ARMSTRONG & PEAKE PLLC

MAY 2023 NEWSLETTER

UPDATES IN KENTUCKY'S WORKERS' COMPENSATION

I attended the University of Kentucky Continuing Education seminar recently in Lexington and I wanted to provide you with a summary of some of the discussion points put forth by Commissioner Scott Wilhoit. He mentioned that the Kentucky Department of Workers' Claims is hiring more enforcement personnel to go to employers' work sites to require that employers show proof of workers' compensation coverage. By law, every employer must have workers' compensation insurance, and if they do not, they can be fined. This is a longstanding practice and that is nothing new, but the Commissioner stated that he is actively seeking more enforcement personnel. Commissioner Wilhoit points out that having insurance coverage for workers' compensation claims is required by law, but is also a win-win for employers and insurers. As he noted, if the employer does not have workers' compensation coverage, an employer can face liability for a claim through the Kentucky Uninsured Employers Fund.

Commissioner Wilhoit also stressed that he does not want to have any employer or insurer face unfair claims settlement practices allegations, and so he stressed that they need to play by the rules. In order to play by the rules, people need to know the rules. For a good refresher on unfair claim settlement practices, 803 KAR 25:240 . Commissioner Wilhoit also mentioned that insurers and adjusters should return phone calls. This is paramount. I have heard this spoken by multiple different commissioners over the years.

Commissioner Wilhoit also mentioned that with regard to the University Evaluator System, the Department is trying to incorporate the medical school at the University of Pikeville into that system as well, instead of just having university evaluations being performed at the University of Kentucky in Lexington and at the University of Louisville in Louisville. Kentucky has a third medical school now in Pikeville, Kentucky. University medical evaluations are required in hearing loss claims and in black lung claims, and are occasionally used in other claims as well.

The Commissioner stated that he is aware of at least some movement afoot to legislatively change the Toler decision (TOLER v. OLDHAM COUNTY FISCAL COURT, No. 2021-SC-0356-WC, Supreme Court of Kentucky, June 16, 2022) which requires all evaluating physicians to have a Kentucky license in order for their report to be admissible as evidence.

He said they are also trying to update the Department of Workers' Claims website and update the practice and procedure regulations found in 803 KAR 25:010. Lastly, he pointed out that the department is still dealing with enforcement of professional employer organizations (PEOs), and that all PEOs must have workers' compensation insurance. Any employer who deals with a PEO cannot get around the requirement to have workers compensation insurance by hiring a PEO. One or the other must have workers compensation insurance. Should you have any questions about Kentucky Workers Compensation call law, free to contact me by email or phone.

CASE SUMMARY

Brisbay v. KentuckyOne Health

Kentucky Workers' Compensation Board Decision number 2016-62626
(opinion entered November 2, 2018)

By: Steve Armstrong

Issue: Whether Judge erred in dismissing plaintiff's claim for idiopathic condition.

Holding: There was substantial evidence for judge's dismissal based on the evidence. Plaintiff had prior ankle treatment and symptoms that the defense uncovered, which explained the ankle incident. This was not an "unexplained" incident, and the incident arose due to a personal condition.

Facts: Plaintiff Brisbay injured her left ankle while at work walking down the stairs of the parking garage at KentuckyOne Health when she heard a pop in her left ankle causing her to fall to her knees. She had been working as a registered nurse for the employer for quite some time, and plaintiff was clearly on the company premises as the connected parking garage under Kentucky law is an operating premises (See Pierson v. Lexington Public Library, 987 S.W.2d 316 (Ky.1999) (Kentucky Supreme Court found an adjacent garage to be the employer's premises where the employer had some control over the garage, thus finding liability against the employer).

Plaintiff testified she was unable to recall anything odd or out of the ordinary about the stairs, which essentially removed it as a factor in being a cause of the injury. An ankle MRI showed a complete rupture of one of her tendons. The injury occurred October 28, 2016, but on cross-examination, plaintiff admitted that she had at least one prior trip and fall with treatment on her left lower extremity. She also was diagnosed with rheumatoid arthritis a few years before that as well, a condition that affected her feet according to medical records from the Lexington Clinic. She was taking medication for arthritis as well at the time of the injury. Further, she admitted on cross examination at hearing that in early October, 2016, the outside of her foot was hurting and she had seen a nurse practitioner.

Keep in mind that this is just a few weeks before the alleged work injury. The defense also filed as evidence X-rays from a year prior in November, 2015 of a left foot x-ray showing that she had degenerative changes in her left foot but no acute fracture. The employer also filed in evidence a left ankle x-ray that showed degenerative joint disease without acute abnormalities, and this is just three weeks before her alleged work injury.

The evidence from treating physicians showed treatment for rheumatoid arthritis on seven occasions the year prior to the alleged work injury. Consistent in this treatment included a history of pain in both lower extremities, both feet. One key medical record showed that nine days prior to the work incident, plaintiff complained of left foot pain and swelling with the history that she had an acute visit for the left foot and ankle pain and swelling. The treating nurse practitioner mentioned in that note of October 18, 2016, just less than 10 days before the incident that the patient had left ankle stiffness and swelling.

It seems key to the defense of this case that the defendant employer was able to find this prior treatment and insert it into the record to give the judge a full grasp of plaintiff's prior medical conditions that were relevant to the claim.

The Administrative Law Judge made the following analysis regarding the incident in connection to the issue of causation:

> “An injury arises "out of" the employment, if the employment causes it, i.e., the employment subjects the worker to an increased risk of activity. Clark County Bd. of Educ. v. Jacobs, 278 S.W.3d 140, 143 (Ky. 2009). An injury occurs in the employment's course, if it takes place during the employment, at a place where the employee may reasonably be, and while the employee is working or otherwise serving the employer's interest. Id. Thus, the "arise out of" language refers to the accident's cause, while the "in the course of" language relates to the accident's time, place, and circumstances. Abbott Laboratory v. Smith, 205 S.W.3d 249, 253 (Ky. App. 2006).”

The Judge went on to cite the three risks that the judge must analyze pursuant to *Larson's Workers' Compensation Law* as follows:

> “There are three risk categories ALJs must analyze, when determining whether the claimant's injury arouse from his employment. The renowned Professor Arthur Larson explained these categories are: (1) risks distinctly associated with employment (e.g., machinery breaking, objects falling, explosives exploding, fingers getting caught in machinery, exposure to toxic substances); (2) risks that are idiopathic or personal to the claimant (e.g., a disease, internal weakness, personal behavior, or personal mortal enemy that would have resulted in harm regardless of the employment); and (3) neutral risks (e.g., a stray bullet, a mad dog, a running amuck, lightning). Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, § 4 (2006)."

As the judge in this case noted, the key question is whether the circumstances of employment increase a claimant's risk for injury more than usual. Is the risk that the claimant is exposed to at work more frequent than risks exposed to by the general public?

The Board further stated:

> "The ALJ must analyze these risks and determine which, if any, is applicable. These categories also include circumstances when the employment increases a claimant's injury risk more than usual. Increased risks include situations that expose a claimant to a common risk more frequently than the general public. If two risk categories converge, the Kentucky Supreme Court has stated, "[w]here an employment and personal cause combine to produce harm, the law does not weigh the importance of the two causes but considers whether the employment was a contributing factor." Jefferson County Public Schools v. Stephens, 208 S.W.3d 862, 866 (Ky. 2006)."

Then the Board entered a discussion regarding the second risk of idiopathic causes as follows:

> "The second risk pertains to "idiopathic" causes. An accident's underlying source is idiopathic if an internal weakness, disease, or something personal to the claimant, as opposed to the employment, causes it. Id. Idiopathic causes can include disease, internal weakness, fainting, dizziness, heart attack, and/or seizure. Idiopathic conditions cause harm despite the employment type." (citing Jefferson County Public Schools v. Stephens, 208 S.W.3d 862, 866 (Ky. 2006).

As a side note, the Board noted that, consistent with Ratliff v Epling, 401 S.W. 2nd 43 (KY. 1966), an employer is responsible for work-related injuries that occur on its entire "operating premises" and not just at the injured worker's work site. The Board also noted that the judge here found that the accident's cause was not unexplained.

Kentucky law provides a presumption that "unexplained" falls are given that rebuttable presumption that they are actually work related. If an employer can "explain" a fall with prior medical conditions, it should. If the explanation is that the fall is due to some personal medical condition, the judge needs to know. This is why discovery of prior medical conditions is paramount in claims like this. Obtain a list of all the medical providers in the past 10 to 20 years on the claimant that you can, and obtain all the medical records you can as fast as you can. Further, the Board noted that plaintiff was really not performing any of the usual job tasks when her ankle popped. She was simply walking up some stairs, and she was not moving a patient, treating a patient at the time.

Kentucky's key case on the presumption of compensability for unexplained falls was the 1971 case Workman v. Wesley Manor Methodist Home, 462 S.W. 2nd 898 (KY. 1971). In the Workman case,

the Court divided Kentucky law on different types of falls. An unexplained fall case is one where it really cannot be said why the injured employee fell. If the fall is unexplained, then there is a presumption that the fall occurring at work is work related and arising out of employment.

> "Stated another way, when an employee during the course of his work suffers a fall by reason of some cause that cannot be determined, there is a natural inference that the work had something to do with it, in the sense that had he not been at work he probably would not have fallen.
>
> …On the other hand, if the defendant employer comes forward with sufficient evidence that the work was not a contributing cause to raise a substantial doubt that it was, then the rebuttable presumption is reduced to a permissible inference and the board is free either to find or decline to find that it was." Workman v. Wesley Manor Methodist Home, 462 S.W.2d 898 (Ky. 1971).

There is a difference in an "idiopathic fall" and an "unexplained fall". The unexplained fall is just that – unexplained – the employee may have lost consciousness for no apparent reason. **In the situation of the unexplained fall, a rebuttable presumption exists that the work played some role in the fall, and therefore should be compensable**. If the employer can effectively rebut this presumption, then the administrative law judge is free to rule in favor of the more persuasive party.

In one of the more recent cases that followed Workman, specifically Vacuum Depositing, Inc., V Dever, 285 S.W.3d 730 (KY. 2009), the Kentucky Supreme Court stated:

> "To summarize, a work-related fall occurs if the worker slips, trips, or falls due to causes such as a substance or obstacle on the floor of the workplace or an irregularity in the floor. When the cause of a workplace fall is unexplained, the fall is presumed to be work-related under Workman. Unexplained falls divide ultimately into two categories: 1.) those the employer has shown to result from a personal or idiopathic cause but which may be compensable under the positional risk doctrine; and 2.) those that remain unexplained and entitled to a presumption of work-relatedness. (Vacuum Depositing, Inc., V Dever, 285 S.W.3d 730 (KY. 2009)).

In Brisbay, the Board noted that,

> "There is not any credible evidence these stairs posed a distinct risk, or increased the risk Brisbay would sustain a left ankle injury. Brisbay did not trip, slip, loss[sic] her balance, stumble, or fall. She simply descended some stairs. There is not any evidence the stairs were defective.

Brisbay did not testify she had difficulty descending these steps. She did not explain navigating these steps were more difficult than the ones at her house or in the general public.

Moreover, there is not any expert or lay evidence the stairs' design, dimensions, or parameters, placed added strain or stress on Brisbay's left ankle. There is not any evidence Brisbay was carrying any work items when the incident occurred. There is not any evidence Brisbay's job required her to descend the garage stairs in a non-normal manner – i.e., sprinting or rushing down them to get into the hospital to assist a patient.

Moreover, there is not any expert or lay evidence the stairs' design, dimensions, or parameters, placed added strain or stress on Brisbay's left ankle. There is not any evidence Brisbay was carrying any work items when the incident occurred. There is not any evidence Brisbay's job required her to descend the garage stairs in a non-normal manner – i.e., sprinting or rushing down them to get into the hospital to assist a patient.”

There was not any credible evidence these stairs posed a distinct risk, or increased risk Brisbay would sustain a left ankle injury. There was no evidence that the stairs were defective. This author believes that obtaining an employee statement recorded if possible is also key to understanding the claim and to locking in the testimony for a later date. As one plaintiff's attorney told this author years ago, when some people hear the law, they get wise about the facts.

The Board went on to note that there was credible and overwhelming evidence that established plaintiff had an idiopathic condition and personal risk, which the employment at KentuckyOne Health did not cause or contribute to produce claimant's left ankle condition. The Board noted and cited the judge's order on petition for reconsideration stating as follows:

“The ALJ finds a risk distinctly associated with Brisbay's KentuckyOne employment did not cause her left ankle condition. Brisbay was a PICC nurse. Her job involved walking throughout the hospital, and inserting, as well as checking, PICCs. Brisbay's job, while treating patients, physically required: bending, twisting, turning, and some lifting. Her left ankle condition, however, did not occur, while performing these activities. Instead, Brisbay's left ankle condition occurred, while simply walking down the parking garage's steps.

Although Brisbay's job required walking, there is not any evidence it required repetitive stair use. There is not any evidence Brisbay's job required frequently going up and down stairs that would expose her to greater risk. There is not any evidence indicating how many times a day Brisbay used the stairs. There is not any evidence KentuckyOne required Brisbay to use the stairs, as opposed to an elevator.”

This is a good analysis of how the risk at work might be higher than the risk that the general public faces.

Key Takeaway

Obtain all the facts as fast as you can, preferably with a recorded statement from the plaintiff within the first two or three days of the accident. Take photos of any stairs or the location where the claimant indicates she was injured. Obtain a full medical history from the claimant as fast as you can, and request all of those medical records as fast as you can, including pharmacy records if possible because medications may play a role in a person's fall.

As always, if we can assist you in any way, feel free to email us or call us. If you would like one of our cheat sheets, email me at sarmstrong@armstrongpeake.com.

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