

Kentucky Legal Cases of Note

June 13, 2008

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KY COURT OF APPEALS:

Civil Procedure: Claims Made Policy and Cancellation

[Case No. 2006-CA-000200](#)

OHIC Ins. Co. v. Haj-Hamed

Rendered 11/16/07

This appeal involves a dispute over the cancellation of a "claims made" medical professional liability policy with OHIC Ins. Co. Riverside was owned by Haj-Hamed and had multiple urgent medical care and professional medical offices in Northern Kentucky and Ohio. The policy included Kentucky endorsements which addressed both cancellation and nonrenewal of the policy. (From KY Cases)

Torts: Ambiguous indemnity clause for future torts

[Case No. 2006-CA-002156](#)

Community Trust Bancorp, Inc. v. Mussetter

Rendered 12/14/07

Community Trust owns an office building in Ashland; Mussetter was a renter. Mussetter's employee slipped on stairs in the common area of the building, which were wet from a leaking pipe in the stairwell. She filed WC and SS claims and sued Community Trust. Community Trust filed a third-party complaint against Mussetter and his liability insurer seeking coverage and a defense. On cross-motions for SJ, the TC determined that the provision in the lease requiring Mussetter to obtain liability insurance for the building's public areas was overly broad, vague and against public policy.

CA affirms, but for different reasons. CA holds that the "hold-harmless" or indemnity language controls the ruling. (From KY Cases)

Torts: Assignment of tort claims founded on contract affirmed

[Case No. 2006-CA-001737](#)

Garcia, M.D. v. Associated Ins. Service, Inc.

Rendered 12/14/07

This appeal arises from a personal injury claim by the Garcias against the Star of Louisville who was defended by its liability carrier, HIH Casualty and General Insurance, Ltd. (HIH). While the litigation was pending, HIH declared bankruptcy, withdrew its defense of the Star and, in effect, repudiated coverage. Suddenly faced with the prospect of a large, uninsured liability, the Star negotiated a settlement with the Garcias in exchange for the Garcias' promise to "forbear" seeking enforcement against the Star. As part of this settlement, Star assigned its claims against Star's insurance agent, Associated Insurance Service, Inc. (Associated), an insurance agency operating in Louisville. Associated then filed a third-party complaint against AON Risk Services Inc. of Ohio (AON).

COA disagreed with the trial court, reversing the summary judgment, and held that the Star's assignment of its claims against Associated and AON was valid, remanding the matter for further proceedings. (From KY Cases)

Torts: Medical Negligence**[Case No. 2006-CA-002610](#)****D. Williams as Administrator for the Estate of Leslie Dunagan, et al v. Primary Care Associates of Southern Kentucky, PLLC, et al****Rendered 3/07/08**

The estate and the decedent's parents appeal a judgment entered in favor of Appellees following a second jury trial on their medical malpractice claim after the first trial resulted in a mistrial being ordered by the TC.

On appeal, Appellants raised 3 arguments: 1) TC abused its discretion in granting the mistrial after the jury had already returned its final verdict; 2) TC erred by failing to restrict the second trial to the issue of damages only since liability had already been properly assessed against the Appellees in the first trial; and 3) TC committed various procedural and evidentiary errors during the course of the second trial. The COA focused its entire analysis on whether the TC had authority to grant the mistrial, and cited law from other jurisdictions that a mistrial (which is equivalent to no trial) is inappropriate to grant after the jury has already returned its verdict. At the end, the COA concluded that declaring a mistrial after a final, valid verdict has been rendered was an abuse of the TC's discretion and therefore reversible error. (From KY Cases)

Workers Comp: No offset for certain employer funded disability pension payments**[Case No. 2007-CA-001677](#)****Alcan Aluminum Corp. v. Stone****Rendered 2/08/08**

Stone was totally occupationally disabled due to a cervical injury sustained while working for Alcan. At that time, Alcan had three retirement plan options: normal, early and full disability. Under the normal retirement plan, at age 65, an employee could retire and receive a defined benefit calculated by a dollar amount times years of service. Under the early retirement plan, an employee who had reached the age of 60 could retire and receive a discounted amount. The full disability retirement plan available to an employee who met certain medical criteria, was calculated similarly to the normal retirement benefit, without the discount for early retirement. In this case, Stone opted to receive \$990.54 per month in disability retirement benefits, which is 15% more than he would have received under early retirement.

Under KRS 342.730(6), an offset is allowed against workers' compensation benefits for income benefits paid from certain employer-funded disability or accident and sickness plans. When Jackie Stone ceased working for Alcan Aluminum due to a total, permanent disability, he elected to receive benefits under Alcan's disability retirement benefits plan. The issue is whether the benefits paid to Stone under the plan met the requirements of KRS 342.730(6). COA affirmed the Workers' Compensation Board's opinion which held Alcan should receive an offset only for the amount that Stone's disability pension exceeds the pension to which he would have been entitled under Alcan's early retirement. (From KY Cases)

Workers Comp: TTD benefits issue was properly preserved and final and appealable**[Case No. 2007-CA-001479](#)****United Parcel Service, Inc. v. Peterson****Rendered 2/15/08**

The employer, United Parcel Service, Inc., petitions for review of an opinion of the Workers' Compensation Board affirming the Chief Administrative Law Judge's (CALJ) finding that Martina Stoudmire properly preserved as an issue whether she was entitled to additional temporary total disability benefits (TTD benefits). The Board further found, however, that the CALJ failed to address whether substantial evidence existed that, because of Stoudemire's left knee and low back conditions, she had not reached a level of improvement that would permit her to return to her customary employment. KRS 342.0011(11)(a). As a result, the Board remanded

the case for additional findings.

The sole issue raised on this appeal is whether the Board correctly concluded that Stoudmire had properly preserved the issue of additional TTD benefits from July 16, 2004, through August 1, 2005. UPS contends that pursuant to 803 KAR 25:010 § 13, Stoudemire did not preserve the issue by raising it at the hearing or designating it as a contested issue. The regulation provides that the CALJ is to conduct a benefit review conference and, if the claim is not settled as a result of the conference, a summary stipulation of all contested and uncontested issues must be prepared and signed by the parties and the CALJ. The regulation further provides that only contested issues shall be the subject of further proceedings. (From KY Cases)

Workers Comp: Arising out of employment

[Case No. 2007-CA-001575](#)

Clark County Board of Education v. Jacobs

Rendered 2/22/08

The Court affirmed an award of disability benefits to a teacher who fell while attending a Beta Club convention with her students out of town. The Court held that the activity benefited the employer, and therefore arose out of employment even though it occurred away from the employer's premises. (From KY Cases)

Workers Comp: Coverage of owner

[Case No. 2007-CA-001901](#)

Kentucky Employers Mutual Insurance v. J & R Mining, Inc.

Rendered 3/07/08

Earl Reed, an owner with his wife of J& R Mining, Inc., was killed while working for his company. The insurer, KEMI, contested coverage on the basis that he was an owner and had not elected to be covered by the policy. The Court held that, as an officer of the corporation, he was an employee of the corporation, requiring rejection of coverage filed in Frankfort on a particular form. Since this was not done, and the signature on an exclusion form provided by the insurer was questioned, the Court held that the decedent was covered by workers' compensation. (From KY Cases)

Insurance: Workers Comp, PIP and subrogation

[Case No. 2006-CA-001995](#)

Kentucky School Board Association v. Jewell

Rendered 3/07/08

This case involved a claimant injured in the scope of employment who settled her disputed workers compensation claim for \$25,000 and was assigned the subrogation rights in exchange for her future medicals. She then settled for the \$25,000 policy limits of the liability carrier and pursued a claim for underinsured motorist benefits (UIM). A verdict was received in excess of the liability limits, but a post-verdict dispute arose on the applicability of the offsets for workers compensation and "payable" PIP as it applied to the UIM benefits. (From KY Cases)

PIP: Compelled no-fault physical examinations

[Case No. 2006-CA-001573](#)

White v. Allstate Insurance Co.

Rendered 12/21/07

Good cause was shown by the PIP carrier who was concerned about the prolonged medical treatment of the insured, and upon a refusal by the treating physician to explain and a refusal by their insured to submit to a physical examination, the PIP carrier obtained a report from a physician conducting a records review and then filed a petition under KRS 304.39-270. The trial court granted the petition, and this appeal followed. (From KY Cases)

KY SUPREME COURT:

Torts: Initial permission rule and permissive use under omnibus liability auto coverage

[Case No. 2005-SC-000571-DG](#)

Mitchell v. Allstate Insurance Co.

Rendered 1/24/08

Two issues were up on appeal. The first was whether the granting of summary judgment was improper with the appellants claiming genuine issues as to the initial permission; and the second was to adopt the "initial permission" rule. The facts were that the owner of the car loaned it to her sister who later permitted her son to drive the car whereupon he had a serious accident resulting in fatality. Allstate denied liability coverage claiming the driver did not have permission from the owner with some evidence that the owner only permitted her sister's son to drive it to work and not to drive around town with his friends. The accident did not happen within the scope of the claimed permission. As to the extent of the permission given by the owner, the appellant claimed that should have gone to the jury.

However, SCOKY bypassed the summary judgment rule by adopting the "initial permission" rule, which defines the scope of permission one has to use a borrowed vehicle. (From KY Cases)

Torts: Employer Liability

[Case No. 2006-SC-000425-DG](#)

Mid-State Plastics, Inc. v. Estate of William Clinton Bryant

Rendered 2/21/08

In this case, the Kentucky Supreme Court addresses the sole issue of whether an employer is liable for an employee's tortious injuries to a guest who accompanied the employee on a business trip.

The SC begins its Opinion by citing Wigginton Studio v. Reuter's Adm'r, 254 Ky. 128, 71 S.W.2d 14 (1938) as controlling precedent with similar case facts. In that case, Kentucky's highest court at the time held that not only does the employee have to be acting within the scope of his/her authority in inviting the guest, but also the guest's presence must be determined to be in furtherance of the employer's business. While the COA noted that its position had been adopted by a number of other states, the SC held that the COA's decision completely ignores the second requirement of Wigginton that the guest's presence must further the employer's business. (From KY Cases)

Workers Comp: Statute of limitations for reopening claim

[Case No. 2007-SC-000052-WC](#)

Ramsey V. Sayre Christian Village Nursing

Rendered 11/21/07

In the workers compensation appeal applying the statute of limitations in reopening a claim, the SC affirmed the COA and held the claimant knew of her depression during the initial proceeding and because she did not assert she was entitled to medical benefits for the depression until more than two years after the original award, the ALJ did not err in dismissing that portion of her claim at reopening. KRS 342.185(1) and KRS 342.270(1) require a claim to be filed within two years after a work-related accident or the termination of voluntary income benefits, whichever occurs last, and require all known causes of action to be joined to the claim or be waived. (From KY Cases)

Workers Comp: Reopening and impact on medicals and disability award

[Case No. 2007-SC-000094-WC](#)

Bartee v. University Medical Center

Rendered 1/24/08

The Supreme Court affirmed a finding that the Claimant's entitlement to temporary total disability cannot be granted prior to a motion to reopen having been filed by the Plaintiff. In this case, the workers' compensation insurance carrier disputed the need for a surgery and filed a motion to reopen. The Claimant had the surgery and filed a motion to reopen afterwards, claiming increased disability and temporary total disability. The Court eventually found that the surgery was reasonable, necessary, and related to the work related injury. However, the Court found that the claimant was not entitled to an award of temporary total disability benefits for a period of time before the motion to reopen for disability was filed. The Court also held that the carrier's Motion to Reopen to contest a medical expense did not reopen the case for purposes of awarding temporary disability, nor was the defendant estopped from objecting to the award of temporary disability benefits. (From KY Cases)

Workers Comp: Safety Violation

[Case No. 2007-SC-000093-WC.pdf](#)

Chaney v. Dags Branch Coal Co.

Rendered 1/24/08

The workers' compensation law provides a 30% increase in compensation if an accident is caused by an employer's intentional failure to comply with a specific safety regulation. The Administrative Law Judge determined that the workers' death resulted from a lack of warning devices, but that an intentional failure was not shown. The Supreme Court reversed, holding that an employer is presumed to know specific state and federal statutes and regulations concerning workplace safety, thus, its intent is inferred from the failure to comply. This does not apply to the general "safe work place" requirement of OSHA. (From KY Cases)

Workers Comp: Survivor Benefits

[Case No. 2007-SC-000159-WC](#)

Morsey, Inc. v. Frazier

Rendered 2/21/08

KRS 342.730(4) limits the duration of an award of survivors' benefits to a widow of an employee who dies because of a work related accident to the date when the widow would qualify for regular Social Security retirement benefits based on the employee's earnings record. Referring to 42 U.S.C. § 402(e), the Court held that a widow's benefits terminate at the time she reaches the age of sixty (60), when she will qualify for widows' benefits under the Social Security Act. (From KY Cases)

Workers Comp: Time period for reopening claim

[Case No. 2007-SC-000303-WC](#)

Officeware v. Jackson

Rendered 3/20/08

SC affirmed ALJ's holding that reopening claim was not time barred finding that the statutory amendment adding an exception to the four-year limitations period for reopening a workers' compensation claim after original award existed for a claim seeking temporary total disability benefits during period of original award was a remedial provision involving a change to the procedural requirements for reopening, and thus, the exception applies retroactively to original claims that arose and were decided before the amendment's July 14, 2000 effective date. Furthermore, the employer's denial of claimant's request to reopen was unreasonable, and thus, claimant was entitled to interest on past-due benefits at statutory rate of 18 percent and to award of attorney fees. (From KY Cases)