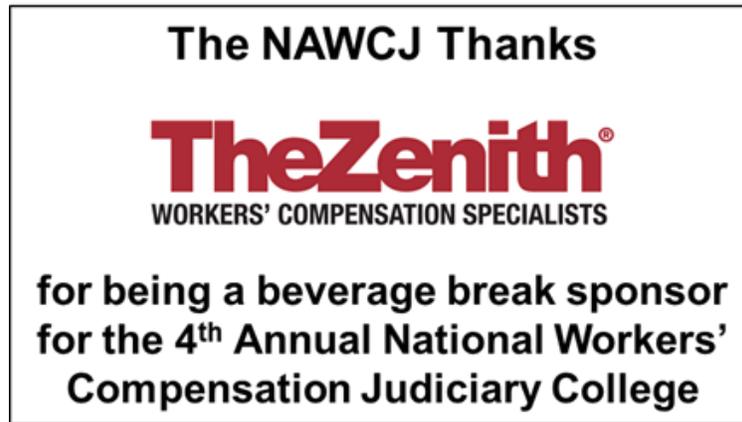


Fourth Annual NAWCJ Judiciary College

August 20-23, 2012



- I. Judicial Writing and Editing, Professor Terrel
- II. Comparative Law Panel
- III. Credibility of Medical Evidence, Professor McCluskey
- IV. Evidence
 - a. Electronic Evidence, Professor Ehrhardt
 - b. Evidence for Adjudicators, Ehrhardt
- V. Live Surgery, Biographies
- VI. To Tell the Truth, Ms. Constantine
- VII. Keeping the Case on Track, Judge Jones
- VIII. Social Networking, Rissman Wieland
- IX. Technology
 - a. Technology, Judge Rosen
 - b. Technology, I phone Article
- X. Appellate Roundtable
 - a. Appellate Roundtable, Alvey
 - b. Appellate Roundtable, Jones

APPELLATE REVIEW OVERVIEW

Honorable Mike Alvey – Chair Kentucky Workers’ Compensation Commission

Chairman Michael W. Alvey received his Bachelor’s degree from Western Kentucky University, and his J.D. from the University of Kentucky College of Law. Admitted to the Kentucky Bar in 1988, Chairman Alvey practiced primarily defending workers’ compensation, federal black lung and personal injury claims. On November 13, 2009 Chairman Alvey was appointed to serve as Chairman of the Kentucky Workers’ Compensation Board effective January 5, 2010. Chairman Alvey was recently appointed to the board of directors of the National Association of Workers’ Compensation Judiciary, Inc. Chairman Alvey retired from the Kentucky Army National Guard in 2000 where he served nearly 21 years as an armor officer and is a graduate of the Armor Officer Basic Course and Armor Office Advanced Course. Chairman Alvey resides in Owensboro, Kentucky where he has been involved in various church and civic activities as well as working with youth sports including both coaching and officiating.



Honorable Nikki Clark

Judge Clark serves on the Florida First District Court of Appeal. She was appointed by Governor Charlie Crist in 2009. She previously served on the Circuit Judge, Second Judicial Circuit of Florida, 1993 – 2009. She presided in Felony, Civil, Family, and Juvenile Divisions, 1993 - 2009; Administrative Judge, Family Law Division, 2005 – 2009; Designed and implemented Independent Living Court to address needs of foster children after age 18; Designed and implemented Unified Family Court for management of families’ cases in multiple Divisions. Judge Clark served as a Chief Cabinet Aide, Office of the Governor, 1993; Legislation and Policy Development Director, Florida Department of Environmental Regulation, 1991 – 1993; Assistant Attorney General, Office of the Florida Attorney General, 1981 – 1991; Attorney, Legal Services of North Florida, 1979 - 1981. She received her Juris Doctorate from Florida State University College of Law in 1977 and her Bachelor of Arts from Wayne State University in 1974. Judge Clark is an instructor, Continuing Legal Education Courses on mortgage foreclosure, ethics, procedures for high-profile cases, and creation of the trial record, 1995 – present. She served as the Committee Chair, Florida Supreme Court Committee on Families & Children in the Court, 2006 – present. Judge Clark was an Adjunct Professor of Trial Practice, Florida State University College of Law, 1998 – 2009. She served as a Foreign Elections Consultant in Nigeria and Liberia, 2005 – 2008, and was a member of the Florida Supreme Court Committee on Fairness & Diversity, 2004 – 2006. Judge Clark is a member of the William H. Stafford Inn of Court, the Tallahassee Women Lawyers Association, the Tallahassee Barristers Association, and is a former member of the Florida Conference of Circuit Judges. She is the recipient of the Florida Supreme Court Chief Justice’s Distinguished Judicial Service Award, 2010, the Rosa L. Parks Servant Leadership Award, (Florida State University), the Rosemary Barkett Outstanding Achievement Award, 2009 (Tallahassee Women Lawyers); the Sojourner Truth Award (National Coalition of 100 Black Women), the Judge of the Year (Florida Law Related Education Association), the Administration of Justice Award, Florida (American Board of Trial Advocacy); Distinguished Service Award (Florida Council on



Crime & Delinquency), the Children’s Advocate Award (Legal Services of North Florida), and the Judicial Appreciation Award (Florida Conference of Circuit Judges).

Honorable Melissa Jones – District of Columbia

Melissa Jones is an Administrative Appeals Judge with the Government of the District of Columbia, Department of Employment Services (DOES). She formerly served as an administrative law judge presiding over workers’ compensation claims between 2006 and 2010. Prior to joining the DOES, she practiced workers’ compensation defense both in private practice and as staff counsel at The Hartford. Her legal experience also includes acquisitions and real estate litigation. Judge Jones is a graduate of St. Bonaventure University, where she authored a thesis on “The Influence of Modern Technology on the Right to Refuse Medical Treatment: The Nancy Cruzan Case.” She received her Juris Doctor at the University of Buffalo School of Law in 1994. Judge Jones serves on the faculty of the National Judicial College in Nevada, and has lectured as an adjunct professor at the University of Maryland University College. She has also lectured for National Business Institute and at the National Association of Administrative Law Judiciary.



Honorable Warren Massey

Warren Massey is a member of the Georgia State Board of Workers Compensation. He previously served in the State House of Representatives since 1996 representing District 24. He is also owner of C.M. Construction, a general contracting firm specializing in retail store construction. Massey received his law degree from Western State University in San Diego. He was admitted to practice law in Georgia in 1976 and maintained a full-time law practice from 1976 to 1985. He is a veteran of the United States Navy having served in the Vietnam War. Massey and his wife, Kay, reside in Winder and have one child.



KENTUCKY WORKERS' COMPENSATION APPELLATE PROCEDURE

Hon. Michael Alvey
Chairman, Workers' Compensation Board

I. Final award, order or decision of the Administrative Law Judge
References: KRS 342.281; 803 KAR 25:010

Date of filing: 803 KAR 25:010, Section 1(4)(a)1 – ALJ's opinion deemed "filed" three days after date set forth on award, order or decision; therefore, date for filing Petition for Reconsideration (PFR) or Notice of Appeal (NOA) runs from three days after date of issuance. The "three day rule" does not apply to appeals to the Court of Appeals which must be filed within thirty (30) days after the opinion from the Workers' Compensation Board is entered.

Petition for Reconsideration: KRS 342.281 -

Within fourteen (14) days from the date of the award, order, or decision any party may file a petition for reconsideration of the award, order, or decision of the administrative law judge. The petition for reconsideration shall clearly set out the errors relied upon with the reasons and argument for reconsideration of the pending award, order, or decision. All other parties shall have ten (10) days thereafter to file a response to the petition. The administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision and shall overrule the petition for reconsideration or make any correction within ten (10) days after submission.

Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 32 (Ky.App 2000) – 1996 amendments were intended by legislature to return to the standard set out in Eaton Axle Corp. v. Nally, 688 S.W.2d 334, 338 (Ky. 1985), whereby PFR must be filed to preserve patent error for appellate review. The Eaton Axle court held:

It is our opinion that KRS 342.281 should be utilized as a statutory counterpart of CR 52.04 and that before beginning the appellate process which utilizes the court system, the claimant, employer or any other party involved in the case before the Workers' Compensation Board seeks an appeal on errors which are patent upon the face of the award, order or decision, he *must* first file a Petition for Reconsideration pursuant to KRS 342.281.

Successive petitions for reconsideration have no tolling effect, unless to correct an error in the order on reconsideration. Messamore v. Peabody Coal Co., 569 S.W.2d 693 (Ky. App. 1978); Tube Turns Division of Chemetron v. Quiggins, 574 S.W.2d 901 (Ky. App. 1978); Stewart v. Kentucky Lottery Corp., 986 S.W.2d 918 (Ky. App. 1998).

II. Appeals to the Workers' Compensation Board

References: KRS 342.285; 803 KAR 25:010; CR 7.02(4)

Time: NOA due 30 days from date opinion or order of ALJ is filed
Brief due within 30 days from date NOA is filed
Respondent's brief due within 30 days from Petitioner's brief
Petitioner may file reply brief within 10 days from date Respondent's brief was served or due

Cross-appeal: Notice of cross-appeal due within 10 days of NOA

Parties: Appealing party is Petitioner; responding party is Respondent
Must designate ALJ as Respondent
Where medical bill is at issue, provider must be designated as party
Where attorney fee is at issue, attorney must be designated as party -
Peabody Coal Co. v. Goforth, 857 S.W.2d 167 (Ky. 1993)

Briefs:

Page limit: 20 pages for Petitioner and Respondent briefs¹; 5 pages for reply brief;
25 pages for combined brief on behalf of Respondent/Cross-Petitioner

Copies: Original and two copies filed with DWC (ATTN: APPEALS BRANCH)

Format: Must conform to CR 7.02(4) – 12 point font, double-spaced, 1.5" margin left side

Cover: certificate of service; captioned "Before Workers' Compensation Board"

Content:

- A. DATE OF ENTRY OF FINAL AWARD, ORDER OR DECISION OF THE ALJ
- B. WHETHER ANY MATTERS REMAIN IN LITIGATION BETWEEN THE PARTIES IN ANY OTHER FORUM OR COURT
- C. STATEMENT OF NEED FOR ORAL ARGUMENT*
- D. STATEMENT OF BENEFITS PENDING REVIEW*

Body of Brief:

- I. INTRODUCTION*
- II. STATEMENT OF POINTS AND AUTHORITIES*
- III. STATEMENT OF THE CASE*
- IV. ARGUMENT*
- V. CONCLUSION (name, address, phone # of attorney must follow)*
- VI. APPENDIX
Final award, order or decision from which review is sought
All petitions for reconsideration and orders on reconsideration

¹ The twenty (20)page limit applies to the entirety of the document, minus attachments. The page limit does not apply solely beginning with the argument.

Copies of cases cited from federal courts or foreign jurisdictions*

Copies of board opinions & nonfinal or unpublished appellate opinions*

* Also in Respondent's brief (counter-statements)

III. Petition for Review to Court of Appeals

References: CR 76.25, 76.12 (if briefs are ordered), 76.42

Time: Petition for Review due 30 days from date Board Opinion is entered, as set forth on first page of opinion

Appellee's response due within 20 days of Petition for Review

Cross-appeal: Cross-petition due within 20 days of Petition for Review

Response to Cross-petition due in 20 days

Fee: CR 76.42: \$150.00 for appeal, cross-appeal, petition for rehearing/modification/extension

Parties: Appealing party is Appellant; responding party is Appellee

Designate ALJ and WCB as parties

Petition for Review:

Page limit: 20 pages for Petition & Response; 5 pages for Reply; 25 pages for combined Cross-Petition /Response

Copies: Original and four copies filed with Clerk of the Court of Appeals

Cover: Certificate of service; Petition – red; Response – blue

Content:

- A. NAME OF EACH APPELLANT AND APPELLEE AND THEIR COUNSEL
- B. DATE OF ENTRY OF DECISION BY ADMINISTRATIVE LAW JUDGE AND WORKERS' COMPENSATION BOARD
- C. WHETHER ANY MATTERS REMAIN IN LITIGATION BETWEEN THE PARTIES IN ANY OTHER STATE OR FEDERAL COURT OR ADMINISTRATIVE BODY

Body of Petition*

- I. TABLE OF POINTS & AUTHORITIES
- II. STATEMENT OF MATERIAL FACTS
- III. QUESTIONS OF LAW INVOLVED
- IV. SPECIFIC REASONS RELIEF SHOULD BE GRANTED
- V. APPENDIX

Decision of the ALJ

Decision of the Board

Briefs filed by all parties before the Board

If Motion to Reopen, copies of Motion and Response

* Also in Response (counter-statement)

Briefs: Court may order filing of briefs under CR 76.12 or submit appeal on Petition/Response

***N.B:** It is rare that the Court of Appeals will direct briefs in a workers' compensation claim, which is why it is all the more important that you make your strongest case in your Petition for Review

Rehearing: CR 76.32 – Party may file Petition for Rehearing or Petition for Modification or Extension of the Opinion, or both, within 20 days of issuance of opinion

IV. Appeal to Supreme Court

References: CR 76.25, 76.36(7), 76.12, 74.01, 76.42

Parties to a workers' compensation claim may appeal to the Kentucky Supreme Court as a matter of right. Ky. Constitution §115; CR 76.25(12).

However, not all of Kentucky's Supreme Court justices agree with this interpretation of the state constitution and, at the very least, it should be noted that simply because you may take an appeal to the Supreme Court (or any other appellate body, for that matter), does not mean you always should. Practitioners both new and old would be well-advised to review on a regular basis the following admonition from the state high court:

The 1986 Act intended to streamline the workers' compensation process and expedite review, and we will not apply it in a way that works the opposite result. The WCB and the Kentucky Court of Appeals are not way stations, or rest stops, along the road to the Kentucky Supreme Court. The parties in cases such as the present one must accept that, notwithstanding their right to demand further appellate review, the body performing further review is there to address new problems, not to redecide the same evidentiary questions.

The WCB is entitled to the same deference for its appellate decisions as we intend when we exercise discretionary review of Kentucky Court of Appeals decisions in cases that originate in circuit court. The function of further review of the WCB in the Court of Appeals is to correct the Board only where the the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. The function of further review in our Court is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude. Our purpose in publishing this Opinion is to advise these parties, and everyone else involved in the workers' compensation process, that further review is so limited and they should proceed accordingly.

Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-8 (Ky. 1992).

Time: Notice of appeal due 30 days from date of entry of Court of Appeals decision

Cross-appeal: Notice of cross-appeal due within 10 days from last day allowed for NOA

Fee: CR 76.42: \$150.00 for appeal, cross-appeal, petition for rehearing/modification/extension

Parties: Same as Court of Appeals, above

Briefs:

Timing: Within 60 days from notation on docket by Court of Appeals clerk, indicating record has been prepared and certified per CR 75.07
Cross-appellant's brief within 30 days from clerk's notice of docket entry *or* expiration of time allowed for appellant to perfect appeal

Response briefs within 60 days of Appellant's brief

Page limit: 50 pages for Appellant and Appellee briefs; 10 for Reply; 65 for Combined brief

Copies: Original and nine copies filed with Clerk of the Court of Appeals

Cover: Certificate of service; Appellant – red; Appellee – blue; Reply-yellow

Content:

I. INTRODUCTION

II. STATEMENT CONCERNING ORAL ARGUMENT*

III. STATEMENT OF POINTS AND AUTHORITIES*

IV. STATEMENT OF THE CASE*

V. ARGUMENT*

VI. CONCLUSION

VII. APPENDIX

Index of documents in Appendix

Court of Appeals Opinion

Board decision

ALJ's Opinion, Order or Award

Any pleadings or other documents to which ready reference would be helpful to the court*

*Also in Appellee's brief (counter-statements)

Rehearing: Same as Court of Appeals, above

V. Tips for practitioners

- Do not misquote either the law, or the decision from the ALJ.

- Always provide an analysis as to why the Workers' Compensation Board, or appropriate appellate Court should grant the relief sought.
- Ensure all items required by 803 KAR 25:010 Section 21, or by civil rule are included.
- Only ask for extensions of time when necessary. The Workers' Compensation Board, the Department of Workers' Claims Appeals section, and the clerks at the appellate courts are not personal calendars or tickler systems for any attorney.
- When asking for an extension of time, provide a valid explanation, or basis for the request.
- Thoroughly review the ALJ's decision to determine the issue(s) which may need to be appealed.
- File petitions for reconsideration with the ALJ where appropriate.
- Ensure the ALJ has provided the correct analysis in determining if any enhancing multipliers may apply pursuant to KRS 342.730(1)(c)1 & 3.
- Check the ALJ's opinion for mistakes.
- If an issue is raised, a corresponding argument should be made.
- Ensure all appropriate parties against whom the appeal is taken are listed on the notice of appeal, and the brief.
- DO NOT appeal from interlocutory decisions of the ALJ.
- DO NOT take potshots at either the ALJ or opposing counsel.
- Be civil to opposing counsel.
- Neither the Workers' Compensation Board, nor any other appellate court may substitute its judgment for that of the ALJ, nor make findings of fact.