ARMSTRONG & PEAKE PLLC
OFFICIAL NEWSLETTER

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DEFENSE DEBRIEF:

INSIGHTS ON WORKERS' COMPENSATION

As we welcome a new season of transition and change, there are several important updates in the Kentucky workers' compensation field this fall. The 2025 income benefits schedule and lump sum discount table have been released, and new fines for untimely filing of EDI filings have been launched. You can find them on our website or at the Kentucky DWC website (see page 2 for the link - Carrier Performance Assessment).

You will also find three case summaries this month, two of which will focus on independent contractor issues and Kentucky's economic realities test, and the last of which will focus on the Form 114 and utilization review.

THIS ISSUE:

WHAT'S NEW IN WORKERS' COMP

NEW FINES FROM THE STATE FOR FILING EDI IN AN UNTIMELY MANNER

Also of note, here is the link to the Kentucky Department of Workers' Claims Carrier Performance Assessment System webpage. This mentions that beginning October 1, 2024, the Kentucky Department of Workers' Claims will go live and begin automatically assessing timeliness of EDI first reports of injury, subsequent reports of injury, among others based on the timeliness filing documentation found on the EDI page. Citations will be issued at $100 per occurrence. This also includes proof of coverage. This is a new development. Up until now, Kentucky has largely been a no harm, no foul type of state.

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WHAT'S NEW IN WORKERS' COMP

Now, for the first time in this author's memory, the state of Kentucky is going to be issuing fines for late EDI filings. The website from the state of Kentucky, which you can find here, mentions that beginning January 1st, 2025, a notification will be generated and delivered to carriers and fines may be issued. As you can see from the Department of Workers' Claims website, 00 acceptances and 04 denials are supposed to be filed in EDI within 10 days of the date of injury.

RELEVANT LINKS

2025 Kentucky Workers' Compensation Maximum and Minimum Rates

2025 Kentucky Lump Sum Discount Table

Carrier Performance Assessment System

When submitting a form UI under investigation, it should use the same timeliness as in the FROI 04, which apparently is 10 days.

This author has always understood that there was a 15 day deadline to investigate the claim consistent with the publication from the State of Kentucky found here.

Remember, if you're going to deny a claim, all denials in Kentucky have to be in writing all the time, both with the 04 code and with a letter to the claimant/treating doctor/claimant's attorney indicating why you're denying the claim - see 803 KAR 25:240.

OUFAFA V. TAXI, LLC D/B/A TAXI

64 S.W.3d 592 (KY SC 2023)

Read the full case here

Issue:
Was Plaintiff an employee or an independent contractor?

Facts: Plaintiff Oufafa was working as a Taxi 7 driver when he was shot in the shoulder, but the Defendant denied the claim on the grounds that he was an independent contractor, not an employee.

Issue: Was Plaintiff an employee or an independent contractor?

Holding: The ALJ found that Plaintiff was not an employee and indeed was an independent contractor. The Board overturned the ALJ award, and the appeal then went up to the Court of Appeals, then the Kentucky Supreme Court. The Supreme Court remanded the case to the Administrative Law Judge for finding of fact based on a new test - the "economic realities" test borrowed from the wage and hour law test in Mouanda v. Jani-King International, 653 S.W.3d 65 (Ky. 2022), which in turn borrowed the economic realities test from a Sixth Circuit Court of Appeals case.

The ALJ determined that Plaintiff was an independent contractor under the old cases of Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965) (outlining a nine-factor test for employee/independent contractor determinations), and Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265, 266 (Ky. 1969) In the ALJ's decision, the Judge found that the Defendant Taxi 7 was a taxi leasing company instead of a taxicab company. The Judge noted that the predominant factors are split, but that the remaining factors under the Ratliff case weighed slightly in favor of finding independent contractor.

The Board reversed the Judge, concluding that the Judge's finding that Taxi 7 was a taxi leasing company was clearly erroneous. Instead, the Board found that Taxi 7 was in fact a taxicab company, which would make them an employer and the Plaintiff an employee.

The Board further noted that the ALJ erred in finding that the parties manifested their intent with signed contracts as apparently Taxi 7 had the Plaintiff sign a contract stating that he knew he was not employee and that he was in fact an independent contractor. The Court of Appeals held that the bottom line is that Plaintiff controlled his own compensation and Taxi 7 did not control his compensation.

Here is the 6-Factor Test under Mouanda and Oufafa:

1. Permanency of the relationship between parties;
2. Degree of skill required for rendering of the services;
3. Worker's investment in equipment or other materials for the task;
4. Worker's opportunity for profit or less depending on his skill;
5. Degree of the alleged employer's right to control the manner in which the work is performed; and
6. Whether the service rendered is an integral part of the alleged employer's business.

Here are the 6-factors the ALJ considered pursuant to Ratliff:

1. Whether the worker is engaged in a distinct occupation or business;
2. Whether the type of work is usually done in the locality under the supervision of an employer or by a specialist, without supervision;
3. Whether the worker of alleged employer supplies the instrumentalities, tools, and place of work;
4. Length of employment;
5. Method of payment, whether by time or job; and
6. Whether the work is a part of the regular business of the alleged employer.

The Kentucky Supreme Court stated that the "central question" to the economic realities test is "the worker's economic dependence upon the business for which he is laboring," an inquiry not specifically captured under the ALJ's in-depth analysis nor under our prior caselaw. It further stated:

> "Although the ALJ in this case did not go so far, relying too heavily on documentation alone cuts against the true inquiry at hand: regardless of the attempts of an employer to tie a worker's hands with paper, what is the nature of their employment relationship? If this were not the basic inquiry, then independent contractor/employee questions would always come down to the words on a page, regardless of how employers operate their businesses. The likelihood of abuse is high under such a test."

The Court implies that a person should not be bound by a contract they signed that says that they are an independent contractor and not an employee. The Court went on to say that,

> "Mouanda acknowledges that the distinction between an employee and independent contractor has broad-ranging consequences: "Designation as an employee or independent contractor determines an individual's entitlement, or lack thereof, to many statutory employment protections." Id. at 73. This Court hereby adopts the economic realities test to safeguard the protections afforded by workers' compensation. Accordingly, our holding in Mouanda is extended to the workers' compensation context."

The Kentucky Supreme Court relied upon the economic realities test put forth in the Six Circuit Court of Appeals in the Fair Labor Standards Act cases. Below is the test from Keller v. Miri Microsystems, LLC, 781 F.3d. 799, 806 (6th Cir. 2015).

1) The permanency of the relationship between the parties;
2) The degree of skill required for the rendering of the services;
3) The worker's investment in equipment or materials for the task;
4) The worker's opportunity for profit or loss, depending upon his skill;
5) The degree of the alleged employer's right to control the manner in which the work is performed; and
6) Whether the service rendered is an integral part of the alleged employer's business. Keller, 781 F.3d at 807.

KEY TAKEAWAY

Just having a person sign a contract saying that they agree that they are an independent contractor will not work in this state. This is part of the new test.

It remains to be seen how the test will play out, but below is a brief summary of the Mack v. Jeanes case, which is a recent example of how the Board viewed a Judge's decision using the economic realities test.

MACK V. JEANES AND UNINSURED EMPLOYERS' FUND

No. 2023-00257 and 2021-00261, KY Worker's Compensation Board
June 21, 2024

Read the full case here

Issue:
Was Plaintiff an employee or an independent contractor?

In 2024, the Board issued Mack v. Jeanes and Uninsured Employers' Fund, Board decision numbers 2023-00257 and 2021-00261 (rendered June 21, 2024) where the Plaintiff appealed the Judge's decision finding Plaintiff Mack an independent contractor. Here the Judge decided the case under the economic realities test, and the Board noted that even short exclusive relationships between the worker and the company may be indicative of an employee-employer relationship under Keller v. Miri Microsystems, LLC, 781 F.3d. 799, 806 (6th Cir. 2015). Exclusivity is also a factor when applying this standard, according to the Board.

In this case, Plaintiff Mack argued that her work as a caregiver for Jeanes, now deceased, created an employer/employee relationship. Mack asserts Defendant's daughter, Ms. Jeanes-Frank, paid her to provide her mother caregiving/nursing services. Defendant Jeanes had part-time caretakers following a cancer diagnosis in 2015, but she required full-time companionship as of 2019. Plaintiff Mack was employed in 2020, and the care of Jeanes was the sole purpose of the working arrangement. Defendant Jeanes had passed away in December 2020, less than four months after Plaintiff Mack started the caretaking position. There was no guarantee for the length of Mack's work. Here is how the case turned with the new test:

1. Regarding the **degree of permanency**, the short duration of Plaintiff's working relationship and her knowledge of the Defendant's critical condition weighed in favor of finding that the Plaintiff was an independent contractor. This was not a job that could have lasted years.
2. Regarding the **degree of skill**, the ALJ and the Board noted that the Plaintiff was a certified nursing assistant and had worked in the caretaking industry previously, but that Plaintiff's actual duties of cleaning, cooking, and medication administration were of an unskilled nature that tilted in favor of the employer-employee relationship.
3. Regarding the **Plaintiff's investment**, there was limited in favor of an employer- employee relationship

4. Regarding the Plaintiff's **opportunity for profit or loss**, the Judge noted that Plaintiff could work additional hours and more shifts which lent to the favor that the Plaintiff was an independent contractor.
5. Regarding the **degree of control**, given the testimony of the case, the Judge found that the Defendant had limited supervisory powers, and the caregivers were in large part unsupervised. The degree of control enjoyed by the Plaintiff and the lack of control suffered by the Defendant weighed heavily in favor of the independent contractor status.
6. Regarding Plaintiff's **role in the business**, the Judge had serious difficulty finding that the Defendant was in the business of providing care for her ailing mother. This may be the decisive factor.

Here, one of the key factors was that the deceased Defendant's daughter, Ms. Jeanes-Frank, a retired woman, earned no compensation or profit from helping her mother obtain caretakers. This simply is not a business. The Board found that the Judge's decision reasonably concluded that the daughter was not in the business of supplying caretaking. She was instead an administrator handling routine tasks.

It is also important to note that the defense put forth a vigorous defense with testimony from the Defendant and what appears to be at least two other nurses and other caretakers. The quality of evidence on behalf of the Defendant is notable here.

KEY TAKEAWAY

The quality of evidence is important. The defense here put forth depositions and hearing testimony explaining their position.

GRAHAM V. COCA-COLA CONSOLIDATED INC.

No. 2018-72879, KY Worker's Compensation Board
June 28, 2024

Read the full case here

Issue:
Does Plaintiff have to use a Form 114 for certain medical expenses, and does Plaintiff have to submit pre-authorization requests to comply with utilization review guidelines?

Facts: Plaintiff Graham appealed a decision of a Judge where she denied certain medical expenses based on the Form 114 regulation and other defenses. Plaintiff submitted treatment bills after the fact without giving the Defendant proper time for pre-authorization/utilization review. Plaintiff had moved to a different state which makes treatment problematic.

Issue: Does Plaintiff have to use Form 114 for certain medical expenses and does Plaintiff have to submit pre-authorization requests to comply with utilization review guidelines?

Holding: It depends. Board upheld Judge's decision denying some of the treatment and awarding other treatment.

Plaintiff had a serious low back injury in July 2018 lifting a transmission and underwent multiple back surgeries. He also underwent a bladder stimulator implant in 2019. He was found permanently and totally disabled by a Judge. He then moved to Texas in 2020.

The Defendant, Coca-Cola, moved to reopen, filing a Form 112 medical dispute contesting reimbursement requests for two home modifications, a powered wheelchair, and a visit to a physician in Texas who would not agree to be governed by the Kentucky medical fee schedule or Workers' Compensation system. There was a supplemental dispute regarding Plaintiff's proposed travel expenses to Cincinnati to see the urologist who performed an initial surgical implant for a stimulator for bladder control in 2019. There was also an issue based in the existing medical dispute by the Plaintiff regarding utilization review denial for adult Depend diapers. The Administrative Law Judge found a Form 114 – which is supposed to be used by the Plaintiff/Employee for reimbursement – for home modifications non-compensable because these expenses were never discussed or submitted to the insurance carrier until after the completion of the work, such that utilization review beforehand could not be performed. Form 114 expense requests are supposed to be submitted every 60 days by plaintiffs per 803 KAR 25:096, section 11.

The Board noted that in a post-award medical fee dispute, the burden of proof and risk of non- persuasion with respect to reasonableness and necessity of medical treatment falls on the employer per National Pizza Company v. Curry, 802 S.W.2d 949 (Ky.App. 1991). The Board noted that no notice was provided to the employer regarding these home modifications that were performed until the filing of the Form 114, and Plaintiff posited that utilization review should have taken place after the fact. The employer argued the opposite - that it had the right to obtain utilization review on these home modifications before they were installed.

Here the Board upheld the Judge's decision on a myriad of medical disputes. The Board stated that it recognized that circumstances will occur when injured workers who are entitled to medical benefits per statute move out of state, or even the country, creating substantial issues regarding treatment. It urged communication between the parties as the only practical solution.

The Board upheld the Judge's denial of home modifications because the Judge found that there was a lack of a specific information contained in the prescription for home modifications and because of the failure to submit it prior to the work being done. This was upheld by the Board given the substantial evidence listed by the Administrative Law Judge.

This case also involved a full reading of 803 KAR 25:096 which discussed that medical treatment is supposed to be under the coordination of a single physician selected by the employee - pursuant to the Form 113. See 803 KAR 25:096 Section 3 which states:

> **Section 3. Employee Selection of Physician.**
>
> 1. Except for emergency care, treatment for a work-related injury or occupational disease shall be rendered under the coordination of a single physician selected by the employee. The employee shall give notice to the medical payment obligor of the identity of the designated physician by tendering the completed Form 113, including a written acceptance by the designated physician, within ten (10) days after treatment is commenced by that physician.
> 2. Within ten (10) days following receipt of a Form 113 designating a treating physician, the medical payment obligor shall tender a card to the employee, which shall be presented to a medical provider each time that a medical service is sought in connection with the work-related injury or occupational disease.

This case also discussed the utilization review deadlines found in the then applicable regulation 803 KAR 25:190. 803 KAR 25:190 has now been replaced by 803 KAR 25:195 and some of the pertinent parts are listed below highlighted in yellow.

2. Utilization review shall commence once the medical payment obligor has notice that a claims selection criteria has been met. The medical payment obligor may waive utilization review pursuant to KRS 342.035(5)(c) within two (2) business days of notice that a claims selection criteria has been met unless additional information is required, in which case, utilization review shall be waived within (2) business days following receipt of requested information.
    a. The following requirements shall apply if preauthorization has been requested and utilization review has not been waived by the medical payment obligor:
        i. The initial utilization review decision shall be communicated to the medical provider and employee within two (2) business days of the initiation of the utilization review process, unless additional information is required. If additional information is required, a single request shall be made within two (2) additional business days;

It should be noted that upon utilization review, the physician denied the request for adult diapers. The Board also noted that "Clearly, when a general home modification, or equipment such as a van is at issue, it is incumbent upon the injured worker to coordinate to some degree with the insurance carrier."

As a reminder, insurers / TPAs have 2 days to obtain a Utilization Review from the time a claim selection criteria is triggered. A request for preauthorization is a claim selection criteria. This is a fast turn around time for UR.

KEY TAKEAWAY

Send a letter to the Plaintiff and her/his attorney early on in litigation reminding them of the 60-day rule to submit Form 114 expense forms. Remember that utilization review is a feature, not a bug. Besides, utilization review is required in many circumstances, and you really need to read that regulation -803 KAR 25:195.

Finally, be aware of the 30-day rule in Kentucky for post-award/post-settlement medical disputes – the employer has the burden of proof, and the employer has to file the medical dispute Form 112 and motion to reopen/motion to join within 30 days of receiving a treatment request. At day 31, the treatment can become compensable post-award post-surgery.