job, who bring their own equipment to a job site, and who have more knowledge and expertise regarding how to do the task than those hiring them.

Key Takeaway

It might have helped here had Marshall prepared a written contract and had it signed by Beckum stating that Beckum knew he was an independent contractor, that Beckum was bringing his own tools, disclaiming any employment relationship, and setting forth payment by the job rather than payment by the hour. Marshall should have paid Beckum by the job and not by the hour. It also would have been helpful had Marshall issued a 1099 to Beckum, and had Marshall paid Beckum through company checks instead of personal checks at all times.