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Kentucky Supreme Court rules for employers on maximum prices for prescription drugs under Kentucky workers' comp and against them on employee choice of pharmacy

The actual maximum prices they may charge are, in most instances, significantly lower under the Court's ruling. This was a victory for employers who have been overcharged for drugs the employers are required to provide when their employees with work-related injuries need prescription medications. The Court's opinion became final December 14, 2017, when the Court denied the only motion still before it.

The Kentucky regulation at issue in the case (803 KAR 25:092) refers to "average wholesale prices." The Supreme Court of Kentucky ruled that reference does not mean the manufacturer-established "list price" of a drug commonly referred to as its "Average Wholesale Price" (AWP). The Court held Kentucky's regulation says the maximum amount a pharmacy may charge is the actual average wholesale price the pharmacy paid for the medication, plus a \$5.00 dispensing fee, as stated in the regulation.

Frost Brown Todd represented the employer association that won the victory on this issue: KESA, The Kentucky Workers Compensation Fund – www.KESA.org. Approximately 7,300 employers with Kentucky operations self-insure their Kentucky workers' compensation obligations on a group basis through KESA. Their opponent was Injured Workers Pharmacy (IWP), a home delivery pharmacy business with locations in Massachusetts, Arizona and California.

The Supreme Court of Kentucky struck down a decision of the Kentucky Court of Appeals. The lower Court had affirmed decisions in administrative proceedings below that the lower Court said required KESA to pay IWP the AWP-based prices IWP had charged for drugs IWP had provided to five injured workers. The Supreme

Court remanded, saying an Administrative Law Judge in the Kentucky Department of Workers' Claims would have to determine "what IWP's actual average wholesale price was for the contested medications." IWP had refused to disclose what it paid for the drugs.

This decision has created new opportunities for employers to save on prescription drug costs. Those costs are a significant component of the medical costs employers must bear under workers' compensation.

The Court's holding has implications in States outside Kentucky where applicable statutes and regulations do not explicitly refer to the AWP figures, but pharmacies are nevertheless charging based on them. That is a fairly common practice.

This Kentucky decision is the first published court decision in any State repudiating AWP pricing in workers' compensation. AWP pricing has been subject to severe criticism, and in some cases outright repudiation, in Medicaid pricing and in some other pricing contexts. See, for example, [*In re Pharmaceutical Industry Average Whole Price Litigation*, 582 F.3d 156 \(1st Cir. 2009\)](#), [*Commonwealth v. Tap Pharmaceutical Products, Inc.*, 94 A.3d 350 \(Penn. 2014\)](#), and [*State of Louisiana v. DHHS*, 905 F.2d 877 \(5th Cir. 1990\)](#).

KESA successfully argued AWP pricing should be repudiated in workers' compensation as well.

The Supreme Court of Kentucky ruled against KESA on another issue. KESA had argued employees do not have a right to designate the pharmacy which will provide their prescription medications, and the employer or its insurer may make the designation, as long as the employee is not unreasonably inconvenienced. The Court upheld rulings below that the employee's right of choice under KRS 342.020(1) extends to pharmacies. The statute says: "[i]n the absence of designation of a managed healthcare system by the employer, the employee may select health care providers to treat his injury or occupational disease." The Court held a pharmacy is a "medical provider" for this purpose.

Future blog posts will explore the implications of this Supreme Court of Kentucky decision for pharmacy chains, independently-

owned pharmacies, physicians dispensing medications, pharmacy benefit managers, and other participants in the complex national market of healthcare paid for through workers' compensation.

For more information, please contact [Joe Ardery](#) or any health care attorney in Frost Brown Todd's [Health Care Law Industry team](#).

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