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A&P Official Newsletter

DEFENSE DEBRIEF

INSIGHTS ON WORKERS' COMPENSATION

WHAT'S NEW IN KENTUCKY WORKERS' COMPENSATION

It is a new year, and that means new updates in Kentucky workers' compensation. One of the most important updates to take note of in 2025 is actually a system that went live in October 2024 -- the Carrier Performance Assessment System (CPAS). As of January 1, 2025, CPAS will generate a penalty and notification for all late EDI filings. This penalty must be paid/responded to within 30 days or the Commissioner will issue a citation.

The Kentucky Department of Workers' Compensation will host a public meeting regarding the new CPAS and its penalties on March 19, 2025, at 10:00 AM EDT. The meeting will be available via Zoom, and there will be a public viewing at the Department of Workers' Claims. If you are interested in attending in-person or via Zoom, you can visit the Department of Workers' Claims website for more information.

THIS ISSUE:

JOB CENTER V. GRIFFITH'S

Kentucky Workers' Compensation Board, CLAIM NO. 202298693, OPINION ENTERED: February 7, 2025.

Read the full case here

Issue:
Customary Employment

Issue: What is customary employment? Was the work offered to Plaintiff "customary" employment under The Job Center v Griffiths?

Facts: Plaintiff was not yet at maximum medical improvement, which is the gold standard for suspending TTD. Before MMI, work can be offered within restrictions to avoid TTD, but does the plaintiff have to take it?

Holding: The work offered to this Plaintiff was not "customary" employment, and she did not accept the work. The ALJ awarded TTD until Plaintiff achieved maximum medical improvement.

Plaintiff Griffiths had a work injury while working at The Job Center to her right great toe in December 2021. The Administrative Law Judge awarded TTD from December 21 through August 16, 2022, but the employer argued that TTD should have been suspended / ended April 5, 2022, when it accommodated her work within restrictions. Plaintiff refused to accept the job assignment / accommodated job offer in question, so the employer suspended TTD in April 2022. The Judge disagreed and awarded TTD award for the period in question – April 5, 2022, through August 16, 2022.

We will address the meaning of "customary" employment later. Again, had Plaintiff achieved maximum medical improvement throughout that time, the judge may very well have not awarded TTD, and this is a secondary defense to TTD where the employer accommodates restrictions before MMI.

Plaintiff had a number of different jobs over the years, and this work at The Job Center involved sorting pieces of mail each night at the DHL facility. This was her job at the time of the injury – sorting mail and packages.

Plaintiff had previously worked in the horse training business years before, and the employer filed into evidence physical therapy notes from April 2022 that mentioned that the patient was busy helping load foals and their mothers into trailers and helping them drive to locations for cash. The physical therapy report mentioned that the patient

had been on her feet all day long and was wearing muck boots on both feet. Plaintiff admitted that she had performed these activities but said she was unable to perform her pre-injury activities at work. She admitted she could do occasional odd jobs in the horse industry for which she was only paid $800, though. Plaintiff then returned to full-time work in August 2022. The plaintiff then moved approximately a year later to Maryville, Tennessee to start working as a photographer earning substantially less money per hour than she did at her job at The Job Center. The unrebutted testimony was that Plaintiff had never earned the same or greater wage at any point after leaving her job at The Job Center and that she ultimately took a less physically demanding job. The Job Center purportedly sent multiple written offers to Plaintiff for accommodated work after her injury, but they sent the first letter to the wrong address.

The unrebutted testimony was that Plaintiff was unaware of two other written job offers, and she testified that the first time she received notice of a job offer to return to work was April 22, 2022. Judges often point to unrebutted testimony. According to the plaintiff, she had to change addresses because she had no money to pay rent, and the letters sent to her were not received by her. Likewise, the record reflected that the first job offer to Plaintiff was sent to Harrodsburg, Indiana, not Harrodsburg, Kentucky. So just getting the job offer to the plaintiff was a serious problem. The Board noted,

> "It was addressed to her at 304 North Main St in **Harrodsburg, IN** (not Kentucky) (emphasis added). The envelope indicates multiple address changes, with three different zip codes which are all scratched out, and a final zip code handwritten in blue ink of "40330" which is underlined five times."

The jobs offered to the plaintiff were also problematic. The initial job offer had the rate of pay of $24 an hour, which apparently was the same rate of pay that she earned in her employment with The Job Center, and the job included seated work, answering phones, greeting applicants, and filing paperwork, but at another location.

The first offer, dated March 15, 2022, was apparently to be a receptionist at The Job Center in Northern Kentucky. The second offer was to work at a nonprofit Christian Life Center food pantry in Harrodsburg, Kentucky – many miles away. This was the offer of April 19, 2022, a pay rate of $22 an hour, but at 32.5 paid hours per week. This is at a different location doing different job activities, with fewer hours. Since this is at a different employer, the plaintiff argued, and the judge agreed, that these job offers were not within her experience as she had no prior experience frequently assisting guests.

The judge agreed with the plaintiff's argument that these jobs were simply created jobs constituting "minimal" work or "make work", which is not customary employment. Where does this term "customary employment" come from? The answer comes from a 2000 Kentucky Supreme Court case, Central Kentucky Steel v. Wise, infra. (see below). The Board noted,

> "In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court explained, "It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Thus, a release "to perform minimal work" does not constitute a "return to work" for purposes of KRS 342.0011(11)(a)."

You will not see the term "customary employment" in a statute. It is entirely made by the Kentucky appellate courts. The Board upheld the judge's decision that this minimal work offered by the employer should not be a valid defense to payment of TTD benefits for the period in question. Here the Board noted that facts were distinguishable from Trane Commercial Systems vs. Tipton, 481 S.W.3d 800 (Ky. 2016). In Trane, the claimant had returned to work post-injury. Here, the Board noted,

> "The standard for termination of TTD benefits under Trane, supra requires both a release to return to customary employment and the employee has actually returned to employment. Trane at 807. (Emphasis added). Griffiths clearly did not actually perform work under any of the job offers. The ALJ considered the circumstances of Griffiths' two-day job of assisting with the horses, but determined it was an unsuccessful attempt to return to work, which fell squarely within his purview as fact-finder."

The Board further stated,

> "The Job Center's argument is misplaced, as the facts in the present case are distinguishable from those in Trane, supra which dealt with a claimant who had returned to work post-injury, and the question before the Court was whether an award of TTD benefits was proper during a period for which the injured worker was already earning a wage. In the present case, Griffiths was not earning wages on any regular or sustained basis during the period TTD benefits were awarded."

Two days of work as a horse trainer was not "customary" employment.

The Board also agreed that the work offer at Christian Life Center, which is something akin to a job at Goodwill, was deemed minimal work. It seems the Board really focused on the plaintiff's testimony that she earned $24 an hour at 50+ hours a week at the time of the injury, but the job offered was only $22 per hour at only 35 hours per week. The Board felt this was minimal work, which would not justify termination of TTD, especially given Plaintiff's lack of customer service prior experience. The prior experience and the prior job activities that a plaintiff has done in his or her life is very important, which is why we often request a copy of the plaintiff's resume. We question the plaintiff during his or her deposition on prior job duties to establish a baseline.

The ALJ found Griffiths did not receive the offers in a timely fashion and "regardless, she did not perform any accommodated work. Refusal to accept light duty work in this instance does not preclude an award of TTD for the subsequent period as the accommodated job offer was not for Plaintiff's customary work."

Suggestions for offering "customary" work:

1. Offer job duties performed before, even if only a part of prior jobs;
2. Offer same hours;
3. Offer same pay;
4. No "make work;"
5. Offer duties within restrictions;
6. Offer in writing every time forever;
7. Offer work within employee's experience, training, and education;
8. Never just leave a voicemail;
9. Confirm that the employee actually received the job offer.

KEY TAKEAWAY

If you are going to offer a job pre-MMI, then the job needs to be customary employment. It needs to be the same rate of pay. Preferably it should be a job that the employee has prior experience with, and it should be at least in the same geographical area. Secondly, make sure the written job offer gets in the hands of the employee, preferably by hand delivery, email, certified mail, etc. Don't send it to the wrong city, and don't send it saying you either accept this offer or you're fired because that will not be good evidence for you.

MMJ MASONRY LLC V. GUERRO

Kentucky Workers' Compensation Board CLAIM NO. 201951241, OPINION ENTERED: January 10th, 2025.

Read the full case here

Issue:
Alcohol Intoxication Defense

I**ssue:** Does Kentucky have a defense for employers for intoxication due to alcohol consumption?

Facts: The key fact is that in 2018, the Kentucky legislature changed the statute to discuss intoxication from drugs, but it left out any discussion of alcohol intoxication. It is unknown if they knew what they were doing at that time.

The plaintiff here appears to have been intoxicated when he was injured on December 12th, 2019, when he fell 20 feet from a scaffold onto a pile of bricks and became paralyzed.

Holding: There is no alcohol intoxication defense for employers in Kentucky under the current statute.

Plaintiff filed a Form 101 hearing request in February 2020 alleging paralysis by spinal cord injury when he fell at work on December 19, 2019. This case had multiple defenses, but for purposes of this review, the main focus is on alcohol intoxication. The employer alleged that the plaintiff was voluntarily intoxicated due to alcohol based on a blood test, the results of which revealed a blood alcohol level of 0.206.

It certainly appears that the employer had very good evidence of Plaintiff's intoxication and that the intoxication probably caused the fall. If this case doesn't prove that there is no intoxication defense for alcohol in Kentucky anymore, it is hard to see what case would.

Another issue is that Plaintiff was not wearing a harness or helmet when he fell 16 feet between the scaffolding and the house while on the construction site. The employer put forth the forensic toxicology report / testimony from Dr. Jortani and relied on that along with the University of Kentucky Healthcare toxicology report showing the blood alcohol level. The Administrative Law Judge ruled that there is no alcohol intoxication defense upon which the employer could rely, stating,

> "13. The ALJ is unable to determine by any reading of the statute that alcohol intoxication was intended to be a bar to potential recovery by a Plaintiff in a workers' compensation claim (emphasis added) or the extent to which demonstrated alcohol intoxication may constitute such a bar. The ALJ is therefore compelled to find that the statutory defense of voluntary intoxication is inapplicable in this matter.
>
> 14. The Defendant has alleged that the statute applies because the Plaintiff's alcohol intoxication was illegal per KRS 222.202 which prohibits manifest intoxication to the degree that dangers the drinker or others. The ALJ finds that simply because the legislature criminalized manifest public intoxication, does not render alcohol an illegal substance per KRS 342.610(4).
>
> 15. Accordingly, the ALJ finds that the Plaintiff did not voluntarily introduce an illegal, non-prescribed substance or substances or a prescribed substance or substances in amounts in excess of prescribed amounts into his body prior to the accident. The Plaintiff's claim is therefore not barred by KRS 342.610(4). (Emphasis added)."

The Administrative Law Judge further stated that the plaintiff's intoxication was not outside the course and scope of his employment. In fact, the testimony was that Plaintiff's supervisor picked him up at home and drove him to the job site.

The employer also put forth a safety penalty claim arguing a reduction of 15% pursuant to statute KRS 342.165, but the judge found that the employer had the burden to prove that that Plaintiff intentionally failed to use a safety appliance furnished by the employer or to obey a lawful and reasonable order or administrative regulation of the employer for the safety of employees or the public.

The judge found that the defendant employer did not present a policy prohibiting alcohol intoxication or consumption. The judge noted that while this rule might be self-evident, the voluntary intoxication statute no longer implicates alcohol, and no rule has been cited that Plaintiff intentionally failed to follow.

One lesson here is that if your employee handbook doesn't prohibit alcohol intoxication at work, you now should add that and have a rule against alcohol intoxication at work.

The Board here discussed passage of House Bill 2 in 2018 which removed all discussion of references to KRS 501.010. The prior statute referenced this for voluntary intoxication

regarding substances in the body. The Board noted that the current statute in place since 2018 gives an employer a presumption of intoxication where other than illegal substances or substances that are not prescribed to the employee are found in the bloodstream. There was no presumption for the employer here because there is no discussion of alcohol intoxication in this statute, KRS 342.610. It is also important to note that the Board noted that there was no evidence introduced that Plaintiff was impaired or unsteady when he fell. The Board therefore upheld the judge's award of benefits, overruling any defense of alcohol intoxication. Here the Board stated,

> "In summary, the ALJ was required to consider whether intoxication as defined by Chapter 342 was present at the time of Silva's fall. Since alcohol intoxication is no longer addressed in KRS 342.610, the ALJ correctly determined intoxication was not an available defense to MMJ under the circumstances. Further, there was no question Silva was performing his job tasks at the time of his fall. There was also no allegation Silva deviated from his regular work before and at the time he fell. Nor was there evidence he was impaired or unsteady on the date he fell. Because the definition of intoxication as set forth in the previous version of KRS 342.610(3) and in effect when Roach was decided has been substantially altered, and is now defined by KRS 342.610(4), the ALJ was required to resolve whether the presumption of intoxication is applicable within the context of KRS 342.610(4)."

KEY TAKEAWAY

Someone needs to convince the legislature to change the statute here to include voluntary intoxication by alcohol. Likewise, employers really need to include a prohibition against drinking at work or being drunk at work just to argue the 15% safety penalty reduction. You just can't have an intoxicated employee on a construction site where they can fall from heights, nor can you have an intoxicated employee driving any kind of equipment or vehicles.

CLARK V. THE PET STATION, INC.

Kentucky Workers' Compensation Board CLAIM NO. 202272067, OPINION ENTERED: July 19, 2024.

Read the full case here

Issue:
Double vs Triple Multiplier

Issue: This is a 2X v 3X multiplier case on PPD. Did the Administrative Law Judge misapply the Fawbush case on whether the plaintiff should receive the triple multiplier when the Administrative Law Judge awarded only the double multiplier on PPD benefits instead of the triple multiplier?

Facts: The Administrative Law Judge found that Plaintiff could no longer work caring for dogs or perform the actual work she was doing for the employer. The question then became whether the judge had to award the triple multiplier, given that Plaintiff was now making more money than she did at the time of the injury.

Holding: Kentucky remains that even though a person is making more money at the time of an ALJ award than they did at the time of the injury, the judge has the option to award either the double multiplier or the triple multiplier based on the facts. The Administrative Law Judge's decision was upheld by the Board where the judge only awarded the double multiplier.

Plaintiff worked at The Pet Station when she was attacked by a dog that bit her and knocked her to the floor. She required sutures in multiple parts of her body. She did return to work initially at The Pet Station, but then she began working as a receptionist at University of Louisville Healthcare. It is undisputed that she made more money at the University of Louisville Healthcare. There was conflicting testimony from physicians in the record as to whether Plaintiff had the physical capacity to return to the same type of job she performed at the time of the injury, but the judge found that plaintiff could no longer perform the job duties she had performed at the time of the injury.

This case is a progeny of Fawbush v. Gwinn, Ky., 103 S.W.3d 5 (2003). The key fact here is that the judge determined that Plaintiff could no longer work caring for dogs or perform the actual work she was doing at The Pet Station. The Board stated,

> "The Kentucky Supreme Court in Fawbush, supra, articulated several factors an ALJ must consider when determining whether an injured

> employee is likely to be able to continue earning the same or greater wage for the indefinite future. Those factors include the claimant's lack of physical capacity to return to the type of work that he or she performed at the time of injury, whether the post-injury work is performed out of necessity, whether the post-injury work is performed outside medical restrictions, and if the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Id. at 12. The Court of Appeals in Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387 (Ky. App. 2004) directed the ALJ to "consider a broad range of factors, only one of which is the ability to perform the current job" in determining whether a claimant can continue to earn an equal or greater wage. Id. at 390. It is important to note the post-injury wages are viewed in the context of the job the claimant is performing, whether it is the same as when injured or an entirely new position with a different employer. Fawbush does not contain an exhaustive list of factors an ALJ is to consider in making the determination of whether a worker is likely to continue earning the same or greater wage. Rather, the ALJ's determination is fact-specific and individualized. The Court in Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006) stated, "The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income." Id. at 168."

The Court ruled that because Plaintiff was no longer able to return to her customary work at The Pet Station, Plaintiff was eligible for the triple multiplier, but the judge also found it obvious that Plaintiff had returned to work at an equal or greater wage, making her eligible for the double multiplier, as well, under Fawbush. The Board stated that this required the judge to determine whether Clark was likely able to continue earning the same or greater wage for the indefinite future, citing Fawbush at page 12. The ALJ found that based on Plaintiff's own testimony, she could perform her duties at UofL Health without accommodation, that she had not received any negative feedback, that she expected to receive a raise, and that she was young, all of which led to a reasonable inference that Plaintiff would be able to continue making greater wages indefinitely.

If you'll recall, in the Fawbush case, the reason that the judge granted Plaintiff's triple multiplier claim was that the plaintiff's own testimony was so persuasive that he would not be able to continue doing the job indefinitely. He was taking pain medication in order to be able to perform the job and stated that he was only able to only do the job because he had to make ends meet. Plaintiff in Fawbush was awarded the triple multiplier even though he was making more in gross wages at the time of the hearing than he was when he was injured. Here is the key quote from the Fawbush case:

> "Furthermore, although he was able to earn more money than at the time of his injury, his unrebutted testimony indicated that the post-injury work was done out

> of necessity, was outside his medical restrictions, and was possible only when he took more narcotic pain medication than prescribed. It is apparent, therefore, that he was not likely to be able to maintain the employment indefinitely. Under those circumstances, we are convinced that the decision to apply paragraph (c)1 was reasonable." Fawbush at p. 12.

Likewise, in Fawbush, there was no employer testimony from the defendant that they would be able to keep him on indefinitely. It is an additional, sometimes crucial, piece of evidence that an employer can put forth when they provide work for a plaintiff after an injury to have supervisor testimony to the effect that they would be able to accommodate a plaintiff indefinitely and keep him back at work at the same or greater wage. It is sometimes very important to have an employer show up to testify on the record and make an impression on a judge.

In this Clark v. The Pet Station, Inc. case, the judge's finding that the double multiplier was more appropriate than the triple multiplier was upheld, largely based on the plaintiff's own testimony.

Note that there was no discussion that the plaintiff would ever only receive the basic benefit found in KRS 342.730, and the entire discussion was whether the plaintiff would receive the double multiplier or the triple multiplier.

As the reader may know, most claims are fought over the triple multiplier and whether the plaintiff retains the physical capacity to return to the same job duties he or she performed at the time of the injury. The 3X multiplier can take a $50,000 case to $150,000 case very quickly.

KEY TAKEAWAY

Obtain and produce evidence showing that the plaintiff is making more money now than he or she did at the time of the injury and put forth testimony that the plaintiff will likely be able to earn that money indefinitely in the future.