

## KENTUCKY

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### 1. Citation for the state's workers' compensation statute

Kentucky Revised Statutes § 342.0011 et seq.; 803 Kentucky Administrative Regulations. 25:010 et seq

## SCOPE OF COMPENSABILITY

### 2. Who are covered "employees" for purposes of workers' compensation?

Covered "employees" include all persons, including minors, lawfully or unlawfully employed under any contract of hire; helpers, paid or not, if hired with the knowledge of the employer; corporate executive officers but not owners or partners of non-corporate business unless coverage is elected; volunteer fire, police, civil defense personnel or trainees and members of the National Guard on active duty; newspaper sellers or distributors. Ky. Rev. Stat. § 342.640.

Volunteers, those not for hire, are arguably excluded as non-employees, however, the insured may secure coverage. Payment of wages is not required and the possibility of a civil suit would be avoided.

Specific exemptions include the following: domestic servants, if there are less than two regularly employed in a private home for 40 hours or less per week; maintenance, repair and similar employees employed in a private home if the employer has no other employees subject to the Act; services performed in exchange only for aid or sustenance received from a religious or charitable entity; participants in a car pool; employees covered by federal employers' liability legislation; any employee who elects non-coverage (rejection must be written). Ky. Rev. Stat. § 342.650.

### 3. Identify and describe any "statutory employer" provision.

An employer is any person, other than one engaged solely in agricultural work, having one or more employees in the state, including non-federal governmental agencies. Ky. Rev. Stat. § 342.630. A prime contractor is liable to the employees of a subcontractor, if the latter fails to secure and maintain compensation coverage. Ky. Rev. Stat. § 342.610.

### 4. What types of injuries are covered and what is the standard of proof for each:

**A. Traumatic or "single occurrence" claims.**

"Injury" means any work-related traumatic event or series of events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. "Injury" does not include the effects of the natural aging process and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment. "Injury" when used generally... shall include an occupational disease and damage to a prosthetic appliance, but shall not include a psychological, psychiatric or stress-related change in the human organism unless it is the direct result of a physical injury. Ky. Rev. Stat. § 342.0011(1).

Although the effects of the "natural aging process" are specifically excluded, Administrative Law Judges and the Workers Compensation Board have deemed those disabilities compensable if the work played any role in the condition.

**B. Occupational disease (including respiratory and repetitive use).**

"Occupational disease" means a disease arising out of and in the course of employment and is deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease, and it can be seen to have followed as a natural incident of the work as a result of exposure occasioned by the nature of the employment, which can be traced to the employment as the proximate cause. Ky. Rev. Stat. § 342.0011(2)-(3).

**5. What, if any, injuries or claims are excluded?**

Kentucky is a "full benefit" jurisdiction. Any claim that can be proven to be a work-related "injury" or "occupational disease" is covered. Psychological claims not stemming from a physical injury are excluded.

**6. What psychiatric claims or treatments are compensable?**

Work-related psychological, psychiatric or stress injuries which are the direct result of a physical injury sustained in the course and scope of employment are compensable. Ky. Rev. Stat. § 342.0011(1). "Mental-mental" claims are excluded.

## 7. What are the applicable statutes of limitations?

A claim for benefits must be filed within two years of the date of injury or death or the last voluntary temporary total disability benefit made by the Employer, whichever is later. Ky. Rev. Stat. § 342.185. When temporary total disability benefits have been paid, an IA-2 form must be filed electronically with the Kentucky Department of Workers Claims notifying of the termination of these benefits in order to start the statute running. At that time, the Kentucky Department of Workers Claims issues a letter advising the employee of the applicable statute of limitations. Failure to timely and appropriately file the IA-2 will result in a tolling of the statute of limitations period until such form has been filed and in some cases may bar the affirmative defense even being raised.

In an occupational disease claim, the limitation of action period is three years after the last injurious exposure to the occupational hazard or after the employee first experiences a manifestation of an occupational disease in the form of symptoms reasonably sufficient to advise him that he has contracted the disease, whichever is later; if voluntary payments have been made, notice shall be deemed waived provided, however, that the right to compensation for an occupational disease claim is forever barred unless filed within five years of the last injurious exposure. Ky. Rev. Stat. § 342.185 was amended as of April 4, 1994, to include a limitation period for HIV claims of five years from date of exposure. In a claim for asbestos-related disease, the claim must be filed within twenty years from the last exposure to the occupational hazard. Ky. Rev. Stat. § 342.316.

In a cumulative trauma claim, the employee must give notice to the employer and file the claim within two years from the date the employee is told by a physician that the cumulative trauma is work-related. The claim for cumulative trauma is barred five years from the date the employee is last exposed to the cumulative trauma.

## 8. What are the reporting and notice requirements for those alleging an injury?

Notice of an accident must be given to the employer "as soon as practicable after the happening thereof." Ky. Rev. Stat. § 342.185. In cases of a repetitive trauma injury the employee must give notice within 2 years of being informed by a physician that the injury is related to employment. Notice of an occupational disease must be given within three years of the last injurious exposure or the first experience of a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise the employee that he or she has contracted the disease.

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

Self-inflicted injuries are excluded, but the defense is affirmative. Ky. Rev. Stat. § 342.610(3). Failure to follow medical advice may also be a defense. Ky. Rev. Stat. § 342.035(3). Failure to follow a known and reasonable safety rule results in a 15% reduction in benefits. Ky. Rev. Stat. § 342.165(1).

B. Willful misconduct, "horseplay," etc.

In addition to that above, injuries from horseplay are excluded, but the defense is affirmative.

C. Injuries involving drugs and/or alcohol.

If an employee voluntarily introduced an illegal, nonprescribed substance or substances or a prescribed substance or substances in amounts in excess of prescribed amounts into his or her body detected in the blood, as measured by a scientifically reliable test, that could cause a disturbance of mental or physical capacities, it shall be presumed that the illegal, nonprescribed substance or substances or the prescribed substance or substances in amounts in excess of prescribed amounts caused the injury, occupational disease, or death of the employee and liability for compensation shall not apply to the injury, occupational disease, or death to the employee. Ky. Rev. Stat. § 342.610 (4). Violation of safety rules and failure to follow medical advice may also be affirmative defenses.

10. What, if any, penalties or remedies are available in claims involving fraud?

A claim may be barred if the employee gives a written false representation concerning physical condition or medical history upon which the employer substantially relies in hiring and the misrepresentation is casually connected to the injury. Ky. Rev. Stat. § 342.165(2).

Any person who makes false representations designed to cause a reduction in the employer's premium is subject to criminal and civil penalties. Ky. Rev. Stat. § 342.335(2). Fraud investigations are conducted by the Department of Insurance. Ky. Rev. Stat. §§ 304.47-040, 342.335.

**11. Is there any defense for falsification of employment records regarding medical history?**

If an employee knowingly and willfully makes a false representation as to medical history or physical condition, **in writing**, the employer substantially relies upon the representation in hiring, and there is a causal connection between the representation and the injury, the employee is barred from collecting benefits. Ky. Rev. Stat. § 342.165(2).

**12. Are injuries during recreational and other non-work activities paid for or supported by the employer compensable?**

If an employee is injured in a recreational activity associated with the employer, the injury may be viewed as "work-related" if: (1) the injury occurred on the employer's premises during lunch or a recreation period incident to regular employment; or (2) the employer expressly or impliedly required participation in the activity; or (3) the employer derived substantial direct benefit from the activity beyond the intangible value of improvement of employee health and morale; or (4) the employer exerts sufficient control over the activity to bring it within the orbit of employment. *Smart v. Georgetown Cmty. Hosp.*, 170 S.W.3d 370 (Ky. 2005). Any one of these factors is generally sufficient causal connection to the job to establish compensability.

**13. Are injuries by co-employees compensable?**

Injuries by co-employees are generally compensable unless the injury was the result of the employee's involvement in horseplay, assault (so long as the cause of the assault was not causally connected to the employment) and/or a willful violation of a safety policy.

**14. Are acts by third parties unrelated to work but committed on the premises, compensable (e.g. "irate paramour" claims)?**

The test of compensability is whether the assault/injury had a causal connection with the employment. If the assault/injury occurs through personal animosity or over causes wholly unrelated to the employer's business, the employee cannot be compensated even though the assault/injury occurs at work. Compensation will, however, be granted for injuries from an assault by a fellow employee when those injuries are fairly traceable to the conditions of employment.

## BENEFITS

### 15. What criterion is used for calculating the average weekly wage?

The workers' compensation commissioner determines the state "average weekly wage" on or before September 1 of each year by taking the total wages reported by Employers divided by average monthly insured workers during preceding 12 months, then dividing by 52 weeks. Beginning in 1997 the average wage calculation is based on wage information in effect two years prior to the calculation. Ky. Rev. Stat. § 342.143.

Income benefits for disability are based on 66 2/3% of the employee's "average weekly wage" but not to exceed 110% of the State maximum average weekly wage for temporary or permanent total disability benefits, not to exceed the State maximum for permanent partial disability benefits or dip below the minimum. A wage statement needs to be obtained for 52 weeks preceding the injury then divided into four 13 week quarters. "Average weekly wage" is based upon the best quarter of earnings during the four quarters preceding the injury. Wages are based on the salary or on the weekly hour or output. The Employee is entitled to include all compensation excluding premium pay. Straight time rate of pay times the number of hours worked, plus earned bonuses, earned vacation pay and other incentives are included. If the employee works a second job, and the employer had knowledge of that second job, wages from concurrent employment are included in determining average weekly wage. Ky. Rev. Stat. § 342.140. If the employee did not work a full thirteen weeks prior to the injury, average weekly wage is calculated based on the wages of similarly situated employees.

### 16. How is the rate for temporary/lost time benefits calculated, including minimum and maximum rates?

Temporary total and permanent disability benefits are based upon 66 2/3% of the employee's average weekly wage but not to exceed 110% of the state maximum average weekly wage and not less than 20% of the state minimum average weekly wage. Ky. Rev. Stat. § 342.730.

The state temporary total disability rates for injuries are: for 2012 injuries, the maximum rate is \$736.19 and the minimum is \$147.24. For 2013 injuries, the maximum rate is \$752.69 and the minimum is \$150.54. For 2014 injuries, the maximum rate is \$769.06 and the minimum is \$153.81. For 2015 injuries, the maximum rate is \$773.61 and the minimum is \$159.72. For 2016 injuries, the maximum rate is \$798.63 and the minimum is \$159.72. For 2017 injuries, the maximum rate is \$835.04 and the minimum rate is \$167.00.

17. **How long does the employer/insurer have to begin temporary benefits from the date disability begins?**

Benefits must be instituted no later than the 15th day after the employer has knowledge of an injury or disability, and are to be paid thereafter not less often than semi-monthly. Ky. Rev. Stat. § 342.040. The employee must miss seven days of work before becoming eligible for benefits. On the 15th day, the employer/carrier must pay for the first 7 days of lost time retroactively.

18. **What is the "waiting" or "retroactive" period for temporary benefits (e.g. must be out \_\_\_\_\_ days before recovering benefits for the first \_\_\_\_ days)?**

The employee must be out 15 days before recovering benefits for the first 7 days. Ky. Rev. Stat. § 342.040.

19. **What is the standard/procedure for terminating temporary benefits?**

Prior approval does not have to be obtained from the Workers' Compensation Board before terminating temporary total disability benefits. The employer must have reason to believe that injured worker has reached maximum medical improvement or been released to return to customary employment. Notice must be given to the Workers' Compensation Board that benefits were terminated (Electronic filing of Form IA-2). The Board, in turn, sends written notice to employee of his/her right to prosecute a claim. The statute of limitations period in a claim where temporary total disability was paid does not begin to run until the IA-2 is filed.

20. **Is the amount of temporary total disability paid credited toward the amount entitled for permanent partial disability?**

If the employer voluntarily advanced temporary total disability benefits and the employee is subsequently awarded permanent partial disability for that same period at a lesser rate, a dollar for dollar credit can be taken unless that credit is more than future benefits due, in which case only a week for week credit can be taken. The employer is entitled to a credit for salary continuation paid to an injured employee regardless of whether it is paid in lieu of temporary total disability benefits.

21. **What disfigurement benefits are available and how are they calculated?**

For injuries before December 1996, benefits are awarded for occupational "disability" (a decrease of wage earning capacity due to the injury or loss of ability to compete and obtain the kind of work employee is customarily able to do, in the area where he lives, taking into consideration age, occupation, education, health impairment or disfigurement).

For injuries on or after December 12, 1996, an injured worker must receive a functional impairment rating under the AMA Guides, most recent edition<sup>1</sup>, in order to receive any award for permanent disability. There are no specific disfigurement benefits.

**22. How are permanent partial disability benefits calculated, including the minimum and maximum rates?**

**A. How many weeks are available for scheduled members/parts, and the standard for recovery?**

Not applicable. See answer 22B.

**B. Number of weeks for "whole person" and standard for recovery.**

Once employee reaches maximum medical improvement, has been released to return to work, or has been given permanent functional impairment and restrictions, temporary total disability benefits should be terminated. At that point permanent partial disability, if any, begins.

*For injuries occurring prior to December 12, 1996, it is within the discretion of the Administrative Law Judge to determine the amount of permanent partial occupational disability after taking into consideration the worker's age, education, skills, experience and physical limitations.*

*For injuries occurring or last date of exposure on or after December 12, 1996 and before July 15, 2000, disability is determined by the table set forth in Ky. Rev. Stat. § 342.730, which utilizes the AMA impairment rating times a multiplication factor. The product of these figures is referred to as the "permanent disability rating." Age, education and geographical location are not to be*

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<sup>1</sup> Although Kentucky states reference the most recent edition of the AMA Guides, following the passage of the AMA Guides 6th Edition, the Kentucky legislature delayed the application of the use of the 6th edition of the AMA Guides. Until given further notice, impairments should be assessed using the 5th edition.



considered in determining permanent partial disability.

<u>AMA IMPAIRMENT</u>	<u>FACTOR</u>
0 - 5%	0.75
6 - 10%	1.00
11 - 15%	1.25
16% - 20%	1.50
21% - 25%	1.75
26% - 30%	2.00
31% - 35%	2.25
36 and above	2.50

Benefit duration is 425 weeks for 50% or less permanent disability rating and 520 weeks for greater than 50% permanent disability rating. The permanent disability rating is the AMA functional impairment multiplied by the factor. For older workers benefits cease at age 70 or 4 years after the date of injury or last injurious exposure, whichever last occurs.

Under Ky. Rev. Stat. § 342.730(1)(c)(2), when an employee returns to work at the same or greater average weekly wage (AWW) benefits are reduced by ½ for each week such work continues. If employment ceases for any reason, benefits will be restored to the regular benefit level during unemployment or work at lesser wages than earned at time of injury. However, under § 342.730(1)(c)(1), an employee who does not retain the "physical capacity" to return to the type of work performed at the time of injury is entitled to 1.5 times the benefit to which one would otherwise be entitled.

*For injuries occurring on or after July 15, 2000 but before July 14, 2018, permanent partial disability is calculated by taking 66 2/3% of the employee's average weekly wage but not more than 75% of the state's average weekly wage multiplied by the permanent impairment rating caused by the injury or occupational disease as determined by the AMA Guidelines times the factors set forth below; for permanent partial disability for injuries occurring after July 14, 2018, the maximum rate has been increased to 82.5% of the state's average weekly wage with the factors remaining the same:*

<u>AMA IMPAIRMENT</u>	<u>FACTOR</u>
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0 - 5%	0.65
6 - 10%	0.85
11 - 20%	1.00
21 - 25%	1.15
26 - 30%	1.35
31 - 35%	1.50
36 and above	1.70

In addition to the benefits above, the following is to be added to the income benefit multiplier set forth above if the employee does not retain the physical capacity to return to the type of work previously done to compensate for limited education and advanced aging impacts on post injury earning capacity:

If at the time of the injury the employee had:

- Less than 8 years of formal education -- increase multiplier by .4
- Less than 12 years or GED – increase multiplier by .2

If at the time of the injury the employee was:

- Age 60 or older – increase multiplier by .6
- Age 55 or older -- increase multiplier by .4
- Age 50 or older -- increase multiplier by .2

If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury, the benefit for permanent partial disability shall be multiplied by 3 times the amount otherwise determined under this subsection, but this provision shall not be construed so as to extend the duration of payments; or

If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury, the weekly benefits for permanent partial disability shall be determined under paragraph (b) of this section for each week that the employment is sustained. During any period of cessation of that employment, for any reason, with or without cause, payment of the weekly benefits shall be 2 times the amount otherwise payable under this section.

For permanent partial disability, if an employee has a permanent disability rating of 50% or less as a result of a work-related injury the compensable permanent partial disability period shall be 425

weeks, and if the permanent disability rating is greater than 50%, the compensable permanent partial disability shall be 520 weeks. Benefits payable for permanent partial disability shall not exceed 99% of 66 2/3% of the employee's average weekly wages determined by this chapter and shall not exceed 82.5% of the state's average weekly wage. The employer may elect to pay an award or settlement of permanent partial disability benefits in a lump sum. If this is done, the employer may take a discount to reflect present value. At the time of this publication, the stated 2011 discount allowed by regulation was 2.125% (425 weeks = 390.1578 weeks and 520 weeks = 468.5100).

*For all post July 18, 2018 injuries*, all income benefits terminate on date on which the employee reaches the age of 70 or 4 years from the date of injury or last injurious exposure, which ever last occurs. . Ky. Rev. Stat. § 342.730(4). Benefits will be offset for unemployment benefits or employer funded disability or sickness and accident plan covering same disability unless the plan contains an internal offset provision providing otherwise. Ky. Rev. Stat. § 342.730(6).

For injuries in 2011, the maximum for permanent total is \$721.97; the maximum for permanent partial disability is \$541.47. For 2012 injuries, the maximum for permanent total is \$736.19; the maximum for permanent partial disability is \$552.13. For 2013 injuries, the maximum for permanent total is \$752.69; the maximum for permanent partial disability is \$564.52. For 2014 injuries, the maximum for permanent total is \$769.06; the maximum for permanent partial disability is \$576.80. For 2015 injuries, the maximum for permanent total is \$773.61; the maximum for permanent partial disability is \$580.21. For 2016 injuries, the maximum for permanent total is \$798.63; the maximum for permanent partial disability is \$598.98. For 2017 injuries, the maximum for permanent total is \$835.04; the maximum for permanent partial disability is \$626.29. Until publication of the 2018 Schedule of Benefits, the maximum for injuries occurring after July 14, 2018 will be 110% of the latest maximum benefit for permanent and temporary total disability benefits.

**23. Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?**

Rehabilitation regulations requiring mandatory referral to "qualified rehabilitation counselors" expired on April 4, 1994. Ky. Rev. Stat. § 342.710 still provides that an Administrative Law Judge may order vocational rehabilitation for a period not to exceed 52 weeks, except in unusual cases. An employee is entitled to vocational rehabilitation when, as a result of the injury, he is unable to perform work for which he has previous training or experience. Preference is given to returning the work to the same employer or similar employment. Vocational rehabilitation may be sought upon application of any party or by the Administrative Law Judge on his or her own motion. Worker's refusal to accept rehabilitation when ordered results in a 50% loss of compensation for the period of refusal.

**24. How are permanent total disability benefits calculated, including the minimum and maximum rates?**

There is no 425 or 520 week cap for disability benefits if a worker is determined to be permanently totally disabled. Benefits are available for the worker's life or until she becomes eligible for old age social security, depending upon the date of the injury. Benefits are determined based upon 66 2/3% of worker's "average weekly wage," subject to the state maximum and minimum rates. For injuries occurring on or after April 4, 1994, non-work-related disability shall not be considered in determining the appropriate award of disability.

For injuries occurring on or after December 12, 1996, all income benefits, even permanent total disability, terminate on date on which the employee reaches the age of 70 or 4 years after the date of injury or the employee's last injurious exposure, whichever last occurs. Ky.Rev.Stat. § 342.730(4).

If employee returns to work while receiving permanent total disability benefits, he must notify the employer and the carrier. Ky.Rev.Stat. § 342.730(7).

**25. How are death benefits calculated, including the minimum and maximum rates?**

In regards to benefits when death results from a compensable injury:

**A. Funeral expenses.**

Under Ky. Rev. Stat. § 342.750(6), if death of employee occurs within 4 years from date of injury as a direct result of the injury, a lump sum payment is to be made to estate, from

which burial expenses are to be paid. For deaths occurring in 2008, the lump sum amount is \$65,813.60, for 2009 it is \$68,198.54, and for 2010 it is \$69,916.52. This amount is recalculated on an annual basis along with average weekly wage and benefit rates.

**B. Dependency claims.**

Benefits payable for death are similar to those for total disability, payable directly to the dependents of the employee. A determination of dependency is made at the time of death.

Benefits are payable to the surviving spouse based upon 50% of the employee's average weekly wage if there were no dependent children. A surviving spouse, with dependent children, is entitled to 45% of the average weekly wage (or 40% if the children are not living with the spouse). In addition, each dependent child is entitled to 15% of the average weekly wage, but if there are more than two children the 30% benefit is divided equally. If there is no spouse but there are dependent children: one child gets 50% of the average weekly wage; if two children, 15% to the second child; and if more than two, benefits divided equally. Benefits due to a surviving spouse are paid until death or remarriage. In the event of remarriage, two years of indemnity benefits are paid in a lump sum. Ky. Rev. Stat. § 342.730. Benefits due to dependent children are paid until death, marriage or age 18 (or 22 if a full-time student) unless the child is physically or mentally incapable of self-support. Benefits to spouses and dependents terminate on the date that the employee would have reached the age of 70 or 4 years from the date of injury or last injurious exposure, whichever last occurs. Ky. Rev. Stat. § 342.730(4).

If the employee has a compensable injury but dies from unrelated causes before the expiration of the compensable period, unpaid portions, whether or not accrued under an award entered before or after the death, are paid pursuant to a formula similar to that set forth above. Ky. Rev. Stat. § 342.730(3).

Effective July 14, 2018, income benefits otherwise payable for temporary total disability to a professional athlete under the direction and control of an employer that is a professional team located in Kentucky, absent any collective bargaining agreement, shall terminate no later than the date on which the contract for hire upon which the employment is based expires, so long as the professional athlete has been released to return to employment for which he or she has prior training or experience. Ky. Rev. Stat. § 342.730(9).

**26. What are the criteria for establishing a "second injury" fund recovery?**

The "second injury" fund in Kentucky was known as the "Special Fund." Ky. Rev. Stat. § 342.120 formerly provided that the Special Fund was liable for that portion of permanent disability resulting from a dormant non-disabling disease or condition which was aroused or brought into disabling reality by reason of a compensable injury or occupational disease. However, pursuant to § 342.120(e), the Special Fund has no liability for injuries or occupational disease where the injury or last exposure occurs on or after December 12, 1996. It will continue to process payments for the life of existing awards and to participate in claims and re-openings for injuries and dates of exposure prior to December 12, 1996.

For those injuries for which there is still liability, Ky. Rev. Stat. § 342.1202 provides for an automatic 50/50 apportionment in cases where the pre-existing condition involved the back or the heart.

Another formula is set forth for apportionment in occupational disease claims based upon lengths of employment/exposure. In all other cases apportionment must be proven based upon reasonable medical probability. For injuries occurring between April 4, 1994 and December 12, 1996, the Special Fund's liability for all injury claims, other than back and heart claims which is already set at 50%, shall not exceed 50% of the permanent disability award. Where the Judge finds the portion of aroused previously dormant condition exceeds 50%, the portion exceeding 50% shall be paid by the Employer. Ky. Rev. Stat. § 342.1202(2).

**27. What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?**

A claim may be re-opened upon a showing of a change of occupational disability, mistake, fraud or newly discovered evidence. Ky. Rev. Stat. § 342.125(1). Except for re-openings for medical issues, award of additional temporary total disability benefits, fraud, an employee returning to work under Ky. Rev. Stat. § 342.730(1)(c)(2), or where an employee holding a total award returns to work, a motion to reopen must be made within four years of the date of the original award or order approving settlement or finalizing an appeal. The motion may not be made within one year of a prior motion to reopen. For cases involving black lung, an additional two years of employment with continuous injurious exposure is required prior to a motion to reopen. Any increase in benefits is payable from the date of filing the motion to reopen for the remainder of the compensable period.

**28. What situation would place responsibility on the employer to pay an employee's attorney fees?**

Attorney fees are paid out of the employee's disability award, either by taking a credit from the end of the award, reducing the weekly installments, or paying from a lump sum settlement. If benefits have been deemed wrongfully denied and the employee seeks a penalty, it could include an attorney fee in addition to (rather than out of) the disability award, plus court costs and 18% interest on past due benefits rather than 12%. There is a \$15,000.00 limit on attorney fees for contracts signed between April 4, 1994 and December 12, 1996. Ky. Rev. Stat. § 342.320.

For all cases in which attorney fee contracts were signed after July 14, 2000 but before July 14, 2018, a fee cap is now in place where the maximum fee for the employee's counsel is 20% of the first \$25,000, 15% of the next \$10,000, and 5% of the remainder up to a maximum fee of \$12,000.00 for services.

For attorney fee contracts signed on or after July 14, 2018, twenty percent (20%) of the first twenty-five thousand dollars (\$25,000) of the award, fifteen percent (15%) of the next twenty-

five thousand dollars (\$25,000), and ten percent (10%) of the remainder of the award, not to exceed a maximum fee of eighteen thousand dollars (\$18,000).

## EXCLUSIVITY/TORT IMMUNITY

### 29. Is the compensation remedy exclusive?

#### A. Scope of immunity.

The liability of the employer, so long as payment of compensation was secured (insurance/self-insurance), is exclusive to the employee, legal representative, spouse, parents, dependents, next of kin and anyone else otherwise entitled to recover damages from the employer due to injury or death. Ky. Rev. Stat. § 342.690.

#### B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

If the employer failed to maintain workers' compensation insurance, an employee may maintain a civil action in addition to a claim for compensation. The employee is entitled to the larger of either the compensation benefits or the common law damages. Ky. Rev. Stat. § 342.690. In the event of an employer's failure to secure coverage, the defenses of negligence of a co-employee, assumption of the risk, and contributory negligence are not available.

An employee may reject workers' compensation coverage upon hire, so long as it is done in writing and filed with the Department of Workers' Claims. In the event a non-covered employee is injured, that employee may sue the employer. The employer retains all common law defenses available in that situation. Employee rejections of coverage are carefully screened by the Department of Workers' Claims.

The exclusive remedy provision applies to cases in which the employer manufactured a product which caused the employee's death, barring a claim based upon products liability.

The exclusive remedy provision does not preclude a discharged employee from bringing a common law wrongful discharge action where the basis of that action is that the employee was discriminated against for pursuing a lawful workers' compensation claim.

Also, it should be noted that the exclusive remedy provision may extend to a "statutory employer".

**30. Are there any penalties against the employer for unsafe working conditions?**

If an accident is caused by the intentional failure of an employer to comply with a statute or safety regulation, the amount of compensation payable may be increased by 30%. Likewise, if the accident is caused by the intentional failure of an employee to use a safety appliance furnished by the employer, or the employee's intentional failure to obey safety rules and regulations, compensation may be decreased by 15%. Ky. Rev. Stat. § 342.165. False representations, including misrepresentation of hazards designed to cause reduction in the employer's premium are subject to civil and criminal penalties. Ky. Rev. Stat. § 342.335(2).

**31. What is the penalty, if any, for an injured minor?**

All employees, including minors, whether lawfully or unlawfully employed, are covered unless specifically excluded or an election not to be subject to the Act was made. Ky. Rev. Stat. § 342.640. There is no special penalty for injury to a minor.

**32. What is the potential exposure for "bad faith" claims handling?**

Employer/insurers are now subject to the Unfair Claims Settlement Practices Act in Kentucky. If an employer/insurer engages in unfair settlement practices under Ky. Rev. Stat. § 342 or Ky. Rev. Stat. § 304.12-304, the Commissioner will impose fines of \$1,000 to \$5,000 for each violation. These fines may be imposed personally. For pattern of violations, the Commissioner may revoke the certificate of insurance. Ky. Rev. Stat. § 342.267. The Kentucky Supreme Court has also overturned a lower Court's attempt to expand this to create a separate civil action for bad faith if the Commissioner fines a violation of the UCSPA. As such, no private or separate cause of action outside of the administrative proceedings exists for "bad faith" claims in Kentucky Workers Compensation.

**33. What is the exposure for terminating an employee who has been injured?**

An employee terminated for filing a workers' compensation claim has a cause of action against the employer for compensatory damages even if that employee was terminable at will. It has been held that where the ground for discharging an employee was contrary to public policy, for



example when the employee was discharged for refusing to break the law or for pursuing a right conferred upon him or her by legislative enactment (e.g. workers' compensation), the discharge is actionable. The five year statute of limitations for actions based upon liability created by statute was applied rather than the one year statute of limitations for personal injuries.

## THIRD PARTY ACTIONS

### 34. Can third parties be sued by the employee?

Yes.

### 35. Can co-employees be sued for work-related injuries?

Generally no, unless the injury which occurred at work was otherwise not related to the employment.

### 36. Is subrogation available?

Yes. When an injury for which compensation is payable has been sustained under circumstances creating liability in a third party, the employee may proceed against the third party to recover damages and against the employer for compensation, but cannot collect from both. Notice must be given to the employer of any third party action and the employer may recover indemnity and medical expenses paid, less its portion of the employee's legal fees and expenses. Ky. Rev. Stat. § 342.700. However, if the employee settles with the third party, an employer/insurer is limited to subrogation recovery only to the extent that the employee has settled for the same items of damages for which the employer/insurer has paid. Where the settlement against the third party is for items not paid by the employer/insurer, such as pain and suffering, there is no right of subrogation against the settlement proceeds.

## MEDICALS

### 37. Is there a time limit for medical bills to be paid, and are penalties available for late payment?

When a medical bill is presented for payment in a claim where there has been as settlement or

award and the bill is being disputed by the Employer/carrier, a motion to reopen the case and Form 112 Dispute must be filed within 30 days of presentment of a "substantially completed statement of services." The Employer/carrier bears the burden of proving the treatment was not reasonable nor necessary. In pre-litigation cases, the worker bears the burden of proving compensability and has the option of interlocutory relief to expedite decision. Otherwise, payments must be made within 30 days of receipt of statement for services. Failure to do so without reasonable grounds for delay could result in fine of \$100 - \$1,000 for each offense. Ky. Rev. Stat. § 342.990(8)(b).

A revised Hospital and Medical Fee Schedule have been passed. 803 KAR 25:091; 803 KAR 25:089.

**38. What, if any, mechanisms are available to compel the production of medical information reports and/or an authorization) at the administrative level?**

Medical records and reports are to be produced by providers with a release. If a provider refuses, subpoenas may be procured from an administrative law judge. Most providers tender reports voluntarily with payment requests.

In order to receive medical benefits, an employee must complete a Form 113, Physician Designation and Medical Release. In order to file a claim for benefits (a Form 101 Application for Adjustment of Benefits), a medical release form (Form 106) must be completed by the employee and included.

**39. What is the rule on (a) Claimant's choice of physician; (b) Employer's right to a second opinion?**

**A. Claimant's choice of physician.**

The employee is entitled to choose a physician, and must make the designation on a Form 113 Physician Designation and Medical Release Card. The employee may change the designated physician once, and thereafter only upon agreement of the employer, carrier or Administrative Law Judge. If the employee fails to complete this form, all benefits may be terminated until the employee has complied with the requirement. 803 KAR 25:096 § 3.

Also, a framework for managed care plans has been implemented, but plans must be approved by the Commissioner. Choice of physician must be a component in any managed care plan.

**B. Employer's right to a second opinion and/or Independent Medical Examination.**

The employer is entitled to request the claimant submit to a second opinion at any time. The claimant's refusal will result in the termination/suspension of all benefits until she submits. Ky. Rev. Stat. § 342.205

**40. What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?**

The employer must pay for all "reasonable and necessary" medical expenses for the "cure and relief from the effects of an injury or occupational disease." Ky. Rev. Stat. § 342.020. "Cure and relief" has been interpreted to mean "cure and/or relief." Treatment includes medical, surgical, hospital, nursing, surgical supplies and appliances, therapy and chiropractic care. Effective July 14, 2018, when a compensable injury or occupational disease results in the amputation or partial amputation of an arm, hand, leg, or foot, or the loss of hearing, or the enucleation of an eye or loss of teeth, or permanent total or permanent partial paralysis, medical care is to continue as long as it is needed regardless of the disability award period.

For all other claims where permanent partial disability benefits were awarded, medical care shall be paid for 780 weeks from the date of injury or last exposure. The Commissioner is to provide the employee with notice of the possible termination of medical benefits 754 weeks from the date of injury or last exposure, and benefits may be continued if:

1. An application is filed within seventy-five (75) days prior to the termination of the seven hundred eighty (780) week period;
2. The employee demonstrates that continued medical treatment is reasonably necessary and related to the work injury or occupational disease; and
3. An administrative law judge determines and orders that continued benefits are reasonably necessary and related to the work injury or occupational disease for additional time beyond the original seven hundred eighty (780) week period provided in paragraph (a) of this subsection.

Treatment shown to be unproductive or outside of the type of treatment generally accepted by the medical profession as reasonable, may not be the employer's responsibility. *Square D. Co. v. Tipton*, 862 S.W. 2d 308 (Ky. 1993).

**41. Which prosthetic devices are covered, and for how long?**

Prosthetic devices are covered as may be reasonably required at the time of the injury and thereafter for as long as the employee is disabled.

**42. Are vehicle and/or home modifications covered as medical expenses?**

Possibly. A determination would be made on a case-by-case basis as to whether it is a "reasonable and necessary" medical expense for the "cure and/or relief" of the injury. Home nursing services, particularly involving a spouse, are also often raised and may be compensable.

**43. Is there a medical fee guide or schedule, or other provisions for cost containment?**

Yes. There is a medical fee schedule in effect. Balance billing is prohibited. Ky. Rev. Stat. § 342.033(2). Since April 4, 1994, an employer may furnish medical treatment through an approved managed care system. Ky. Rev. Stat. § 342.020. Alternative Dispute Resolution may be used as another cost containment option, so long as it is included in a collective bargaining contract. A revised Hospital Medical Fee Schedule has been passed effective June 2009. 803 KAR 25:091" with "The DWC periodically updates the Hospital Medical Fee Schedule.

**44. What, if any, provisions or requirements are there for "managed care"?**

Employers in Kentucky may provide health care services through a managed care program. However, a plan must be filed with the Department of Workers' Claims and approved by the Commissioner. Ky. Rev. Stat. § 342.020.

The managed care system provision states that: (1) co-payments and deductibles may not be required for treatment relating to a work-related injury or occupational disease; (2) the employee has the choice of physicians within the plan; (3) the employee may obtain a second opinion at the employer's expense from an outside source if surgery has been recommended; (4) the employee may obtain service from outside the plan when treatment is unavailable through the managed care system; (5) procedures for Utilization Review for disputed fees and treatment must be in place; and (6) restrictions on care imposed by the managed care system shall not apply to emergency care.

## PRACTICE/PROCEDURE

### 45. What is the procedure for contesting all or part of a claim?

When the employee files an application for benefits (the complaint), a schedule to take proof is issued, followed by a Benefit Review Conference and a hearing for a determination of contested issues. A Form 111 Notice of Claim Denial or Acceptance must be filed within 45 days after the claim has been assigned to an Administrative Law Judge. Failure to timely file this Notice of Denial, listing intent to deny a claim and the basis for the denial. Also, a will result in waiver of the defenses. For certain defense, such as statute of limitations, a special answer should also be filed as soon as evidence of the affirmative defense is learned. A notice of resistance of medical expense liability or certain portions of a compensable claim may also be appropriate in pending litigation.

### 46. What is the method of claim adjudication?

#### A. Administrative level.

Upon filing an application for benefits, an Administrative Law Judge will be assigned to the claim. The Administrative Law Judge will conduct any proceedings "necessary to the resolution of the claim," including ordering the parties to appear for a benefit review conference (informal conference), submission of medical reports and testimony by deposition. The Administrative Law Judge may also direct the employee to an evaluating physician from the University of Kentucky or University of Louisville medical schools. Ky. Rev. Stat. § 342.315.

The parties are given a proof schedule which gives the Plaintiff 60 days to submit proof, the employer then has 30 days followed by 15 additional days for rebuttal by the employee. The employer/insurer has 45 days to file a notice of claim acceptance or denial from the date of assignment to the Administrative Law Judge. At the close of proof, a Benefit Review Conference will be held at which time settlement will be attempted, and if failing, the parties will enter into stipulations and a final hearing will be scheduled. At the hearing, the parties may present live testimony. Wither oral arguments will be made at the hearing or briefs submitted typically within thirty days. The Administrative Law Judge must issue a decision within 60 days of the hearing.

#### B. Trial court.

See above.

**C. Appellate.**

After an Opinion or Award by an Administrative Law Judge, either party may submit a Petition for Reconsideration to the Administrative Law Judge or appeal to the Kentucky Workers Compensation Board where it will be reviewed by a three member panel. Following a decision of the Workers' Compensation Board, a petition for review by the Kentucky Court of Appeals may be filed. Thereafter, there is a direct right of appeal to the Kentucky Supreme Court.

**47. What are the requirements for stipulations or settlements?**

Settlements must be in writing on forms filed with the Department of Workers' Claims and submitted for approval by an administrative law judge.

No agreement for commuted lump sum payment of future income benefits over \$100.00 per week is to be approved unless there is "reasonable assurance" that the employee will have an adequate source of income benefits during disability. This may be shown by submission of an affidavit detailing the employee's current work status.

**48. Are full and final settlements with closed medicals available?**

Yes. There is a specific question on the Form 110 settlement agreement which allows for additional consideration to be paid for closure of future medical expenses. Administrative Law Judge's will review these settlements closely and often request additional documentation or testimony verifying that the Plaintiff understands what he/she is doing and has another source of income to pay for any future medical expenses should they arise. The Settlement Agreement itself requires specific acknowledgements when such waivers are sought. If a Medicare Set-Aside is part of the settlement, it must be disclosed on the Form 110. Such agreements are often approved, especially if the employee is represented and/or compensability is disputed, but must ensure proper acknowledgments and consideration. Parties to such agreements should be aware that they may be set aside as unconscionable or against public policy given the right set of circumstances.

**49. Must stipulations and/or settlements be approved by the state administrative body?**

Yes. An Administrative Law Judge must approve all settlements.

## RISK FINANCE FOR WORKERS' COMPENSATION

50. **What insurance is required, what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?**

Every "employer" must maintain sufficient insurance to satisfy the Department of Workers' Claims of its financial ability to pay compensation as provided under the Act in order to transact business in the state. Ky. Rev. Stat. § 342.340. This can be by means of traditional insurance or self-insurance. Additionally, a state fund was created effective April 4, 1994. A certificate of coverage must be filed with the Department of Workers' Claims. Ky. Rev. Stat. § 342.340.

51. **What are the provisions/requirements for self-insurance?**

Regulations and financial monitoring of self-insured funds are being tightened. There is likely to be an increase in surety and bonding requirements and the formation of a surety association due to reticence on the party of self-insureds to cover each other in the event of insolvency.

An employer seeking self-insured status must file with the Department of Workers' Claims an application for a certificate accompanied by an audit for the preceding fiscal year, and a summary statement regarding workers' compensation claims experience. The Department of Workers' Claims determines whether the applicant has financial soundness and resources sufficient to fully pay and discharge any and all workers' compensation liabilities when and as they become due. In the event the application is approved, a bond, with or without surety, is required.

52. **Are "illegal aliens" entitled to benefits of workers compensation in light of The Immigration Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contract in the United States, although most state acts include them within the definition of "employee"?**

Ky. Rev. Stat. § 342.640 provides benefits to all employees whether lawfully or unlawfully in the service of a Kentucky employer. Accordingly, an "illegal alien" is entitled to workers compensation benefits in Kentucky. Additionally, alien dependants also qualify for dependents benefits at one-half the rate provided for resident dependents. Ky. Rev. Stat. § 342.130.

**53. Are terrorist acts or injuries covered or excluded under workers' compensation law?**

Kentucky case law and statute has not yet specifically addressed this issue. However, it would appear that employees injured in the course and scope of their employment as a result of a terrorist act are still entitled to the benefits of workers compensation and these claims would not be per se excluded or barred. Issues to be considered will be whether the injury occurred on the company's property and whether the employee was placed at an increased risk due to the nature or location of employment. Similarly, Kentucky has recognized "Acts of God" injuries under certain circumstances to be compensable.

**54. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare's interests pursuant to the Medicare Secondary Payer Act?**

Under Medicare regulations (42 CFR 411.46), Medicare is secondary payer to the payment of worker's compensation by a worker's compensation carrier or self-insured employer. The obligation to pay medical for a compensable condition cannot be shifted to Medicare. Therefore, Medicare has an interest in all lump sum settlements of a worker's compensation matter if at the time of the settlement the employee meets the following criteria:

- the employee is already a Medicare enrollee, in which case there is not a threshold settlement amount; or
  
- there is a reasonable expectation that the employee will be a Medicare enrollee within 30 months of the settlement *and* the settlement amount is greater than \$250,000.

If the employee meets the criteria for consideration by Medicare, Medicare must be notified in the event of a settlement. Upon review of the file, Medicare may conclude that the settlement does not meet its criteria, or it may require a Medicare set aside trust for large settlements, or it may require merely a custodial self-administered trust account. (Reference 42 CFR 404, 411; 42 USC §1395)

At this time, Kentucky has added no specific requirements for satisfying Medicare's interests. The Form 110 Agreement As To Compensation has been modified to reflect whether an Medicare Set Aside Trust is part of the settlement, and if so, the specific terms. Kentucky has not added any additional requirements or reviews for approval of such settlements.



**55. How are subrogation liens of Medicaid and health insurers treated under workers' compensation law?**

The Federal Medicaid statute requires States to include in their plan for medical assistance provisions (1) that the individual will assign to the State any rights to payment for medical care from any third party and (2) that the individual will cooperate with the State in pursuing any third party who may be liable to pay for care and services available under the Medicaid plan. 42 U.S.C.A. § 1396k(a). The State is authorized to retain such amount as is necessary to reimburse it (and the Federal Government as appropriate) for medical assistance payments and to pay the remainder to the individual. 42 U.S.C.A. § 1396k(b).

Both health insurers and Medicaid liens are recoverable in Kentucky workers' compensation claims if the holder of the lien places the parties on notice of the lien and/or intervenes in the action. Recovery on the lien is limited to those expenses related to the work injury and subject to the caps placed upon fees under the Kentucky Workers' Compensation Fee Schedule.

**56. What are the requirements for confidentiality and privacy of medical records under workers' compensation law and how are they affected by state and federal law (HIPAA)?**

HIPAA, 45 C.F.R. parts 160-164 and 65 F.R. 82462, went into effect on April 14, 2003. The law provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers. 45 C.F.R. 164.512(l). As a result your current practice of obtaining medical records could proceed under state law.

In order to pursue workers compensation benefits in Kentucky, an employee is obligated to sign a Form 106 Medical Waiver and Consent Form which entitles the employer and/or carrier to obtain any medical records relevant to the claim. The form includes a waiver of physician-patient, psychiatrist-patient and chiropractor-patient privilege. There is a 180 day time limitation placed on the waiver by the employee is obligated to sign additional waivers as needed throughout the duration of the claim. Failure to sign such waiver may result in suspension of benefits or dismissal of the claim. No other privacy or confidentiality provisions have been applied to the obtaining or use of these records. If a provider refuses to produce the records with the authorization form, an Administrative Law Judge may sign and issue a subpoena for the records.

**57. What are the provisions for "Independent Contractors"?**

Under Kentucky law, the Administrative Law Judge has the authority to determine whether an individual is an employee or an independent contractor for purposes of coverage under the Act.

Four main factors are considered: the nature of the work performed as it relates to the business of the possible employer, the extent of control of details of the work, the professional skill of the worker and the intentions of the parties. Generally, an independent contractor, as a skilled tradesman, works on his/her own without direct supervision, setting work hours and providing the needed tools and equipment for the job. If truly found to be a contractor, the independent contractor is not entitled to workers' compensation benefits unless he/she has purchased his/her own policy. Ky. Rev. St. 342.690.

A principal contractor may be liable for workers' compensation benefits for any employee injured while in the employ of an intermediate or subcontractor if the subcontractor fails to secure workers' compensation insurance. This up-the-ladder liability is discussed in Ky. Rev. St. 342.610(2) and 342.700(2) and may shield the principal contractor from civil liability.

**58. Are there any specific provisions for “Independent Contractors” pertaining to professional employment organizations/temporary service companies/leasing companies?**

Employee leasing companies are required to register with the Office of Workers Claims and demonstrate that they have secured workers compensation coverage for all job sites where leased employees work. Ky. Rev. St. 342.615. Temporary help service companies are considered employers of temporary employees and must have workers' compensation insurance coverage.

**59. Are there any specific provisions for “Independent Contractors” pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?**

Kentucky has no specific provisions addressing owner/operators or other drivers. Each case would be analyzed for employment relationship versus independent contractor status as set forth above looking to the nature of the work performed as it relates to the business of the possible employer, the extent of control of details of the work, the professional skill of the worker and the intentions of the parties.

Effective July 14, 2018, a new section of the statute dealing with the Department of Labor (Ky Rev. Stat. § 336) defines a “marketplace contractor” and provides that such an individual shall not be deemed to be an employee of a marketplace platform. The legislation has been dubbed “the Uber/Lyft bill” as it appears to be designed solely to exempt from classification as employees those individuals providing services through the electronic platform to connect them to customers. Employees who transport freight, sealed envelopes, parcels and the like are exempted from this definition.

**60. What are the "Best Practices" for defending workers' compensation claims and controlling workers' compensation benefits costs and losses?**

Financial exposure to workers' compensation is an expensive and complex challenge for every business. The best means for reducing and eliminating that exposure is a strong and individualized "Best Practices" plan.

Every business must deal with the expense of workers' compensation in its risk management and in dealing with the inevitable claim. The best approach to ameliorating a business exposure is a strong and individualized "Best Practices" plan.

The ALFA affiliated counsel who compiled this State compendium offers an expert, experienced and business-friendly resource for review of an existing plan or to help write a "Best Practices" plan to guide your workers' compensation preparation and response. No one can predict when the need will arise, so ALFA counsels that you make it a priority to review your plan with the ALFA Workers' Compensation attorney for your state, listed below.

**61. Does your state permit medical marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?**

The issue has not been addressed in Kentucky.

**62. Does your state permit the recreational use of marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?**

The state does not permit the recreational use of marijuana and the issue is not addressed in the state's Workers' Compensation statutes.