Kentucky Legal Cases of Note
October 17, 2007

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KY COURT OF APPEALS:

Workers Compensation Notice of Injury
Case No. 2006-CA-002324
Smith v. Trico County Development and Pipeline
Rendered 8/3/07

The employee was fired the day after his injury, and the ALJ found based on conflicting testimony that he did not report the injury to his employer. Instead, he contacted the insurance carrier for his employer and filled out a first report of injury form the next day. The Administrative Law Judge dismissed the claim on the basis of failing to give notice to the employer, and the Workers' Compensation Board affirmed. The Court of Appeals reversed, holding on an issue of first impression that notice to the insurer satisfied the purposes of the notice statute, being to allow an investigation of the injury and the provision of prompt medical attention in order to mitigate disability. Notice to the insurer was constructive notice to the employer, given that the employer was contacted by the insurer in order to investigate the claim. (From KY Cases)

Workers Compensation Wages
Case No. 2007-CA-000613
Ford Motor Co. v. Pendygraft
Rendered 8/10/07

The Administrative Law Judge ruled that the employee's wages included profit sharing, because these were part of "money payments for services rendered". Reversing, the Court of Appeals relied on a Minnesota case (also against Ford) which held that because profit sharing does not reflect earning power, it is not included as part of the average wage of the employee. This makes sense in the context of the triple and double multipliers, since a higher wage post-injury should reflect a lesser occupational disability, not increased company profits. (From KY Cases)

Workers Compensation Out of State Issue
Case No. 2006-CA-002564
Kentucky Associated General Contractors Self Ins. Fund v. Tri State Crane Rental
Rendered 9/07/07

The Court of Appeals affirmed the Workers' Compensation Board and the ALJ in finding that a crane operator's injury in Ohio was covered under Kentucky Workers' Compensation law. The employer had jobs in many states and the claimant had worked for Tri-State Crane Rental before, in Kentucky as well as other states. Analyzing the extraterritorial application of the workers' comp law, the COA adopted the Board's decision which found that when the claimant had worked for the employer previously, the contract of hire was made in Kentucky. A six-month hiatus occurred where the claimant worked for another employer, since he was a member of the operating engineer's union. But the ALJ found based on conflicting evidence that the employment relationship continued when he was injured on the first day back to work for this employer. Therefore, the injury could be covered under Kentucky workers' compensation law. Although the employer contacted the claimant directly, on the occasion of this period of employment, the opinion lacks any information about the Union's collective bargaining

agreement. It seems that the CBA should have been considered the 'contract of hire' since it established the terms and conditions of employment. The COA also affirmed the Board's reversal of the ALJ's imposition of sanctions for denying the claim. (From KY Cases)

Settlements, Releases, and PIP Indemnity
Case No. 2006-CA-000994
Coleman v. Bee Line Courier Service, Inc.
Rendered 8/10/07
The COA held that a release and indemnification agreement settling a personal injury claim from a car accident against a self-insured employer and its employee which included the plaintiff indemnifying the defendant-employer for any medical expenses it paid was valid and enforceable in spite of the purpose of the Kentucky Motor Vehicle Reparations Act. (From KY Cases)

Insurance – Primary and Excess Clauses
Case No. 2006-CA-000698
Standard Fire Ins. Co. v. Empire Fire and Marine Insurance Co.
Rendered 8/31/07
The Standard Fire Insurance Company appealed from a summary judgment in which Standard was ordered to indemnify Empire Fire and Marine Insurance Company in the amount of $19,870.44, plus attorney fees and costs incurred in the settlement of third-party personal injury claims arising from an automobile accident. COA affirmed.
Standard had issued an insurance policy to the Kaelins on a 1999 Honda Accord, which the Kaelins had leased from Wells Fargo. When the Kaelins defaulted on the lease, Imperial Recovery went out to repossess it. However, the Kaelins gave Imperial the keys to Richardson, the Imperial's driver, who had an accident on the way back to the storage facility. Empire issued a garage policy to Imperial Recovery which provided coverage for any “non-owned autos used in your garage business,” which business included the repossession of automobiles.
Richardson was at fault in causing the two-vehicle collision, and both insurance policies, that issued by Standard to the Kaelins and that issued by Empire to Imperial, remained in full force and effect on the date of the accident. Empire settled with the injured driver and sought indemnity from Standard.
COA addressed three separate issues. First, did Standard’s policy provide coverage to Richardson for this accident? Second, did Empire’s policy provide such coverage? Third, if both policies apply, which policy is primary? (From KY Cases)

Liability Insurance Exclusion for Employees
Case No. 2006-CA-001552
Codispoti v. Preston Highway Motors, Inc.
Rendered 8/10/07
This appeal dealt with an exclusion to coverage for injury to an employee of the "insured." The circuit court entered summary judgment holding that an employee exclusion in the liability policy precluded coverage to Joseph M. Codispoti.
Eric Jameson was driving a vehicle with the permission of the owner Codispot who also was the owner and president of Preston Highway Motors. Jameson was an independent contractor and, therefore, not an employee of Preston Highway Motors, who was hired to drive a Preston Highway Motors car to Indianapolis for an auction. Jameson was driving, and Codispoti was a passenger, when Jameson fell asleep, and wrecked the car injuring himself and his passenger Codispoti.
The vehicle was insured under a policy with First Financial Insurance naming Preston Highway Motors as the named insured who did that pursuant to the terms of the policy, Jameson was a permissive user of the vehicle and, therefore, an insured. However, the policy had an exclusion precluding coverage to indemnify injuries to an employee of the owner. (From KY Cases)

Damages and Zero Pain

Case No. 2006-CA-000482

McCulloch v. Sullivan

Rendered 8/17/07

This appeal involved a trial court's denial of plaintiff's new trial motion and judgment NOV for a zero pain and suffering (and inconvenience) verdict in a trial in which medical testimony supported pain and suffering and the plaintiff was awarded nearly $18,000 in medicals and nearly $14,000 in wage loss. Two other errors raised involved the zero verdict for an impairment award and the zero pain and suffering verdict were both contrary to the evidence, and that she should have been awarded a directed verdict on liability. (From KY Cases)

Parental Consortium in Tort Damages

Case No. 2006-CA-001656

Goebel v. Arnett

Rendered 8/24/07

CA affirms in part and vacates and remands in part TC entry of SJ for attorney in this case of adoption malpractice, fraud, negligent misrepresentation, loss of consortium and intentional infliction of emotional distress.

Appellant, depressed, pregnant and estranged from the baby's father, contacted Adoptions of Kentucky, Inc. She was told she needed an attorney and was referred to Arnett without being told that Arnett was the owner/sole shareholder of Adoptions of Kentucky. Arnett also represented the mother, the adoptive parents and her own agency at the termination proceedings. She did not tell the mother that the adoptive parents had paid the firm a fee in excess of $6,000. The mother also alleges that Arnett ordered her avoid the father before the termination occurred, to falsely inform the court that she did not know the identy of the father, and to terminate her own parental rights under threat of a countersuit from the adoptive parents. The termination was entered. Since, the father was able to regain custody; he and the child now live in Egypt. The mother's motion to set aside her termination was denied and she did not appeal. She filed suit against Arnett and Adoptions of Kentucky. The TC entered SJ against the appellant, noting that since she did not appeal the denial of her motion to set aside her termination she could not recover on her claims as a matter of law. The TC believed that appellant was attempting to re-litigate issues raised, and denied, in her CR 60.02 motion.

The CA affirms in part and vacates and remands in part, holding that the TC erred in concluding that appellant was attempting to re-litigate adjudicated issues. Appellant's claims of Arnett and Adoptions of Kentucky's wrongdoing and negligence had never been litigated. The loss of consortium claim, however, was properly dismissed. The IIED claim, however, remains. (From KY Cases)

Dog Bites

Case No. 2006-CA-001595

Carmical v. Bullock

Rendered 8/10/07

Appellant challenges TC's jury instructions in that he felt the TC should only have included a strict liability instruction consistent with KRS 257.275(1) (now KRS 258.235(4)) on his personal injury claim stemming from a dog attack on Appellee's property. Appellant argued that this statute and *Palmore's* model instructions in dog bite cases call only for a strict liability instruction. The COA disagreed, noting Kentucky courts have previously held this statute does not impose strict liability on a dog owner. The COA determined that an owner's liability should be subject to comparative negligence, which it found consistent with the law of other states. The COA ultimately found the TC's instruction to the jury to be consistent with Kentucky legal precedent on dog bite cases. (From KY Cases)

Expert Testimony in Med Mal
[Case No. 2005-CA-001422]
Green v. Owensboro Medical Health System, Inc.
Rendered 8/10/07
CA affirms entry of SJ for defendants in this medical negligence case.
Appellant fractured her finger and underwent surgery. All went well with her hand, but upon awaking appellant found her four front teeth loose, misaligned & bloody. She sued the surgery practice, the facility and the anesthesiologist. By interrogatory, the facility asked the name of any expert witness and whether appellant had obtained an expert opinion as to the applicable standard of care. With no response, it filed a motion to compel; an order compelling followed. She responded, but with no expert's name. She was again directed to disclose by a date certain. She eventually named her regular treating dentist as her expert, but his testimony was to be limited to pre- and post-operative condition and his opinion that the condition was from trauma and not disease.
Defendants eventually sought SJ for failure to name an expert on the applicable standards of care. The TC denied, giving appellant 90 more days to produce an expert. No expert was produced and SJ was entered against appellant. She appealed, arguing abuse of discretion in that a jury could infer negligence on these facts.
CA holds that whether expert testimony is necessary is in the TC's discretion and, as the CA does not believe the average layperson has sufficient medical knowledge about anesthesia procedures, no abuse of discretion is found. (From KY Cases)

Medical Negligence, Damages, and Consumer Protection Act
[Case No. 2006-CA-000889]
Barnett v. Mercy Health Partners - Lourdes
Rendered 8/31/07
In this lawsuit, the decedent was suspected of lymphoma and underwent surgery to remove it. Complications developed and the decedent died later. It was claimed by the decedent's estate that the surgeon was intoxicated during surgery. However, no evidence was offered at trial on damages which resulted in a dismissal of those claims for tort. With regard to a claim that the hospital and surgeon violated the Consumer Practices Act, the COA concluded that there must be some nexus between the contract act and the business or entrepreneurial activity, and since there was none, the CPA violation must be dismissed. (From KY Cases)

Medical Negligence and Long Arm Statute
[Case No. 2005-CA-000591]
Elder v. Perry County Hospital
Rendered 9/14/07
CA vacates and remands TC dismissals in these two appeals in this medical malpractice case. CA holds that the TC has both personal and subject matter jurisdiction over PCMH, and the TC abused its discretion in dismissing PCMH on forum non conveniens grounds. Additionally, the TC improperly applied the doctrine of forum non conveniens in its dismissal of both defendants PCMH and Norton. (From KY Cases)

Insurance Exclusions
[Case No. 2005-CA-002246]
Reynolds v. The Travelers Indemnity Co.
Rendered 8/17/07
Reynolds appeals TC's entry of Summary Judgment for Travelers finding that exclusions contained in Appellant's homeowner's insurance policy with Travelers precluded coverage for substantial losses incurred at their home. At issue was whether the theft of appliances and

resulting water damage (from severing of the water line to a refrigerator) and mold damage to the Appellant's home by an employee of a contractor working on a drainage improvement project at the home was a covered loss under the policy. Specifically, Reynolds alleged error in the TC applying 3 different exclusions: 1) exclusion for losses caused by theft of home under construction 2) exclusion for losses caused by vandalism and malicious mischief; 3) exclusion for losses caused by continuous or repeated seepage or leakage of water; and 4) exclusion for loss caused by mold.
The COA held that none of the 4 exclusions applied to preclude coverage for any of the Appellant's losses. As to exclusion 1, the COA held that the home was not "under construction" at the time of the theft (it was originally built several years prior), but rather was merely undergoing repairs. The COA ruled exclusion 2 was inapplicable since the losses stemmed from a theft rather than vandalism or malicious mischief. On exclusion 3, the COA for the phrase "period of time" ambiguous as it relates to how long the seepage must have lasted before the exclusion applies, and found both side's interpretation reasonable under the case facts. The ambiguity thus benefited Appellants as the non-drafting party of the insurance contract. Finally, on exclusion 4 the COA felt the mold damage was a direct and proximate result of the theft of the refrigerator and not a separate loss, and thus did not apply to preclude coverage. The COA referenced the "efficient proximate cause doctrine" as adopted by a Washington state court in support of its conclusion that the mold damage was directly caused by the covered theft loss. (From KY Cases)

KY SUPREME COURT:

Workers Compensation Black Lung Reopening
Case No. 2006-SC-000787-WC
Bolin Estate v. T & T Mining
Rendered 8/23/07
The Court affirmed the ALJ's finding that additional exposure is required after an award of benefits for black lung, in order to reopen the award for a progression of the disease. (From KY Cases)

Workers Compensation "Up the Ladder" Immunity
Case Nos. 2004-SC-000043-DG and 2005-SC-000242-DGE
General Electric Co. v. Rehm
Rendered 8/23/07
In this set of civil cases regarding the immunity of contractors from civil suits, the Supreme Court explored the definition of "contractor" set forth in KRS 342.610(2). These were asbestos exposure cases, where there were multiple defendants. Each defendant's business was analyzed to determine whether the work of the subcontractor, for whom the plaintiff worked, performed work which was a "regular and recurrent" part of the work of the defendant. The Supreme Court found that if the defendant had employees who would regularly perform the work that the subcontractor performed, the exclusive remedy provisions of the workers' comp act would apply. If the subcontractors work was not a regular part of defendant's business, as in the case where the work would be subcontracted out, the defendant would remain liable to the subcontractor's employees. The case also discussed the 'jural rights' doctrine, but finds the exclusivity provision of the workers' compensation act constitutional in that regard. (From KY Cases)

Workers Compensation Trial Basis Hire
Case No. 2006-SC-000750-WC
Hubbard dba D & H Logging v. Henry

Rendered 8/23/07
The claimant agreed to work for Hubbard on a trial basis with no pay for two days. He was severely injured and theefore, never hired. THe ALJ dismissed the workers' comp claim finding the was no employee-employer relationship, but the Worker's Comp Board reversed, and the Court of Appeals and Supreme Court affirmed, citing the statute sating that there does not need to be an express contract of hire. (From KY Cases)

Workers Compensation Bad Faith
Case No. 2006-SC-000608-MR
Kentucky Employers Mutual Ins. v. Hon. Eddy Coleman
Rendered 8/23/07
The Supreme Court determined that the Circuit Court could not proceed with a civil suit against the workers' compensation insurance company for what were found to be bad faith refusals to allow medical treatment and pay for medications required by a work related injury. The Administrative Law Judge found in favor of the injured worker and awarded sanctions against the workers' compensation insurance carrier in the form of attorney's fees and costs. The case was also referred to the Executive Director of the Office of Workers' Claims for imposition of fines for unfair settlement practices. The Executive Director fined the insurance company $9,000, which has been appealed. The claimant filed a bad faith action against the carrier, which the carrier sought to dismiss on the grounds of lack of jurisdiction, relying on the exclusive remedy provisions of the work comp act. The Circuit Court denied the motion, and the carrier then sought a writ of prohibition against the Circuit Court, which was denied. The Supreme Court reversed, holding that the workers' compensation insurance company was immune from a civil tort action because of the exclusive remedy of the workers' compensation act. A dissenting opinion by Justice Scott points out that this violates the jural rights of workers guaranteed by the Kentucky Constitution, and that a tortious act of an insurance company, such as sending private investigators to harass the injured worker or inflicting harm upon the worker by denying necessary medical treatment, are separate non-work related injuries. Granting immunity for even the most contemptible acts will allow workers' compensation insurers to act with impunity while suffering only minor sanctions under the workers' compensation act. (From KY Cases)

Workers Compensation Overpayments
Case No. 2006-SC-000678-WC
Southeast Coal Company v. Mansfield
Rendered 8/23/07
When the employer decided to reduce its payments of a claimant's award due to its previous overpayment, the claimant's remedy was to file a circuit court enforcement action, not go back to the work comp ALJ for clarification. (From KY Cases)

Workers Compensation Appeals
Case No. 2006-SC-000849-WC
Sidney Coal Co., Inc. v. Huffman
Rendered 9/20/07
The Court held that a Workers' Compensation Board Opinion which allows or directs the ALJ to change his opinion is final and appealable. The plaintiff was entitled to have his theory of the case addressed by the ALJ. When he refused to do so on request for further findings of fact on issues of total disability or partial disability and extent of temporary total disability, the Board and Court of Appeals properly remanded the case to him for further findings of fact. (From KY Cases)