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DEFENSE DEBRIEF:

INSIGHTS ON WORKERS' COMPENSATION

Official Newsletter of Armstrong & Peake PLLC

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THIS ISSUE:

This Month in Workers' Compensation

As we enter the summer season, we are excited to share important updates regarding Kentucky workers' compensation.

In this issue, we'll be summarizing two recent cases from the Kentucky Workers' Compensation Board, General Motors v. Smith and Coit v. McMichael. General Motors v. Smith discusses the issue of credit for wages paid during periods where Plaintiff is eligible for TTD, and Coit addresses issues with the state of limitations vs. the Direct and Natural Consequences rule as it relates to adding new body parts to old claims.

There is also a new Administrative Law Judge practicing in Kentucky. Judge Laura Beasley was sworn in on April 29, 2024. Click here to learn more about her.

General Motors v. Smith

Kentucky Workers' Compensation Board Decision
Claim Number: 2022-01035 (entered February 23, 2024).

Issue:

How can an employer take credit for wages paid during plaintiff Smith's periods where he earned money but was actually eligible for TTD benefits?

LAW: **KRS 342.730(7) allows an offset for wages paid during a TTD period, but it requires a calculation of the employee's gross income minus applicable taxes, which is no easy feat.**

> **"KRS 342.730 (7) Income benefits otherwise payable pursuant to this chapter for temporary total disability during the period the employee has returned to a light-duty or other alternative job position shall be offset by an amount equal to the employee's gross income minus applicable taxes during the period of light-duty work or work in an alternative job position."**

RULING: **The Administrative Law Judge found that the employer did not produce best evidence required for the offset/credit. The details and type of taxes taken out are relevant, and the Board upheld the ALJ's denial of the claim for credit.**

Kentucky is a maximum medical improvement state for TTD. In other words, unless the employer can provide light duty/modified duty before the plaintiff reaches maximum medical improvement, TTD is generally owed. The question is whether the employer can provide some type of customary employment. We generally suspend TTD when plaintiff reaches MMI. In cases where the employee returns to work at modified duty but would have been eligible for TTD, this statutory provision found in KRS 342.730(7) gives the employer a chance to obtain a credit for wages paid. But the employer has to prove what it paid in gross wages minus what taxes were withheld. Of course, none of this applies after the employee reaches maximum medical improvement, and once the employee reaches maximum medical improvement, the TTD period ends.

The Judge here found that the employee had reached maximum medical improvement October 13, 2022, but noted that General Motors had paid wages during the period to the employee for returning to work during periods where he was eligible for TTD. The judge found

that the only evidence filed pertained to gross wages and this did not contain any information regarding the tax deductions listed in the statute. Judge Harvey here noted that while the employer had made an excellent effort to calculate the plaintiff's taxes, these were only estimates made by the defense counsel.

The problem with the defendant's argument was that the statute contemplated a credit for actual amounts paid to the employee during the relevant period, minus taxes.

A projection of those amounts based on counsel's calculations is not the same as evidence of actual gross wages minus applicable taxes. Judge Harvey, therefore, decided he had to decline the arguments made by General Motors and refused to give them or to award them a credit. The proposed calculation of the credit did not rise to the level of substantial evidence upon which the judge could rely. Judge Harvey further noted that TTD is payable when the injured worker is not yet at maximum medical improvement and has not been able to return to his regular work citing Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004). The Court of Appeals instructed that until MMI is achieved, an employee is entitled to TTD benefits as long as he remains disabled from his customary work or the work he was performing at the time of the injury.

> "TTD is payable during the period where an injured worker is not yet at MMI and has not been able to return to his regular work. See Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004)."

On appeal, the Board noted that it appreciated the purpose of TTD benefits as being replacing lost wages and that the legislature has allowed a credit for employers where they permit alternative work for an employee before they reach maximum medical improvement. This credit, is to offset TTD, and is set forth KRS 342.730(7). As the Board noted:

> "The Board fully appreciates the fundamental purpose of TTD benefits replacing lost wages, and therefore, when an employer permits alternative work for an employee before they reach MMI, a credit for wages paid to offset TTD benefits is sanctioned by KRS 342.730(7), effective July 14, 2018, which states as follows:

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> "Income benefits otherwise payable pursuant to this chapter for temporary total disability during the period the employee has returned to a light-duty or other alternative job position shall be offset by an amount equal to the employee's gross income minus applicable taxes during the period of light-duty work or work in an alternative job position."
>
> However, the party seeking the credit, in this case General Motors, bears the burden of establishing a proper legal basis for the request. American Standard v. Boyd, 873 S.W.2d 822 (Ky. 1994); Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008)."

The Board then noted that the party seeking the credit (the employer) bears the burden of establishing the proper legal basis for the request.

The Board noted that General Motors filed wages including gross wages where he worked in an alternative position from August 21, 2021 to March 29, 2022. The Board cited the case mentioned by Judge Harvey as found in Whitaker v. Irvine Nursing and Rehabilitation, claim number 2019-86691, rendered June 20, 2022 (ALJ awarded the employer credit for wages paid during TTD, but the Board reversed, noting that the employer there only introduced evidence of post-injury gross wages, not wages minus applicable taxes). Further, the Board noted in that case that there was no testimony elicited concerning the wages, and in this case, there was no testimony regarding the net amounts that plaintiff Smith actually received.

The Board noted that pay stubs may often be the best proof, but they would not limit that type of evidence that an employer may provide to prove the amount of the credit. Here the Board upheld the judge's denial of the credit claimed by General Motors.

KEY TAKEAWAY: Make sure that you have the best evidence possible for calculating the plaintiff's gross wages minus taxes - the actual pay stubs which show taxes being taken out and then the net pay after taxes being taken out. Give the actual paystubs to your defense counsel, because a spreadsheet of payments just will not do!

Coit v. McMichael

Kentucky Worker's Compensation Board
Claim Number: 2016-95170 (rendered May 31, 2024)

Issue:

Can a claimant add a new body part, here the opposite shoulder, years later that was never mentioned in the Form 101 Hearing Request upon reopening under the Direct and Natural Consequences Rule? Or is it barred by the statute of limitations for reopenings (found in KRS 342.125)?

FACTS: Plaintiff was injured to the right shoulder when he fell down some steps in October of 2015, and specifically denied that his left shoulder was bothering him at the time of his settlement when he settled the claim in 2018.

RULING: **The claim for the opposite shoulder, here the left shoulder, was not barred when the claim was reopened in 2023, even though the injury occurred in 2015 and the settlement took place in 2018 with no mention of the left shoulder. The Direct and Natural Consequences Rule allows the claim for medical treatment to move forward for this new body part years later. On a side note, the Board found that the treating physician's bills for the left shoulder were not compensable because they were not submitted to the employer within 45 days of the treatment, and the plaintiff was not held responsible for the bill either.**

Apparently, the Administrative Law Judge, Chris Davis, made an award against Coit in December of 2023 for medical treatment bills from Dr. Tillett for the left shoulder, and the left shoulder was not part of the plaintiff's initial claim at all. This left shoulder was not mentioned in the Form 101 Hearing Request, in discovery, or in the settlement agreement, and was specifically denied as having any pain back in 2018 when the claim was settled. Plaintiff did have right shoulder surgery in 2015, with the body parts listed on the settlement agreement as being the right shoulder with additional injuries alleged to the right arm, left forearm, and right knee. Plaintiff retained his rights to future medical benefits.

Then Plaintiff moved to reopen his claim apparently on the newly discovered evidence in February of 2023 claiming a left shoulder injury through overuse to protect his right shoulder, and Dr. Tillett, a Louisville orthopedic surgeon, supported that left shoulder claim through a medical report.

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The employer moved to dismiss based on the four-year statute of limitations found in KRS 342.125(3). On the threshold preliminary review, the Chief ALJ did not agree with the plaintiff's theory that this was newly discovered evidence, and believed that it was simply a change of condition but allowed the motion to reopen. He apparently allowed the plaintiff to amend, however. As the Board noted,

> **"The Chief ALJ noted the four-year limitation precludes any increase in the award, but it does not prevent a determination on compensability of left shoulder treatment."**

This at least gives an argument that if a plaintiff tries to add a new body part injury past the four years, that the employer should probably argue that there can be no increase in the award.

Wisely, the defense argued the following as contested issues:

1. **Work-relatedness of the left shoulder injury/causation**
2. **Application of the 45-day rule found in KRS 342.020, which is now in force under the Farley v. P&P Construction Inc., 677 S.W. 3d 415 (KY. 2023)**
3. **Whether the ALJ retained jurisdiction over the matter on a medical dispute docket because plaintiff was alleging a new body part**

After the Judge made an award of the treatment, the defendant requested that the ALJ justify why a different body part may become compensable through reopening more than four years after the original award.

Although it appears that the employer may have won the issue of compensability of the medical treatment, which probably makes the entire case moot, the big issue in this case is whether an employee can add a new body part more than four years later. The Board stated as follows:

> **"We agree with the ALJ's analysis on this issue. Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997) stands for the proposition that a subsequent injury, whether an aggravation or a new and distinct injury, is compensable if it is a direct and natural consequence of the original injury. *See also* Diop v. Zenith Logistics, 486 S.W.3d 302 (Ky. App. 2015). There are also other cases where the new injury occurred many years after the initial injury and was deemed compensable. Ellis Popcorn Co. v. Stogner, 2022-SC-0016-WC (Ky. Dec. 15, 2022). In that case, a back injury due to a fall in 2017 was related to a head injury occurring in 1990**

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> causing loss of muscle coordination, seizures, and the need to wear a brace on the left leg. Here, it was for the ALJ to determine if the left shoulder condition was a direct and natural consequence of the 2015 injury...
>
> Causation is a matter to be determined by the fact-finder. Coleman v. Emily Enterprises, 58 S.W.3d 459, 462 (Ky. 2001). The ALJ found the left shoulder condition was work-related, thus the four-year time limitation is not applicable to a reopening for medical expenses."

The Board ruled that the judge's ruling that the motion to reopen for a medical dispute is not the subject for a four-year statute of limitations under KRS 342.125 even though the condition at issue did not involve the same body part alleged in the original claim.

From a practical standpoint, the Board pointed to the 45 day rule, stating:

> "In Farley, the Supreme Court was quite clear that KRS 342.020(4) is unambigurous as to its requirements. The Court determined the 45-day requirement for a provider to submit medical bills is not tolled pending an Opinion on compensability."

To quote the Board:

> "No reasonable ground was offered by the medical provider explaining the failure to comply with KRS 342.020(4)."
>
> "We note, per regulation, McMichael is not individually responsible for paying this bill. 803 KAR 25:096 Section 10(3). Dr. Tillett was notified at the beginning of this medical dispute and joined as a party per Order issues March 9, 2023."

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KEY TAKEAWAY: The plaintiff still retains the burden of proof when they try to tack on a new body part years later. Then, look to assert the 45-day rule, as there was no bill from the treating physician submitted within 45 days of treatment because that defense worked for this employer in this case.