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EMPLOYMENT LAW INSTITUTE

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**University of Kentucky College of Law
Office of Continuing Legal Education
Lexington, Kentucky**

THE INJURED OR DISABLED WORKER and KENTUCKY WORKERS' COMPENSATION REFORM 2000

Saturday, June 10th

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— 7th Biennial —
EMPLOYMENT LAW INSTITUTE
THE INJURED OR DISABLED WORKER AND
KENTUCKY WORKERS' COMPENSATION REFORM 2000

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**THE INJURED WORKER:
FRAMING THE ISSUES AND COVERAGES**

**ADA, KRS 344 DISABILITY DISCRIMINATION,
WORKERS' COMPENSATION, AND SOCIAL SECURITY DISABILITY**

**George J. Miller
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Lexington, Kentucky**

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SECTION A

THE INJURED WORKER: FRAMING THE ISSUES AND COVERAGES

ADA, KRS 344 DISABILITY DISCRIMINATION, WORKERS' COMPENSATION, AND SOCIAL SECURITY DISABILITY

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SECTION A

I. REMEDIES AVAILABLE UNDER THE AMERICANS WITH DISABILITIES ACT

A. Reasonable Accommodation of a Known Disability

1. Employee must request accommodation.
2. Requested accommodation must be reasonable.
3. Employer and employee both have a duty to engage in an interactive process to discuss reasonable accommodations. Employee's failure to do so relieves employer of liability.
4. Employer's duty is to provide a reasonable accommodation. The accommodation provided need not be the accommodation requested by the employee.
5. Forms of reasonable accommodation:
 - a. Making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and
 - b. Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C. § 12111(9). See also 29 CFR 1630.9; *EEOC Technical Assistance Manual*, Section 3; *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the American With Disabilities Act* (March 1, 1999); *EEOC Enforcement Guidance: Workers' Compensation and the ADA* (September 3, 1996).
6. Employer is relieved of obligation to provide reasonable accommodation if that would result in an undue hardship to the employer. 42 U.S.C. § 12112(b)(5)(A).

B. Remedies for Violations

1. Back pay. 42 U.S.C. § 12117; 42 U.S.C. § 2000e-6(g).
2. Reinstatement. *Id.*
3. Compensatory damages. 42 U.S.C. § 1981a (a)(2).
 - a. Future pecuniary losses, emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses;
 - b. Personal injury? *Smith v. Blue Cross/Blue Shield of Kansas*, 894 F. Supp. 1463 (D. Kan. 1995) ("To the extent that plaintiff was attempting to raise a claim of personal injury, plaintiff's remedy was in tort or pursuant to the Workers' Compensation Act.").

4. Punitive damages if employer acted with malice or with reckless indifference to the federally protected rights of the aggrieved individual. 42 U.S.C. § 1981a (b).
5. Where an alleged discriminatory practice involves the provision of a reasonable accommodation, compensatory and punitive damages may not be awarded "where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity the accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business." *Id.* at § 1981a (a)(3).
6. Limitations on the amount of compensatory and punitive damages. 42 U.S.C. § 1981a (b)(3).
 - a. 15-100 employees - \$50,000
 - b. 101-200 employees - \$100,000
 - c. 201-500 employees - \$200,000
 - d. More than 500 employees - \$300,000.
7. Attorney fees. 42 U.S.C. § 12117; 42 U.S.C. § 2000e-6(k).
8. Workers compensation benefits and unemployment insurance benefits are collateral sources, and the collateral source rule bars deduction of such benefits from an award of backpay for discrimination under federal law. *Hamlin v. Charter Township of Flint*, 165 F.3d 426, 433-34 (6th Cir. 1999).

II. REMEDIES AVAILABLE UNDER KRS 344 FOR DISABILITY DISCRIMINATION

- A. Reasonable Accommodation
Same as above
- B. Remedies for Violations
 1. Injunctions to enjoin further violations. KRS 344.450.
 2. Actual damages sustained. *Id.*
 3. Damage for humiliation, embarrassment, personal indignity, and other intangible injuries. *Mitchell v. Seaboard Sys. R.R.*, 883 F.2d 451 (6th Cir. 1989); *Easton v. Louisville & Jefferson County Board of Health*, 706 F.Supp. 536 (W.D. Ky. 1987); *Meyers v. Chapman Printing Co.*, 840 S.W. 2d 814 (Ky. 1992).
 4. Compensatory damages. *Mitchell v. Seaboard Sys. R.R.*, 883 F.2d 451 (6th Cir. 1989).
 5. Punitive Damages? *Union Underwear Co. d/b/a Fruit of the Loom v. Barnhart*, 1999-SC-91DG (Ky. Supreme Court) (Pending).
 6. Costs and reasonable attorney fees. KRS 344.450.
 7. Workers compensation benefits may be deducted from backpay liability. *Hardaway Management Co. v. Southerland*, 977 S.W.2d 910

(Ky. 1998). However, if the plaintiff's inability to work was caused by the employer's violation of the plaintiff's civil rights, then no offset is allowed. *Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 899 F.2d 1473 (6th Cir. 1990).

III. REMEDIES UNDER THE KENTUCKY WORKERS COMPENSATION ACT

- A. A disability for purposes of workers' compensation benefits is not necessarily the same as a disability under the ADA. *EEOC Enforcement Guidance: Workers' Compensation and the ADA* (September 3, 1996).
- B. Income benefits. KRS 342.730.
- C. Medical benefits. 342.020.
- D. Vocational Rehabilitation Services. KRS 342.710.
- E. Retraining Incentive Benefits for Coal Miners Pneumoconiosis. KRS 342.732.
- F. No right to time off or reinstatement.
- G. Exclusiveness of remedy. KRS 342.690.
- H. Does pursuit of workers compensation benefits constitute an election of remedies which bars a claim under KRS 344 for the same injury? *Meyers v. Chapman Printing Co.*, 840 S.W. 2d 814, 819 (Ky. 1992).

IV. SOCIAL SECURITY DISABILITY BENEFITS

- A. Income benefits.
- B. Workers compensation benefits are offset. 42 U.S.C. § 424a (a); 20 C.F.R. § 404.408; *Frost v. Chater*, 952 F. Supp. 659 (D. N. D. 1996); *Bubnis v. Chater*, 958 F. Supp. 111 (E. D. N. Y. 1997).
- C. A disability for purposes of the Social Security Act is not necessarily a disability for purposes of the ADA. *Social Security Forum*, Vol. 15, No. 7 (July 1993).

V. JUDICIAL ESTOPPEL

Filing an application for Social Security Disability Benefits, in which the claimant alleges inability to work, does not judicially estop the plaintiff from alleging that the plaintiff was a qualified individual with a disability under the ADA, if the plaintiff can explain the apparent inconsistency. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 797 (1999). However, the application is further evidence of the plaintiff's inability to work, with or without a reasonable accommodation. *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376 (6th Cir. 1998); *Blanton v. Inco Alloys Inter., Inc.*, 123 F.3d 916 (6th Cir. 1997).

VI. PUTTING IT ALL TOGETHER

- A. Consider the following scenario.

Smith has been employed at ABC Coal Company for approximately sixteen years. At all relevant times before January 1998, Smith was a scoop operator. The scoop is a wheeled vehicle which is used to clean up loose coal at the mine face and to transport parts and supplies. The operator sits in the scoop and operates it with hydraulic hand and foot controls. Loose coal is cleaned up by pushing it with the

bucket attached to the scoop. The job sometimes requires the operator to manually lift materials such as concrete blocks weighing 25 lbs. each into the scoop's bucket if they cannot not be "scooped up" by the bucket. Other duties of the scoop operator include rock dusting, which is the process of scattering rock dust over the interior surfaces of the mine. Bags of rock dust weigh 50 lbs. each. For Smith, the rock dusting task was easier than the other tasks of the job, because he could put the bag of rock dust on top of the scoop, and did not have to carry it in his arms.

On August 16, 1997, Smith fell at work trying to pick up a bag of rock dust, allegedly injuring his back and wrist. Smith was initially treated by his family doctor and remained off work. On September 28, 1997, at the request of ABC, Smith was seen by Dr. Orthopod, who examined and tested both Smith's back and wrist. Smith's complaint about his back was mainly pain and stiffness in the morning. Dr. Orthopod noted that Smith presented "without brace, cane, or TENS unit." Smith had normal strength and sensation in his legs, and a negative straight leg raising test, without atrophy of the calf or thigh. Dr. Orthopod reviewed MRI and x-ray images of Smith's back, which revealed no disk herniation. Dr. Orthopod's diagnosis was "lumbar strain superimposed on active pre-existing degenerative disk disease L5-S1 with osteoarthritis."

Smith' complaint about his wrist at that time was that it felt "weak" and that it "swells." However, Dr. Orthopod noted that Smith' s wrist had "no visible swelling" and had "full passive motion." Dr. Orthopod also noted that Smith's "left wrist diagnosis sounds like sprain although certainly poor effort on testing." Dr. Orthopod diagnosed Smith's wrist problem as a "sprain."

Dr. Orthopod stated that Smith would be able to return to his previous job after 10-12 weeks, with lifting restrictions of 75 lbs. maximum, 30 lbs. frequent lifting, and recommendations to change positions every one to two hours.

Smith then went to see Dr. Sawbones about his wrist. On November 11, 1997, Dr. Sawbones performed an arthroscopy on Smith's wrist, at which time he did "laser smoothing of the tear of the triangular fibro-cartilagineous complex." The procedure was successful. Following surgery, Smith had a short course of physical therapy and has had no treatment since then. According to Smith, his wrist healed well, and the only problem it now gives him is that it is "stiff" when the weather changes.

On December 2, 1997, some 3 1/2 months after the accident at work, and while still off work collecting workers' compensation benefits, Smith was observed at a flea market lifting heavy racks of clothing and boxes of merchandise, using his left arm and wrist. This event was captured on videotape by an investigator for ABC's third party workers' compensation administrator. The videotape was sent to Dr. Orthopod, who watched it and then reported to ABC in a letter, stating: "My conclusions after viewing the videotape are that the August 1997 injury has not resulted in permanent impairment." He went on to state: "Also, my opinion is that he could return to a belt head job requiring shoveling and repeated bending. I do think that after light duty that he could return to his regular scoop operator job without restrictions." Later Dr. Orthopod testified that he meant "without further restrictions," and he did not intend to say that Smith no longer had a 75 lb lifting restriction.

Dr. Sawbones was not consulted about whether Smith could return to work. Until April 1998, Smith continued to see Dr. Sawbones for checkups on his wrist, and Dr. Sawbones noted in his chart that Smith was totally disabled at those times. Dr. Sawbones' office notes were regularly sent to ABC's third-party workers' compensation administrator and ABC's workers' compensation attorney.

Based upon Dr. Orthopod's letter, ABC notified Smith that his worker's compensation benefits were being terminated, and he should return to work. Smith protested that his own doctor, Dr. Sawbones, had not yet released him, but he returned to work anyway, as he needed the income. Smith returned to work in January 1998, when he was placed in the head drive operator's position, a light duty job. The essential duties of a head drive operator, which were performed on a daily basis, included shoveling spilled coal, rock dusting, and greasing belt rollers. Smith performed the rock dusting task by carrying a 50 pound bag of dust in his arms or over his shoulder, breaking open the bag, and scattering the dust with his hand. Just how he spread the rock dust was left to his discretion, but ABC recommended that employees who had difficulty carrying the whole bags of rock dust should cut them in half.

On February 15, 1998, Smith filed an Application for Adjustment of Claim with the Workers' Compensation Board, relating to the alleged 1997 injury to his back and wrist. Dr. Orthopod assigned Smith a 7% impairment rating to the lumbar spine, Dr. Sawbones assigned a 10% impairment rating to Smith's wrist, Dr. Liberal assigned a 12% rating to Smith's back and a 5% rating to his wrist, and Dr. Conservative found no impairment at all.

On May 31, 1998, Smith wrote a memorandum to his supervisor,¹ complaining that the head drive job was causing him pain because of his left wrist and back injury. Smith requested to be "put back on workers' compensation" or placed in an easier job. The only "easier" jobs he specifically mentioned were fire boss and tram motor operator. His request was denied, because there were no openings in those positions at the time, and Smith was able to perform the essential functions of the head drive job without accommodation. Smith agreed that the head drive job was much easier than his previous job as a scoop operator. Smith subsequently bid unsuccessfully for a position as a fire boss, first in June 1998 and again in January 1999. He was not selected for this job because he was not a certified electrician, which ABC contends was a requirement for the job. Smith, however, says that other employees who did not have electrical cards were permitted to hold this position.

On December 14, 1998, the Administrative Law Judge issued an Opinion and Award, dismissing Smith's claim for occupational disability. The Judge based her findings and conclusions upon the medical testimony of the doctors, as well as her own review of the videotape of Smith at the flea market. Of the videotape, she noted that it shows Smith able to "lift, bend, and stand, without difficulty, and that the majority of reaching and lifting was performed with his left hand." The Judge ruled that Smith was entitled to retain the temporary total disability benefits he had already been paid by

¹ This memorandum was delivered to the supervisor the day before the supervisor testified in a workers' compensation deposition taken by Smith' attorney.

ABC, but he was not entitled to more. On June 10, 1999, the Workers' Compensation Board affirmed the the ALJ's Opinion and Award as to her conclusions about occupational disability.

Smith worked as a head drive operator until March 1999, when he was reassigned to a position as a scoop operator. He held this position until April 2, 1999, when he alleges that he injured his back at work. He does not remember any specific moment when he hurt his back that day, but he says that it got progressively more painful through the course of the shift.

Smith has not worked since April 2, 1999. Since then, he has been drawing workers' compensation benefits. He has also applied for Social Security Disability Insurance benefits, claiming that he has been totally disabled since April 1999. His claim was denied twice by the Social Security Administration, but for Smith the third time was a charm. The SSA recently determined that he is disabled and awarded him \$1250 per month in benefits. Smith filed another workers' compensation claim in 1999 over the alleged injury to his lower back on April 2, 1999. This claim is still pending.

Smith has sued ABC in state court, alleging a violation of KRS 344. Smith specifically alleges that his back and wrist conditions were disabilities, that ABC failed to accommodate him by requiring him to perform the head drive job and then by reassigning him to the scoop operator's job in March 1999. He claims that he is now totally disabled due to the April 1999 injury and that the injury came about while performing duties in excess of his restrictions. Smith relies upon the medical evidence in the first workers' compensation case to prove that he was disabled before April 1999.

As for damages, current medical evidence shows that Smith now has a herniated disk. There is a dispute about whether or not he can perform light to medium level jobs in the local economy with this condition. Smith seeks back pay, lost future wages to age 65, emotional damages due to the shame of being unable to work, and punitive damages.

B. Questions

1. Was Smith a qualified individual with a disability prior to April 1999? Was Dr. Orthopod's recommendation of lifting restrictions evidence of a disability? What about the impairment ratings?
2. Did Smith request a reasonable accommodation? When? What? Was Dr. Orthopod's recommendation a request for an accommodation?
3. Was Smith entitled to a reasonable accommodation when he was in the head drive job, assuming that he was able to perform all of the essential functions of the job without any accommodation?
4. Did ABC fail to provide Smith with a reasonable accommodation? How? When?
5. If Smith proves all of the elements of liability, and further proves that his current disabling condition came about while performing duties as a scoop operator which exceeded the restrictions recommended by Dr. Orthopod, what are his damages? Should he be allowed to recover lost income due to his alleged inability

to work? Isn't his current back problem just a work-related injury which is covered by workers' compensation? If so, is his claim under KRS 344 barred by the exclusiveness of the workers' compensation remedy? By filing a workers' compensation claim for this injury, has Smith elected his remedy?

**THE INJURED WORKER:
FRAMING THE ISSUES AND COVERAGES**

FAMILY LEAVE

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FAMILY LEAVE

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I. Introduction

The Family and Medical Leave Act (FMLA) was enacted by Congress on February 3, 1993. The fundamental purpose of the FMLA was to balance the demands of the workplace with the needs of employees to deal with certain medical necessities (including maternity related disabilities) and compelling family matters by providing a minimum employment standard for unpaid leave, and the right of the employee to reinstatement to their former position or an equivalent position at the conclusion of the qualifying leave. It also was the expressed intent of Congress to "accomplish [this purpose] in a manner that accommodates the legitimate interests of employers." 29 U.S.C. §§ 2610(b)(2) and (3).

The FMLA provides for two types of broad protections to employees. The first protections confer affirmative entitlements to employees and thus are prescriptive obligations of the employer. 29 U.S.C. §§ 2612 and 2614. Subsection (a)(1) of Section 2612 provides, in part, that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period" for any of four specific reasons, as follows: (1) the birth of a son or daughter of the employee and in order to care for such son or daughter; (2) the placement of a son or daughter with the employee for adoption or foster care; (3) in order to care for the spouse, child or parent of the employee, if such spouse, child, or parent has a serious health condition; and (4) because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

Subsection (a)(1) of Section 2614 further provides, in part, that after a qualifying absence, the employer must restore the employee to the same position or to a position comparable to that held by the employee before the leave. This restoration right is subject to a number of limitations, including two articulated in subsection (a)(3) of Section 2614. These limitations provide that a restored employee is not entitled to (1) the accrual of any seniority or employment benefits during any period of leave and (2) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

The second protections provided employees by the FMLA prohibit the employer from, among other actions, (1) interfering with, restraining, or denying the exercise of any right provided under the FMLA, or (2) discharging or in any other manner discriminating against any individual for opposing any practice made unlawful by the FMLA, or because the individual has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to the FMLA. 29 U.S.C. § 2615(a) and (b). Where an employer has violated these prescriptive and proscriptive provisions, the employee is entitled to compensatory damages equal to the amount of any wages, salary, employment benefits, or other compensation which the employee was denied or lost as a result of the violation, and interest on the compensatory damages. Additionally, unless the court concludes that the employer acted in good faith and reasonably believed it has complied with the FMLA, the employee is entitled to liquidated damages equal to the amount of compensatory damages, plus interest. 29 U.S.C. § 2617(a)(1)(A). Finally, an employer is liable for equitable relief if appropriate, including employment, reinstatement, or promotion. 29 U.S.C. § 2617(a)(1)(B).

Congress authorized the Secretary of Labor to promulgate regulations "necessary to carry out" the FMLA. 29 U.S.C. § 2654. The Secretary of Labor issued final regulations implementing Title I of the FMLA, which affects private employers and state and local governments, on January 6, 1995, with an effective date of April 6, 1995. The final regulations provide detailed guidance on the scope, meaning, and application of the FMLA. Because these administrative regulations have been promulgated in response to an express delegation of authority, they are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

This article examines the developments and application of the FMLA through the implementing final regulations and relevant case authority. It is intended as a basic reference tool and guide to access the comprehensive scheme of federal regulation which characterizes the FMLA, as well as a source of practical information in the consideration of FMLA issues. The citations to sections of the final regulations are in shorthand throughout the article and have eliminated the full citation 29 C.F.R. § ___.

II. Scope of Coverage of the FMLA

A. Employer Coverage (29 U.S.C. § 2611(4); § 825.104)

"Employer" is defined as any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year.

Employer coverage also extends to any person who acts, directly or indirectly, in the interest of a covered employer to any of the employees of the covered employer, or any "public agency" as defined in Section 3(x) of the Fair Labor Standards Act ("FLSA").

"Joint employer" and "successor in interest" relationships also may be covered under the FMLA. (§§ 825.106, 825.107).

B. Employees Eligible for Leave under the FMLA (29 U.S.C. § 2611(2); § 825.110)

To be eligible for FMLA leave, an employee must meet each of the following three requirements:

- a. The employee must have been employed by the employer for at least 12 months.
- b. The employee must have been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave.
- c. The employee must be employed at a work site where 50 or more employees are employed by the employer within 75 miles of that work site.

The FMLA's definitions of "employ" and "employee" are borrowed from the FLSA. If a particular arrangement in fact constitutes an employer-employee relationship within the meaning of the FLSA as contemplated by the statutory definitions, and the "employee" satisfies the FMLA eligibility criteria, the employee is entitled to the benefits of the FMLA.

The following cases address the existence of an employment relationship generally:

- (i) **Termination of employment relationship**—Mayo v. Trinity Marine Industries, Inc., 137 Lab. Cas. (CCH) ¶33,839 (E.D. La. 1999) (where the individual was either no longer employed by reason of his voluntary resignation, or was in the process of being terminated at the time the request for FMLA leave was made, the individual is not an eligible employee under the FMLA and is not entitled to FMLA leave; eligibility for FMLA leave does not survive the termination of the employment relationship) - 29 U.S.C. §2611; §§825.110 and 825.216(a).
- (ii) **Effect of prior resignation**—Hammon v. PHL Airways, Incorporated, 165 F.3d 441 (6th Cir. 1999) (an employee's actions of expressing his intention to quit his job and taking steps to relinquish his position constituted a voluntary "effective resignation" of his employment which was properly accepted by the employer, even though acceptance of the resignation occurred during a conversation where the employee attempted to withdraw the resignation and sought FMLA leave to address his nervous condition; the Court of Appeals affirmed that "an employee cannot bring a claim under the FMLA unless he notifies his employer of his condition and requests relief during his employment") - 29 U.S.C. §§2611 and 2613; §§825.110, 825.208 and 825.302.

A true independent contractor relationship within the meaning of the FLSA would not constitute an employer-employee relationship.

PRACTICE POINTER: Because an employee who voluntarily resigns their employment cannot claim that they suffered an adverse employment decision under the FMLA or other statutory protection, it is beneficial to document - *e.g.*, by a confirming letter to the employee - the voluntary resignation and acceptance of the resignation.

Determination of employment for at least 12 months is governed by § 825.110(b), (c) and (d).

The 12 months employment need not be consecutive. Employment for any part of a week counts as a week of employment. Employment for the 12-month period includes any period of paid or unpaid leave during which other benefits or compensation are provided. Intermittent, occasional, and casual employment also counts towards the 12-month employment requirement. Employment in a total of 52 weeks is deemed to equal 12 months.

PRACTICE POINTER: Under the FMLA eligibility requirement that an employee must have been employed by the employer for 12 months (29 U.S.C. §2611(2)(A)), such employment does not have to be continuous in nature and the requirement will be satisfied by separate periods of employment which in the aggregate equals 12 months of employment.

The "1,250 hours of service" requirement is addressed in § 825.110(b)(c), and (d) of the FMLA. The requirement is determined according to principles established under the FLSA for determining compensable hours of work. Under FLSA principles, an employee receives credit toward the FMLA "hours of service" requirement only for actual hours worked. Under the FLSA, payments made for occasional periods when no work is performed due to vacation, holiday, illness . . . and other similar causes are not considered compensation for hours worked. 29 U.S.C. § 207(e)(2). Any accurate accounting of actual hours worked under FLSA principles may be used. Full-time teachers of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250-hour test. *See Robbins v. The Bureau of National Affairs, Inc.*, 896 F. Supp. 18 (D.D.C. 1995) (an employee who had worked only 875.75 hours in the 12-month period preceding commencement of her maternity leave and sought credit for paid holiday time, vacation time, sick leave and previous maternity leave properly was denied FMLA leave; the Court held that because neither paid nor unpaid leave is considered "hours worked" under the FLSA, such leave should not be considered "hours of service" for FMLA purposes.) *See FMLA Advisory Opinion No. 78*, 1996 Lab. L. Rep. (CCH) ¶ 32,431 (1996).

The employer has the burden to "clearly demonstrate" that the 1,250-hour service requirement in a 12-month period was not satisfied if FMLA leave is to be denied any employee with respect to which:

1. the employer does not maintain an accurate record of hours worked, or
2. no hours-worked records have been kept because the employee is a full-time, FLSA-exempt employee.

Sufficient hours of service must be accrued in the 12-month period prior to FMLA. In *Clark v. Allegheny University Hospital*, 135 Lab. Cas. (CCH) ¶33,667 (E.D. Pa. 1998), an employee had less than 1,250 "hours of service" in the 12-month period preceding his request for FMLA leave and was not eligible for FMLA leave; "hours of service" for FMLA purposes is determined by the same principles used in the FLSA to determine "hours of work" for payment of overtime compensation—*i.e.*, actual hours worked—and payments made for occasional periods when no work is performed due to vacation, holiday, illness and other similar causes are not considered hours of service within the meaning of the FMLA—29 U.S.C. §2611(2)(C); §825.110

PRACTICE POINTER: Although employers generally maintain accurate records of actual hours worked by non-exempt employees, the same is not necessarily true for exempt employees. In the absence of accurate records of hours worked by an exempt employee, the employer has the burden of showing that the employee has not worked the requisite hours and, if the employer is unable to meet this burden, the employee is deemed to have met this test. Therefore, employers should review record-keeping practices to ensure that exempt employees' actual hours worked can be established in some manner.

In the event the employer is unable to meet this burden, the employee is deemed to have met the 1,250 hours of service requirement.

The requirement of 50 employees within 75 miles of the employment site is governed by §§ 825.110(f), 825.111 of the regulations. Whether 50 employees are employed within 75 miles is determined when the employee gives notice of the need for leave. Once an employee is determined eligible in response to a notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's work site. An employer may not terminate employee leave that already has started if the employee count drops below 50.

In Schlett v. Avco Financial Services, 950 F. Supp. 823 (N.D. Ohio 1995), the employee was employed by the employer for less than 12 months and the employer employed fewer than 50 employees within 75 miles of the employee's work site. The court held that the employee was not entitled to coverage under the FMLA even though the employer failed to notify the employee of her ineligibility within two business days of receipt of notice of need for leave pursuant to § 825.110(d). The employer does not waive general coverage criteria by its failure to timely act under § 825.110(d).

PRACTICE POINTER: When an employee requests FMLA-qualifying leave, the employer should first make certain they satisfy the basic employment requirements for eligibility (i.e., covered situs of employment; covered relationship; 12 months employment; 1,250 hours actually worked).

An employee's worksite under the FMLA ordinarily will be the site the employee reports to or, if none, from which the employee's work is assigned. For employees with no fixed worksite (e.g., construction workers, truck drivers, seamen, pilots), the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. When an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports.

The determination whether an employee has worked for the employer for at least 1,250 hours in the 12 months preceding the leave, and has been employed by the employer for a total of at least 12 months, must be made as of the date leave commences. According to the FMLA Final Regulations, if an employee notifies the employer of need for FMLA leave before the employee meets the eligibility requirements, the employer must either:

1. confirm the employee's eligibility based upon a projection that the employee will be eligible on the date the leave would commence; or
2. advise the employee when the eligibility requirement is met.

If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible for FMLA leave. In this circumstance, the employer is "estopped" to deny the leave.

If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. The following cases address the "estoppel provision" of the FMLA Final Regulations. Some courts have rejected this provision.

1. Seaman v. Downtown Partnership of Baltimore, Inc., 991 F.Supp. 751 (D. Md. 1998), (where the employee had been employed by the employer for less than 12 months when she requested maternity leave under the FMLA, the employer was not estopped, pursuant to §825.110(d) of the regulations, from terminating her employment, even though the employer previously had designated on the leave request form that the leave request was granted and charged against the employee's FMLA entitlement. The Court held that §825.110(d) of the regulations was invalid to the extent it "rewrote" the eligibility requirements of the FMLA, noting that the plain language of the eligibility provisions of the FMLA require that an employee must have worked for the employer for at least 12 months, and

that nothing in the relevant statutory provision or the FMLA indicates that the Department of Labor has the power to require employers to waive this eligibility requirement, either by their action or their inaction.) 29 U.S.C. §2611(2)(A); §825.110(d).

2. Wolke v. Dreadnought Marine, Inc., 954 F. Supp. 1133 (E.D. Va. 1997), (where the employee was employed by the employer for less than 12 months and the employee was not entitled to FMLA coverage even though the employer failed to notify the employee of this ineligibility within two business days of receipt of notice of need for leave pursuant to § 825.110(d), the Court held that § 825.110, which purports to transform employees who are ineligible under the FMLA to eligible status, was invalid because it impermissibly contradicts the clear intent of Congress to restrict the class of eligible employees by shortening the twelve-month eligibility period.)
3. In Jessie v. Carter Health Care Center aka Sterling Acquisition Corp., 926 F.Supp. 613 (E.D. Ky. 1996), the employee was denied eligibility status for FMLA leave by way of the estoppel provision of regulations, where the employee failed to notify the employer of the need for leave, the Court finding that conversations regarding the employee's medical condition concerned the availability of light duty work and not leave.

PRACTICE POINTER: Notwithstanding these cases, it is the employer's obligation to designate leave as FMLA leave (§ 825.208(a)), and this designation normally must be made when the employer learns the reason for the leave (§ 825.208(b)(1)); the employer must be diligent in designating qualifying leave, including workers compensation leave, as FMLA leave)

C. Circumstances Under Which Employer Is Required to Grant Family or Medical Leave (29 U.S.C. § 2612; § 825.112)

Employers covered by the FMLA are required to grant leave to eligible employees for:

- a. the birth of a son or daughter, and to care for the newborn child;
- b. placement with the employee of a son or daughter for adoption or foster care;
- c. care for the employee's spouse, son, daughter or parent with a serious medical condition; and
- d. because of a serious medical condition that makes the employee unable to perform the functions of the employee's job.

Entitlement to FMLA leave for a birth or placement expires 12 months from the date of birth or placement (29 U.S.C. § 2612(a)(2); § 825.201). Both the father and the mother may take family leave for the birth, or placement for adoption or foster care of a child.

An employee is "unable to perform the functions of the position" where the health care provider finds that the employee is unable to work at all, or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act. (§ 825.115). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment. In requiring certification from the health care provider, the employer may provide a statement of the essential functions of the employee's position for the health care provider to review.

The employee must show proof of incapacity. In Austin v. Shelby County Government, 3 S.W. 3d 474 (Tenn. App. 1999), the FMLA certification from a physician indicated that the employee suffered from hypertension, set forth the drug regime prescribed by the physician, and indicated that the probable duration of employee's leave was "undetermined." However, the physician failed to indicate in the space provided on the form that it was medically necessary for the employee to be off work for any period of time (the physician in fact noted that

the employee was able to perform the functions of his position). The employee failed to establish that he suffered from a serious health condition which entitled him to leave. In order to establish the right to FMLA leave based upon a serious health condition, the serious health condition must render the employee "unable to perform the functions of [his] position." 29 U.S.C. §2612(a)(1); §§825.114(a)(2), 825.115.

The employee must prove that the condition incapacitated him for the full time of the leave. In Haefling v. United Parcel Service, Inc., 169 F.3d 494 (7th Cir. 1999), the employee was unable to demonstrate through any probative evidence that a purported neck injury resulted in any period of incapacity from work of more than three consecutive days, or that the neck injury resulted in an inability of the employee to perform daily routine activities on the days he was not scheduled to work. Consequently, the employee was not entitled to FMLA leave for a serious health condition and discharge for excessive absenteeism was affirmed. Whether an illness or injury constitutes a serious health condition under the FMLA is a legal question that is not established either by the employee's own self-serving assertions regarding the severity of his medical condition, or by treatments that are not medically necessary. 29 U.S.C. §2612(a)(1)(D); §825.114(b).

PRACTICE POINTER: When medical certification of an employee's serious health condition is provided, the employer should make certain that it contains information that the employee either is presently unable to work, and/or will be required to miss periods of work in the future as the result of the serious health condition.

The medical certification provision that an employee is "needed to care for" a family member encompasses both physical and psychological care. (§ 825.116). The care contemplated by the regulation includes situations where the family member is unable to address their own basic medical, hygiene, or nutritional needs due to a serious health condition. The term also includes circumstances where the employee may provide psychological comfort and reassurance that would be beneficial to the covered family member with a serious health condition.

Definitions of "spouse," "parent," and "son or daughter" under the FMLA are addressed under (29 U.S.C. § 2611(7), (12), and (13); § 825.113). "Spouse" is a husband or wife as defined or recognized under state laws for purposes of marriage, including common law marriage where recognized. "Parent" means the biological parent or an individual who stands or stood *in loco parentis* to an employee when the employee was a son or daughter. The term parent does not include parents-in-law. "Son or daughter" entails a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*. For the purpose of FMLA eligibility, the son or daughter must be under 18, or age 18 or older and "incapable of self-care because of a mental or physical disability."

In the case of Sakellarion v. Judge & Dolph, Ltd., 893 F. Supp. 800 (N.D. Ill. 1995), the employee was absent from work to care for her 36-year old daughter suffering from an asthmatic condition and failed to prove that the daughter was incapable of self care because of a physical or mental disability. Consequently, the employee was not entitled to leave under the FMLA; the Court held that:

[A] plaintiff's assertion that her adult daughter needed to stay in bed, without more, is not sufficient evidence from which a jury could infer that the daughter was incapable of self care.

The employer may require the employee giving notice of the need for leave to provide reasonable documentation or a statement of family relationships, such as a birth certificate, a court document, or a statement from the employee.

D. "Serious Health Condition" Under the FMLA (29 U.S.C. § 2611(11); § 825.114)

A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential care community, or continuing treatment by a health care provider. Any period of incapacity or treatment connected with inpatient care (*i.e.*, an overnight stay) and any period of incapacity or subsequent treatment in connection with such inpatient care is a serious health condition. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

- a. any period of incapacity due to pregnancy, or for prenatal care;
 - (i) absences from work due to morning sickness, regardless of the duration of the absence, are covered. (§ 825.114(e)).
 - (ii) treatment from a health care provider is not required during the absence;
- b. a period of incapacity (*i.e.* inability to work, attend school or perform other regular daily activities) due to a serious health condition (including treatment therefor, or recovery therefrom) lasting more than three consecutive days and any subsequent treatment or period of incapacity relating to the same condition that also involves:
 - (i) treatment two or more times by or under the supervision of a health care provider; or
 - (ii) treatment by a health care provider one time with a continuing regiment of supervised treatment;
- c. any period of incapacity due to a chronic serious health condition (*e.g.*, asthma, diabetes, epilepsy);
 - (i) a chronic condition may cause episodic rather than a continuing period of incapacity;
 - (ii) treatment from a health care provider is not required during the absence;
- d. a period of incapacity which is permanent, or long-term conditions for which treatment may not be effective (*e.g.*, Alzheimer's, severe stroke, terminal stages of a disease). Only supervision by a health care provider is required, rather than actual treatment; or
- e. any period of incapacity to receive multiple treatments, and conditions which would result in incapacitation in the absence of multiple treatments (*e.g.*, chemotherapy, physical therapy, dialysis).

Unless complications arise, the following are examples of conditions that generally do not meet definitions of a serious health condition and therefore do not qualify for FMLA leave:

- common cold
- flu
- ear aches
- upset stomach
- minor ulcer
- headaches other than migraine
- routine dental or orthodontic problems
- periodontal disease

Where the employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which results in a regimen of continuing treatment prescribed by the health care provider, minor illnesses are treated as serious health conditions. A regimen of continuing treatment sufficient for purposes of FMLA leave involves a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment not sufficient, by itself, for purposes of FMLA leave is one that can be initiated without a visit to a health care provider, such as taking over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise and other similar activities.

The Appendix to this article sets forth various cases that address the issue of what constitutes a serious health condition under the FMLA.

III. Rights and Obligations Created by the FMLA

A. Employer Notice Requirements

Every employer covered by the FMLA is required to post and keep posted, in a conspicuous place, a notice explaining the FMLA's provisions and procedures for filing complaints. (29 U.S.C. § 2619; §825.300). An employer that fails to post the required notice cannot take any adverse employment action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of the need to take FMLA leave. Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer is responsible for providing the notice in a language in which the employees are literate. The Wage and Hour Division poster is not enough to satisfy all of the FMLA notice requirements.

If an employee handbook or similar document is maintained, the handbook must incorporate information concerning FMLA rights and responsibilities and the employer's policies regarding the FMLA. (§825.301(a)(1) and (2)). In the absence of an employee handbook or similar document, the employer must provide "written guidance" to employees concerning all the employee's rights and obligations under the FMLA.

The employer is required to provide written notice detailing the specific expectations and obligations of the employee. (§825.301(b)(1)). The specific notice must explain the consequences of a failure to meet these obligations. It must be provided to the employee in a language in which the employee is literate. Elements of the specific notice are itemized at §825.301(b)(1).

"Specific notice" is different from the notice provided in an employee handbook or through "written guidance." The specific notice may include other information, such as whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so.

The employer must promptly notify the employee in writing that leave is designated and will be counted as FMLA leave. (§825.208). Oral notice of designation is acceptable, but such notice must be confirmed in writing no later than the following payday, unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday.

Notice of cancellation of health insurance coverage is covered under § 825.212.

B. Notice Requirements Concerning Employee Rights and Obligations During FMLA Leave (§825.301)

1. Employer Notice

The employer must give an employee notice of their rights and obligations during an FMLA leave within a reasonable time after notice of the need for the leave. (§825.301(c)). Notice generally should be given within one to two business days if feasible. Where leave already has begun, notice should be mailed to the employee's address of record.

Price v. City of Fort Wayne, 117 F.3d 1022 (7th Cir. 1997) illustrates the issue of adequacy of notice. There the employee filled out an employer-provided leave request form, indicated that the cause was medical need, and attached a doctor's note requiring the employee to take the time off. This was adequate to put the employer on notice of possible FMLA leave, and it became the responsibility of the employer to inquire further. Employee notice of the need for FMLA leave is given when the employee requests leave for a covered reason.

Employer notice of rights and obligations ordinarily is only required once in each six month period, on the first occasion that the employee gives notice of need for leave. (§825.301(c)). Individual notice must be given to the employee each time medical certification or a "fitness-for-duty" report is required, unless the requirement is clearly set forth in the six month notice and any employee handbook. Where subsequent written notice is not

required, at least oral notice shall be provided. If the employer fails to provide notice in accordance with the regulations, the employer may not take any adverse action against the employee for failure to comply with any provision set forth in the notice. (§825.301(f)).

2. Employee Notice (29 U.S.C. § 2612(e); §§ 825.302, 825.303)

Employees need only give notice of leave under the FMLA once, whether it is to be taken continuously, intermittently, or on a reduced leave schedule. The employee is not required to assert rights under the FMLA or even mention the FMLA when requesting leave. (§825.302(c)). The employee need only state their need for a leave for particular circumstances. It is the obligation of the employer to inquire further if it is necessary to have more information about whether FMLA leave is being sought.

In Browning v. Liberty Mutual Insurance Company, 178 F.3d 1043 (8th Cir. 1999), the employee failed to provide sufficient information of serious health condition. In this case, an employee who was released to return to work by her physician following a cubital tunnel release procedure failed as a matter of law to give sufficient information to the employer such that the employer would be on notice that a subsequent four-day absence from work was for a qualifying FMLA. The only information provided to the employer was on the first day of absence to the effect that the employee's arm had gone numb and she would not be at work that day, and the physician's release to work had not been rescinded. Notice to the employer of a serious health condition which qualifies an employee for FMLA must be adequate and timely under established reporting procedures of the employer. §825.303.

PRACTICE POINTER: Under the FMLA, the employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave. The employee need not specifically mention FMLA leave, but must state that leave is needed, and the statement should be made within one or two working days of learning of the need for leave, except in extraordinary circumstances. (§§825.208, 825.302 and 825.303)

PRACTICE POINTER: Employers should make certain that any employee who is responsible for receiving information on absences (e.g., switchboard operator, supervisors) is trained on when to make at least some preliminary inquiries to determine whether the absence is FMLA qualifying, and knows to forward this information immediately to the person responsible for FMLA matters.

Satterfield v. Wal-Mart Stores, Inc., 135 F.3d 973 (5th Cir. 1998) illustrates another case in which the employee failed to provide sufficient information regarding a serious health condition. In this case, the employee, who had been absent from work three times in the preceding three weeks, informed her employer at the time of her fourth absence only that she would not be at work "that day" because she was "having a lot of pain in her side" or was "sick" (the employee also specifically failed to apprise the employer that she had scheduled a doctor's appointment for four days later and that she did not expect her condition to improve prior to that appointment). The information was insufficient to reasonably apprise the employer that the request to take time off was for a serious health condition within the meaning of the FMLA, or to cause the employer to undertake an inquiry whether FMLA leave was appropriate. Insofar as employee notice is concerned, what is practicable, both in terms of timing and content, will depend upon the facts and circumstances of each case, but the critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition. 29 U.S.C. §2612(e)(1) and (2); §§825.302, 825.303.

PRACTICE POINTER: Because the issue of whether an employee's notice of absence is sufficient to trigger an FMLA leave inquiry will always arise after the fact, the employer should establish a protocol for recording in writing on a daily basis the specific reasons for absence provided by employees as they call in to report that they will not be at work.

Employee notice generally must be provided directly by the employee. However, notice of the need for FMLA leave may be provided in certain circumstances, such as incapacity, by the employee's "spokesperson." A "spokesperson" includes the employee's spouse, adult child, parent, or doctor.

In Holmes v. The Boeing Company, 166 F.3d 1221 (10th Cir. 1999), the employer properly terminated an employee for excessive absenteeism when the employee failed to follow specific absence notification procedures - *i.e.*, that if he was going to miss any more work because of illness, he would need to speak directly with his supervisor or his personnel representative - even though the absence which resulted in the employment termination may have been for an FMLA-qualifying serious health condition. The FMLA does not prohibit an employer from requiring its employees to give notice to specific company personnel on the day the employee is going to be absent in non-emergency cases. 29 U.S.C. §2614; §§825.302, 825.303.

Where the employee fails to give 30 days notice of foreseeable leave without a reasonable excuse, leave may be delayed until at least 30 days after the employee provides notice of the need for leave. (§825.302(b)). It is mandatory that the employee consult with the employer when planning medical treatment. Reasonable effort must be made by the employee to schedule leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider.

In the case of foreseeable leave, where the employee originally was approved for FMLA leave for surgery based upon 30-day notice, a request to move the leave forward on six days notice because of a change in insurance coverage may constitute adequate notice under § 825.302(a) due to a "change in circumstances." Hopson v. Quitman County Hospital & Nursing Home, Inc., 119 F.3d 363 (5th Cir. 1997). In this case the Court held that what constitutes a "change in circumstances," whether an employee's notice is given "as soon as practicable," and whether the employee has made a reasonable effort to schedule leave so as not to disrupt unduly the operations of the employer requires an inquiry into the particular facts and circumstances of each case.

PRACTICE POINTER: If an employee provides less than 30 days notice of an FMLA leave, all the facts surrounding the circumstances of the leave must be ascertained in order to determine whether the notice was adequate. (§825.302 and .303)

If an employee fails to provide medical certification requested by the employer, the leave is not FMLA leave. (§825.311(b)). The following cases address the adequacy of employee notice of the need for FMLA leave:

1. Johnson v. Primerica aka The Travelers, Inc., 131 Lab. Cases (CCH) ¶ 33,346 (S.D.N.Y. 1996). Where the employee's written notice advised of the need for leave to take care of "family-related business matters," the Court held such notice was insufficient to place the employer on notice of the need for FMLA leave, or to trigger the duty of the employer to inquire under the FMLA, rejecting the employee's claim that the employer should have inquired further to determine whether the leave qualified under the FMLA because the employer had prior knowledge of the serious health condition of the employee's son (asthma). "Nothing in the FMLA or the governing regulations...suggests that an employer's duty to inquire may be triggered solely by the employer's knowledge of prior medical events."
2. Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028 (M.D. Tenn. 1995). The employee advised the employer that her child was ill and that she may have to miss work due to this illness. The court held that the employer was sufficiently aware that the employee's subsequent absence may have qualified as FMLA leave and thus was obligated to inquire whether the child had a serious medical condition.
3. Hendry v. GTE North, Inc., 896 F. Supp. 816 (N.D. Ind. 1995). Where the employee reported to the employer that she would be absent from work due to a migraine headache, notice was sufficient to trigger the duty on the part of the employer to inquire further from the employee whether FMLA leave was being sought, and to obtain the necessary details of the leave to be taken.
4. Reich v. Midwest Plastic Engineering, Inc., 2 Wage & Hours Cas. 2d (BNA) 1409 (W.D. Mich. July 26, 1995). The employee informed the employer that she had chicken pox, but failed to provide the requested doctor's excuse explaining her absence or to inform the employer that she was under continuing treatment of a health care provider for chicken pox and that the condition required inpatient care at a hospital. The employee had not provided sufficient notice for her employer to determine that she had a serious health con-

dition. The Court held that adequate notice requires "sufficient detail to make it evident that the requested leave was protected as FMLA-qualifying leave. An employer should not have to speculate as to the nature of an employee's condition."

5. Manuel v. Westlake Polymers, Inc., 66 F. 3d 758 (5th Cir. 1995). Where the employee advised the employer that an absence from work was necessary due to complications from toe surgery, the employee was not obligated to invoke the FMLA by name. "The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition."

C. Employer Designation of Leave as FMLA Leave (§825.208)

It is the employer's responsibility to designate leave, paid or unpaid, as FMLA leave. (§825.208(a)). The designation must be in writing, (§825.208(b)(2)), and designation of FMLA leave normally must be made when the employer learns the reason for the leave. (§825.208(b)(1)).

The employer may make such a designation even when an employee would rather not use any of their FMLA entitlement. The employer designation must be based on information obtained from the employee or an employee spokesperson (e.g., spouse, parent, physician, adult child, etc.).

The employer is permitted to designate leave as FMLA leave after the leave ends in two limited circumstances (§825.208(e)):

1. If an employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return to work,
 - a. designation must be made within two business days after the employee's return to work, and
 - b. appropriate notice of this designation must be given to the employee.
2. If the employer knows the reason for the leave, but has been unable to confirm that the leave qualifies under the FMLA,
 - a. the employer should make a preliminary designation, and so notify the employee, at the time the leave begins, and
 - b. upon receipt of medical information, confirmation or withdrawal of the preliminary designation must be made.

An example of inappropriate retroactive designation of leave is Viereck v. City of Gloucester, 961 F. Supp. 703 (D. N.J. 1997). The employee adequately placed the employer on notice that an absence from work was for FMLA-qualifying reasons. The employer's designation of the leave as FMLA leave retroactive to date of first absence was unreasonable where it waited at least five weeks to do so. The Court held that where an employer has the requisite knowledge to determine that leave is FMLA-qualified but fails to do so, it may not designate leave as FMLA leave retroactively, and may designate it only prospectively as of the date of notification to the employee of the designation.

PRACTICE POINTER: Because of the numerous time limitations and other affirmative employer compliance obligations, procedures should be established to handle compliance obligations in a timely manner with responsibility for handling leave/absence issues being delegated only to those employees who have a knowledge of the FMLA.

PRACTICE POINTER: An employer should deal with requests for FMLA leave quickly, preferably within 24 hours from the receipt of information which indicates that the leave may be FMLA qualifying. As a "safe harbor" position, an employer can always make a preliminary designation and so notify the employee. (§825.208(e)).

D. Intermittent Leave

FMLA leave may be taken "intermittently or on a reduced leave schedule" under certain circumstances (§ 825.203(a)).

"Intermittent leave" is defined as leave taken in separate blocks of time due to a single qualifying reason. "Reduced leave" is defined as a change in the employee's schedule for a period of time, normally from full-time to part-time.

The employer may limit leave increments to the shortest period of time that the payroll system uses to account for absences or use of leave. Under the payroll time system, the required minimum leave increment cannot be more than one hour. An employee may not be required to take more FMLA leave than is necessary to address the circumstances that precipitated the leave.

An employee who needs intermittent leave or leave on a reduced schedule must attempt to schedule their leave so as not to disrupt the employer's operations.

There must be a medical need to support intermittent or reduced leave. Voluntary treatments and procedures are insufficient. It must be that such medical need can best be accommodated through an intermittent or reduced leave schedule.

However, leave may be taken intermittently or on a reduced leave schedule when medically necessary:

- for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider,
- for recovery from treatment or recovery from a serious health condition, or
- to provide care or psychological comfort to an immediate family member with a serious health condition. (§ 825.203).

Circumstances where intermittent leave may be appropriate are leave taken on an occasional basis for medical appointments; leave taken several days at a time spread over a period of time, such as for chemotherapy; and leave for prenatal examinations. Leave taken after birth or placement of a child for adoption or foster care is not subject to intermittent leave or reduced schedule leave unless the employer agrees.

The employer may require the employee to transfer temporarily, during the period of intermittent leave or reduced schedule leave, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave. (§ 825.204). The alternative position must have equivalent pay and benefits, but equivalent duties are not required. The employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave, or otherwise to work a hardship on the employee.

In determining the amount of leave used (§ 825.205), only the amount of leave actually taken may be counted toward the 12 weeks of leave. Where an employee normally works a part-time schedule or variable hours, the amount of leave to which the employee is entitled is determined on pro rata or proportional basis.

In situations where employees who are "suffered and permitted" to work for the employer during FMLA leave, time worked is considered "hours worked" under the FLSA. This amount of time cannot be counted against the employee's 12-week FMLA leave allowance.

E. Medical Certification (29 U.S.C. § 2613; §§825.305; 825.306; 825.307)

An employer may require that a request for FMLA leave for the employee's own serious health condition, or to care for a spouse, child or parent with a serious health condition, is supported by a written certification issued by the health care provider of the eligible employee or of the child, spouse, or parent, as appropriate.

An employer is limited in the nature and amount of medical information that it can require the employee to provide in support of a request for FMLA leave involving a serious health condition. The Department of Labor has developed an optional form (Form WH-380) for the employee's (or their family members') use in obtaining medical certification from health care providers that meets the FMLA's certification requirements. Either Form WH-380, or any other form requesting the same basic information may be used by employer. Information in addition to that provided by Form WH-380 may not be requested to support FMLA leave. In all instances, information on the form must relate only to the serious health condition for which the current need for leave exists.

Stoops v. One Call Communications, Incorporated, 141 F.3d 309 (7th Cir. March 31, 1998) considers the issue of medical certification of inability to work. In this case, the employee's treating physician indicated that the employee suffered from a chronic serious health condition—*i.e.*, chronic fatigue syndrome—but that the employee was not presently incapacitated and would not have to work intermittently or on a reduced leave schedule. The employee was properly terminated under the employer's no-fault attendance policy for absences due to chronic fatigue syndrome and the employer was not required to investigate the employee's condition further or seek a second medical verification. The regulation which requires an employer to make preliminary designation of whether leave is FMLA-qualifying based solely on information that the employee provides to the employer (§825.208(a)) does not require that the employer base its decision solely on information provided by the employee at the time of the request for leave, nor does the regulation prohibit an employer from basing its decision on a prior certification by the employee's physician that the employee was not qualified for FMLA leave. 29 U.S.C. §2612(a)(1)(D); §825.208(e)(2).

PRACTICE POINTER: When medical certification of a serious health condition is requested, insist that the treating physician provide all information requested and that any certification form, such as the Form WH-380, is completed in its entirety. Where an employer properly requests a physician's certification under the FMLA and that certification indicates the employee is not entitled to FMLA leave, the employer does not violate the FMLA by relying upon that certification in the absence of some overriding medical evidence.

Certification requirements for chiropractic treatment are examined in Sievers v. Iowa Mutual Insurance Company, 581 N.W. 2d 633 Iowa Sup Ct., (July 29, 1998). There an employee claim that the employer discouraged her from taking FMLA leave and forced her to resign because of her request for time off failed because the employee failed to establish that the daughter's chiropractor was qualified as one "capable of providing health care services" to the daughter. Under FMLA regulations, specific requirements to qualify chiropractic treatment as "health care services" for FMLA coverage purposes must be established by the employee and the failure to do so will result in non-entitlement to FMLA leave. 29 U.S.C. §2611(6)(B); §825.118(b).

PRACTICE POINTER: Chiropractic treatment qualifying as "health care services" under the FMLA is limited to "manual manipulation of the spine to correct a subluxation," and x-rays must demonstrate the existence of the subluxation.

Where an employee submits a complete certification signed by the health care provider, the employer cannot request additional information from the health care provider. However, a health care provider representing the employer may contact the employee's health care provider for purposes of clarification and authenticity of medical certification. Permission for such contact must be provided by the employee.

The employer should request that an employee furnish certification from a health care provider at the time (or within two business days thereafter) the employee gives notice of the need for foreseeable leave, or in the case of unforeseen leave, within two business days after the leave commences. When leave is foreseeable and at least 30-days notice has been provided, the employee should provide medical certification before the leave begins. The employee must provide the requested certification within the time frame requested by the employer (which must allow at least 15 days after the employer's request), unless it is not practical to do so under the particular circumstances.

At the time the employer requests certification, the employee must be advised of the anticipated consequences of their failure to provide adequate certification. In addition, the employer must advise the employee

whenever the employer finds a certification incomplete. The employee must also be provided a reasonable opportunity to cure any such deficiency.

Health care providers should be given accurate job descriptions so informed decisions can be made when issuing medical certification to employees.

F. Employer Requirement of "Fitness-for-Duty" Report (29 U.S.C. § 2614(a)(4); § 825.310)

An employer may require an employee whose FMLA leave was occasioned by the employee's own serious health condition to obtain and present certification from the employee's health care provider that the employee is able to resume work as a condition of restoring the employee to employment. Such fitness-for-duty certification may only be required pursuant to a uniformly applied policy or practice of the employer requiring certification of similarly situated employees. If state or local law, or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. The requirements of the Americans with Disabilities Act that any return-to-work physical be job-related and consistent with business necessity also apply. However, an employee's right to require a fitness-for-duty certification shall not apply in the case of intermittent leave.

An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for leave. It is sufficient for purposes of certification that the statement from the employee's health care provider indicate simply that the employee is able to return to work. A health care provider employed by the employer may contact the employee's health care provider, with permission from the employee, for purposes of clarification of the employee's fitness to return to work. However, no additional information may be acquired by the employer's health care provider, and clarification may be requested only for the serious health condition for which FMLA was taken. The employee must be returned to work while contact with the employee's health care provider is being made. No additional fitness-for-duty certification may be required.

Employees must be notified in advance of their return to work of an employer's requirement that a fitness-for-duty certification must be provided as a condition of job restoration. Specific notice of the fitness-for-duty requirement also must be given at the time notice of the leave is given or immediately after leave commences and the employer is notified of the medical circumstances requiring the leave. Notice must be provided by the employer in the notice required by Final Regulation § 825.301 regarding an employee's rights and obligations under the FMLA.

Where an employer maintains a handbook explaining policies and benefits, the handbook should explain the employer's general policy regarding fitness-for-duty certification to return to work.

G. Reinstatement Rights of Employees (29 U.S.C. § 2614; §§825.214; 825.215; 825.216)

Any eligible employee who takes FMLA leave is entitled, upon return from such leave, to be restored to employment in either the position of employment held by the employee when the leave commenced, or an "equivalent" position. An equivalent position is a position with equivalent pay, benefits, and other terms and conditions of employment (*i.e.*, duties; conditions; responsibilities; privileges; and status). An equivalent position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. The requirement to restore an employee to the same or equivalent job does not extend to *de minimus* or intangible, unmeasurable aspects of the job.

Taylor v. Cameron Coca-Cola Bottling Co., Inc., 134 Lab. Cas. (CCH) ¶33,583 (W.D. Pa. 1997) illustrates the issue of elimination of certain employee job duties. In that case an employee who claimed that, upon her return from covered FMLA maternity leave, she no longer performed certain price correction duties in her accounts receivable clerical position, which duties constituted "a lot of her work," raised a genuine issue of material fact as to whether she was returned to equivalent employment.

Peterson v. Slidell Memorial Hospital and Medical Center, 133 Lab. Cas. (CCH) ¶33,532 (E.D. La. 1996), on the other hand, illustrates a situation in which the employee was given more demanding duties upon her

return to work. The Peterson court held that an employee who asserted that, upon her return from covered FMLA leave, she was transferred to a secretary position that had more demanding typing requirements than her former secretarial position, has stated a claim under the FMLA upon which relief could be granted.

PRACTICE POINTER: Where an employee is not returned to their former position following FMLA leave, the employer is vulnerable to a claim that the new position is not "virtually identical" to the former position (§825.215(a)) and the burden is on the employer to prove that any differences in a new position are "*de minimus* or intangible, unmeasurable aspects of the job." (§ 825.215(f)).

PRACTICE POINTER: The regulations do not provide that an employee be returned to "substantially" equivalent employment, but rather to "equivalent employment," and a generically similar position may not be adequate to meet the employer's obligations under § 825.215.

An employee is entitled to restoration of employment even if the employee has been replaced, or their position has been restructured to accommodate the employee's absence.

In Roshetko v. Beverly Enterprises, Inc. d/b/a Eastern Shore Health Care Center, 137 Lab. Cas. (CCH) ¶33,841 (S.D. Al. 1999), an employee who worked on a "Baylor Plan" schedule—*i.e.*, Saturday/Sunday double shift schedule—at a premium to her regular pay and normal shift differentials was not entitled to be restored to that schedule following her return from maternity leave where the employer eliminated the Baylor Plan schedule practice at the time of employee's leave for non-retaliatory business reasons. An employee's right under the FMLA to be restored to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment is a qualified right, and a restored employee is not entitled to any right, benefit or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken the leave. 29 U.S.C. §2614(a)(1); § 825.216.

PRACTICE POINTER: Under the FMLA, a restored employee does not step back on the "employee benefit escalator" at the point they stepped off; rather, they step back on at the precise point they would have occupied had they kept their position continuously.

In Brown v. J. C. Penney Corporation, 924 F. Supp. 1158 (S.D. Fla. 1996), the job of the employee was given to another while the employee was out on FMLA leave. The employer did not violate the FMLA through the mere act of replacing the employee, even if it intended this change to be permanent. The FMLA does not require that an employee be returned to the exact position held prior to embarking on leave and a violation occurs only when the employee returns from FMLA leave and is not offered "equivalent" employment.

PRACTICE POINTER: When it is necessary for an employer to install a substitute employee for an employee on FMLA leave, care should be taken in the representations that are made to the substitute employee (*e.g.*, temporary or permanent position), and if the substitute is a permanent arrangement, an equivalent position for the employee on FMLA leave must be available upon their return.

Where an employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right under the FMLA to restoration to another position. § 825.214(b).

An employee has no greater right to reinstatement or to any other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. If an employee is laid off and employment terminated during the course of an FMLA leave, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee to employment ceases at the time of the layoff. If an employee's job is eliminated while the employee is on FMLA leave, and the job elimination is for reasons unrelated to the leave, the employee does not have to be reinstated.

In Garcia v. Fulbright & Jaworski, L.L.P., 132 Lab. Cas. (CCH) ¶33,437 (S.D. Tex. 1996), an employee was discharged for poor job performance approximately one month after the return from FMLA leave. Discrimina-

tory intent cannot be inferred merely from the timing of discharge after returning from the FMLA leave. The Court found that although an employee is entitled to reinstatement to the former position or an equivalent one with the same benefits and terms, "the FMLA does not provide to employees assurances of permanent employment or assurances that a certain position will have some permanence to it."

PRACTICE POINTER: Although timing alone is insufficient to establish discriminatory intent, it can be an important factor evidencing discrimination where there are other facts which suggest improper motive for an employer's actions (such as, for example, disparaging comments relating to an employee's use of FMLA leave).

According to Day v. Excel Corporation, 132 Lab. Cas. (CCH) ¶33,477 (D. Kan. 1996), an employee's termination from employment one week after their return to work from FMLA leave for surgery was not evidence of a violation of the FMLA. The employer demonstrated that the discharge was part of a general and independent decision to downsize the employee's department and cut back on departmental expenses. The Court held that [a]n employee returning from FMLA leave is not entitled to greater rights than he had prior to the leave... "[n]or can a discriminatory intent be inferred merely from the time an employee is terminated following FMLA leave."

PRACTICE POINTER: An employer should be prepared to justify any job elimination decision with documentation and legitimate business reasons; job elimination should not be advanced by the employer as a basis for refusing to return an employee to work following an FMLA leave if the job elimination is only a temporary arrangement.

H. Compensation and Benefits During FMLA Leave (29 U.S.C. §§ 2612 and 2614; §§ 825.207, 825.209)

FMLA leave generally is unpaid (§825.207). Providing unpaid FMLA leave shall not affect the status of an employee as exempt pursuant to section 13(a)(1) of the Fair Labor Standards Act. (§825.206). The employer may make deductions from the exempt employee's salary for any hours taken as FMLA leave within a workweek. The special exception to the "salary basis" requirements of the FLSA exemption applies only to employees of covered employers who are eligible for FMLA leave and to leave which qualifies as FMLA leave. Similar treatment of FMLA leave is permitted for employees paid in accordance with the "fluctuating workweek" method of payment for overtime.

PRACTICE POINTER: The exempt status of an employee may be adversely affected where a deduction in salary is taken for non-covered leave under the FMLA. For example, where an employee has not worked long enough to be eligible for FMLA leave, the employer's policy permits leave in excess of the 12 weeks provided for under the FMLA, or leave is permitted for a reason which does not qualify as FMLA leave (e.g., care of a grandparent; a medical condition which does not qualify as a serious health condition), a deduction from the employee's salary is not permitted.

During any FMLA leave, the employer must maintain the employee's coverage under any group health plan for the duration of such leave. (§825.209). Coverage must be maintained at the level and under the same conditions coverage would have been provided if the employee had been continuously employed during the entire leave period. If an employer provides a new health plan or benefits, or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee was not on leave. Maintenance of health insurance policies which are not part of the employer's group health plan are the responsibility of the employee.

Any share of group health plan premiums paid by the employee prior to the FMLA leave must continue to be paid by the employee during the period of FMLA leave. The employer must provide advance written notice of the terms and conditions under which payment of the employee's share of the premium must be made. Such notice properly is provided by the employer when it informs the employee of their specific expectations and obligations, as required by § 825.301(b) of the Final Regulations. Where paid leave is substituted for FMLA

leave, the employee's share of the premium must be paid by the method normally used during any paid leave. Where FMLA leave is unpaid, a number of options are provided in the regulations for obtaining payment from the employee. (§825.210(c)).

Where the employee premium payment is more than 30 days late, the obligation of the employer to maintain coverage normally will end. An exception to this rule is created where the employer policy provides for a longer grace period. The employer must provide written notice to the employee that payment has not been received, and that coverage will be dropped on a specified date, at least 15 days prior to termination of coverage.

Under certain circumstances, an employer's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under the FMLA is terminated, as follows:

- a. when the employment relationship would have terminated if the employee had not taken FMLA leave;
- b. when an employee informs the employer of their intent not to return from leave (including before starting the leave if the employer is so informed before the leave starts); and
- c. when the employee fails to return from leave or continues on leave after exhausting their FMLA leave entitlement in the 12-month period.

An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is determined by the employer's established policy for providing such benefits when the employee is on other forms of paid or unpaid leave.

I. Substitution of Paid Leave for Unpaid Leave (29 U.S.C. § 2612(d)(2); §§825.207, 825.208)

An employer may require that an employee substitute accrued paid leave for unpaid FMLA leave. Where the employer does not require the substitution of paid leave, the employee may elect to use paid leave for unpaid FMLA leave. Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of sick/medical leave. The employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave where the employer's uniform policy normally would not allow such paid leave. Where the employer does not require the substitution of paid vacation or personal leave, no limitations may be placed by the employer on an employee's right to substitute such leave for any qualifying FMLA leave.

Where an employee on FMLA designated leave is entitled to compensation for the leave pursuant to any existing leave plan or program (e.g., short-term disability plan; workers compensation insurance), the leave is not unpaid and the provisions for substitution of paid leave are inapplicable. § 825.207(d)(1) and (2). Where the requirements to qualify for payments pursuant to a temporary disability plan are more stringent than those of the FMLA, the employee must meet the more stringent requirements of the plan.

The employee may choose not to meet the requirements of the plan and receive no payments from the plan. In this circumstance, leave is unpaid and the provisions for substitution of paid leave are applicable. When the employer or the employee elects to substitute paid leave for unpaid FMLA leave, and procedural requirements for taking paid leave are less stringent than the requirements of the FMLA (e.g., notice or certification requirements), only the less stringent requirements may be imposed. § 825.207(h).

Employee compliance with less stringent leave plan requirements cannot result in delay or denial of FMLA leave on grounds that the employee has not complied with stricter requirements of FMLA. Where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, the employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program.

If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan is counted as FMLA leave, the decision must be made by the employer within two business

days of the time the employer gives notice of the need for leave. § 825.208(c). However, where the employer does not initially have sufficient information to make a determination that leave qualifies as FMLA leave, the decision must be made at such time as the employer has sufficient information to make such determination.

The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. See Cline v. Wal-Mart Stores, Incorporated, 144 F.3d 294 (4th Cir. 1998), where the employer failed to notify the employee that vacation days taken in conjunction with FMLA leave were to be designated as part of the employee's twelve weeks of FMLA leave. The employee was entitled to twelve weeks of FMLA leave plus five days of vacation leave, and the employer violated the FMLA when it failed to restore the employee to equivalent employment because the employee was absent from work for a serious health condition beyond the statutory twelve weeks. To designate employer-provided leave as FMLA leave an employer must "promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave." 29 U.S.C. §2612(a)(2); §825.208(d).

PRACTICE POINTER: Employer policy statements relating to employee rights under the FMLA, as well as the request for leave form, should clearly provide that paid leave used in conjunction with FMLA leave is designated as part of the employees' twelve weeks of leave. Although an employer has the option of requiring an employee to designate vacation or other leave as FMLA leave, that option can be waived if the employer fails to give proper notice of its intentions.

IV. Prohibited Acts And Enforcement Mechanisms

A. Interference with an Employee's Rights, or Proceedings or Inquiries under the FMLA (29 U.S.C. § 2615, § 825.220)

It is unlawful for an employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided by the FMLA. An employer interferes with the exercise of an employee's rights by refusing to authorize FMLA leave, as well as discouraging an employee from using FMLA leave. Employer interference also includes manipulation by a covered employer to avoid responsibilities under the FMLA (e.g., reducing hours available to work in order to avoid employee eligibility). See Mardis v. Central National Bank & Trust of Enid, 173 F.3d 864 (10th Cir. 1999), an employer is not entitled to summary judgment on a claim of interference with the exercise of FMLA rights where the employer allegedly conditioned the grant of FMLA leave for an employee to care for her husband with multiple sclerosis on forfeiture of her vested rights to vacation and sick leave, even though the employee did not avail herself of FMLA rights by actually applying for leave. The Court of Appeals held that threatening an employee with absolute forfeiture of accrued but unused vacation and sick leave as a condition of taking leave under the FMLA would operate as a powerful disincentive to assertion by an employee of their rights under the FMLA and may establish a violation of the FMLA. 29 U.S.C. §2615(a)(1); §825.220.

PRACTICE POINTER: Although the FMLA does not define "interference," the regulations provide that the term includes "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." Therefore, written employment policies which misstate an employee's entitlement to FMLA leave in a negative way could constitute "interference" and a violation of the Act.

It is unlawful for an employer to discharge or in any other manner discriminate against any individual for opposing any unlawful practice under the FMLA. An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. See Bocalbos v. National Western Life Insurance, 162 F.3d 379 (5th Cir. 1998), where an employee's claim of retaliation for taking FMLA leave was rejected when the employee failed to attain actuarial examination credits in the time required by the employer. The attainment of such credits had been a job requirement for at least three years prior to the FMLA leave, and the employee acknowledged that leave could have been scheduled for a time that did not conflict with test dates for earning actuarial examination credits. The Court of Appeals found that notwithstanding an employee's leave

for FMLA-qualifying reasons, the failure of an employee to satisfy a legitimate job requirement constitutes a nondiscriminatory reason and sufficient grounds for termination of the employee's employment. 29 U.S.C. §2615(a); §825.220.

A causal link between employer action and leave request must be shown. See Gleken v. Democratic Congressional Campaign Committee, 38 F.Supp. 2d 18 (D.C.C. 1999), where an employee refused employer requests to resume working a full-time schedule due to legitimate business demands. The employee's employment was properly terminated notwithstanding the employee's announced intention to request FMLA leave later in the year. The District Court found as a matter of law that the employee could not establish a causal link between the employer's April request that she resume a full-time schedule and the impending birth of her child in August, relying in part on the fact that no employee ever had been denied maternity or paternity leave. 29 U.S.C. §2612(a)(1)(D); §825.112(a)(1).

PRACTICE POINTER: Although an employee request for FMLA leave does not prevent an employer from terminating an employee's employment for valid and legitimate business reasons, it is imperative that the business reason is capable of being proved. Also, prior compliance with the FMLA and employment policies and practices can provide strong evidence of a lack of discriminatory motive in subsequent cases.

The use of FMLA leave by an employee cannot be considered as a negative factor in employment actions (e.g., hiring, promotion), nor can FMLA leave be counted under "no fault" attendance policies. The scope of protection for "opposition discrimination" (i.e., retaliation for opposing any act which is unlawful under the FMLA, or which is believed to be unlawful under the FMLA or its regulations) extends to both employees and "individuals." It is unlawful under the FMLA for any person to discharge or in any other manner discriminate against any individual because the individual has:

- a. filed a charge or instituted (or caused to be instituted) any proceeding under or related to the Act;
- b. given, or to give, any information in connection with an inquiry or proceeding; or
- c. testifies, or is about to testify, in any inquiry or proceeding.

Employees cannot waive, nor may employers induce employees to waive, their rights under the FMLA.

B. Enforcement of the FMLA (29 U.S.C. § 2617; § 825.400)

An employee who believes that their rights under the FMLA have been violated has both an administrative and a judicial remedy. A written complaint may be filed with the Secretary of Labor by the employee, or by an individual acting on behalf of the employee. Additionally, a complaint may be filed with any local office of the Wage and Hour Division, United States Department of Labor. No particular form of complaint is required.

A private lawsuit may be filed by the employee in any state or federal court of competent jurisdiction. A private lawsuit must be filed within two years after the last action which the employee contends was in violation of the FMLA, or three years if the violation was willful. A complaint filed with the Secretary of Labor should be filed "within a reasonable time" of the discovery of a violation, but in no event later than the limitations periods set forth above. See Wenzlaff v. NationsBank, 940 F. Supp. 889 (D. Md. 1996), where an employee solicited but allegedly was refused equivalent employment by their former employer following the termination of the employment relationship. No violation of the FMLA occurred and the two-year statute of limitations period was measured from the date of the employee's employment termination. The Court held that the statutory language of the FMLA implicitly limits the scope of any violation to interactions between individuals sharing an employer-employee relationship at the time of the alleged violation; to read the statute otherwise would enable any potential plaintiff to "revive" a time-barred claim at any time simply by reapplying for their former position.

Frizzell v. Southwest Motor Freight, 154 F.3d 641 (6th Cir. 1998) examines the right to jury trial. The district court erred when it rejected the employee's jury demand and proceeded to conduct a bench trial on her FMLA claim. Although the FMLA does not expressly provide for the right to a jury trial, the Court of Appeals found that the structure of the remedial provisions of the FMLA, the reference in the FMLA's legislative history to the Fair Labor Standards Act, and other fragments of FMLA legislative history reveal Congress's intent to create a right to a jury trial in the FMLA. 29 U.S.C. §2617.

An employer who violates the FMLA shall be liable to any affected employee for damages and such equitable relief as may be appropriate.

An employee's damages may include:

1. wages, employment benefits, or other compensation denied or lost;
2. any actual monetary loss sustained by the employee as a direct result of the violation (*e.g.*, the cost of providing care) up to a sum equal to 12 weeks of wages for the employee;
3. interest on such sum; and
4. liquidated damages in an amount equal to the amounts permitted in subparagraphs 1-3.

Where an employer proves that the violation of the FMLA was in good faith and that it had reasonable grounds for believing that it was not acting in violation of the FMLA, the liquidated damages amount may be reduced by the court. See Morris v. VCW, Inc., 133 Lab. Cas. (CCH) ¶ 33,502 (W.D. Mo. 1996). In order to avoid an award of liquidated damages, the employer bears the burden of proving that it acted with subjective good faith and that it had an objectively reasonable belief its conduct did not violate the law. The good faith requirement demands that the employer establish that it honestly intended to ascertain the dictates of the FMLA, to act in conformance with it, and generally requires some duty to investigate potential liability under the Act. Successfully establishing reasonable grounds for the conduct taken generally requires a showing that the employer relied on a reasonable, although erroneous, interpretation of the Act or its implementing regulations.

Equitable relief available to an employee may include employment, reinstatement, and promotion. An employee also may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer when a violation is found. See McDonnell v. Milley Oil Company Incorporated, 134 F.3d 638 (4th Cir. 1998), where based upon the limited success of the employee on her FMLA claim—*i.e.*, nominal damages of \$1.00, doubled to \$2.00 in accordance with the statute, and prejudgment interest of \$.10—an award of attorneys' fees of \$19,698.81 by the district court was excessive. Even when an award of attorneys' fees is mandatory, as it is under the FMLA, the amount to be awarded remains within the sound discretion of the trial court and the most critical factor in calculating a reasonable fee award "is the degree of success obtained." 29 U.S.C. §2617(a)(3); §825.400.

Holt v. Welch Allyn, Inc., 1997 WL 210420 (N.D. N.Y., 1997) examines individual liability for FMLA violations. The definition of "employer" in the FMLA is unlike the definition of "employer" in Title VII, but tracks the definition of "employer" in the Fair Labor Standards Act. Under the FLSA, the term "employer" has been interpreted to include individuals with substantial control over the aspect of employment alleged to have been violated and, therefore, liability under the FMLA is extended to all those who controlled in whole or in part the employee's ability to take an FMLA leave and return to their position following the leave.

V. Miscellaneous Provisions of the FMLA

A. Interaction with Workers' Compensation (§§827.702; 825.207)

FMLA leave may run concurrently with a workers' compensation absence. However, a workers' compensation injury/illness must meet the criteria for a FMLA serious health condition. (§825.207(d)(2)). When an employee is receiving workers' compensation or other disability benefits, the employee may not elect, and the

employer may not require the employee to exhaust any form of accrued paid leave provided by the employer during workers' compensation leave. (§825.702(d)(2)).

Under workers' compensation statutes, an employer may offer "light duty" assignments. The employer must still afford the employee their FMLA rights while at the same time fulfilling requirements under the respective state law. Where an employee is able to return to a light duty assignment, but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a light duty job and may elect to continue on FMLA leave. If the workers' compensation program provides for forfeiture of benefits upon refusal of a light duty assignment, the employer's obligation to provide such benefits may cease notwithstanding the FMLA. See §825.207(d)(2); FMLA Advisory Opinion No. 55.

If the employee on FMLA leave voluntarily accepts a light duty assignment, such employee retains rights to job restoration to the same or equivalent position until 12 weeks have passed in the 12-month period, including all FMLA leave taken and the period of light duty. (§825.220(d)). A cumulative period of 12 weeks for purposes of job restoration is measured by the time designated as FMLA leave for the workers' compensation leave of absence and the time the employee works in a light duty assignment. Any period of time employed in light duty assignment cannot count against the 12 weeks of FMLA leave. (§825.220(d); FMLA Advisory Opinion No. 55).

B. Substance Abuse (§§825.114(d); 825.112(g))

FMLA leave is available for treatment for substance abuse under certain circumstances (§825.114(d)). Conditions described in the definition of "serious health condition" must be met. Additionally, leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider.

Absence because of an employee's use of the substance, rather than for treatment, does not qualify for FMLA leave. (§825.114(d)). Treatment for substance abuse does not prevent the employer from taking employment action against the employee pursuant to a published and uniformly applied policy providing for employment termination for substance abuse in specified circumstances. (§825.112(g)). The employer may not take action against the employee because the employee has exercised their right to take FMLA leave for treatment.

Action may be taken against the employee, including discharge, pursuant to a substance abuse policy whether or not the employee is presently taking FMLA leave. FMLA leave is available to employees to care for an immediate family member who is receiving treatment for substance abuse. The employer may not take action against an employee in this circumstance. However, medical certification that the employee is "needed to care for" a covered family member may be required. 29 U.S.C. § 2612(b); §§ 825.203, 825.204.

C. The "Holiday Effect"

The amount of leave used by an employee is not affected by a holiday which occurs within a week of FMLA leave. (§825.200(f)). The temporary shutdown of operations for one or more weeks (e.g. annual shutdown of plant for retooling or repairs) is treated differently. Days that an employer's activities have ceased do not count against an employee's FMLA leave entitlement.

D. The "Twelve-Month Period" for Determining Leave Entitlement (§ 825.200)

Any one of four designated methods may be used for determining the 12-month period in which the 12 weeks of leave entitlement occurs as follows:

- the calendar year;
- any fixed 12-month "leave year" (i.e., fiscal year, employee's anniversary date of employment);
- the 12-month period measured forward from the date any employee's first FMLA leave begins; or

- a “rolling” 12-month period measured backward from the date an employee uses any FMLA leave.

(§ 825.200).

Sample policy language:

Leave Policy. In accordance with the Family and Medical Leave Act of 1993 (“FMLA”), the Company will provide up to 12 weeks of unpaid family or medical leave in a 12-month period for eligible employees. Any combination of family leave and medical leave may not exceed this maximum limit. The phrase “12-month period” for determining when the 12 weeks of leave entitlement occurs means the 12-month period measured forward from the date an employee’s first FMLA leave begins.

The employer is permitted to choose any one of the four methods. (§825.200(d)(1)). The method must be applied uniformly and consistently. The employer may change to an alternative method. However, employees must be provided with 60-days notice of such change. Transition to an alternative method must permit employees to retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to employees.

Consequences of employer failure to select a method for determining 12-month period are set forth in §825.200(e). The 12-month period that provides the most beneficial leave outcome for the employee will be used. Subsequent designation of a method for determining the 12-month period is permitted only after 60-days notice to employees of the method selected. During the 60-day notice period, the method providing the most beneficial outcome to the employees is followed. A designated method may be implemented only at the conclusion of the 60-day period.

VI. Appendix

- **Flu-like symptoms** - Procopio v. Castrol Industrial North America, Inc., 132 Lab. Cas. (CCH) ¶ 33,473; (E.D. Pa. 1996) (flu-like symptoms exhibited by the employee were held not to be a serious health condition where the employee felt ill at work, sat down and later was found in an unconscious state, visited his family doctor that evening, and returned to work the following day; a brief episode of flu-like symptoms does not meet the statutory requirements of either a “disability” or a “serious health condition”)
- **Sleep apnea** - Brohm v. IH Properties, Inc. d/b/a Jewish Hospital Shelbyville, 149 F.3d 517 (6th Cir. 1998) (where the employee was discharged for sleeping during surgical procedures and not for sleep apnea, a claim that the employer was required to provide him leave under the FMLA to seek treatment for his sleep apnea failed; the employee never requested medical leave during the time of his employment and the ex-employee does not have a claim for FMLA leave after their employment has been terminated)
- **Child’s alleged molestation** - Martyszenko v. Safeway, Inc., 120 F.3d 120 (8th Cir. 1997) (an employee’s absences from work to observe her child who allegedly had been sexually molested was not covered by the FMLA where the child’s doctor only recommended that the child’s behavior should be supervised, but not observed continuously, and the alleged molestation did not create a mental condition that hindered the child’s ability to participate in any activity; the FMLA requires some incapacity to prove a serious health condition; the FMLA was designed to permit a parent to tend to the child where the child is unable to participate in school or in regular daily activities, but not to cover short-term conditions for which treatment and recovery are very brief)
- **Rectal bleeding** - Bauer v. Varsity Dayton - Walther Corporation, 118 F.3d 1109 (6th Cir. 1997) (an employee’s medical problem was not a serious health condition under the FMLA since the employee never sought or received inpatient care and the condition did not cause him to be absent from his position for more than three calendar days; the employee’s course of action after his employment terminated (i.e., failure to seek

medical treatment and regular attendance at work) were relevant to the issue whether objective evidence establishes that the individual had a serious health condition at time of the employment action)

- **Rectal Bleeding** - Bauer v. Dayton - Walther Corporation, 910 F. Supp. 306 (E.D. Ky. 1996) (rectal bleeding was neither a serious health condition nor a "chronic" serious health condition, where the employee sought medical attention for the condition on one occasion, no treatment for the condition was administered, and the condition caused the employee to miss work only one full day and leave early twice, nor did the condition present the sort of episodic period of incapacity contemplated by the FMLA; the Court also rejected the employee's "potentiality" claim - i.e., the potentiality of a condition to have turned out to be a serious medical condition such as rectal cancer - holding that the condition must be taken for what it was during the relevant time period, and not for what it conceivably could have become)
- **Cumulative effect of multiple diagnoses** - Price v. City of Fort Wayne, 117 F.3d 1022 (7th Cir. 1997) (several different and seemingly unrelated illnesses all afflicting a single individual at the same time, but no one of which rises alone to the level of a serious health condition, can taken together give rise to a serious health condition under the FMLA; the employee simultaneously suffered from elevated blood pressure, hyperthyroidism, back pain, severe headaches, sinusitis, infected cyst, sore throat, swelling throat, coughing and feelings of stress and depression, which caused her doctor to conclude that the employee could not perform her job)
- **Miscarriage** - Murphy v. Cadillac Rubber & Plastics, Inc., 946 F. Supp. 1108 (W.D. NY. 1996) (absences of the employee in order to recover from miscarriage and its "devastating emotional impact" on her was covered under FMLA; the FMLA's legislative history specifically includes miscarriages along with a number of other pregnancy-related conditions that the Congress intended the FMLA to cover)

PRACTICE POINTER: An employer should move with caution when handling requests for leave for pregnancy, childbirth, or complications arising therefrom as they are accorded special treatment under the FMLA. (See §§ 825.114(a)(2)(iii); 825.114(e); 825.202; and 825.308(a))

- **Sinusitis bronchitis** - Hott v. VDO Yazaki Corporation, 922 F. Supp. 1114 (W.D. Va. 1996) (sinusitis bronchitis was not a serious medical condition where the employee's medical certification excused her from work only for one day and indicated that she was able to perform the functions of her position, and the employee did not prove that sinusitis bronchitis is an illness that, if not treated, would likely result in a period of incapacity of more than three days)
- **Personal opinion about medical condition** - Gudenkauf v. Stauffer Communications, Inc., 132 Lab. Cases (CCH) ¶ 33,410 (D. Kan. 1996) (an employee's personal opinion that her pregnancy prevented her from performing the functions of her job for more than one-half of each work day was insufficient to establish a serious health condition under the FMLA)
- **Proof of incapacity of child with fever** - Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028 (M.D. Tenn. 1995) (the employee's gastroenteritis and upper respiratory infection was not a serious health condition because although the employee saw a doctor and was given three prescriptive drugs, the employee did not prove through competent medical evidence that she was "incapacitated" for more than three days; but the daughter of the employee, who visited a health care provider and was given a course of prescription medication, had a serious health condition where the doctor's instructions were that the daughter should not return to day care while she had a fever and this resulted in her remaining out of day care for more than three consecutive days)
- **Chicken pox** - Reich v. Midwest Plastic Engineering, Inc., 130 Lab. Cases (CCH) ¶ 33,287 (W.D. Mich. 1995) (chicken pox was a serious health condition where the employee, who was pregnant, was treated on three separate occasions for chicken pox in conjunction with scheduled pre-natal doctor appointments and was admitted to the hospital and retained overnight as a direct result of her chicken pox)
- **Ear infection did not result in incapacity** - Seidle v. Provident Mutual Life Insurance Company, 871 F. Supp. 238 (E.D. Pa. 1994) (a child's ear infection did not constitute a serious health condition where the treat-

ment consisted of one twenty-minute doctor's examination and a ten-day regimen of antibiotics, where the child was not absent from day care for more than three days)

- **Serious health condition ends at death - Brown v. J. C. Penney Corporation, 924 F. Supp. 1158 (S.D. Fla. 1996)** (where the employee took FMLA leave to care for ailing father with a serious health condition, but did not return to work until almost a month after his father's death, the employer was not obligated to restore the employee to his former or equivalent position because "serious health condition" is limited to health problems that afflict the living; efforts by an employee on behalf of a deceased family member's estate does not come within the FMLA definition of "to care for" since no serious health condition existed after death)

KENTUCKY WORKERS' COMPENSATION PRACTICE
AFTER THE 2000 LEGISLATIVE REFORMS

AN OVERVIEW

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SECTION C

WORKERS' COMPENSATION OVERVIEW

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I. Introduction

Any discussion of the law of workers' compensation in Kentucky must begin with an understanding that major changes in this area of law are frequent. The General Assembly currently convenes in regular session every two years. In the past thirteen years, there have been two additional special sessions of the General Assembly devoted entirely to workers' compensation. The law of workers' compensation consists not only of the statute, but also includes published opinions of the Kentucky Court of Appeals and Kentucky Supreme Court, and Regulations promulgated by the Kentucky Department of Workers' Claims. Changes in the statute usually result in new court decisions interpreting those amendments, and in new regulations providing more detail as to administration, insurance, claims adjusting, or adjudication of claims. As an illustration of the frequency of change, in 1999, there were thirty-nine published opinions of the Court of Appeals and Supreme Court dealing with workers' compensation.

The Workers' Compensation Act appears in Chapter 342 of the Kentucky Revised Statutes (KRS). Access to the statute is available on the internet at <http://162.114.4.13/krs/342-00/CHAPTER.HTM>. The regulations promulgated by the Kentucky Department of Workers' Claims appear in Chapter 25 of Title 803 of the Kentucky Administrative Regulations (KAR), and are available at <http://www.lrc.state.ky.us/kar/TITLE803.HTM>. The published court opinions are published by West Publishing Company, and appear in the Southwestern Reporter. The West publication of the published court decisions is available in book form, on CD rom, and on the internet for a fee at <http://www.westlaw.com/>.

Additional information regarding Kentucky Workers' Compensation is available on the internet. The address for the Kentucky Department of Workers' Claims website is <http://www.state.ky.us/agencies/labor/dwc/>. That site contains various publications, including a Workers' Compensation Guidebook, forms, current and proposed regulations, and information on the various DWC programs, such as Electronic Data Interchange (EDI). The Workers' Compensation Act is published in annotated form, along with the Regulations and other information such as life expectancy tables, present value discount tables, and the schedule of benefit rates, by CompEd, Inc. The website for CompEd, Inc. is <http://www.comped.net/>. This site also contains news, Workers' Compensation Board opinions, and published and unpublished Court opinions.

Other resources for the law of Kentucky workers' compensation are Kentucky Workers' Compensation authored by Ronald W. Eades, and published by The Harrison Company. That book can be ordered by calling 800 588-6840. Kentucky Workers' Compensation, authored by Norman E. Harned, and published by Lawyers Cooperative Publishing has been cited as an authoritative treatise by the courts. The series of treatises Kentucky Practice, published by West Publishing Company has a section in Volume 3A on Kentucky workers' compensation authored by Glenn L. Schilling, the first Commissioner of the Department of Workers' Claims, and is updated annually. Finally, the Office of Continuing Legal Education at the University of Kentucky College of Law (UK/CLE) publishes a very useful practice handbook, Workers' Compensation in Kentucky.

As of the writing of this article, it appears that the 2000 Regular Session of the Kentucky General Assembly will pass House Bill 992, which would make significant changes in the Workers' Compensation Act. It is assumed that HB 992 will be signed by the Governor, and will become law effective July of 2000. Some procedural changes will become effective upon signature of the Governor. Those amendments will be summarized in this article. It is likely that these amendments will result in the promulgation of new regulations by the DWC, and there will no doubt be new issues to be decided by the courts.

This article will not attempt to present a historical overview of the Kentucky workers' compensation program, which began in 1916. Rather, we will focus on current law and current issues facing Kentucky employers. This article is not written as a technical guide for attorneys involved in litigation of claims, but rather is an effort to provide a basic understanding for employers and employment practitioners of the law of Kentucky workers' compensation.

II. Administration of the Program

The current Kentucky Department of Workers' Claims was created by amendments effective on October 26, 1987, and is the government agency responsible for the administration and adjudication of all aspects of the workers' compensation program. Prior to the 1987 amendments, the program was administered by the three-member Workers' Compensation Board, and was headed by a Chairman.

The DWC reports that this program currently encompasses 1.7 million Kentucky workers employed by 80,000 businesses, and that covered workers incur approximately 66,000 reportable injuries per year. According to the DWC, total program costs in terms of premium, simulated premium, and assessments are presently almost \$1 billion per year.

The DWC is administered by a Commissioner, who is appointed by the Governor, with the consent of the Senate. The Commissioner has no set term of office, and may be removed at any time by the Governor. The Commissioner is charged with supervising the employees of the DWC, which include the Administrative Law Judges, Arbitrators, Ombudsmen, and Benefit Specialists. The DWC is charged with overseeing employers, insurance companies and self-insurance programs, treatment and billing by medical providers, and enforcing the provisions of the Workers' Compensation Act.

III. Adjudication of a Claim

A. Arbitrator

A workers' compensation claim begins with the filing of an Application for Resolution of Claim with the DWC. Currently, every claim is then assigned by the DWC to an Arbitrator. If the Arbitrator believes that the claim presents factual issues best resolved through hearing before an Administrative Law Judge, the Arbitrator can enter an Order transferring the claim to the ALJ for further proceedings. Otherwise, from the date of the assignment, the employer and the employee have sixty (60) days in which to submit evidence in support of their positions.

The submission of evidence to the Arbitrator is limited. The parties cannot take depositions of medical witnesses, and are limited to submission of medical records or reports. The parties cannot take depositions of lay witnesses, except for a deposition of the claimant, and only if the claimant agrees to allow such a deposition. Evidence from lay witnesses can be submitted only by affidavit.

At the end of that period of proof time, the Arbitrator holds a Benefit Review Conference. At the BRC, the parties discuss material facts upon which there is agreement, and identify those issues that remain contested. There is usually some discussion of the position of the parties with regard to possible settlement. If the claim is not settled, the Arbitrator is required to issue a benefit review determination within ninety (90) days of the date of the assignment of the claim to the Arbitrator.

Either party can file a petition for reconsideration within fourteen (14) days of the benefit review determination to request that the Arbitrator correct any patent errors in the benefit review determination. The Arbitrator will enter an Order either granting or denying the petition.

B. Administrative Law Judge

Either party then has the right to appeal from the Arbitrator's benefit review determination. This is done by filing a Request for a Hearing before an ALJ, within thirty (30) days of the benefit review determination or Order on reconsideration. If there is no appeal, the Arbitrator's benefit review determination becomes the final resolution of the claim. If there is an appeal to an ALJ by either party, the litigation of the claim virtually starts all over again, as this is called a de novo proceeding. The Arbitrator's benefit review determination is no longer relevant for purposes of determining the employee's entitlement to benefits.

The litigation at this level starts with an Order assigning the claim to one of the ALJ's. Within fifteen (15) days of the date of that assignment, each party is directed to file a document stating the material facts that are stipulated, the issues that are contested, and the evidence that was presented to the Arbitrator that each party wants the ALJ to consider. The assignment Order provides forty-five (45) days of proof time for all parties, followed by thirty (30) days of proof time for the employer, followed by fifteen (15) days of rebuttal proof time for the employee. Evidence from lay witnesses must be submitted by deposition. Evidence from medical witnesses can be submitted by medical report, or by deposition.

At the end of the proof time, the ALJ holds an Informal Conference. The parties again discuss stipulations and contested issues, and the ALJ makes an attempt to encourage settlement. If the claim cannot be settled, the ALJ will schedule a formal Hearing. The claimant testifies under oath at the hearing. The employer is allowed to present the testimony of a company representative. The ALJ decides what witnesses will be allowed to testify at the Hearing. The ALJ decides whether to allow oral argument on the issues at the Hearing, or whether to allow briefs to be filed by the parties. Within sixty (60) days of the Hearing, the ALJ must issue an Opinion ruling on the issues and the claimant's entitlement to benefits.

The parties are allowed fourteen (14) days to file a petition for reconsideration to request correction of patent errors.

C. Workers' Compensation Board

Either party can appeal a decision of the ALJ to the Workers' Compensation Board within thirty (30) days of the ALJ's final Order. No further evidence can be submitted before the Board. The Board reviews briefs submitted by the parties, and issues an Opinion within sixty (60) days of the last brief.

D. Court Of Appeals And Supreme Court

Any party may appeal to the Court of Appeals from a decision of the Board. Any party may also appeal as a matter of right to the Supreme Court from a decision of the Court of Appeals. The standard of review for issues of fact is very limited. The Court cannot substitute its opinion on the weight of the evidence for that of the ALJ. The court is required to determine whether the ALJ's decision was supported by substantial evidence, or whether the evidence is so overwhelming as to compel a contrary finding.

E. 2000 Amendments

The amendments enacted by the 2000 Regular Session of the General Assembly repeal those provisions of the Act regarding Arbitrators. As of the effective date of the amendment, the terms of the existing Arbitrators will terminate. The claims that are currently pending before the Arbitrators on the effective date of the amendment will have to be assigned to an ALJ.

The adjudication of claims before the ALJ would possibly change in one respect. The amendment discusses that the initial assignment of the claim to an ALJ will include notice of the time and place of a Benefit Review Conference. It has been left to the Commissioner to determine by regulation at what stage the BRC will take place, and whether one ALJ will conduct the BRC, and another ALJ conduct the hearing and make the decision on the merits.

The amendment provides for the appointment of nineteen ALJs. The current statute provided for sixteen, but the Commissioner was only using thirteen of the available sixteen appointments.

The 1996 amendments to the Act had provided for elimination of the Workers' Compensation Board effective June 30, 2000. The 2000 amendments reverse that enactment, and allow the Board to continue as a level of appellate review.

IV. Compensability

A. Definition of Injury

Prior to the 1996 amendments to the Act, "injury" was defined simply as a work-related harmful change in the human organism arising out of and in the course of employment. This was a very broad definition of injury. For injuries on or after December 12, 1996, that definition was amended to provide as follows:

"Injury" means any work-related *traumatic event or series of traumatic 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*.

It was believed that by adding these three new requirements to the definition of injury, that the General Assembly intended to exclude from compensation many events that were previously properly found to be compensable under the earlier definition. The experience to date with the Arbitrators and ALJ's as a whole has not been in line with that expectation. In many claims, the sentiment appears to be that because the income benefits for many injured workers were significantly reduced by the 1996 amendments, much to the financial benefit of Kentucky employers, the answer for some adjudicators is to attempt to find the claim to be compensable, and at least award the minimal benefits. There have not yet been any court decisions interpreting this new definition.

1. Traumatic Event

The additional requirement of a traumatic event should be significant. It is not the *result* that must be traumatic, but rather the *event*. The term "traumatic event" was not defined. Employers will generally argue that this term requires more than the employee simply performing normal daily activity, such as bending over, or simply walking up or down a step or stairs, or lifting a small object. The word "traumatic" implies that there is some element of unusual force or torque that acts upon the body. This may also involve some element of an unexpected or sudden event. Somewhere there is a line between being run over by a freight train, and simply standing still in one spot. The placement of that line will be a topic of dispute until the Supreme Court speaks to the issue. To date, this is not an issue that has been generally resolved in favor of employer's.

2. The Proximate Cause

The Act does not define the term "*the proximate cause*". Employers maintain that this means the primary cause, and not merely a contributing cause. If the primary cause of the harmful change in the human organism is a pre-existing condition, then the employer has an argument that the event at work is not compensable. If the medical witness testifies that in the absence of the pre-existing condition, the traumatic event, in and of itself, would not have caused a harmful change in the human organism, then that is evidence that would support a finding that the claimant has not met his burden of proof to establish the requirements of the definition of injury.

The employee argues that while he may have had a pre-existing condition, he was able to work and had no functional impairment or physical restrictions as a result of that condition until he sustained the traumatic event. The argument is that the traumatic event aroused the pre-existing dormant condition into disabling reality. To date, this issue has generally been resolved in favor of claimants. The issue is presently pending before the Court of Appeals.

3. Objective Medical Findings

The experience prior to the 1996 amendments was that awards were being made to claimants on the basis of subjective complaints with no objective medical evidence to support those complaints. The legislature sought to change that situation by requiring that the claimant prove by *objective medical findings* that he had sustained a harmful change in the human organism. "Objective medical findings" was defined as "*information gained through direct observation and testing of the patient applying objective or standardized methods*". The Supreme Court is currently being asked to define what that definition means. As with the other parts of the 1996 amendment to the definition of injury, this is an issue that is rarely resolved with a finding that the alleged injury is not compensable.

4. Natural Aging Process

As part of the 1996 change in the definition of injury, the legislature included this sentence:

"Injury" does not include the effects of the natural aging process. . . "

The Act does not define the term "natural aging process". Just as with the other parts of the new definition of injury, this is an issue that has not been generally resolved in favor of employers. The only Court of Appeals decision to date was unpublished (not binding authority), and ruled that all that is excluded from compensation by this language is prior active disability. Since there was a long line of court decisions ruling that even under the pre-1996 law the effects of a prior active disability were excluded from compensation, the only rationalization is that the legislature did not intend to make any change in the law, but rather simply codified prior case law.

The employer's position is that the legislature clearly intended to entirely exclude from compensation medical conditions that are primarily caused by the natural aging process, even if those conditions were not symptomatic or disabling until the occurrence of the traumatic event.

As part of the 1996 amendments, the Special Fund was eliminated. The Special Fund was previously liable for income benefits for permanent occupational disability when the claim involved arousal of pre-existing dormant conditions. Employers had reason to believe that the 1996 amendments meant that the conditions which previously involved Special Fund liability would no longer be compensable, and that the liability for those conditions would not simply be shifted to the employer.

B. Course and Scope of Employment

To be compensable under the Workers' Compensation Act, the injury must occur while the employee is in the course and scope of his employment with the employer. These issues arise in a variety of situations, including idiopathic falls, parking lot injuries, injuries sustained at recreational activities, injuries sustained while traveling, and injuries sustained when performing activity at work that the employee was told not to do. The resolution of these issues generally involves some combination of whether the injury occurred on the employer's operating premises, whether the activity performed by the employer was for the benefit of the employer, whether there was any compulsion by the employer, or whether there was positional risk.

C. Statute of Limitations

The injured worker must file a claim with the DWC by way of an Application for Resolution of Claim, or reach a settlement, within two years of the date of the injury, or if the employer has paid temporary total disability (TTD) benefits, within two years of the last payment of TTD benefits. A claim for an occupational disease must be filed within three years of the date of last exposure, and if the symptoms that apprise him he has the disease do not arise until after the last exposure, within three years of the onset of symptoms, but not later than five years from the date of last exposure. A claim for AIDS, or human immunodeficiency virus, must be filed within five years of the exposure to the virus. In cases of radiation disease or asbestos-related disease, the claim must be filed within twenty years from the last injurious exposure to the occupational hazard. Also, *see* the discussion in this article regarding cumulative trauma, which contains a discussion of the statute of limitations and notice in that type of claim.

If a claim is barred by limitations, the employee is not entitled to workers' compensation benefits for that injury or disease. This includes income benefits and medical benefits.

D. Notice of Injury

An injured worker is required to give the employer notice of an injury as soon as practicable. If the employee does not give due and timely notice, the claim will be dismissed, unless there is a reasonable excuse for the failure to give timely notice.

E. False Statement by Employee on Job Application

KRS 342.165(2) provides that *no compensation shall be payable* for work-related injuries if the employee at the time of entering the employment falsely represents in writing his physical condition or medical history, if all of the following factors are present:

- (a) The employee has knowingly and willfully made a false representation as to his physical condition or medical history.
- (b) The employer has relied upon the false representation, and this reliance was a substantial factor in the hiring, and
- (c) There is a causal connection between the false representation and the injury for which compensation has been claimed.

The Americans with Disabilities Act has not entirely ended the employer's ability to conduct a pre-employment physical examination, and any such exam should closely follow the requirements of that law. This is an example of one important value of the pre-employment physical examination.

F. Employee's Refusal to Seek or Follow Medical Advice

KRS 342.035(3) provides that no compensation shall be payable for the death or disability of an employee if his death is caused, or if and insofar as his disability is aggravated, caused, or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice.

V. Income Benefits

The Act provides benefits to workers who are injured on the job, or who sustain disease due to exposure at the workplace. There are four types of benefits, *i.e.* income, medical, vocational rehabilitation, and death benefits. Kentucky provides income benefits for temporary total disability (TTD), permanent partial disability (PPD), and permanent total disability (PTD). The law does not provide for temporary partial disability benefits.

A. Temporary Total Disability Benefits

In general, TTD benefits are paid for the period of time following an injury during which the employee is unable to return to work. KRS 342.0011(11)(a) defines TTD as meaning "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." Those simple and plain words of the English language are not quite so clear when it comes to applying the law to the facts of a particular claim.

The definition of TTD was enacted effective December 12, 1996. There are not yet any published court opinions interpreting that amendment. There are several recurring situations:

- (1) The employee has been released to return to work by a doctor with or without restrictions, and **actually returns to work**. He is no longer entitled to TTD benefits.
- (2) The employee has been released to return to work by a doctor without restrictions, but **chooses not return to work** because he does not believe that he is physically able to perform the work. He is probably no longer entitled to TTD benefits. The Arbitrator or ALJ can choose to believe a claimant's testimony that he is not able to work, and disregard the opinion of the doctor, but usually the medical opinion is credited over the self-serving testimony from the claimant.
- (3) The employee has been released to return to work with restrictions, and the employer has offered to accommodate those restrictions, but the employee **chooses not to return** to work. He is probably no longer entitled to TTD benefits.

- (4) The employee has been released to return to work without restrictions, but the employer does not have a job available for him. **The employer may have already filled the job while the employee was off work, or the employer may simply want to terminate the employment relationship.** He is not entitled to TTD benefits, but beware of potential liability for wrongful discharge, breach of contract, or ADA benefits.
- (5) The employee has been released to return to work with restrictions, but the **employer does not have a job available** for him that would accommodate the restrictions.

This is the fact situation that has generated the most disputes, but again there are not yet any published court opinions on this issue. The Commissioner of the DWC has issued a policy statement to the employees of the DWC stating his opinion that in this situation, the employee is **entitled** to TTD benefits.

Most defense attorneys would argue that if the employee has been released to return to work with restrictions, then he has "reached a level of improvement that would permit a return to employment", and is not entitled to further payments of TTD benefits. If he is able to work, he is no longer totally disabled. The statute does not state that the employee must have reached a level of improvement that would permit him to return to the identical job he performed when injured, or to return to employment with this same employer, or that the definition of TTD depends in any degree upon the willingness or ability of the employer to accommodate restrictions.

On the other hand, the plaintiff's attorney will argue that the words "return to employment" do mean a return to the employee's usual type of occupation. There is some appeal to the argument that an employee should not be forced to terminate his employment relationship when his employer cannot or will not accommodate temporary restrictions, seek other employment that would fit within his temporary restrictions, and then seek to renew his employment relationship when he is eventually released to return to work without restrictions.

Other TTD issues involve the situation of a dispute between doctors as to the employee's physical ability to return to work. The usual situation is the treating doctor keeping the employee off work entirely, while another treating or examining physician believes that the employee is able to return to work, either with or without restrictions. The employer and the insurance carrier can choose to believe the opinion of any medical provider when making the decision of whether to pay or continue to pay TTD benefits. However, if the claim is litigated the Arbitrator or ALJ can also choose which medical opinion to believe.

The ultimate goal of the law is for the employee to return to the workforce as quickly as possible, in a manner that does not involve a significant danger of further injury to the employee, and to employment that is suitable for the employee. Too often, this process seems to devolve into the employer who believes that the employee is trying to fraudulently milk the system for a paid vacation, and the employee who believes that his employer does not care about him and the insurance company just wants to deny payments to which he is clearly entitled.

The weekly rate for TTD benefits is a factor of the date of injury and the employee's average weekly wage. The calculation is average weekly wage multiplied by 66 2/3%, and then reduced to the statutory maximum. The year of the date of injury, not the year involved in the period of TTD, determines the applicable statutory maximum. There is also a statutory minimum TTD rate. The maximum and minimum TTD benefit rate for recent years is as follows:

<u>Year Of Injury</u>	<u>Maximum</u>	<u>Minimum</u>
1996	\$415.94	\$83.19
1997	447.03	89.41
1998	465.36	93.07
1999	487.20	97.44
2000	509.03	101.81

B. Permanent Partial Disability Benefits

KRS 342.0011(11)(b) defines permanent partial disability as meaning "the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work. "Permanent disability rating" is defined as the permanent impairment rating times the factor set forth in the table in KRS 342.730(b). "Permanent impairment rating" is defined as the percentage of whole body impairment caused by the injury as determined by the latest edition of the American Medical Association Guides to the Evaluation of Permanent Impairment.

The AMA Guides provide a somewhat scientific approach to measuring the permanent effects of an injury on the human body's ability to function, and expresses that impairment in terms of a percentage to the body as a whole. The most recent edition is currently the fourth edition, and consists of 339 pages.

Prior to the adoption of the AMA Guides as the basis for rating impairment, physicians based their opinions of the percentage of impairment on any number of factors. Some used the AMA Guides, some used Guides published by Academies of the various medical specialties, and others simply pulled numbers out of the air. The AMA Guides were adopted by the General Assembly to bring more uniformity to the determination of the extent of permanent disability. However, the AMA Guides contain much room for disagreement between doctors as to how to properly rate impairment. Some doctors have taken special courses in interpretation and application of the AMA Guides, while others have only a fleeting familiarity with it.

The percentage of functional impairment is multiplied by the factor in the table in KRS 342.730(b). This converts impairment to disability, *i.e.* PPD:

<u>AMA Impairment</u>	<u>Factor</u>
0 to 5%	.75
6 to 10%	1.00
11 to 15%	1.25
16 to 20%	1.50
21 to 25%	1.75
26 to 30%	2.00
31 to 35%	2.25
36% and above	2.50

PPD benefits are payable for a maximum period of 425 weeks if the percentage of PPD is 50% or less. If the PPD is over 50% the maximum period for payment of income benefits is 520 weeks.

The calculation of PPD benefits is average weekly wage multiplied by 66 2/3%, *then reduced to the statutory maximum for PPD*, multiplied by the PPD rating (impairment multiplied by factor). There is no statutory minimum weekly rate for PPD benefits. The statutory maximum for PPD benefits is as follows:

<u>Year Of Injury</u>	<u>Maximum</u>
1996	\$311.96
1997	335.27
1998	349.02
1999	365.40
2000	381.77

C. Return to Work at Equal or Greater Wages

If the employee returns to work at equal or greater wages, his PPD benefit rate is multiplied by .50, which reduces the weekly income benefits by one-half. The test is not whether the employee is able to earn that wage, but only whether he is in fact earning that equal or greater wage. The wages do not have to be earned from the same employer where he was injured. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, the weekly PPD payment is restored to the full amount.

The unresolved dispute is how to determine the post-injury wages. The employer's position is that this is an average weekly wage analysis that involves each 52 week period after the return to work. Just as the average weekly wage for purposes of determining the benefit rate is based upon the best of the four 13-week periods prior to the date of injury, the comparison to post-injury wages should be determined on the best of the four 13-week periods for each year of the compensable period of the PPD award.

The claimant's argument is that this is a week-by-week analysis. For every week after his return to work following the injury that his wage is equal to or greater than his average weekly wage, his PPD benefit would be reduced by one-half. But, for every week when his post-injury wage was not equal or greater, he would be entitled to the full PPD benefit.

This issue is currently pending in the Supreme Court, and it is anticipated that there will be no decision until late 2000 or early 2001. The position advanced by the claimant does find support in the language of the statute. The employer will argue that a week-by-week analysis would be overly time consuming and expensive to administer.

D. Loss of Physical Capacity

If, due to the injury, the employee does not retain the physical capacity **to return to the type of work** that he performed at the time of the injury, the PPD benefit is multiplied by 1.50. Here is more clear English language that does not explain what happens in everyday situations.

What if the employee has been released to return to work with restrictions that would prevent him from being able to perform his usual job, but the employer can accommodate those restrictions and allow him to return to his usual job? The answer is probably that the 1.5 multiplier does not apply in that situation, but there are not yet any court decisions interpreting this amendment.

What is meant by "the same type of work"? Does that mean the exact job that the employee performed when injured? Probably not. If a long-haul over-the-road truck driver, who has lost the physical capacity to perform that job, still retains the physical capacity to handle short runs, is this the same type of work. If an industrial electrician has lost the physical capacity to perform all of the heavy labor or dangerous aspects of his job, but retains the physical capacity to perform many other forms of lighter electrician work, has he lost the physical capacity to perform his usual type of work? If the bulldozer operator can no longer operate the biggest bulldozer, but can operate smaller pieces of heavy equipment, has he lost the physical capacity to perform his usual type of work? There is a line somewhere, as yet unknown, that separates the same type of work from not the same type of work. Perhaps by the year 2001, we will begin to fill in more of this picture.

What if the employee has returned to work at equal or greater wages, but does not retain the physical capacity to perform his usual type of work? Do both the .50 and the 1.5 multipliers apply? Again, there is not yet a court decision, but the Arbitrators and ALJs have generally tended to apply both multipliers in that situation, with the result being the PPD benefit multiplied by a combined factor of .75.

The PPD benefit when the 1.5 multiplier is calculated in the same manner as for PPD without the 1.5 multiplier, but there is a different cap at the end of the calculation. The PPD award with the 1.5 multiplier is limited to 100% of the state average weekly wage (which is the statutory maximum for total disability) or 99% of 66 $\frac{2}{3}$ % of the employee's average weekly wage, whichever is less. This issue is presently pending before the Supreme Court, and should be decided in 2000.

E. Permanent Total Disability

KRS 3542.0011(11)(c) defines permanent total disability as meaning "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work." "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy.

This amendment to the Act was intended to dramatically reduce the number of awards for permanent total disability benefits in injury claims by eliminating the old loss of wage earning capacity standard. But, that has not been the result. The reason for this development lies primarily with the application of the amended language to the facts in the individual claims by Arbitrators and ALJs. The ALJ is often faced with a choice of two potential awards, with one award being around \$50.00 per week for 425 weeks, and the other being \$509.03 per week to retirement age. This can literally mean the difference between an award that is worth \$20,000.00 and one worth \$500,000.00 in income benefits. The ALJ will often tend toward the higher award when he believes that the employee has lost the physical capacity to return to his usual job.

The same statutory maximum and minimum rates apply to PTD as those for TTD discussed earlier. The duration for PTD benefits is to normal retirement age, as discussed in the next paragraph.

F. Termination Of Income Benefits

All income benefits shall terminate when the employee qualifies for normal old-age Social Security retirement benefits, or two years after the employee's injury or last exposure, whichever last occurs. Social Security law has changed that age from 65 for all employees to the following schedule based upon the employee's year of birth:

<u>Year Of Birth</u>	<u>Full Retirement Age</u>
1937 or earlier	65
1938	65 and 2 months
1939	65 and 4 months
1940	65 and 6 months
1941	65 and 8 months
1942	65 and 10 months
1943 to 1954	66
1955	66 and 2 months
1956	66 and 4 months
1957	66 and 6 months
1958	66 and 8 months
1959	66 and 10 months
1960 and later	67

For older workers' the compensable period is at least *two years from the date of injury*. Some employees continue to work beyond the normal old-age retirement date, and should be entitled to some period of income benefits for work-related injuries.

G. Offsets Against Income Benefits

If the employee receives unemployment benefits, there is a corresponding offset as against an award of TTD or PTD benefits, but not as against PPD benefits. If the employee receives benefits from a disability (usually long term disability or short term disability plans) or sickness and accident plan which extends income benefits for the same disability covered by workers' compensation, there is an offset against PPD, TTD, and PTD income benefits, if two conditions are present. First, the plan must be entirely employer-funded. Second, the plan must not contain an internal offset provision for receipt or an award of workers' compensation benefits.

H. 2000 Amendments

There were no changes in income benefits for temporary total disability or permanent total disability. However, there were major changes in the calculation of income benefits for permanent partial disability.

The factors were reduced as follows:

<u>AMA Impairment</u>	<u>Factor</u>
0 to 5%	0.65 {0.75}
6 to 10%	0.85 {1.00}
11 to 15%	1.00 {1.25}
16 to 20%	1.00 {1.50}
21 to 25%	1.15 {1.75}
26 to 30%	1.35 {2.00}
31 to 35%	1.50 {2.25}
36% and above	1.70 {2.50}

The multiplier for loss of physical capacity was changed from 1.5 to 3. Further, when this multiplier is applicable, there is an add-on to the multiplier for certain ages and certain levels of education as follows:

<u>Age On Date Of Injury</u>	<u>Increase In Multiplier</u>
60	0.6
55	0.4
50	0.2

<u>Education</u>	<u>Increase In Multiplier</u>
Less than 8 years	0.4
Less than 12 years And no GED	0.2

The amendment appears to allow an increase in the multiplier for age and education, where applicable, not one or the other. Thus, the 60 year old worker with a 7th grade education and no GED, who has lost the physical capacity to return to the type of work he performed at the time of injury, would be allowed a total multiplier of $3.0 + 0.6 + 0.4 = 4.0$.

The multiplier for return to work at equal or greater wages was changed. Instead of applying a .50 reduction when the employee has returned to work at equal or greater wages, a multiplier of 2.0 would apply when the employee has not returned to work at equal or greater wages.

The word connecting the provisions for loss of physical capacity and return to work at equal or greater wages is "or," which indicates the legislative intent that both multipliers should not apply to the same claim.

VI. Survivor's Benefits

The amount and duration of benefits available to survivors depend upon whether the employee's death was due to the injury or disease. Work-related death is covered by KRS 342.750. Nonwork-related death is covered by KRS 342.730.

A. Work-Related Death

For a work-related death from an injury on or after December 12, 1996, there is an immediate lump sum payment to the estate of the deceased of twenty-five thousand dollars (\$25,000.00). The date of death must be within four years of the date of injury. Out of that payment, the estate is to pay the cost of burial and the cost of transportation of the body to the employee's place of residence.

If there is a widow or widower only, the award is 50% of the average weekly wage of the deceased. However, the average weekly wage of the deceased shall be taken as not more than the average weekly wage of the state (see the chart for the statutory maximum for TTD discussed earlier). For a work-related death from an injury in 2000, the widow could receive up to, but not more than, \$254.51 per week, which is \$509.03 multiplied by 50%.

If there is a widow or widower and a child or children under the age of 18, the payment to the widow is 45% of the average weekly wage, or 40% of the average weekly wage if the child or children do not live with the widow or widower. In addition, the child shall receive 15% of the average weekly wage. This is up to a limit of two children, with 15% each. If there are more than two children, then the 30% is divided equally among them.

If the widow or widower remarries, he or she is paid a lump sum representing the next two years of benefits.

If there are children, but no widow or widower, 50% of the average weekly wage for one child, and 15% for each additional child, divided among the children, share and share alike. Death benefits to a child terminate when he dies, marries, or reaches age 18, unless the child is physically or mentally incapable of self-support. If a child is enrolled as a full-time student in any accredited educational institution, he can continue to receive benefits to age 22.

There are circumstances in which a parent, grandparent, brother sister, or grandchildren can qualify for death benefits, if they were actually dependent upon the employee.

The aggregate weekly income benefits payable to all beneficiaries shall not exceed 66 2/3% of the employee's average weekly wage.

Death benefits also terminate upon the date that the employee would have qualified for normal old-age Social Security retirement benefits. The language in the Act in this regard is confusing as to exactly when the benefits terminate, but this author believes that the initial statement in this paragraph is a correct interpretation of the statute.

B. Nonwork-Related Death

If the employee had filed a claim and was awarded income benefits prior to his death from a cause other than the injury, eligible survivors can file a motion to substitute the survivors for the employee as the plaintiff, and can receive a percentage of the remainder of the awarded income benefits. If the employee had filed a claim, **and the litigation was still pending**, the survivors can likewise file a motion for substitution, but this motion must be filed within one year of the date of death, or the claim by the survivors is barred. Also, even if the employee did not file a claim prior to his death, the survivors can file the claim for income benefits. The estate would be eligible for payments that would have accrued prior to the date of death, and the survivors would have a claim for a percentage of benefits due after the date of death.

The calculation of benefits for the survivors is essentially the same as for a work-related death, with the percentages being applied to the amount of the award of weekly income benefits that was, or would have been, made to the deceased employee. There is a difference in the duration of survivors benefits for a work-related and nonwork-related death. The benefits to a child do not continue past age 18. Also, the duration of benefits for survivors is only for the remainder of the employee's compensable period (i.e. 425 or 520 weeks) that remained on the date of death.

C. 2000 Amendments

The legislature has increased the lump sum payment to the estate from \$25,000.00 to \$50,000.00 for a work-related death. What is not as clear is the addition of the following language: "Annually, the Commissioner shall compute, in accordance with KRS 342.740, the increase or decrease in the state average weekly wage, and consistent therewith, shall adjust the amount of the lump sum payment due under this subsection for injuries occurring in the succeeding year." This language would appear to require the Commissioner to adjust the \$50,000.00 lump sum payment up or down in subsequent years, depending upon changes in the state average weekly wage. Since the state average weekly wage has increased every year in recorded history, this would mean that the \$50,000.00 lump sum payment would also increase annually. The exact formula for computing that increase is not entirely clear, but would likely increase by the same percentage as the state average weekly wage increases.

VII. Medical Benefits

Entitlement to medical benefits is governed by KRS 342.020, which provides: "the employer shall pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability. The employer's obligation to pay medical benefits shall continue for so long as the employee is disabled regardless of the duration of the employee's income benefits.

The DWC has adopted fee schedules by regulation, which limit the allowable charges by physicians, hospitals, and pharmacies. The DWC has adopted clinical practice parameters for low back injuries, which provide direction to the medical provider as to what is proper medical treatment for that type of injury.

The employee can seek medical treatment from the physician of his choice, unless the employer has an approved managed care organization, in which case the employee must select a treating physician from the physicians approved in that plan. The employee is required to designate the treating physician by completing a Form 113, and providing that to the employer or its insurer. The employee can then make one change in designated physician without approval of the employer or insurer. After that one change, the employee cannot change the designated physician without the agreement of the employer or insurer. These provisions were designed to eliminate "doctor shopping".

Only the designated physician can make a referral to another medical provider. In a MCO, the referral must be made to another provider in the MCO. When the employer has a MCO, the only medical treatment that is compensable is that received within the MCO, except for two situations: (1) emergency treatment and (2) the MCO does not include the needed medical specialty.

If the designated physician is not providing proper medical care or is proposing treatment or surgery that is not reasonable and necessary, the employer or insurer can file a motion to allow the employer or insurer to select the treating physician.

VIII. Vocational Rehabilitation Benefits

KRS 342.710 governs the employee's entitlement to vocational rehabilitation benefits, and provides that one of the primary purposes of the Act is the restoration of the injured employee to gainful employment, and preference shall be given to returning the employee to employment with the same employer or to the same or similar employment.

When the injured worker is unable to perform work for which he has previous training or experience, he is entitled to those vocational rehabilitation services, including retraining and job placement, that are reasonably necessary to restore him to suitable employment. "Suitable employment" has been interpreted to mean a

similar wage as he earned at the time of the injury. Typically, the claimant who seeks rehabilitation benefits makes that request in the Application for Resolution of Claim.

A frequently occurring situation is one in which the injured employee is released to return to work with restrictions, and the employer cannot, or will not, accommodate the restrictions to return the employee to work. At that point, one analysis that should be made is whether the employer or carrier should make an offer of voluntary vocational rehabilitation benefits.

Many times, all that is needed is job placement services to assist the employee locate a position with another employer that can accommodate his restrictions. Job placement services can be relatively inexpensive. From the employer's viewpoint, retraining benefits are much more costly, and are generally considered only as a final option to avoid or limit exposure to an award for PTD.

Prior to an award of rehabilitation benefits, the employer cannot force the employee to participate in or cooperate with job placement services or retraining. However, following an award, usually based upon PTD, the employee must accept rehabilitation or his award of income benefits can be reduced by 50%.

Vocational rehabilitation benefits may include tuition, supplies, and mileage, and if the rehabilitation requires residence away from the employee's customary residence, board and lodging. The Act provides that vocational retraining is not to extend for a period exceeding 52 weeks, except in unusual cases, but the Supreme Court has interpreted the requirement of "unusual" liberally.

IX. Cumulative Trauma

A. What Is Cumulative Trauma?

What is the nature of this creature? "Cumulative trauma" is a term that is not defined in the Kentucky Workers' Compensation Act, or in any Kentucky Court decision, regulation, or the AMA Guides. As a matter of practice, cumulative trauma has come to include virtually any work activity. There is no mandatory requirement that the work activity be repetitive, or that it involve unusual or excessive exertion, or that it must be performed over any particular length of time. The term cumulative trauma has become synonymous with "wear and tear".

B. How Did Cumulative Trauma Get Into Our Workers' Compensation Law?

How did the concept of cumulative trauma enter the world of Kentucky workers' compensation law? Prior to 1972, the Act limited compensation to injury from a work related traumatic event or occupational disease. There was no leeway for the Workers' Compensation Board to grant compensation for a gradual type of injury unless it could be classified as an occupational disease. In 1972, the General Assembly changed the definition of injury to mean "any work related harmful change in the human organism".

On October 1, 1976, the Kentucky Supreme Court rendered the decision in Haycraft v. Corhart Refractories Co., Ky., 544 S.W.2d 222 (1976). Norman Haycraft was 44 years old and had worked continuously for Corhart for 17 years. His work involved hard physical labor, including using a sledgehammer and lifting and sliding heavy objects. He first injured his low back at work in 1959, and would have "flare ups" two or three times per year. He had injuries or re-injuries at work, and on two occasions away from work. Those two events consisted of falling down steps at home, and when an automobile in which he was riding turned over.

In March of 1972, Norman was engaged in turning over heavy slabs of granite, and as he dismounted from a truck, went down to his knees with back pain. He was off work two days, and continued to see his regular physician. He continued to work at hard manual labor for the next two years until April 11, 1974. On that day, Mr. Haycraft was visiting his mother in a hospital, and sat in a chair all day. Upon reaching home, his back and leg were giving him so much pain that he could hardly get out of the car. On April 23, 1974, he underwent a discectomy at L4-L5. The Kentucky Supreme Court reversed the Workers' Compensation Board decision denying the claim. The Court held as follows:

On the basis of the evidence it seems obvious to us that this claimant has undergone a "harmful change in the human organism" that is to some degree work-related. We agree that not all degenerative diseases or conditions are compensable. We agree also that it is difficult to assess the degree of relationship between this claimant's work and his disability. But difficult or not, that such a relationship does exist can hardly be avoided. Not only is it beyond question that the nature of the work was such that it probably aggravated and accelerated the degenerative disc condition, but also there have been two incidents of actual injury to the man's back arising out of and in the course of his employment.

To the extent that the claimant was actively disabled prior to April 11, 1974, he cannot be compensated. For the remainder of his disability attributable to the present condition of his back he is entitled to compensation to be divided between the employer and the Special Fund, the employer's portion to be assigned not on the basis of how much of it would have occurred in the absence of the degenerative disc disease, but on the basis of how much the work has contributed to it.

The first mention of cumulative trauma in the statute, KRS Chapter 342, was with the amendments which became effective on December 12, 1996, thirty years after Haycraft. The term "cumulative trauma" is now specifically included in the definition of "injury". Since the General Assembly has not enacted any statute concerning cumulative trauma claims (with the exception just noted), virtually all of the law in this area of workers' compensation has come from the Court of Appeals and Supreme Court. And, it has come one little bit at a time, rather than in any comprehensive fashion. There are still questions that have not been answered, and others that are in the "gray" area.

C. How Do We Know Whether a Condition Is Cumulative Trauma or Occupational Disease?

In O.K.Precision Tool & Die Co. v. Wells, Ky., 678 S.W.2d 397 (1984), Dora Goble developed a condition diagnosed as lateral epicondylitis, an inflammation of the tensor muscles near the elbow, more commonly known as "tennis elbow", caused by 15 years of assembly line work imparting torque to a screwdriver. Her condition became disabling on August 13, 1980, only 2 1/2 months after she had been employed at OK. The Board found 50% PPD, and dismissed the Special Fund. On appeal to circuit court, OK argued that this was an occupational disease, and that the Special Fund should therefore have 25% of the liability. (The Court of Appeals decision in Southern Kentucky Concrete Contractors was not yet final and published.) The circuit court agreed with OK, and decided that Goble's condition was an occupational disease as a matter of law. The Court of Appeals reversed with instructions to assess all liability against OK.

By the time the Kentucky Supreme Court decided this case, the opinion in Campbell was final and published, and OK probably changed its position as to whether the condition was an injury or an occupational disease, because under Campbell the Special Fund would have had 99% of the liability, as opposed to only 25% if the condition was determined to be an occupational disease.

The Supreme Court ruled that it is for the doctors to testify, and for the Board (now Arbitrator or Administrative Law Judge) to find as a fact, what should be classified as a gradual type injury and what is an occupational disease. Except as to diseases expressly labeled as occupational diseases in the Act, the question what is an injury and what is a disease is a question of fact for the Board to decide based on appropriate evidence. The Supreme Court put its stamp of approval on the Court of Appeals decision in Campbell, and remanded the case to the Board to apportion the award accordingly.

D. What Is the Employer's Liability for Medical Benefits for Cumulative Trauma?

In Derr Construction Company v. Bennett, Ky., 873 S.W.2d 824 (1994), Thomas Bennett worked 21 years as an ironworker, but only the last 8 weeks for Derr. His work included heavy lifting and extensive climbing, usually while wearing a 60 to 100 pound tool belt. For several years, Bennett had experienced arthritic problems in his knee, and had sought medical treatment. He was told that he would probably need a total knee replacement surgery at some point in the future.

On October 2, 1989, Bennett had an onset of pain in both knees after sliding down a utility pole. There was medical testimony that the severity and abnormally rapid progression of his degenerative arthritic condition were attributable to his many years of strenuous duties as an iron worker. The ALJ found that Bennett was 100% PTD, but excluded 40% as prior active disability. Of the remaining 60% disability that was determined to be compensable, .43% was apportioned to Derr and 59.57% was apportioned to the Special Fund. Derr was ordered to pay all medical expenses.

Derr appealed, arguing that it should only be liable for 60% of the medical expenses, and that Derr was personally responsible for the 40% of the medical expenses. After noting that the Special Fund has no liability under the Act for medical benefits, the Supreme Court reasoned that regardless of whether future total knee replacement surgery had been recognized as an eventuality before the 10/2/89 incident, there was testimony that the incident had hastened the date on which the surgery would be required.

Therefore, although it might seem harsh on the facts of this case to impose liability for future medical expenses necessitated by claimant's arthritic condition on this employer, it has been determined that work done for this employer contributed, at least to some degree, both to the condition and to claimant's resulting disability. Under such circumstances, where work has caused the disabling condition, the resulting medical expenses ought to be borne by the workers' compensation system.

E. Statute of Limitations and Notice

The Act provides that a claim for injury must be filed within two years of the date of injury or within two years of the date of last payment of voluntary income benefits, whichever is later. The Act also requires that a claim is barred if the injured employee fails to provide notice of the injury to his employer as soon as practicable after the injury occurs.

Eunice Pendland worked for Randall Company for 26 years. She operated a punch press machine, which required her to stretch her thumb and fingers over the machine in order to complete each operation. She performed this maneuver approximately 2,000 each working day. She experienced pain at the base of her thumbs for several years. The pain progressed to the point that she could no longer work on January 14, 1983. She had surgery, returned to work for a short time, quit work in September of 1984, and has not worked since that time. She filed her claim on January 7, 1985. The Workers' Compensation Board found that the date of injury was January 14, 1983, and that the claim was not barred by limitations.

In Randall Co. v. Pendland, Ky. App., 770 S.W.2d 687 (1988), the Court of Appeals held as follows:

... in cases where the injury is the result of many mini-traumas, the date for giving notice and the date for clocking a statute of limitations begins when the disabling reality of the injuries becomes manifest. While a date earlier than the last work day may be proven to be applicable in some situations, such as by a period of temporary or partial disability caused by the series of mini-traumas, such is not the situation in this case.

In her 8 years of employment with Rockwell International, Barbara Brockway's job involved finishing fiberglass truck parts, using pneumatic sanders, grinders and routers, as well as performing hand sanding. As early as 1987, she began experiencing symptoms of pain in her hands, wrists, and arms. In 1989, she was referred to Dr. Kasdan, a hand surgeon, who diagnosed bilateral carpal tunnel syndrome, which he attributed to her work at Rockwell. He advised her that she should avoid repetitive pinching and gripping activities and constant and repetitive use of intense or heavy vibratory tools. Dr. Kasdan also advised Brockway that she would need a permanent job change. Rockwell places her on a different job until she stopped working on May 29, 1992. She filed her claim on December 14, 1992 alleging an injury date of May 29, 1992. The ALJ found that the disabling reality of the injuries became manifest in 1989, and dismissed the claim as barred by limitations.

In Brockway v. Rockwell International, Ky. App., 907 S.W.2d 166 (1995), the Court of Appeals affirmed the dismissal of the claim:

In our judgment, Brockway, based upon the evidence adduced in 1989, would have been entitled to file for entitlement to an award for disability as a result of the mini-traumas sustained by her at that point.

The major significance of Brockway was the Court's discussion in dicta of the continuing cumulative trauma that occurred after the date upon which the disabling reality of the cumulative trauma became manifest. The Court indicated that while some part of the claim may be barred by limitations, if the continued work activities resulted in additional mini-traumas contributing to the employee's physiological condition and resulting in additional disability, a claim for that additional disability would be compensable. While the Court did not mention what liability the employer would have for medical benefits incurred during this additional period of work or future medical benefits, Derr Construction Co. v. Bennett could apply, and the employer could have liability for 100% of the medical expenses.

The latest additions to this discussion are Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999), and Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999). Huff was rendered by the Supreme Court on June 17, 1999, and Clark was rendered on August 26, 1999. Huff involved three workers, who filed claims for occupational hearing loss. Alcan began conducting annual audiological examinations of all employees in 1967. These three employees all had documented hearing loss in 1967, and the hearing loss progressed very little since the early 1970's. The medical evidence established that the current physical limitations due to the hearing loss would have been the same limitations the employee experienced since the mid-70's. The use of hearing protection at Alcan became mandatory on September 8, 1993. The ALJ concluded that each of these employees was aware of their hearing loss before 1985. Since all three claims were not filed until September 7, 1995, the ALJ dismissed the claims as barred by the two-year statute of limitations. The Workers' Compensation Board reversed the ALJ, and the Court of Appeals affirmed the Board. The Supreme Court overruled the Court of Appeals and reinstated the opinion of the ALJ dismissing the claims.

The Court concluded that the phrase "*manifestation of disability*" refers to *the physical disability or symptoms which cause a worker to discover that an injury has been sustained*, and does not refer to the occupational disability due to the injury.

F. Which Employer or Carrier Is on the Risk?

There is no published court opinion on point. However, the practice has been to use the same date that determines when limitations begins to run and when the duty to give notice arises. The court's decision in Brockway discussed above indicates that perhaps more than one employer or more than one carrier may be liable for benefits in certain fact situations.

In Clark, the claimant was a truck driver, who also loaded and unloaded the truck, and worked in the warehouse. In 1985, he injured his right knee. In 1987, he underwent surgery on both knees. His symptoms became progressively worse until he stopped working on July 27, 1994 and underwent a prosthetic replacement of the left knee.

The ALJ concluded that Clark had sustained 75% permanent partial occupational disability as a result of the condition of both knees. He further concluded that the entire disability was due to cumulative trauma, that the cumulative trauma first manifested in 1987, and that his disability progressively increased during the entire period between his return from surgery and July 27, 1994. The ALJ then concluded that the claim for disability due to cumulative trauma was barred by the statute of limitations, except for that disability that was caused by the two years of cumulative trauma that occurred prior to the filing of the claim on July 3, 1995. Since only 55 weeks of the claimant's entire career came within that two-year period, the ALJ determined that only 3.3% of the 75% PPD was compensable. The ALJ also awarded medical benefits. This decision was affirmed by the Workers' Compensation Board.

The Court of Appeals reversed. The Court noted that there were two gradual injuries; one was prior to the surgeries in 1987, and the second was the period of time following the surgeries in 1987 through the last day of work. The Court then concluded that the second period of cumulative trauma became manifest on July 27, 1994, and was not time barred, thus resulting in an award of 45% PPD.

The Court reiterated the rule that it had earlier announced in Huff. The Court discussed that once a worker is aware of a disabling condition and the fact that it is caused by work, the worker would also be aware that continuing to perform the same or similar duties was likely to cause additional injury. For that reason, the rationale which supports the decision in Randall Company v. Pendland does not support tolling the period of limitations for whatever additional injury is caused by trauma incurred after the worker discovers the existence of a work-related gradual injury.

G. What Factors Determine the Date Upon Which the Disabling Reality of Cumulative Trauma Becomes Manifest?

In Pendland, the Court said that when the injured employee has stopped working, we first consider the last day of work. In practice, this idea has been used when the employee stops work temporarily for a surgery, but later returns to work, and is still working during the adjudication of the claim.

The Court went on to explain that the key date can be prior to the date the employee last worked when there is a period of "temporary or partial disability". We assume that "temporary" means a period of temporary total disability, *i.e.* the employee is unable to work due to the medical condition, or is taken off work by a doctor due to the medical condition. There is nothing defining any requirement as to how many days of work must be missed, and even one day may arguably be enough. Thus, it is very important for the employer to maintain detailed and accurate attendance records and personnel files to document all time off work and the reason for same.

Most of the litigation centers around the argument of whether the employee has a period of partial disability prior to the date he last worked. The factors to consider include:

1. When did the symptoms begin?
2. How severe were the symptoms?
3. How did the symptoms affect the employee's ability to function at work and at home?
4. When did the employee first seek medical treatment?
5. How often did the employee require medical treatment?
6. When did the treating physician suggest that the patient restrict his physical activity because of the medical condition?
7. When did the physician first recommend that the patient change occupations?
8. When did the physician state a functional impairment rating?
9. When did the employer change the employee's job duties because of the employee's complaints?
10. When did the employee first notify the employer of his physical problem?

This analysis has probably been changed with the Supreme Court decision in Alcan Foil Products v. Huff. The issue of the date the disability became manifest is determined by the answer to this question: "When did the employee discover that an injury had been sustained?" Here are the relevant areas of inquiry:

- When did the symptoms begin?
- When did the employee first think that there could be a causal nexus between his symptoms and his work activity?
- Did the symptoms change when the employee was away from work?
- When did the employee first seek medical treatment for the medical condition?

- When did a medical provider first tell the employee of a diagnosis of his condition and that the condition was work-related?

The primary potential problem with the Court's new interpretation of "the date the disability became manifest" is that it may be subjective, rather than objective. Every "informed" plaintiff will state that he did not have any clue that his condition may have been work-related until he was specifically so advised by a doctor, and the ALJ can choose to believe or not believe the employee. Is the test when *this particular employee* admits that he actually knew that he had an injury, or when *a reasonable employee should have known* that he had an injury? Does "discovery of an injury" require conviction beyond a reasonable doubt, or is it enough that the employee thought his symptoms might be caused by work activity?

X. Penalty for Safety Violation

A. Current Law

KRS 342.165(1) provides that if an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable shall be increased by fifteen percent in the amount of each payment.

This is an element of liability that is curiously very often overlooked by claimants. This is an issue that has raised some problems in the past between the employer and its insurance carrier. Some carriers have taken the position that this is a penalty for an intentional act by the employer, and that intentional acts by insureds are excluded by the insurance policy. This can lead to disputes between the employer and its insurance carrier as to who will pay for the defense of this issue, and who will pay the 15% penalty in the event it is awarded.

There is also a 15% penalty against the employee if the accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the commissioner or the employer for the safety of employees or the public. This 15% penalty probably applies only to income benefits, TTD, PPD, and PTB, and not to medical benefits.

It is important for the employer to immediately investigate the facts following a report of an injury, and to advise the insurance carrier as soon as the injury is reported when the accident involves such a violation by the employee.

There are currently only seven published Kentucky court opinions interpreting the provisions of KRS 342.165. Those decisions provide guidance to employers and employees on issues arising under that section of the Act, and are summarized as follows.

1. Gibbs Automatic Moulding Company v. Bullock, Ky., 438 S.W.2d 793 (1969)

Glenda Faye Bullock operated a small punch press. The press had two safety levels, so arranged that both hands of the operator were required to operate them in order to prevent a hand from being caught in the press when it came down. However, it was possible on this machine to anchor one of these levers so that one hand could be free, to allow the operator to stamp longer pieces which had to be supported with one hand. There was a sign on the machine: DO NOT TIE THE HANDLE DOWN. While operating the press with the lever tied and stamping short pieces, the press came down on her right hand, injuring several fingers.

Bullock argued that the lever was tied down in violation of a regulation adopted pursuant to KRS 338.040, which became effective ten days before the injury. She argued that the employer had constructive notice of the regulation, and was liable for the 15% penalty.

The Board found that the evidence did not suggest an intentional violation of the regulation by the employer. The Supreme Court ruled that the Board's finding was supported by substantial evidence. The basis of the statutory penalty is that the injury is the result of an intentional failure to comply with a regulation which has been communicated to the employer. There was no showing that the employer had actual knowledge of the regulation. In order to have an intentional failure to comply, there must be actual knowledge, or such period of time must have elapsed as would create a presumption of knowledge. The ten days between the effective date and injury are not enough on the absence of actual knowledge.

2. Childers v. International Harvester, Co., Ky. App., 569 S.W.2d 673 (1978)

Luegean Childers died due to inhalation of carbon monoxide gas while relining a furnace. The widow entered into a settlement agreement for \$84.00 per week. Subsequently, OSHA issued a citation to International Harvester for three safety violations: excessive employee exposure to carbon monoxide, failure to provide respirators, and improper planning and rescue equipment in case of emergency. Childers filed a motion to reopen the settlement on the grounds of mistake or newly discovered evidence and alleged entitlement to the 15% penalty. The Board sustained the employer's motion to dismiss.

On appeal, the employer argued that no statutory penalty is recoverable in a workers' compensation proceeding for violation of the Kentucky Occupational Safety and Health Act, KRS Chapter 338, because KRS 338.021(2) provides:

Noting in this article shall be construed to supercede or in any manner affect any workmen's compensation law or to the enlarge or diminish or affect in any manner the common law or statutory rights, duties, or liabilities of employers or employees, under any law with respect to injuries, diseases, or death of employees arising out of or in the course of employment.

The Court of Appeals ruled that such an interpretation of KRS 338.021 was not intended by the legislature. The purpose of KRS 338.021(2) rather seems to be the preclusion of independent civil actions based on violations of KOSHA.

The Court further ruled that since Childers had alleged mistake and newly discovered evidence as grounds for reopening, that reopening was not precluded by the earlier decision in Preston v. Elm Hill Meats, Inc. The case was remanded to the Board for consideration of the motion to reopen.

3. Barnet of Kentucky v. Sallee, Ky. App., 605 S.W.2d 29 (1980)

James Ronald Sallee was employed as a shift production supervisor. A machine jammed and resulted in a blown fuse. Sallee remarked to fellow employees that he was going to inspect the problem. Later, his body was found in front of the electrical cabinet in the control room. One fuse had been removed and another was partially removed. The floor of the control room was wet or moist. The medical evidence established that Sallee was electrocuted while changing a fuse. The Workers' Compensation Board found that the leaky condition of the roof was known to Barnet prior to the injury, that the wet conditions in the control room were known to Barnet prior to the injury, that Barnet was aware of a specific OSHA regulation, and that the failure of Barnet to comply with the OSHA regulation contributed to Sallee's death. The Board awarded the 15% penalty.

The OSHA regulation, 29 CFR Section 1910.22(a)(2), provided that the floor of every workroom shall be maintained in a clean, and so far as possible, a dry condition.

The Court reversed the award of the 15% penalty. There was a complete absence of proof that Barnet intentionally failed to keep the floor, so far as possible, in a dry condition.

There was conflicting testimony as to the cause of the wet condition of the floor on the evening of Sallee's death. Some attributed it to the fact that it was raining outside and water was tracked in. Some thought it was due to humidity. Some thought it was the result of a leak either in the roof or in another part of the plant. Of those who thought it was a leak, some thought the leak had been present for several months, while others thought the leak was not known to exist until after the injury. There was uncontradicted testimony from those who acknowledged the existence of the leak before Sallee's death, that Barnet had been making efforts to locate and repair it.

Barmet also argued that the Board erred by not assessing a 15% penalty against Sallee for his failure to use a fuse-puller and his violation of Barmet's role that only maintenance men were to change fuses. In denying Barmet's request, the Court noted that there was substantial evidence that fuse-pullers were not available, and that even if a policy requiring maintenance men only to change fuses existed, it was not enforced or followed as a general policy. Four employees testified that both foremen and maintenance men changed fuses.

4. Ernest Simpson Construction Company v. Conn, Ky., 625 S.W.2d 850 (1981)

Simpson was the general contractor for the construction of the Lawrence County High School. Roy Cecil Conn was an employee of Geneva Construction Company, a masonry subcontractor. Conn was killed when he fell through an incomplete opening in a stairwell, which had been covered with loose boards by Simpson. The cover of loose boards was a violation of OSHA regulations promulgated pursuant to KRS 338.051. The Board awarded death benefits from Geneva to the widow, and also awarded the 15% penalty against Simpson.

The Supreme Court reversed. The purpose of KRS 342.165 is not to compensate workers or their families, but to penalize those employers who intentionally fail to comply with safety regulations. By its terms, the statute requires two conditions to be operative before the penalty can be applied. The accident to the employee must have been caused by:

- 1) the employer of the injured party; and
- 2) the employer must be the employer who would otherwise have been liable for the payment of workers' compensation benefits.

Because Geneva had workers' compensation, Simpson was not liable for compensation benefits. Neither of the requirements has been met.

The Court noted that this is a hiatus in the law, which can only be eliminated by legislative action. Although it was the intentional violation by Simpson of a safety rule that caused Conn's death. Simpson could not be ordered to pay the 15% penalty. Simpson could not be sued in circuit court for negligence, because it is allowed immunity under the exclusive remedy provisions of the Act. The legislature has not yet taken any action as a result of the Supreme Court's decision in Conn.

The question remains as to whether Conn could have brought a civil action against Simpson, not based upon negligence, but rather upon the exception to the exclusive remedy doctrine carried out in the Act for an injury or death that results from an intentional act of the employee to cause such injury or death. Simpson would argue that there is a significant difference between an intentional violation of an OSHA regulation, and intent to cause injury or death of an employee.

5. Whitaker v. McClure, Ky., 891 S.W.2d 80 (1995)

Dorothy McClure was awarded benefits for 100% disability, with 4% excluded as prior active disability. The ALJ determined that her injury was substantially caused by her willful violation of a safety rule. The award of income benefits was apportioned 75% to the employer and 24% to the Special Fund.

The question presented to the Court was whether the 15% reduction in benefits would apply to that part of the award apportioned to the Special Fund? The Court noted that as of July 15, 1982, the employer and Special Fund are each directly liable to the claimant for benefits. Prior to that date, the employer paid the entire amount to the claimant, and the Special Fund would reimburse the employer for its share quarterly. The express language of KRS 342.165 limited the penalty to that portion of the award determined to be the liability of the employer.

6. Apex Mining v. Blankenship, Ky., 918 S.W.2d 225 (1996)

Sherman Blankenship was permanently and totally disabled as a result of an accident which occurred while he was operating a road grader. The ALJ found that Apex had provided Blankenship with a defective

grader, the throttle of which was tied wide open with an "O" ring. Additionally, it had defective brakes, the decelerator pedal was not in proper condition, and the equipment could only be stopped by lowering the grader blade. There was evidence that other operators had been forced to crash the defective machine into other equipment in order to stop it. The ALJ found that the employer knew of the defective condition, and had failed to repair it. The Judge concluded that the defective machine had contributed in some degree to Blankenship's accident, and that the employer's failure to repair the machine was an intentional act of non-compliance with KRS 338.031. The Judge ruled that Apex would have been liable for the 15% penalty, but for the fact that Blankenship already was to receive an award for 100% disability.

KRS 338.031 provided in pertinent part:

- 1) Each employer:
 - (a) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
 - (b) Shall comply with occupational safety and health standards promulgated under this Chapter.

Apex first argued on appeal that KRS 342.165 requires an intentional violation of a "specific" statute, and that KRS 338.031 was "general" in nature. Apex' second argument was that the 15% could not be awarded because the income benefit would then exceed the statutory maximum weekly rate for income benefits.

The Supreme Court ruled that KRS Chapter 342 permits a worker to receive an income benefit for total disability as well as a 15% increase in compensation pursuant to KRS 342.165.

The Court noted that there was apparently no statute or regulation which explicitly requires an employer to keep the brakes and decelerator of a grader in good operating condition, as well as to refrain from fastening the throttle in the full open position.

The Court acknowledged that the term "recognized hazards" as used in KRS 338.031 could be construed broadly to include hazards which were recognized by safety experts but which might not be apparent to workers or employers. However, the Court observed that this case did not concern a safety hazard of which this employer could reasonably have been aware, but one that was obvious, even to the lay person.

While KRS 338.031 is not as specific a statute as might be desirable, the Court was mindful that the Workers' Compensation Act is social legislation which is to be construed liberally and in a manner consistent with accomplishing the legislative purpose.

7. Cabinet for Workforce Development v. Cummins, Ky., 950 S.W.2d 834 (1997)

Lee Kyle Cummins was a teacher of refrigeration, air conditioning, and heating at an adult vocational school. He alleged disability as a result of exposure to freon, acid, oils, lubricants, and solvents, and that his workplace did not have a ventilation system or monitors. The ALJ determined that Cummins was permanently and totally disabled as a result of physical and psychiatric injuries resulting from his exposure to chemicals. The ALJ denied his request that the 15% penalty be imposed, because Cummins had failed to cite a specific statute or regulation which required a ventilation system.

The Supreme Court affirmed the ALJ's decision on the grounds that there was no specific statute or regulation which required mechanical ventilation or the use of protective gloves or a respirator when working with solvents. The Court was not persuaded that the employer's failure to provide this equipment indicated such a gross disregard of patently obvious, basic safety concepts as occurred in Blankenship.

Unpublished court opinions cannot be cited as legal authority, but can provide insight for many issues. We have located three such cases concerning KRS 342.165.

8. Pyro Mining Company v. May, 85-CA-880-MR 3/21/86

Bennie May was seriously injured when he slipped and fell while cleaning a clogged coal screen, striking his back on a piece of angle iron. It had been raining continuously, causing the coal screen to become muddy and slick. The Board found that May was 100% disabled, and imposed the 15% penalty.

The statute cited by May was KRS 338.031, which mandates that each employer furnish each employee a workplace free from recognized hazards. May's argument was that Pyro failed to place covers over the coal screens to prevent the accumulation of coal dust, which is slippery when wet. Whenever it rained, the coal screens clogged, necessitating cleaning of the screens. Such cleaning required workers with shovels to climb upon the screens, which were placed at precariously sharp angles. This practice had been used by Pyro for quite a while, despite the obvious dangers. By ignoring the hazard and failing to remedy it, Pyro failed to provide a safe workplace, thereby violating KRS 338.031.

The Court disagreed with Pyro's argument that 338.031 lacks the specificity required by 342.165 to warrant the imposition of a penalty. "KRS 338.031 imposes upon every employer the affirmative duty to take measures to protect his employees from apparent dangers associated with the workplace. The fact that the safety measures necessary to comport with this statute would vary according to the particular workplace in no way abrogates the employer's duty to ensure that each employee's working environment is safe. In the instant case, Pyro failed to do this by sending May to clean the coal screen, thereby subjecting him to risk of injury from an obvious hazard. We pause to add that one important factor contributing to our decision that the penalty was rightfully assessed against Pyro is the ease with which accidents like the one suffered by May could have been prevented."

9. Porter v. Magoffin County Fiscal Court, 97-CA-2059-WC 8/14/98

Gregory Porter was injured when the sanitation truck in which he was riding was rear-ended by another vehicle. The truck was not equipped with safety belts. The ALJ awarded TTD and medical benefits, but found no permanent disability. The ALJ assessed the 15% penalty for violation of KRS 189.126(6), and calculated the penalty as \$23.27 per week for 425 weeks, being 15% of 66 ²/₃% of Porter's average weekly wage.

Porter argued on appeal that he was entitled to the 15% penalty regardless of whether he was found not to be permanently disabled. The Court of Appeals ruled that "compensation" as used by KRS 342.165 includes not only awards for permanent disability, but awards of TTD benefits and medical expenses.

10. Overstreet v. Enro Shirt Company, 1997-CA-2968-WC 9/4/98

Joyce Hall Overstreet sustained an injury due to an electric shock to her left hand that created a severe contraction of her left arm. Enro was cited by OSHA for violation of two regulations: (1) the cover of the electric outlet box which was the source of the shock, was secured in an improper manner with a metal strap; and (2) a flexible extension cord was used to provide power to this outlet, instead of fixed wiring, for approximately one year prior to the accident.

The ALJ awarded benefits for 100% disability, with 5% excluded as prior active disability. The ALJ also assessed the 15% penalty against Enro. Overstreet asked that the 15% penalty also be assessed against medical benefits awarded. The ALJ denied that motion.

Overstreet argued on appeal that "compensation" is defined in the Act as including medical benefits. The Supreme Court explained that "compensation" had been interpreted not to include medical benefits when the issue involved apportionment to the Special Fund. Claude N. Fannin Wholesale Co. v. Thacker, Ky. App., 661 S.W.2d 477 (1984). In Thacker, the Court noted that the prefatory language to all the definitions provides: "As used in this article, unless the context otherwise requires." Thus, the term "compensation" cannot automatically be deemed to include medical and income benefits whenever it appears in the law. The Court did not believe that application of the 15% penalty to medical benefits was a reasonable result intended by legislature.

B. 2000 Amendment

The legislature increased the penalty on employers to thirty percent (30%), but left the penalty on employees at fifteen percent (15%). There is little doubt that this amendment will encourage claimants to make allegations of a safety violation by the employer much more often than in past claims. The penalty would be 30% of the income benefit awarded, not 30% PPD. For example, an award of income benefits for PPD of \$60.00 per week would become an award of \$78.00 per week. An award for TTD or PTD at the maximum rate of \$509.03 would become \$661.74 per week. The final answer to the issue of whether the penalty applies to medical benefits has not yet been stated by the Supreme Court.

XI. Employer's Right to Request a Physical Examination of the Employee

KRS 342.205 provides that after an injury and so long as compensation is claimed, the employer has the right to have the claimant examined by a physician at any reasonable place and time. If the employee refuses to submit himself to, or in any way obstructs the examination, his right to receive benefits is suspended until the refusal or obstruction ceases. After an award or settlement, this requires a motion to reopen by the employer before the benefits could be suspended.

XII. Reopening

A. Current Law

A settlement or an award of benefits can be reopened by either party upon a showing of certain facts:

- (a) fraud
- (b) newly discovered evidence
- (c) mistake; and
- (d) change of disability as shown by objective medical evidence of worsening or improvement of impairment.

No claim can be reopened within two years of the award, or more than four years following the award. This creates a two-year window of opportunity for reopening. Further, no motion to reopen could be filed by the same party within two years of a previous motion to reopen. The effect of this provision in conjunction with the two-year window of opportunity was to limit a party's ability to reopen to a single opportunity.

These time limitations do not apply to reopening to resolve medical fee disputes, fraud, or conforming the award to KRS 342.730(1)(c) 2, which was the .50 multiplier for return to work at equal or greater wages.

The most common issue that arose following the 1996 amendments to the Act set forth above was the situation in which an employee sustained a period of TTD within the two-year waiting period following an award or settlement. Many insurers and employers applied the law as written, and would not voluntarily pay TTD benefits in that situation.

B. 2000 Amendments

These amendments made three changes in the reopening provisions. The legislature added to the list of situations for which the time limitations do not apply as follows: "or seeking temporary total disability benefits during the period of an award,".

The two-year waiting period would be repealed. An award or settlement could be reopened virtually the next day. The provision that no motion to reopen may be filed by the same party within two years of any previous motion to reopen by the same party, was reduced to one year.

XIII. Average Weekly Wage

A. The Statute

An employee's average weekly wage (AWW) is a primary factor in determining his income benefit rate, and is calculated according to KRS 342.140 as follows:

The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows:

- (1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:
 - (a) The wages were fixed by the week, the amount so fixed shall be the average weekly wage;
 - (b) The wages were fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve (12) and divided by fifty-two (52);
 - (c) The wages were fixed by the year, the average weekly wage shall be the yearly wage so fixed divided by fifty-two (52);
 - (d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury.
 - (e) The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he would have earned had he been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.
 - (f) The hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where the services are rendered by paid employees.
- (2) In occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, the average weekly wage shall be taken to be one-fiftieth (1/50) of the total wages which the employee has earned from all occupations during the twelve (12) calendar months immediately preceding the injury.
- (3) In the case of volunteer firemen, police, and civil defense members or trainees, the income benefits shall be based on the average weekly wage in their regular employment.
- (4) If the employee was a minor, apprentice, or trainee when injured, and it is established that under normal conditions his wages should be expected to increase during the period of disability, that fact may be considered in computing his average weekly wage.
- (5) When the employee is working under concurrent contracts with two (2) or more employers and the defendant employer has knowledge of the employment prior to the injury, his wages from all the employers shall be considered as if earned from the employer liable for compensation.

- (6) The term "wages" as used in this section and KRS 342.143 means, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the employer, and gratuities received in the course of employment from other than the employer to the extent the gratuities are reported for income tax purposes.
- (7) The commissioner shall, from time to time, based upon the best available information, determine by administrative regulation industries which ordinarily do not have a full working day for five (95) days in every week. In those industries, compensation shall be computed at the average weekly wage earned by the employee at the time of injury reckoning wages as earned while working full time. "AT full time" as used in this subsection means a full working day for five (95) working days in every week regardless of whether the injured employee actually worked all or part of the time.

B. Obtaining Wage Information

Determining the employee's AWW is the first step in calculating the dollar value of a given percentage of occupational disability. How do you obtain wage information? The Employer's First Report of Injury Form SF1 contains information as to the employee's wage rate on the date of injury, and the number of hours per week the employee was regularly scheduled to work. A copy of that form may be obtained from the employer, carrier or Department of Workers' Compensation (DWC). This is the information that is often used by the employer or carrier in calculating the rate of voluntary Temporary Total Disability (TTD) payments.

The best information is the actual record maintained by the employer of wages earned by the employee. That may be obtained from the employer or carrier. The actual wage records often show that the AWW is lower than the estimate made from the information contained in SF1. Once the claim has been filed, the employee may serve a request for verification of earnings, and the employer must respond with a completed Form AWW-1.

C. The Average Claim

Most claims fall within KRS 340.140 (1) (d), the employee is paid by the hour, and has worked 13 weeks or more for the employer. Begin with the date of injury, and count back in time to determine the 52 week period prior to the date of injury. While there is no Kentucky court opinion on point, most employers or carriers agree that the 52 weeks begins with the first full week of a regular pay period. If the employee was injured on the third day after the end of a pay period, that should not count as a full week when determining the 52 week period.

The relevant information for each of the 52 weeks is the total number of hours worked multiplied by the regular rate. The 52 weeks are then divided into four 13 week periods, again counting back from the date of injury. The 13 week period is not a sliding period; *i.e.* not the best individual weeks out of 52, or the best 13 consecutive weeks anywhere in the 52. The total dollar amount for each 13 week period is then divided by 13. The highest dollar figure from the four quarters is deemed to be the employee's AWW.

D. Overtime and Premium

Overtime and premium pay are not included. Overtime hours are included, but at the regular hourly rate. R.C. Durr Co., Inc v. Chapman, Ky. App., 563 SW. 2d 743 (1978). There are no Kentucky court decisions defining "premium pay". We do know that "premium pay" is distinguished from "out-put" pay, which is included in the calculation of AWW. Denim Finishers, Inc. v. Baker, Ky. App., 757 S.W. 2d 215 (1988); also see Keathley v. U.S. Shoe Company, Ky., 585 S.W. 2d 386 (1979). Some employees are paid a shift differential, which is an additional hourly rate for working a less desirable shift. Employers usually take the position that this is premium pay. Employers also consider a bonus, such as a Christmas bonus or production bonus, to be premium pay.

E. Sporadic Work

Practitioners frequently encounter the employee who has worked less than 13 weeks for the employer, yet there is only one published Kentucky opinion on point, C & D Bulldozing v. Brock, Ky., 820 S.W. 2d 482 (1991). Brock worked sporadically for C & D when work was available for a 15 week period from early August

to 11/15/85. He received no wages for the weeks ending 8/23, 8/30, 9/6, 9/13 and 9/20. The Court held that the statutory scheme does not turn upon the time period from an original date of hire to the date of injury, but turns upon the actual period of employment. Where the work is sporadic, a determination must be made on a case-by-case basis. The records showed that Brock worked nine weeks out of the 15 week period. The owner of C & D stated that Brock was not employed during the weeks he received no wages. The Court discussed examples of indicia of employment during the 6 weeks Brock did no work, including whether Brock had any rights he could assert against the employer during the dead times (*e.g.* unemployment benefits), whether any benefits were provided by the employer during those periods (*e.g.* health insurance), or whether Brock had priority with respect to re-employment. The Court concluded that Brock worked less than 13 weeks for C & D, and that this AWW was properly calculated by dividing by 13 the 7 weeks he worked in the 13 week period prior to the injury, and not by dividing by 13 the 9 weeks he worked in the 15 week period prior to the injury.

It is rare that the hourly wage has not been fixed or cannot be ascertained, but Uninsured Employers' Fund v. Poyner, Ky. App., 829 S.W. 2d 430 (1992) is proof that it can happen. Stahl, who was in the logging business, employed Poyner to cut down trees. The primary issue was whether Poyner was an employee or an independent contractor. There was evidence that the usual rate of pay was \$50.00 per day, or \$250.00 per a five-day work week. The Court held that the Administrative Law Judge (ALJ's) finding was not clearly erroneous.

F. Seasonal Employment

There are only four published Kentucky court opinions on the topic of seasonal employment. In Department of Parks v. Kinslow, Ky., 481 S.W. 2d 686 (1972), the claimant was employed to pick up garbage and do general maintenance work at Barren River State Park. He worked from 4/16/69 to 9/30/69 and again from 4/1/70 to 6/29/70 when he was injured. The park was open year around, but from October until April the services were drastically curtailed. Kinslow knew he was being employed only from April to October, and was classified as a seasonal employee. The Court noted that the apparent intent of the legislature was to reduce the amount of the recovery if the employment was with a business carried on naturally only for a particular season of the year. The seasonal worker should not receive the same compensation as that of a nonseasonal worker. The Court noted that a classic example of a seasonal occupation is that of fruit picking in California, even though fruit picking is being carried on somewhere in the United States every day throughout the year. The very existence of the Barren River State Park depends upon the patronage of tourists during the period from late spring to early fall. In the popular sense, this is seasonal.

In May v. James H. Drew Shows, Inc., Ky. App., 576 S.W. 2d 524 (1979), the claimant began working for the employer, a traveling carnival, when it came to his home town of Louisa on July 4. He worked as a truck driver and roustabout, more or less doing anything requested of him, at the carnival while it was in Louisa, then left with the carnival on its road tour. May was in his summer vacation between his junior and senior year of high school. This was a summer job, and he intended to return to school in September. The Court of Appeals held that May was not a seasonal employee. The test in determining whether an occupation is seasonal is not what the plaintiff intended, but what the job itself was, seasonal or permanent. A summer job for a student is not seasonal merely because the student is only planning to work during the summer. Rather, an occupation is seasonal because of what the job itself entails. May's uncontradicted testimony was that he could have continued working for the carnival if he did not return to school. The Court did not find it relevant that carnivals can only play in Kentucky during the summer, because he could have continued to work with the carnival in other parts of the country for a year. The Court identified as a classic example of a seasonal employee, a lifeguard at an outdoor pool, since such pools are only open for swimming during the summer.

In Heckel v. Singleton, Ky. App., 627 S.W. 2d 279 (1982), the claimant was 16 years of age and was employed to drive an ice cream truck. The old Workers' Compensation Board (WCB) had found that Singleton was not a seasonal employee in that ice cream can be sold at any time of the year. The circuit court reversed, specifically finding that the employment was seasonal. This issue was not raised on appeal to the Court of Appeals, which leaves this decision with little value in terms of precedent. The same is true of Holman Enterprise Tobacco Warehouse v. Carter, Ky., 536 S.W. 2d 461 (1976), in which Carter, a full-time farmer and sharecropper, for many years had worked in a warehouse during the tobacco season, which normally extends from mid-November to late January or early February. The Court noted that this was an occupation that was exclusively seasonal, and that was apparently not a disputed issue on appeal.

The issue in Holman was whether Carter's farm income was properly included as part of his "total wages" when calculating the AWW for a seasonal employee. The Court noted that the statute does not use the words "salary" or "income", but limits the formula to wages, and ruled that farm income cannot be considered wages within the provision of 342.140 (2).

There are many situations in which the seasonal employee issue may arise. Some of these include high-way construction laborer, amusement park employees, school teachers, janitors, cafeteria workers, etc., and home building. The "season" at issue may not always be summer or climate-related, but may be business seasons, *i.e.* Christmas season, tax season, racing dates, baseball, basketball, football or hockey season, a school year or Girl Scout cookie season.

G. Volunteer Workers

There are no published court opinions in Kentucky concerning the provision for volunteer firemen, police and civil defense members.

H. Minors

The issue of AWW for minors arose in City of Paintsville v. Ratliff, Ky., 889 S.W. 2d 784 (1994). Ratliff was 17 and working as a volunteer fire fighter. He was still a student and was employed on a part-time basis at McDonalds. He testified that he expected to go into firefighting which would pay \$7.76 to \$15.00 per hour, or welding, which would pay \$10.00 to \$17.00 per hour. These rates would result in an AWW of \$310.40 to \$680.00. The ALJ found that Ratliff's wages should be expected to increase during the period of disability. Instead of using the AWW based upon the part-time job at McDonalds, the ALJ found an AWW of \$310.40. The WCB, Court of Appeals and Supreme Court affirmed.

The Court discussed that a great amount of discretion has been placed with the ALJ in determining whether it could be expected that a minor's wages would increase during disability, and that during disability meant his lifetime, not 425 weeks. There was no proof that under normal conditions Ratliff could not have worked as a regular fire fighter. This applies only to permanent occupational disability, and not to TTD which must be based upon actual wages.

I. Burden of Proof and Exemptions

With concurrent employment, keep in mind that it is the plaintiff's burden to prove AWW. The plaintiff must prove that the employer had knowledge prior to the injury of the employee's concurrent employment. What income is not included? The courts have held that employment that is exempt from coverage under the Act, here work as a railroad employee, is not to be included as concurrent wages. Wright v. Fardo, Ky. App., 587 S.W. 2d 269 (1979). Other exempt employees include some domestic servants in a private home, some employees performing temporary maintenance, repair or remodeling on a private home, some religious or charitable employees, agricultural employees, and federal employees, Longshoremen, and railroad employees.

J. Wages Defined

"Wages" includes the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the employer. The only Kentucky decision on this issue is Rainey v. Mills, Ky. App., 733 S.W. 2d 756 (1987). The claimant argued that wages must necessarily include fringe benefits, specifically employer pension plan contributions, health insurance benefits, and life insurance premiums. The Court held that the "similar advantage received" must be of the same class as those specifically delineated. The express language of the statute and the failure of the legislature to include fringe benefits in any of the Act's amendments compelled a conclusion that they were not intended to be encompassed within the workers' compensation scheme.

Does "wages" include holiday, vacation, sick, or personal leave pay? The question is probably whether these are "money payments for service rendered". There are no published Kentucky court decisions on this issue, and that usually means that the practitioner should refer to Larson's The Law of Workers' Compensation. The correct result is probably that these types of payments should count toward AWW to the extent that they are

used for actual time off from work. Those payments are probably not includable to the extent that they can be accumulated and exchanged for money as a form of bonus.

XIV. Miscellaneous Requirements of Employers

A. KRS 342.038(1)

Every employer shall keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment.

B. KRS 342.038(3)

Every employer shall report to his workers' compensation insurance carrier or the party responsible for the payment of workers' compensation benefits any work-related injury or disease or alleged work-related injury or disease within three working days of receiving notification of the incident or alleged incident. Potential fine for violation of this section of the Act is \$100.00 to \$1,000.00 per occurrence. The alleged incident must be reported even when the employer believes that the incident did not occur.

XV. Insurance Issues

A. Coverage of Business Owner

When an owner of a business, a qualified partner of a partnership, or a qualified member of a limited liability company have elected to be included as employees, this inclusion shall be accomplished by the issuance of an appropriate endorsement in a workers' compensation policy.

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A SUMMARY OF HOUSE BILL 992

This bill makes significant changes in the Kentucky Workers' Compensation Act. Most of the changes will affect injuries on and after the effective date of the amendments, which is **July 15, 2000**, but some are remedial and will apply to pending claims. There was no change in the definition of injury (or any other definition), in black lung benefits, or in the unfair claims settlement practices provisions.

ADJUDICATION OF CLAIMS

The terms of all Arbitrators will expire on the effective date of this amendment, which will be mid-July. We will revert to the prior system of adjudicating claims before Administrative Law Judges. There is a provision for a Benefit Review Conference before the ALJ, but we do not yet know *when* the BRC will occur. It could occur early in the litigation, or could simply replace the old Pre-Hearing Conference. The Commissioner will promulgate new Regulations in this regard. We also do not know what happens with claims that were previously assigned to Arbitrators, but which will not result in final opinions prior to the effective date of the amendment. Those claims will obviously be re-assigned to ALJ's, but the details of the proof schedule will have to be addressed by Regulation. Those regulations will take effect on an emergency basis.

The number of ALJ's currently allowed is 16, although the Commissioner is only using 13 of the available 16 positions. The amendment raises the number of ALJ positions to 19, but the Commissioner apparently plans to increase the number of active ALJ's to 17. He could request the appointment of up to an additional 2 ALJ's in the future, in the event that the claims work load requires that action.

The 1996 amendments to the Act had terminated the existence of the Workers' Compensation Board. The 2000 amendments bring the Board back into existence. There will apparently be a gap from June 30, 2000 until the effective date of this amendment in mid-July when the Board will not exist. There is a serious question as to where to file an appeal, if an appeal is filed during that two week period from June 30 to July 13, 2000?

ATTORNEY FEE

The attorney fee for plaintiffs and defendants is capped at \$12,000.00. The amendment specifically provides that this change will apply to claims in which the employment contract is entered into and signed after the effective date of the amendment. *In an original claim* (as opposed to a reopening?), the formula for the plaintiff's attorney fee will be 20% of the first \$25,000.00, 15% of the next \$10,000.00, and 5% of the remainder of the award, up to a maximum of \$12,000.00.

The amendments to KRS 3432.320 are listed as being among those that are remedial.

The amendment repeals the penalty of up to \$5,000.00 per level of appeal on an employer who does not "prevail" on appeal.

SETTLEMENT

KRS 342.265 (2) was amended in 1996 to require that settlement agreements concluded after March 31, 1997 providing for commuted lump sum payment of future income benefits which would otherwise be payable in amounts greater than **ten dollars** per week shall not be approved unless there is a reasonable assurance that the worker will have an adequate source of income during disability. The 2000 amendment changes the dollar amount to weekly benefits greater than **one hundred dollars**, and makes this change effective for settlement agreements concluded after the effective date of this amendment.

The Special Fund is apparently re-considering its position regarding settlement of awards in light of this amendment. The Special Fund may be contacting insurers and/or claimants to discuss lump sum settlement of old awards.

REOPENING

KRS 342.125 was amended in 1996 to provide three time limitations:

- (1) no claim could be reopened more than four years following the date of the original award or order granting or denying benefits;
- (2) no claim could be reopened within two years of the award or order granting or denying benefits;
- (3) no party may file a motion to reopen within two years of any previous motion to reopen by the same party.

The exceptions to these time requirements were:

- (1) reopening to resolve medical fee dispute;
- (2) reopening on the grounds of fraud;
- (3) reopening to conform the award as set forth in KRS 342.730(1)(c)2, (50% reduction for weeks when claimant has returned to work at equal or greater wages) or
- (4) for reducing a permanent total disability award when an employee returns to work.

The 2000 amendments leave in place the four year limitation on reopening, but eliminate the two-year waiting period following an award or order granting or denying benefits. The two-year period following a previous motion to reopen by the same party was reduced to one year. Finally, added to the list of exceptions to the time limitations is "or seeking temporary total disability benefits during the period of an award."

PENALTY FOR SAFETY VIOLATION BY THE EMPLOYER

KRS 342.165 provides that if an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation

made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased **fifteen percent** in the amount of each payment. The amendment would increase that penalty to **thirty percent** of each payment.

In the past, this has been an issue that was rarely raised by plaintiff's as a whole. The increase to thirty percent, in conjunction with recent court decisions on this issue, will likely result in this issue being involved in more claims. If that occurs, there will be more litigated claims, and the litigation of those claims will be more expensive.

It is obvious that the safety penalty against the employer will apply to PPD and PTD income benefits. The penalty will also likely apply to TTD benefits, survivors' benefits, and to the lump sum payment to the estate in the event of a work-related death.

There are issues as to whether the insurer is liable for this penalty, or whether it is excluded under the insurance policy as an intentional act by the insured. There is a companion issue as to whether the insurer must offer a defense of the issue of whether the penalty applies. That discussion needs to be revisited by insurers to make certain that its position on this issue is on solid ground.

PPD BENEFITS

The PPD grid was changed to provide as follows:

AMA IMPAIRMENT	NEW FACTOR	OLD FACTOR
0 to 5%	0.65	0.75
6 to 10%	0.85	1.00
11 to 15%	1.00	1.25
16 to 20%	1.00	1.50
21 to 25%	1.15	1.75
26 to 30%	1.35	2.00
31 to 35%	1.50	2.25
36% and above	1.70	2.50

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 injury, the benefit for PPD shall be multiplied by *three times* the amount determined in the grid set forth above. Only for the employee who has lost this physical capacity, there is an additional potential add on:

EDUCATION	ADD ON
less than 8 years	0.4
less than 12 years or GED	0.2

AGE	ADD ON
60 or older	0.6
55 or older	0.4
50 or older	0.2

This means that if the employee has lost the physical capacity to return to the type of work he performed at the time of the injury, was 60 years of age, and had less than 8 years of formal education, the multiplier would be $3.0 + 0.6 + 0.4 = 4.0$. What is the answer to the question of whether a claimant who is 60 years old on the date of injury, and who alleges that he is entitled to the add on for being fifty or over, for being 55 or older, and for being 60 or older? Also consider the claimant who does not have 8 years of formal education, who asks for the add on for less than 8 years and less than 12 years of formal education. A strategically placed "or" near the end of this provision apparently provides that there is no stacking of the add on for 8 years and 12 years, or for age 50, age 55, and age 60, but that same "or" could possibly provide that there is only one add on, and that the claimant does not receive an add on for both education and age.

If the employee returns to work at a weekly wage *equal to or greater* than the average weekly wage at the time of injury, the weekly benefit for PPD shall be determined per the grid set forth above. *During any period of cessation of that employment*, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for PPD during the period of cessation shall be *two times* the amount otherwise payable under the grid set forth above.

The legislature added the work "or" between the multiplier for loss of physical capacity and the multiplier for no return to work at equal or greater wages.

BENEFITS FOR WORK-RELATED DEATH

KRS 342.750 provides for a \$25,000.00 lump sum payment to the estate in the event of a work-related death within four years of the date of injury. This amendment increases that lump sum payment to \$50,000.00. Further, as there are changes in the state average weekly wage in future years, the Commissioner is directed to "adjust" the amount of this lump sum payment. The legislature did not specify a formula to be utilized by the Commissioner in making this adjustment.

As an example, the state average weekly wage increased by 4.48 percent from the benefit rate in 1999 to the benefit rate in 2000. As an example, a 4.48% increase in the \$50,000.00 lump sum payment would be an increase of \$2,240.00 in the lump sum payment. Of course, the Commissioner may devise a different formula for calculating the annual adjustment. This adjustment would apply to injuries occurring in 2001, and subsequent years.

KENTUCKY WORKERS' COMPENSATION PRACTICE

AFTER THE 2000 LEGISLATIVE REFORMS

CHANGES FOR THE CLAIMANT AND CLAIMANT COUNSEL

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Lexington, Kentucky**

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SECTION D

HOUSE BILL 992 CHANGES FOR CLAIMANTS

Benefit Review Conferences - BRC

- A BRC is still allowed under KRS 342.270.
- However, there are no longer Arbitrators, so Administrative Law Judges will perform the BRC.
- The Administrative Law Judge may grant or deny benefits at the BRC including interlocutory relief.
- The purpose of the BRC is now to allow the parties to confer with the Administrative Law Judge informally with the parties to define and narrow the issues and discuss settlement and consider other matters that may aid in the resolution of the claim.
- If any agreement is entered at the BRC on any matter, the ALJ will write a memorandum setting forth the matter agreed upon. The memorandum shall be signed by all of the parties, and the ALJ shall file it with the Commissioner and it will become part of the record.

Benefits

- The AMA impairment factors for PPD awards in KRS 342.730(1)(b) have been modified as follows:

IMPAIRMENT FACTOR	DECEMBER 12, 1996	JULY, 2000
0 - 5%	.75	.65
6 - 10%	1.00	.85
11 -15%	1.25	1.00
16 - 20%	1.50	1.00
21 - 25%	1.75	1.15
26 - 30%	2.00	1.35
31 - 35%	2.25	1.50
36% and above	2.50	1.70

- If an employee does not retain the physical capacity to return to the type of work that the employee perform at the time of injury, the factor is multiplied by 3.0 rather than 1.5 under KRS 342.730(1)(c)(1).

- KRS 342.730 no longer contains the .5 reduction factor for returning to work at a weekly wage that is greater than the average weekly wage (AWW) at the time of the injury.
- Also, during any period of cessation of that employment for any reason, the PPD benefit shall be twice the amount otherwise payable under paragraph (b). However, this does not extend the period of payments.
- KRS 342.730(1)(c)(3) allows the multiplier to be increased by increments by employee's educational and age status as follows:

EMPLOYEE'S STATUS AT TIME OF INJURY	FACTOR UNDER 342.730(1)(c)(3)
Less than 8 years of formal education	0.40
Less than 12 years of formal education or a GED	0.20
Age 60 or older	0.60
Age 55 or older	0.40
Age 50 or older	0.20

Settlements

- KRS 342.265(2) Lump sum settlements agreements for over \$100.00 (raised from \$10.00) per week require a reasonable assurance that the worker will have an adequate source of income.
- This makes lump sum settlements more available for claimants.

Safety Violations by Employers

- KRS 342.165(1) states that compensation for which an employer would have been liable is increased by 30% if an employee can prove a safety violation. This is raised from 15% under the prior law.

Death Benefits

- The lump sum death benefit allowed in KRS 342.750 is raised from \$25,000.00 to \$50,000.00. Also, the statute now allows the Commissioner to adjust the death benefit based on increase or decrease in state average weekly wages.

Attorney's Fee

- The \$2000.00 cap on attorney's fee for services performed before an Arbitrator is no longer applicable since there are no longer any Arbitrators.
- Attorney's fee for claimant's attorney is now calculated as follows:
 - 20% of the first \$25,000.00.
 - 15% of the next \$10,000.00.
 - 5% of the remainder of the award.
 - Maximum fee is now \$12,000.00.

Reopening

KRS 342.125 now has an additional ground for reopening for seeking Temporary Total Disability Benefits.

Also, the two year waiting period is no longer in effect. However, no party may file a motion to reopen within one year of any previous motion to reopen by the same party.

The limitation of four years to file a motion to reopen is still in effect.

Board

KRS 342.215 is amended to no longer abolish the Workers' Compensation Board July 1, 2000.

KENTUCKY WORKERS' COMPENSATION SYSTEM
AFTER THE 2000 LEGISLATIVE REFORM

**CHANGES IN ADMINISTRATION
AND
NEW EMERGENCY PRACTICE REGULATIONS**

**Donna H. Terry
Administrative Law Judge
Kentucky Department of Workers' Claims**

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SECTION E

**KENTUCKY WORKERS' COMPENSATION SYSTEM
AFTER THE 2000 LEGISLATIVE REFORM**
**CHANGES IN ADMINISTRATION
AND NEW EMERGENCY PRACTICE REGULATIONS**

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UNIVERSITY OF KENTUCKY
EMPLOYMENT LAW INSTITUTE
JUNE 10, 2000

DONNA H. TERRY, ADMINISTRATIVE LAW JUDGE

**THE WORKERS' COMPENSATION SYSTEM AFTER THE 2000 REFORM:
Changes In Administration And New Emergency Practice Regulations**

I. ADMINISTRATIVE CHANGES PROMULGATED BY HB 992

- A. Administrative structure unchanged .
- B. Functions of some administrative divisions may change.

II. LITIGATION STRUCTURAL CHANGES PROMULGATED BY HB 992

- A. Arbitration level abolished.
- B. Workers' Compensation Board reinstated.
- C. Administrative Law Judge level retained

III. EMERGENCY PRACTICE REGULATIONS UNDER HB 992

- A. The attached regulations will become effective on an emergency basis on the date of filing and will remain in effect until permanent regulations are adopted.
- B. Amended forms, including Form 101 and Form 107, are being drafted and will replace current versions.
- C. Public hearing and opportunity for comment and suggestions will be scheduled before regulation becomes final.

IV. SECTION 1: DEFINITIONS

- A. All references to Arbitrators and the arbitration stage have been deleted from definitions.
- B. Aside from renumbering the definitions, all previous definitions were unchanged by HB 992.

V. SECTION 2: PARTIES

A. The section on Parties remains the same aside from deletion of all references to Arbitrators.

VI. SECTION 3: PLEADINGS

A. Section 3(4) has been amended to delete references to "Arbitrators" and "Administrative Law Judge/Acting Arbitrator."

B. The requirement that the name of the ALJ be designated in the caption of each claim has been retained.

VII. SECTION 4: MOTIONS

A. Section 4(8) has been amended to comply with the new provisions of KRS 342.320(8).

B. The amended regulation provides that motions for attorney fees filed by the defendant-employer shall be filed "within thirty (30) days following the finality of the decision." Therefore, it is no longer necessary for defense counsel to file piece-meal motions throughout claim, and ALJ's will probably only issue one defense attorney fee order.

C. The maximum attorney fee for both plaintiffs and defendants attorneys in an original claim is \$12,000.00

D. The motion must contain an affidavit detailing the services rendered and time expended and the total charged as well as the date upon which the agreement for legal services was reached.

E. Now that defense counsel has been relieved of the obligation to file periodic motions, it can be expected that ALJ's will require full compliance with the requirements of Section 4(8).

VIII. SECTION 5: APPLICATION FOR RESOLUTION OF INJURY CLAIMS

A. Section 5(d) deletes the reference to medical reports filed with the application before an Arbitrator.

B. Reports filed with the application will not be considered evidence before the ALJ. All evidence must be submitted pursuant to notice or motion.

C. Proof before the ALJ shall be on a 45-30-15 day basis, commencing on the date of the Commissioner's assignment order. The assignment order will contain the date and time of the Benefit Review Conference.

D. Notice of Claim Denial of Acceptance (Form 111) must still be filed within 45 days after notice of claim filing or order sustaining motion to reopen.

IX. SECTION 6: APPLICATION FOR RESOLUTION OF OCCUPATIONAL DISEASE CLAIMS

A. Section 6(b) requires the filing of a Form 105 (Medical History) but deletes prior language regarding the requirement to list all doctors and medical facilities within the past fifteen years. However, the Form 105 still mandates that information.

B. Proof in an occupational disease claim shall be presented pursuant to Section 5(3), on a 45-30-15 basis.

C. Medical and vocational reports shall be exchanged by parties in accordance with Section 5(4) within ten days following receipt. These reports shall not be filed with ALJ unless they are intended as evidence.

D. Notice of Claim Denial or Acceptance (Form 111) must still be filed within 45 days pursuant to Section 5(2).

X. SECTION 7: HEARING LOSS

A. The amendments are essentially the same as those related to the Occupational Disease Claims (Section 6).

XI. SECTION 8: MEDICAL EVALUATIONS PURSUANT TO KRS 342.315

A. Section 8(2) contains several minor changes in its language, none of which cause any change in current procedure. It remains within the discretion of the ALJ to appoint a medical school evaluator in injury claims or medical fee disputes.

B. All claims for coal workers' pneumoconiosis, occupational disease, and hearing loss will continue to have automatic referrals to universities.

XII. SECTION 9: MEDICAL REPORTS

A. Unchanged other than deletion of reference to Arbitrator.

XIII. SECTION 10: INTERLOCUTORY RELIEF

A. No substantive changes.

XIV. SECTION 11: BENEFIT REVIEW CONFERENCES (previously known as Pre-hearing Conference or Informal Conference)

- A. Purpose: Expedite the proceeding and avoid need for formal hearing.
- B. Parties shall resolve controversies, narrow and define issues and facilitate prompt settlement.
- C. Benefit Review Conference will be informal and no transcript will be made.
- D. Witness List must be filed 10 days prior to BRC. Because ALJ needs the list prior to the BRC, it is advisable to mail a courtesy copy to ALJ to assure receipt
- E. The Witness List must contain a list of witnesses as well as a summary of anticipated testimony. For medical witnesses this includes at minimum (1) a description of the diagnosis, (2) physical findings and diagnostic studies, (3) functional impairment rating, and (4) work restrictions. A mere listing of witnesses names is insufficient.
- F. At the BRC, the ALJ may limit witnesses "for good cause shown." ALJ may also require testimony of lay witnesses by deposition in order to expedite hearing docket.
- G. The parties' appearance at the BRC is mandatory, except that plaintiff's attendance which may be excused for good cause shown upon prior motion and approval by ALJ.
- H. Representatives shall have full settlement authority at BRC.
- I. Any request for postponement must be made at least 15 days prior to BRC. Last minute telephone calls or motions to reschedule are not "substantial compliance."
- J. Only issues listed as contested on the BRC order shall be subject to further proceedings.
- K. Upon motion and good cause shown, ALJ may allow additional proof between BRC and formal hearing. However, since the hearing is typically scheduled within two weeks following the BRC, this additional period may be rarely used for expert witnesses.

XV. SECTION 12: EVIDENCE

- A. Kentucky Rules of Evidence are still applicable in ALJ proceedings.
- B. Affidavits are no longer evidence.
- C. ONLY RELEVANT PORTIONS of hospital, educational, Bureau of Vital Statistics, Armed Forces, Social Security and other public records may be filed but not for the purpose of the opinion of any physician contained therein.
- D. FILING OF MEDICAL AND HOSPITAL RECORDS IN BULK WILL NO LONGER BE PREMISSABLE. ALJ'S WILL STRIKE ANY MEDICAL RECORDS WHICH ARE NOT RELEVANT TO THE CONTESTED ISSUES. CONTINUED VIOLATION OF THIS RULE WILL RESULT IN SANCTIONS AGAINST COUNSEL.

XVI. SECTIONS 13 TO 19

The Sections on Extensions of Time, Stipulation of Facts, Discovery and Depositions, Wage Certification, Hearings, Petitions for Reconsideration, Benefit Calculations for Settlements, and remaining sections are essentially unchanged.

XVII. SECTIONS 21 TO 26

The Sections on Coverage, Withdrawal of Records, Sanctions, Payment of Compensation from the UEF, use of the AMA Guidelines in Coal Workers' Pneumoconiosis Cases, and Request for Participation by the Kentucky Coal Workers' Pneumoconiosis Fund remain essentially unchanged.

XVIII. SECTION 27: FORMS

Amendments to several forms are being considered, especially Forms No. 101 and 107.

KENTUCKY DEPARTMENT OF WORKERS' CLAIMS
DRAFT EMERGENCY PRACTICE REGULATIONS
UNDER HB 992

Upon Filing, To Remain In Effect Until Permanent Regulations Adopted

803 KAR 25:010. Procedure for adjustments of claims.

RELATES TO: KRS 342.125, 342.260, 342.265, 342.270(7), 342.710, 342.715, 342.760

STATUTORY AUTHORITY: KRS 342.260, 342.270(7)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 342.260 requires the commissioner to promulgate administrative regulations necessary to implement the provisions of KRS Chapter 342. KRS 342.270(7) requires the commissioner to promulgate an administrative regulation establishing procedures for the resolution of claims, including benefit review. This administrative regulation establishes the procedure for the resolution of claims before an arbitrator, administrative law judge, or Workers' Compensation Board.

Section 1. Definitions. (1) "Administrative law judge" means an individual appointed pursuant to KRS 342.230(3).

~~(2) "Arbitrator" means an individual appointed pursuant to KRS 342.230(9).~~

~~(2)(3) "Board" is defined by KRS 342.0011(10).~~

~~(3)(4) "Civil rule" means the Kentucky Rules of Civil Procedure.~~

~~(4)(5) "Commissioner" is defined by KRS 342.0011(9).~~

~~(5)(6) "Date of filing" means the date a pleading, motion, or other document is received by the Commissioner at the Department of Workers' Claims in Frankfort, Kentucky, except final orders and opinions of [arbitrators,] administrative law judges, and the board, which shall be deemed "filed" three (3) days after the date set forth on the final order or opinion.~~

~~(6)(7) "Employer" means and includes individuals, partnerships, voluntary associations and corporations.~~

~~(7)(8) "An employer who has not secured payment of compensation" means any employer who employs an employee as defined by KRS 342.640 but has not complied with KRS 342 340.~~

~~(b)(9)~~ "Special defenses" means defenses that shall be raised by "special answer" filed within forty-five (45) days of the notice of filing an application for resolution of claim, or within ten (10) days after discovery of facts supporting the defense if discovery could not have been had earlier in the exercise of due diligence. Special defenses shall be waived if not timely raised. Special defenses which shall be pleaded are defenses arising under:

- (a) KRS 342.035(3) unreasonable failure to follow medical advice;
- (b) KRS 342.165 failure to comply with safety administrative regulation;
- (c) KRS 342.316(6) and 342.335 false statement on employment application;
- (d) KRS 342.395 voluntary rejection of KRS Chapter 342;
- (e) KRS 342.610(3) voluntary intoxication and self-infliction of injury;
- (f) KRS 342.710(5) refusal to accept rehabilitation services; and
- (g) Running of periods of limitations or repose under KRS 342.185, 342.270, 342.316, or other applicable statute.

Section 2. Parties. (1) The party making the original application for resolution of claim pursuant to KRS 342.270 and 342.316 shall be designated as "plaintiff" and adverse parties as "defendants".

(2) All persons shall be joined as plaintiffs in whom any right to any relief pursuant to KRS Chapter 342, arising out of the same transaction and occurrence, is alleged to exist. If any person should refuse to join as a plaintiff, that person shall be joined as a defendant, and the fact of refusal to join as a plaintiff shall be pleaded.

(3)(a) All persons shall be joined as defendants against whom the ultimate right to any relief pursuant to KRS Chapter 342 may exist, whether jointly, severally, or in the alternative. An ~~arbitrator or~~ administrative law judge may order, upon a proper showing, that a party be joined or dismissed.

(b) The Special Fund may be joined as a defendant in accordance with the appropriate statutory provisions for claims in which the injury date or date of last exposure occurred before December 12, 1996.

(c) Joinder shall be sought by motion as soon as practicable after legal grounds for joinder are known. Notice of joinder and a copy of the claim file shall be served in the manner ordered by the arbitrator or administrative law judge.

Section 3. Pleadings. (1) An application for resolution of claim and all other pleadings shall be typewritten and be submitted upon forms prescribed by the commissioner.

(2) An application for resolution of claim shall be filed with sufficient copies for service on all parties. The commissioner shall make service by first class mail. Incomplete applications may be rejected and returned to the applicant. If the application is resubmitted in proper form within twenty (20) days of the date it was returned, the filing shall relate back to the date the application was first received by the commissioner. Otherwise, the date of second receipt shall be the filing date.

(3) All pleadings shall be served upon the commissioner and shall be served upon all other parties by mailing a copy to the other parties or, if represented, to that representative, at the parties' or representatives' last known address. A certificate of service indicating the method and date of service and signed by the party shall appear on the face of the pleading. Notices of deposition and physical examination shall be served upon the parties and shall not be filed with the commissioner.

(4) After the application for resolution has been assigned to an ~~arbitrator or~~ administrative law judge, subsequent pleadings shall include, within the style of the claim and immediately before the claim number, ~~["Before arbitrator (name)"]; "Before administrative law judge (name)"; or ["Before administrative law judge/acting arbitrator (name)"].~~ Upon consolidation

of claims, the most recent claim number shall be listed first.

Section 4. Motions. (1) The party filing a motion shall tender a proposed order granting the relief requested.

(2) The party filing a motion may file a brief memorandum supporting the motion and opposing parties may file brief memoranda in reply. Further memoranda (for example, reply to response) shall not be filed.

(3) Every motion and response, the grounds of which depend upon the existence of facts not in evidence, shall be supported by affidavits demonstrating such facts.

(4) Every motion, the grounds of which depend upon the existence of facts which the moving party believes are shown in the evidence or are admitted by the pleadings, shall make reference to the place in the record where that evidence or admission is found.

(5) A motion, other than to reopen pursuant to KRS 342.125 or for interlocutory relief, may be considered ten (10) days after the date of filing. A response shall be considered if filed on or before the tenth day after the filing of the motion.

(6)(a) A motion to reopen shall be accompanied by as many of the following items as may be applicable:

1. A current medical release Form 106 executed by the plaintiff;
2. An affidavit evidencing the grounds to support reopening;
3. A current medical report showing a change in disability established by objective medical findings;
4. A copy of the opinion and award, settlement, voluntary agreed order or agreed resolution sought to be reopened;
5. An affidavit certifying that a previous motion to reopen has not been made by the moving party, or if one (1) has previously been made, the date on which the previous motion

was filed.

(b) A motion to reopen shall not be considered until twenty-five (25) days after the date of filing. A response shall be served within twenty (20) days of filing the motion to reopen.

(c) Any party may use the following forms provided by the department for motions to reopen:

1. Motion to reopen by employee;
2. Motion to reopen by defendant; and
3. Motion to reopen KRS 342.732 benefits.

(7) Motion for allowance of a plaintiff's attorney fee shall be made within thirty (30) days following the finality of the award, settlement or agreed resolution upon which the fee request is based and be served upon the adverse parties and the attorney's client. The motion shall set forth the fee requested and mathematical computations establishing that the request is within the limits set forth in KRS 342.320. The motion shall be accompanied by an affidavit of counsel detailing the extent of the services rendered and the time expended, a signed and dated Form 109 as required by KRS 342.320(5), and a copy of the signed and dated contingency fee contract.

(8) A motion for allowance of defendant's attorney's fee shall be filed within thirty (30) days following the finality of the decision [as required by KRS 342.320]. The motion shall be accompanied by an affidavit of counsel detailing the extent of the services rendered and the time expended, the hourly rate and total amount to be charged, and the date upon which agreement was reached for providing the legal services [~~and a certification of any amounts previously paid on the claim in question~~].

(9) The following motions relating to vocational rehabilitation training provided by the department may be used by all parties:

- (a) Petition for vocational rehabilitation training; and

(b) Joint motion and agreement to waive vocational rehabilitation evaluation.

Section 5. Application for Resolution of an Injury Claim. (1) To apply for resolution of an injury claim, the applicant shall file Form 101 with the following completed documents:

(a) Work history (Form 104), to include all past jobs performed on a full or part-time basis within twenty (20) years preceding the date of injury;

(b) Medical history (Form 105), to include all physicians, chiropractors, osteopaths, psychiatrists, psychologists, and medical facilities such as hospitals where the individual has been seen or admitted in the preceding fifteen (15) years and including beyond that date any physicians or hospitals regarding treatment for the same body part claimed to have been injured;

(c) Medical release (Form 106);

(d) One (1) medical report describing the injury which is the basis of the claim and, if a psychological condition is alleged, an additional medical report establishing the presence of a mental impairment or disorder. Medical reports required under this paragraph may consist of legible, hand-written notes of a treating physician. ~~[Medical reports filed with an application shall be considered as evidence before the arbitrator.]~~

(2) Defendant shall file a notice of claim denial or acceptance (Form 111) within forty-five (45) days after the date of issuance of notice that an application for resolution of claim has been filed, or within forty-five (45) days following an order sustaining a motion to reopen a claim. If none is filed, all allegations of the application shall be deemed admitted. The notice of claim denial or acceptance shall set forth all pertinent matters which are admitted and those which are denied. If a claim is denied in whole or in part, a defendant shall set forth a detailed summary of the basis for denial, and the name of each witness whose testimony may be relevant to that denial. This notice shall include a description of the physical require-

ments of plaintiff's job at the time of the alleged injury and the name, address and telephone number of the individual responsible for gathering this information for the employer and its insurer. This requirement of filing a notice of admission or denial shall be in addition to the requirement to file a special answer in accordance with Section 1(9) of this administrative regulation although a denial may incorporate special defenses which have been timely raised.

(3) Proof taking and discovery for all parties shall proceed for a period beginning with the date of issuance of an order of assignment by the commissioner. All parties may take proof for a period of forty-five (45) days from the date of the order; the defendants may take proof for an additional thirty (30) days; and, thereafter, the plaintiff may take rebuttal proof for an additional fifteen (15) days. ~~[notice that an application for resolution has been filed to and including a date sixty (60) days from the date the claim is assigned to an arbitrator.]~~

(4) During the pendency of a claim, any party obtaining a medical or vocational report or records shall serve a copy of the report or records upon all other parties within ten (10) days following receipt.

Section 6. Application for Resolution of an Occupational Disease Claim. (1) To apply for resolution of an occupational disease claim, the applicant shall file Form 102 with the following completed attachments:

(a) Work history (Form 104), to include all past jobs performed on a full or part-time basis within twenty (20) years preceding the date of last exposure and all jobs in which plaintiff alleges exposure to the hazards of the occupational disease;

(b) Medical history (Form 105) ~~[to include all physicians, chiropractors, osteopaths, psychiatrists, psychologists, and medical facilities such as hospitals where the individual has~~

been seen or admitted in the preceding fifteen (15) years and including beyond that date any physicians or hospitals regarding treatment for the same body part claimed to have been injured];

(c) Medical release (Form 106);

(d) One (1) medical report supporting the existence of occupational disease. For coal related pneumoconiosis claims, the medical report shall include both a chest x-ray examination and spirometric tests if pulmonary dysfunction is alleged. [Medical reports filed with an application shall be considered as evidence before the arbitrator];

(e) Social Security earnings record release form (Form 115).

(2) Defendant shall file a notice of claim denial or acceptance (Form 111) within forty-five (45) days after the date of issuance of notice that an application for resolution has been filed in conformity with Section 5(2) of this regulation, [or within forty-five (45) days following an order sustaining a motion to reopen a claim. If none is filed, all allegations of the application shall be deemed admitted. The notice of claim denial or acceptance shall set forth all pertinent matters which are admitted and those which are denied. If a claim is denied in whole or in part, a defendant shall set forth a detailed summary of the basis for denial, and the name of each witness whose testimony may be relevant to that denial. This notice shall include a description of the physical requirements of plaintiff's job on the alleged date of last exposure; the names of any witnesses; and the name, address, and telephone number of the individual responsible for gathering this information for the employer and its insurer, if any. This requirement of filing a notice of admission or denial shall be] in addition [to the requirement to file] a special answer in accordance with Section 1(9) of this [administrative] regulation [although a denial may assert the special defenses set out above].

(3) For all occupational disease and [or] hearing loss claims, the commissioner shall promptly schedule an examination pursuant to KRS 342.315 and 342.316.

(4) Proof taking and discovery for all parties shall proceed as set forth in Section 5(3) of this regulations [for a period beginning with the date of issuance of notice that an application for resolution of claim has been filed to and including a date sixty (60) days from the date the claim is assigned to an arbitrator.];

(5) During the pendency of a claim, medical and vocational reports shall be exchanged in accordance with Section 5(4) of this regulation. [any party obtaining a medical or vocational report or records shall serve a copy of the report and records upon all other parties within ten (10) days of the receipt.];

Section 7. Application for Resolution of a Hearing Loss Claim. (1) To apply for resolution of a hearing loss claim, the applicant shall file Form 103 with the following completed documents:

(a) Work history (Form 104), to include all past jobs performed on a full or part-time basis within twenty (20) years preceding the last date of noise exposure;

(b) Medical history (Form 105), to include all physicians, chiropractors, osteopaths, psychiatrists, psychologists, and medical facilities such as hospitals where the individual has been seen or admitted in the preceding fifteen (15) years and including beyond that date any physicians or hospitals regarding treatment for hearing loss or ear complaints;

(c) Medical release (Form 106);

(d) One (1) medical report describing the hearing loss which is the basis of the claim and, if a psychological condition is alleged, an additional medical report establishing the presence of a mental impairment or disorder. Medical reports required under this paragraph may consist of legible, hand-written notes of a treating physician. [Medical reports filed with an application shall be considered as evidence before the arbitrator];

(e) Social Security earnings record release form (Form 115).

(2) Defendant shall file a notice of claim denial or acceptance (Form 111) within forty-five (45) days after the date of issuance of notice that an application for resolution of claim has been filed, In conformity with Section 5(2) of this regulation In addition to [or within forty-five (45) days following an order sustaining a motion to reopen a claim. If none is filed, all allegations of the application shall be deemed admitted. The notice of claim denial or acceptance shall set forth all pertinent matters which are admitted and those which are denied. If a claim is denied in whole or in part, a defendant shall set forth a detailed summary of the basis for denial, and the name of each witness whose testimony may be relevant to that denial. This notice shall include a description of the physical requirements of plaintiff's job at the time of the alleged injury and the name, address and telephone number of the individual responsible for gathering this information for the employer and its insurer. This requirement of filing a notice of admission or denial shall be in addition to the requirement to file] a special answer in accordance with Section 1(9) of this [administrative] regulation [although a denial may incorporate special defenses which have been timely raised].

(3) Proof taking and discovery for all parties shall proceed for a period beginning with the date of issuance of an order of assignment as set forth in Section 5(3) [of notice that an application for resolution has been filed to and including a date sixty (60) days from the date the claim is assigned to an arbitrator].

(4) During the pendency of a claim, [any party obtaining] a medical and [or] vocational reports shall be exchanged in accordance with Section 5(4) of this regulation [or records shall serve a copy of the report or records upon all other parties within ten (10) days following receipt].

[Section 8. Benefit Review Before Arbitrator. (1) The arbitrator to whom the claim is assigned shall discuss voluntary rescission of the claim with the parties by telephone confer-

~~ence or in a benefit review conference and may require the parties to submit written stipulations of fact.~~

~~—(2) If a claim is resolved, the parties shall complete an agreement as to compensation (Form 110) or prepare for entry an agreed resolution of the claim. The parties shall tender the agreement as to compensation or agreed resolution to the arbitrator for approval.~~

~~—(3) A benefit review conference, if held, shall be attended by the plaintiff and representative, if any, and by the defendant or its representative, if any. The benefit review conference shall be an informal proceeding and a transcript or recording of the conference shall not be made. The parties shall, at the conference, dispose of controversies if possible and define disputed issues.~~

~~—(4) Proof before an arbitrator shall be submitted by way of medical or vocational report and, for lay witnesses, by way of affidavit.~~

~~—(a) A report of a medical evaluator pursuant to KRS 342.315 shall become evidence before the arbitrator without the filing of a notice or motion.~~

~~—(b) Cross-examination may occur at the expense of the party seeking that cross-examination and may be had only upon motion to the arbitrator setting forth good cause for the need of cross-examination. A motion to permit cross-examination shall be made within ten (10) days following filing of the medical report or affidavit, or notice of assignment to an arbitrator, whichever last occurs. More than two (2) medical reports shall not be placed in evidence by any party without prior approval of the arbitrator.~~

~~—(5) Additional proof may be submitted in the following forms:~~

~~—(a) Any party may take a deposition of another party if the party agrees to be deposed. Notice of the deposition shall be given to all parties.~~

~~—(b) A deposition shall be considered as evidence only if it is filed prior to the expiration of proof time.~~

~~—(c) Parties may present written questions to other parties who have not been deposed but not to witnesses who are not parties. Questions shall not be presented after thirty (30) days from the date the claim is assigned to an arbitrator.~~

~~—(d) Answers to written questions may be submitted as evidence in accordance with the following:~~

~~—1. A party may present a maximum of fifteen (15) questions to each party;~~

~~—2. Each portion of a question requiring a separate answer shall be counted as a separate question;~~

~~—3. Questions shall be presented in nontechnical terms and shall not request legal conclusions be made by the answering party.~~

~~—4. The following questions shall not count towards the maximum number of questions allowed:~~

~~—a. A question requesting the name of the answering party; and~~

~~—b. A question requesting whether the party is willing to supplement answers if pertinent information later becomes available.~~

~~—5. The party on whom the questions have been served shall serve a copy of the answers within fifteen (15) days after the service of the questions.~~

~~—6. Answers to the questions shall be signed by the responding party, whose signature shall be notarized and may be admitted into evidence by any party by notice to all parties and the arbitrator.~~

~~—7. If the defendant employer is not a natural person, the defendant employer shall designate an individual to answer the questions, and the attorney for the Special Fund shall be deemed to be answering on behalf of the Special Fund.~~

~~—(6) If a claim is not voluntarily resolved, the arbitrator shall, within ninety (90) days of assignment of the claim, render a written benefit review determination setting forth matters~~

~~stipulated, matters denied, findings of fact, and conclusions of law.~~

~~—(7) At any time during the benefit review process, an arbitrator may determine that the pending claim presents factual issues best resolved through a hearing before an administrative law judge and enter an order transferring the claim to an administrative law judge for further proceedings.]~~

Section 9[9]. Medical Evaluations Pursuant to KRS 342.315. (1) All persons claiming benefits for coal workers' pneumoconiosis pursuant to KRS 342.732, hearing loss, or occupational disease shall be referred by the commissioner for a medical evaluation in accordance with [the] contracts entered into between the commissioner and the University of Kentucky and University of Louisville medical schools.

(2) Upon ~~[For]~~ all other claims, the commissioner, ~~[an arbitrator,]~~ or an administrative law judge, ~~[in their discretion, or upon motion by a party,]~~ may direct appointment by the commissioner of a university medical evaluator ~~[in accordance with contracts with the University of Kentucky and University of Louisville medical schools].~~

(3) Upon referral for medical evaluation under this section, the parties may tender additional relevant medical information to the university medical school to whom the evaluation is assigned. This additional information shall not be filed of record. The additional medical information shall be:

(a) Submitted to the university within fourteen (14) days following an order (or medical evaluation pursuant to KRS 342.315;

(b) Submitted by way of medical reports, notes, or depositions;

(c) Clearly legible;

(d) Indexed;

(e) Furnished in chronological order;

(f) Timely furnished to all other parties pursuant to Section 5(4) of this administrative regulation;

(g) Accompanied by a summary that is filed of record and served upon all parties. The summary shall:

1. Identify the medical provider;
2. Include the date of medical services;
3. Include the nature of medical services provided.

(4) Upon the scheduling of an evaluation, the commissioner shall provide notice to all parties and the employer shall forward to the plaintiff necessary travel expenses. Upon completion of the evaluation the commissioner shall provide copies of the report to all parties and shall file the original report in the claim record to be considered as evidence.

(5) The administrative law judge shall allow timely cross-examination of a medical evaluator appointed by the commissioner at the expense of the moving party.

(6) Unjustified failure by the plaintiff to attend the scheduled medical evaluation may be grounds for dismissal, payment of a no-show fee, sanctions, or all of the above.

(7) Failure by the employer or its insurance carrier to pay travel expenses within seven (7) days of notification of a scheduled medical evaluation may be grounds for imposition of sanctions.

Section 9[14]. Medical Reports. (1) A party shall not introduce direct testimony from more than two (2) physicians by medical report except upon a showing of good cause and prior approval by an [arbitrator-or] administrative law judge.

(2) Medical reports shall be submitted on Form 107-I (injury), Form 107-P (psychological) or Form 108-OD (occupational disease), Form 108-CWP (coal workers' pneumoconiosis), or Form 106-HL (hearing loss), as appropriate, except that an [arbitrator-or] administrative

law judge may permit the introduction of other reports.

(3) Medical reports shall be signed by the physician making the report, or be accompanied by an affidavit from the physician or submitting party or representative verifying the authenticity of the report.

(4) Medical reports shall include within the body of the report or as an attachment, a statement of qualifications of the person making the report. If the qualifications of the physician who prepared the written medical report have been filed with the commissioner and the physician has been assigned a medical qualifications index number, reference may be made to the physician's index number in lieu of attaching qualifications.

(5) Narratives in medical reports shall be typewritten. Other portions, including spirometric tracings, shall be clearly legible.

(6) Upon notice, a party may file the testimony of two (2) physicians, either by deposition or medical report, which shall be admitted into evidence without further order if an objection is not filed. Objection to the filing of a medical report shall be filed within ten (10) days of the notice or the motion for admission. Grounds for the objection shall be stated with particularity. The [arbitrator-or] administrative law judge shall rule on the objection within fifteen (15) days of the filing.

(7) [~~In proceedings before an administrative law judge,~~] ~~if~~ a medical report is admitted as direct testimony, any adverse party may depose the reporting physician in a timely manner as if on cross-examination at its own expense.

Section 10[11]. Interlocutory Relief. (1) At any time during a claim, a party may seek any or all of three (3) forms of interlocutory relief:

- (a) Interim payment of income benefits for total disability pursuant to KRS 342.730(1)(b);
- (b) Medical benefits pursuant to KRS 342.020;

(c) Rehabilitation services pursuant to KRS 342.710;

(2) Any response to a request for interlocutory relief shall be served within twenty (20) days from the date of the request and thereafter, the request shall be ripe for a decision.

(3) Entitlement to interlocutory relief shall be shown by means of affidavit, deposition, or other evidence of record demonstrating the requesting party is eligible under KRS Chapter 342 and will suffer irreparable injury, loss or damage pending a final decision on the application. Rehabilitation services may be ordered while the claim is pending upon showing that immediate provision of services will substantially increase the probability that the plaintiff will return to work.

(4) If interlocutory relief is awarded in the form of income benefits, the application shall be placed in abeyance unless a party shows irreparable harm will result. The [arbitrator-or] administrative law judge may require periodic reports as to the physical condition of the plaintiff. Upon motion and a showing of cause, or upon the [arbitrator-or] administrative law judge's own motion, interlocutory relief shall be terminated and the claim removed from abeyance.

(5) An attorney's fee in the amounts authorized by KRS 342.320 that does not exceed twenty (20) percent of the weekly income benefits awarded pursuant to a request for interlocutory relief may be granted. The approved fee shall be deducted in equal amounts from the weekly income benefits awarded and shall be paid directly to the attorney.

(6) ~~A~~ [An-appropriate] party seeking Interlocutory relief may use the following forms [provided by the department with regard to interlocutory relief]:

- (a) Motion for interlocutory relief;
- (b) Affidavit for payment of medical expenses;
- (c) Affidavit for payment of temporary total disability; and
- (d) Affidavit regarding rehabilitation services.

Section 11. Benefit Review Conferences.

(1) The purpose of the benefit review conference is to expedite the processing of the claim and to avoid whenever possible the need for a formal hearing. The conference is an informal procedure, presided over by the administrative law judge. No transcript of the proceedings shall be made. At the benefit review conference, the parties shall attempt to resolve controversies, narrow and define issues, and facilitate prompt settlement. The parties shall exchange lists of known witnesses ten (10) days before the benefit review conference. The witness list shall give the name of each proposed witness together with a summary of the anticipated testimony of the witness. For medical witnesses, this summary shall include at a minimum a description of the diagnosis made, the physical findings and diagnostic studies upon which the diagnosis is based, and the functional impairment rating assessed by the witness and any work-related restrictions imposed.

(2) At the benefit review conference, the administrative law judge may limit witnesses for good cause shown.

(3) The plaintiff and his representative, the defendants or their representatives shall attend the benefit review conference. Representatives of parties must have authority to resolve disputed issues and settle the claim at the conference. The administrative law judge may upon motion and good cause shown waive the requirement that the plaintiff attend the conference.

(4) A party may seek postponement of a benefit review conference by motion and good shown filed at least fifteen (15) days prior to the date of the conference.

(5) If at the conclusion of the benefit review conference the parties have not reached agreement on all the issues the administrative law judge shall prepare a

summary stipulation of all contested and uncontested issues which shall be signed by representatives of the parties and by the administrative law judge. Only contested issues shall be the subject of further proceedings.

(6) The administrative law judge upon motion with good cause shown may order that additional discovery or proof be taken between the benefit review conference and the date of the hearing.

(7) If a claim is not settled, the administrative law judge shall schedule a date for the hearing on the claim at the benefit review conference.

Section 12. Appeals to Administrative Law Judges from Benefit Review Determinations.

(1) Within thirty (30) days after the date of the filing of a written benefit review determination or ruling on petition for reconsideration from that benefit review determination by an arbitrator, any party aggrieved by the determination may appeal to an administrative law judge. No appeal shall be taken from a written benefit review determination that does not grant or deny the ultimate relief sought as to all parties without the need for further steps to be taken.

(2) The appeal shall be initiated by filing a "Request for Hearing before an Administrative Law Judge". The proceedings before the administrative law judge shall be de novo and cross appeals shall not be permitted. The appealing party shall be designated as petitioner and all parties against whom the appeal is taken as respondents. In the event that more than one (1) party appeals, the first party to file shall be designated petitioner and all other parties shall be designated respondent. The petitioner shall certify copies have been served upon all other parties.

(3) The commissioner shall assign the claim to an administrative law judge and shall notify the parties of the schedule for presentation of proof and the time and place of the hearing. The scheduling order shall provide forty-five (45) days for all parties to present proof, thirty

(30) days for a party designated as defendant in the proceeding before the arbitrator, and fifteen (15) days for rebuttal for a party designated as plaintiff in the proceeding before the arbitrator.

(4) Within fifteen (15) days following assignment to an administrative law judge, the parties shall file a statement of proposed stipulations, notice of contested issues, and designation of any admissible evidence in the benefit review record upon which they intend to rely on appeal before the administrative law judge. Any party who fails to file a timely statement of proposed stipulations shall be bound by stipulations made before the arbitrator, subject to relief under Section 17(2) of this administrative regulation. Admissible evidence in the benefit review record that is properly designated by a party shall be considered as filed in the record before the administrative law judge and shall not be resubmitted.

(5) The administrative law judge may order an informal conference for the purpose of defining and narrowing the issues, discussing settlement, and considering other relevant matters that may aid in the disposition of the case.

(6) At least fifteen (15) days prior to the scheduled hearing, each party shall serve a witness list and copies of known exhibits on all other parties and upon the commissioner. Except for good cause shown, any person not listed as a witness shall not present testimony. Each witness list shall state the name of each proposed witness and summarize the testimony of the witness, and shall identify matters in controversy. For each medical witness, the summary shall include a diagnosis, the physical findings, the results of diagnostic studies supporting the diagnosis, and an assessment of functional impairment in accordance with the most recent edition of the AMA Guides to Evaluation of Permanent Impairment.

(7) Except for evidence timely designated by the parties, information submitted to the arbitrator shall not be considered evidence before the administrative law judge. Proof and discovery before the administrative law judge shall be by way of notice of introduction of

medical reports and depositions of lay witnesses. However, a report of a medical evaluator pursuant to KRS 342.315 shall become evidence before the administrative law judge without the filing of a notice or motion.

—(8) If, during the pendency of a claim before an administrative law judge, the parties voluntarily resolve a claim, an Agreement as to Compensation (Form 110) or agreed opinion and award shall be submitted for the approval of the administrative law judge.

Section 13. Appeals to Administrative Law Judges from Final Orders. (1) Within thirty (30) days after the date of filing of a final order of an arbitrator other than a benefit review determination or ruling on a petition for reconsideration from that benefit review determination, any party aggrieved by the order may file a "Request for De Novo Review by an Administrative Law Judge". As used in this section "final order" means one that grants or denies the ultimate relief sought as to all parties without the need for further steps to be taken.

—(2) The appealing party shall be designated as petitioner and all other parties shall be designated as respondents. The petitioner shall certify copies have been served upon all other parties.

—(3) The request for de novo review by an administrative law judge shall not exceed five (5) pages, and shall contain a clear and concise statement of the material facts, the questions of law involved and the specific reasons for which the request was filed. The request shall cite any authority for petitioner's position.

—(4) The respondents shall have fifteen (15) days after the request for de novo review is filed in which to file responses which shall not exceed five (5) pages, setting forth the basis of their opposition to the request.

—(5) The commissioner shall refer the matter to an administrative law judge, who shall issue a decision within thirty (30) days after the date of the last response or its date on which the

response was due.

Section 14. Transfer to Administrative Law Judge. (1) If an arbitrator determines the claim presents factual issues best resolved through a hearing before an administrative law judge, an order shall be entered by the arbitrator and shall be served upon all parties and the commissioner.

—(2) The commissioner shall upon receipt of a transfer order issue an order scheduling proof time, assigning to an administrative law judge, and scheduling the time and place of hearing.

—(3) Upon transfer to an administrative law judge, the claim shall proceed in the manner established in Section 12(3) through (8) of this administrative regulation. The parties shall continue to be designated as plaintiff and defendant after transfer.]

Section 12[15]. Evidence - Rules Applicable. (1) The Rules of Evidence prescribed by the Kentucky Supreme Court shall apply in all proceedings before an administrative law judge except as varied by specific statute and this administrative regulation.

[(2) Affidavits submitted with an application for resolution of claim and in proceedings before an arbitrator shall constitute evidence before the arbitrator. Affidavits of parties and lay witnesses shall be permitted and encouraged in proceedings before an arbitrator.]

2[(3)] Any party may file as evidence before the [arbitrator or] administrative law judge pertinent material, and only relevant portions of hospital, educational, Bureau of Vital Statistics, Armed Forces, [or] Social Security and other public records. An opinion of a physician which is expressed in these records shall not be considered by an [arbitrator or] administrative law judge in violation of the limitation on the number of physician's opinions established in KRS 342.033.

Section 13[16]. Extensions of Proof Time. (1) Extensions of time for producing evidence may be granted upon [a] showing of [a] circumstance~~s~~ that prevent[s the party from] timely introduction [introducing proof]. Motions for extension of time shall [not] be filed no later than five (5) days before the deadline sought to be extended. The motion or supporting affidavits shall set forth:

- (a) The efforts to produce the evidence in a timely manner;
- (b) Facts which prevented timely production; and
- (c) The date of availability of the evidence, the probability of its production, and the materiality of the evidence.

(2) In the absence of compelling circumstances, only one (1) extension of thirty (30) days shall be granted to each side for completion of discovery or proof by deposition.

(3) The granting of an extension of time for completion of discovery or proof shall enlarge the time to all plaintiffs if the extension is granted to a plaintiff and to all defendants if an extension is granted to a defendant, and shall extend the time of the adverse party automatically except if the extension is for rebuttal proof.

Section 14[17]. Stipulation of Facts. (1) Refusal to stipulate facts which are not genuinely in issue shall warrant imposition of sanctions as established in Section 26 of this administrative regulation. Assertion that a party has not had sufficient opportunity to ascertain relevant facts shall not be considered "good cause" in the absence of due diligence.

(2) Upon cause shown, a party may be relieved of a stipulation if the motion for relief is filed at least ten (10) days prior to the date of the hearing, or as soon as practicable after discovery that the stipulation was erroneous. Upon granting relief from a stipulation, the administrative law judge may grant a continuance of the hearing and additional proof time.

Section 15[18]. Discovery and Depositions. (1) Discovery and the taking of depositions shall be in accordance with the provisions of Civil Rules 26 to 37, inclusive, except for Civil Rules 27, 33, and 36 which shall not apply to practice before the administrative law judges or the board. [~~In proceedings before arbitrators, depositions and questions shall be propounded in accordance with Section 8 of this administrative regulation.~~]

(2) Depositions may be taken by telephone if the reporter administering the oath to the witness and reporting the deposition is physically present with the witness at the time the deposition is given. Notice of a telephonic deposition shall relate the following information:

- (a) That the deposition is to be taken by telephone;
- (b) The address and telephone number from which the call will be placed to the witness;
- (c) The address and telephone number of the place where the witness will answer the deposition call; and

(d) [~~That all~~] opposing parties may participate in the deposition either at the place where the deposition is being given, at the place the telephone call is placed to the witness, or by conference call. If a party elects to participate by conference call, that party shall contribute proportionate costs of the conference call.

(3) The commissioner shall establish a medical qualifications index. An index number shall be assigned to a physician upon the filing of the physician's qualifications. Any physician who has been assigned an index number may offer the assigned number in lieu of stating qualifications. Qualifications shall be revised or updated by submitting revisions to the commissioner. Nothing in this rule shall preclude any party from inquiring further into the qualifications of a physician.

Section 16[19]. Wage Certification. If at any time during the pendency of a claim wages

are at issue, the employer shall promptly complete and serve a completed form AWW-1 on all other parties.

Section 17[20]. Hearings. (1) At hearing, the parties shall present proof concerning contested issues. If plaintiff fails to appear, the administrative law judge may dismiss the case for want of prosecution, or if good cause is shown, the hearing may be continued.

(2) At the conclusion of the hearing, the claim shall be taken under submission immediately or briefs may be ordered. Briefs shall not exceed fifteen (15) pages in length. Reply briefs shall be limited to five (5) pages. Permission to increase the length of a brief shall be sought by motion. The administrative law judge may announce his decision at the conclusion of the hearing or shall defer decision until rendering a written opinion. A decision shall be rendered no later than sixty (60) days following hearing. The time of filing a petition for reconsideration or notice of appeal shall not begin to run until after the "date of filing" of the written opinion as established by Section 1 of this administrative regulation.

(3) The parties with approval of the administrative law judge may waive a final hearing. Waiver of a final hearing shall require agreement of all parties and the administrative law judge. The claim shall be taken under submission as of the date of the order allowing the waiver of hearing and briefs may be ordered. A decision shall be rendered no later than sixty (60) days following the date of the order allowing the waiver of hearing.

Section 18[24]. Petitions for Reconsideration. (1) If applicable, a party shall file a petition for reconsideration within fourteen (14) days of the filing of a [~~benefit-review-determination or-a~~] final order or award of an [~~arbitrator-or~~] administrative law judge, clearly stating the patent error which the petitioner seeks to have corrected and setting forth the authorities upon which petitioner relies. The party filing the petition for reconsideration shall tender a

proposed order granting the relief requested.

(2) A response shall be served within ten (10) days after the date of filing of the petition.

(3) The [~~arbitrator-or~~] administrative law judge shall act upon the petition within ten (10) days after the response is due.

Section 19[22]. Benefit Calculations for Settlements. (1) For computing lump sum settlements, the employer shall utilize the prescribed discount rate for its weeks of liability only, not for the entire award period. A discount shall not be taken on past due benefits by the employer or Special Fund. Lump sum settlements shall be calculated as follows:

(a) Determine the entire lump sum liability:

1. Compute the remaining weeks of liability in the award by subtracting the number of weeks past due from the entire number of weeks in the award.

2. Discount the number of weeks remaining in the award at the prescribed discount rate.

3. Multiply the weekly benefit rate by the discounted number of weeks remaining (subparagraph 2 of this paragraph) in award. This product equals the entire future lump sum liability for the award.

4. Add the amount of past due benefits to the future lump sum liability award (subparagraph 3 of this paragraph). The sum represents the entire lump sum value of the award.

(b) Determine the employer's lump sum liability as follows:

1. The employer's future liability shall be computed by determining its total weeks of liability less the number of weeks of liability past due.

2. The number of weeks remaining shall be discounted at the prescribed discount rate and multiplied by the amount of the weekly benefit.

3. Multiply the number of past due weeks by the amount of the weekly benefit.

4. The employer's entire liability for lump sum payment shall be determined by adding the

results of paragraph (b)2 and 3 of this subsection.

(c) Determine the Special Fund's portion of the lump sum liability by subtracting the value of the employer's liability in lump sum (paragraph (b) of this subsection) from the entire value of the lump sum settlement (paragraph (a) of this subsection). The remainder shall be the Special Fund's lump sum liability.

(2) If the employer settles its liability for income benefits with the employee for a lump sum payment and a determination is made of the Special Fund's liability, the Special Fund's portion of income benefits shall be paid commencing with the date of approval of the employer's settlement and continuing for the balance of the compensable period.

(3) In computing settlements involving periodic payments, the employer shall pay its liability over the initial portion of the award, based on the number of weeks its liability bears to the entire liability for the claim. The Special Fund shall make all remaining payments for the balance of the compensable period.

(4) Pursuant to KRS 342.265, election by the Special Fund to settle on the "same terms" as the employer shall mean the Special Fund agrees to settle in the same manner as the employer in either a discounted lump sum or in periodic payments based upon its proportionate share of the permanent disability percentage paid by the employer. "Same terms" shall not include any additional payments the employer included for buy out of medical expenses, temporary total disability, rehabilitation, or other benefits for which the Special Fund is not liable.

(5) Parties involved in a lump-sum settlement of future periodic payments shall use the discount factor computed in accordance with KRS 342.265(3).

Section 20(23). Appeals to Workers' Compensation Board. (1) Within thirty (30) days after the date of filing of a final award or order of an administrative law judge any party aggrieved

by the order may appeal to the board. As used in this section "final order" shall be determined in accordance with Civil Rule 54.02(1) and (2).

(2) An appeal shall be initiated by the filing of a notice of appeal denoting the appealing party as the petitioner and all parties against whom the appeal is taken as respondents. The administrative law judge who rendered the order appealed from shall be named as a respondent. If appropriate, the Director of the Special Fund or the Director of the Coal Workers' Pneumoconiosis Fund shall be named as a respondent pursuant to KRS 342.120 or 342.1242. The workers' compensation claim number shall be set forth in all pleadings before the board.

(3) Any party other than the petitioner may file a cross-appeal through notice of cross-appeal filed within ten (10) days after notice of appeal is served. The cross-appeal shall designate the parties as appropriate (i.e., petitioner-cross-respondent).

(4) Notice of appeal, cross-appeal and all other pleadings before the board shall be served as established by Section 3 of this administrative regulation. The commissioner shall issue an acknowledgement to all parties of the filing of a direct appeal.

(5) If a ground for the appeal is fraud or misconduct pursuant to KRS 342.285(2), the board shall immediately schedule a hearing on that issue. All subsequent appeal time in the case shall be calculated from the date the transcript of hearing is filed instead of the date of filing of notice of appeal.

(6) Petitioner's brief shall be filed within thirty (30) days of the filing of the notice of appeal. The organization and contents of petitioner's brief shall be as provided in Civil Rule 76.12(4)(c) except an index shall not be required and the appendix shall include copies of decision appealed, petitions for reconsideration, rulings on petitions, and cases cited from federal courts and foreign jurisdictions.

(7) Respondent's brief shall be filed within thirty (30) days of the date petitioner's brief was

served. Organization and contents shall be provided in Civil Rule 76.12(4)(d) except an index shall not be required and the appendix shall include copies of cases cited from federal courts and foreign jurisdictions. If the respondent is also a cross-petitioner, a combined brief shall address issues raised by the cross-appeal.

(8) Failure of a party to timely file a brief may be grounds for imposition of one (1) or more of the following sanctions:

- (a) Affirmation or reversal of the final order;
- (b) Striking of an untimely brief;
- (c) A fine of not more than \$500; or
- (d) Dismissal of appeal of petitioner's original brief.

(9) If applicable, the petitioner's reply brief shall be served within fifteen (15) days after the date on which the last respondent's brief was served or due, whichever is earlier. The organization and contents of the petitioner's reply brief shall be as provided in Civil Rule 76.12(4)(e), except that an appendix, index, or contents page shall not be required. If the petitioner is also a cross-respondent, a combined brief shall address issues raised by the cross-petitioner's brief.

(10) If a cross-appeal has been filed, the cross-petitioner's reply brief may be served within fifteen (15) days after the date on which the last cross-respondent's brief was served or due, whichever is earlier. The organization and contents of the cross-petitioner's reply brief shall be as provided in Civil Rule 76.12(4)(e) except that an appendix, index, or contents page shall not be required.

(11) Petitioner's brief and the respondent's brief shall be limited to fifteen (15) pages each, reply briefs to five (5) pages, and combined briefs to twenty (20) pages. Permission to increase the length of a brief shall be sought by motion.

(12) All pleadings shall conform to the requirements set forth in Civil Rule 7.02(4) and shall

be filed without covers. The style of the case, including the claim number and title of the pleading, shall appear on the first page of the pleading.

(13) The board shall enter its decision affirming, modifying, or setting aside the order appealed from, or may remand the claim to an administrative law judge for further proceedings. Motions for reconsideration shall not be permitted.

(14) Although the Workers Compensation Board will be non-existent for the interim between July 1, 2000 and July 14, 2000, appeals from final awards or orders of administrative law judges shall nonetheless be filed as prescribed by this section and the Commissioner shall issue an acknowledgement of appeal pursuant to subsection 4.

~~(15)(14)~~ If applicable, the decision of the board shall be appealed to the Kentucky Court of Appeals as provided in Civil Rule 76.25.

~~(16)(15)~~ Except for motions that call for final disposition of an appeal, any board member designated by the chairman may dispose of any motion; and, any intermediate order may be issued on the signature of any board member.

Section 21[24]. Coverage - Insured Status. Upon the filing of an application for resolution of claim, the commissioner shall ascertain whether the employer or any other person against whom a claim is filed and who is not exempted by KRS 342.650 has secured payment of compensation by obtaining insurance coverage or qualifying as a self-insurer pursuant to KRS 342.340. If an employer does not have insurance coverage or qualify as a self-insurer, the commissioner shall notify the arbitrator or administrative law judge and all parties by service of a certification of no coverage.

Section 22[25]. Withdrawal of Records. (1) A portion of any original record of the depart-

ment shall not be withdrawn except upon an order of the commissioner, an administrative law judge, or a member of the board.

(2) All physical exhibits, including x-rays, shall be disposed of sixty (60) days after the order resolving the claim has become final. A party filing an exhibit may make arrangements to claim an exhibit prior to that time. If an unclaimed exhibit has no money value, it shall be destroyed; if an unclaimed exhibit has a value of more than \$100, it shall be sold as surplus property; if an unclaimed exhibit has a value of less than \$100, it shall be donated to the appropriate state agency; and, if an unclaimed exhibit has historic value, it shall be sent to the state archives.

Section 23[26]. Sanctions. Pursuant to KRS 342.310, [~~an arbitrator,~~] an administrative law judge, and the board may assess costs upon determination that proceedings have been brought, prosecuted, or defended without reasonable grounds. A sanction may be assessed against an offending attorney or representative rather than against the party. If a party is a governmental agency and attorney's fees are assessed, the fees shall include fees for the services of an attorney in public employment, measured by the reasonable cost of similar services had a private attorney been retained. Failure of a party to timely file any pleading required by this administrative regulation may be treated by [~~an arbitrator,~~] an administrative law judge, or the board as prosecuting or defending without reasonable grounds.

Section 24[27]. Payment of Compensation from Uninsured Employers' Fund. (1) Payment from the Uninsured Employers' Fund of compensation shall be made upon the determination by an [~~arbitrator-or~~] administrative law judge that the responsible employer failed to secure payment of compensation as provided by KRS 342.340 and:

(a) Thirty (30) days have expired since the finality of an award and a party in interest

certifies the responsible employer has failed to initiate payments in accordance with that award;

(b) Upon showing that the responsible employer has filed a petition under any section of the Federal Bankruptcy code; or

(c) The plaintiff or any other party in interest has filed in the circuit court of the county where the injury occurred an action pursuant to KRS 342.305 to enforce payment of the award against the uninsured employer, and there has been default in payment of the judgment by the employer.

(2) The plaintiff may by motion and affidavit demonstrate compliance with this section and request an [~~arbitrator-or~~] administrative law judge to order payment from the Uninsured Employers' Fund in accordance with KRS 342.760.

(3) This section shall not be construed to prohibit the voluntary payment of compensation by an employer, or any other person liable for the payment, who has failed to secure payment of compensation as provided by KRS Chapter 342, the compromise and settlement of a claim, or the payment of benefits by the Special Fund.

(4) The form, Motion for Payment from Uninsured Employers' Fund, provided by the department may be used by the employee.

Section 25[28]. Use of American Medical Association Guidelines in Coal Workers' Pneumoconiosis Cases. (1) Predicted normal values for FVC and FEV1 shall be determined in accordance with the latest edition of the American Medical Association Guideline. Age shall be determined as of the date of the evaluation. Height shall be measured while the plaintiff stands in his stocking feet and shall be rounded to the nearest centimeter. If the plaintiff's height is an odd number of centimeters, the next highest even height in centimeters shall be used.

(2) Formulas established by the guidelines for predicted normal FVC and FEV1 shall be applied and predicted values computed.

Section 26(29). Request for Participation by the Kentucky Coal Workers' Pneumoconiosis

Fund. (1) Following a final award or order approving settlement of a claim for coal workers' pneumoconiosis benefits pursuant to KRS 342.732, the employer shall tender a written request for participation to the Kentucky coal workers' pneumoconiosis fund within thirty (30) days. This request shall be in writing and upon a form supplied by the Director of the Kentucky Coal Workers' Pneumoconiosis fund and shall be accompanied by the following documents:

- (a) Plaintiff's application for resolution of claim;
- (b) Defendant's notice of resistance, notice of claim denial or acceptance, and any special answer;
- (c) All medical evidence upon which the award or settlement was based;
- (d) Final ~~[benefit review determination,]~~ opinion, or order of an ~~[arbitrator or]~~ administrative law judge determining liability for benefits, or order approving settlement agreement. If an administrative law judge's award was appealed, appellate opinions shall be attached;
- (e) If the request for participation includes retraining incentive benefits under KRS 342.732, the employer shall certify that the plaintiff meets the relevant statutory criteria;
- (f) If the request for participation is for settlement of a claim, the employer shall certify that the settlement agreement represents liability for benefits in the claim, and does not include any sums for other claims which the plaintiff may have against the employer.

(2) Within thirty (30) days following receipt of a completed request for participation, the director shall notify the employer and all other parties of acceptance or denial of the request.

(3) A denial shall be made upon a finding by the director that the employer failed to defend

the claim or entered into a settlement agreement not supported by the medical evidence or which was procured by fraud or mistake. Denial shall be in writing and shall state the specific reasons for the director's action.

(4) Denial of a request for participation may be appealed to an administrative law judge within thirty (30) days following receipt. The administrative law judge shall determine if the denial was arbitrary, capricious, or in excess of the statutory authority of the director, and shall not reexamine the weight assigned to evidence by an ~~[arbitrator or]~~ administrative law judge in a benefit review determination or award.

(5) The employer shall promptly commence payment on all of the liability pursuant to the benefit review determination, award, or order and shall continue until the liability of the Kentucky Coal Workers' Pneumoconiosis fund is established. This duty of prompt payment shall continue during pendency of an appeal from denial of a request for participation.

(6) Upon an appeal from the denial of a request for participation, if the Kentucky Coal Workers' Pneumoconiosis fund does not prevail, it shall reimburse the employer for its proportionate share of the liability together with interest at the rate established in KRS 342.040.

~~[Section 30. Assignment to Arbitrators. (1) The assignment of appropriate claims to arbitrators pursuant to KRS 342.270(2) shall begin March 15, 1997.~~

~~—(2) Provisions in this administrative regulation which apply solely to practice before an arbitrator shall apply to claims which are assigned to an arbitrator pursuant to KRS 342.270(2) and Section 29(1) of this administrative regulation.]~~

Section 26(34). Forms. After March 15, 1997, the Department of Workers Claims shall not accept applications or forms in use prior to the forms required by and incorporated by refer-

ence in this administrative regulation. Outdated applications or forms submitted after March 15, 1997 shall be rejected and returned to the applicant or person submitting the form. If the application or form is resubmitted on the proper form within twenty (20) days of the date it was returned, the filing shall date back to the date the application or form was first received by the commissioner. Otherwise, the date of the second receipt shall be the filing date.

Section 27[32]. Incorporation by Reference. (1) The following material is incorporated by reference:

- (a) Form 101, "Application for Resolution of Injury Claim", (January 1, 1997 Edition), Department of Workers Claims;
- (b) Form 102, "Application for Resolution of Occupational Disease Claim", (January 1, 1997 Edition), Department of Workers Claims;
- (c) Form 103, "Application for Resolution of Hearing Loss Claim", (January 1, 1997 Edition), Department of Workers Claims;
- (d) Form 104, "Plaintiff's Employment History", (January 1, 1997 Edition), Department of Workers Claims;
- (e) Form 105, "Plaintiff's Chronological Medical History", (January 1, 1997 Edition), Department of Workers Claims;
- (f) Form 106, "Medical Waiver and Consent", (January 1, 1997 Edition), Department of Workers Claims;
- (g) Form 107-I, "Medical Report - Injury", (January 1, 1997 Edition), Department of Workers Claims;
- (h) Form 107-P, "Medical Report - Psychological", (January 1, 1997 Edition), Department of Workers Claims;
- (i) Form 108-OD, "Medical Report - Occupational Disease, (January 1, 1997 Edition),

Department of Workers Claims;

- (j) Form 108-CWP, "Medical Report - Coal Workers' Pneumoconiosis", (January 1, 1997 Edition), Department of Workers Claims;
- (k) Form 108-HL, "Medical Report - Hearing Loss", (January 1, 1997 Edition), Department of Workers Claims;
- (l) Form 109, "Attorney Fee Election", (March 15, 1995 Edition), Department of Workers Claims;
- (m) Form 110-I, "Agreement - Injury", (April 15, 1998 Edition), Department of Workers Claims;
- (n) Form 110-O, "Agreement - Occupational Disease", (April 15, 1998 Edition), Department of Workers Claims;
- (o) Form 111- Injury and Hearing Loss, "Notice of Claim Denial or Acceptance", (January 1, 1997 Edition), Department of Workers Claims;
- (p) Form 111-OD, "Notice of Claim Denial or Acceptance", (January 1, 1997 Edition), Department of Workers Claims;
- (q) Form 115, "Social Security Release Form", (January 1, 1997 Edition); and Department of Workers Claims;
- (r) Form AWW - 1, "Average Weekly Wage Form", (January 1, 1997 Edition), Department of Workers Claims;
- (s) Lump Sum Settlement Tables, (April 15, 1997 Edition), Department of Workers Claims;
- (t) Six (6) Percent Present Value Table (May, 1997 Edition);
- (u) Form MIR-1, Motion for Interlocutory Relief (May 29, 1997 Edition);
- (v) Form MIR-2, Affidavit for Payment of Medical Expenses (May 29, 1997 Edition);
- (w) Form MIR-3, Affidavit for Payment of Temporary Total Disability (May 29, 1997 Edition);

- (x) Form MIR-4, Affidavit Regarding Rehabilitation Services (May 29, 1997 Edition);
- (y) Form VRT, Petition for Vocational Rehabilitation Training (May 29, 1997 Edition);
- (z) Form MTR-1, Motion to Reopen by Employee (May 29, 1997 Edition);
- (aa) Form MTR-2, Motion to Reopen KRS 342.732 Benefits (May 29, 1997 Edition);
- (bb) Form MTR-3, Motion to Reopen by Defendant (May 29, 1997 Edition);
- (cc) Form WVR, Joint Motion and Agreement to Waive Vocational Rehabilitation Evaluation (May 29, 1997 Edition);
- (dd) Form UEF-P, Motion for Payment from Uninsured Employers' Fund (May 29, 1997 Edition).

(2) This material may be inspected copied or obtained at the Department of Workers' Claims Monday through Friday, 9 a.m. to 4 p.m. at the following locations:

- (a) Frankfort - Perimeter Park West, Building C, 1270 Louisville Road, Frankfort, Kentucky 40601;
- (b) Paducah - 220B North 8th Street, Paducah, Kentucky 42001; and
- (c) Pikeville - 412 Second Street, Pikeville, Kentucky 41501. (21 Ky.R. 2576; Am. 3032; eff. 6-15-95; 22 Ky.R. 2071; eff. 7-5-96; 23 Ky.R. 3958; 24 Ky.R. 349; eff. 7-17-97; 2436; eff. 7-13-98.)

KENTUCKY WORKERS' COMPENSATION SYSTEM
AFTER THE 2000 LEGISLATIVE REFORM

ADJUSTMENTS IN PRACTICE METHODS AND ADVOCACY STRATEGIES:
UNFAIR CLAIMS SETTLEMENT PRACTICES

Donna H. Terry
Administrative Law Judge
Kentucky Department of Workers' Claims

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SECTION F

ADJUSTMENTS IN PRACTICE METHODS
AND ADVOCACY STRATEGIES
FOR WORKERS' COMPENSATION COUNSEL –
UNFAIR CLAIMS SETTLEMENT PRACTICES

DONNA H. TERRY, ADMINISTRATIVE LAW JUDGE

I. **UNFAIR CLAIMS SETTLEMENT PRACTICES FOR GENERAL INSURANCE CLAIMS**

- A. KRS 304.12-230 adopted 1984; amended 1998.
- B. Administrative regulations at 806 KAR 12:092 (health insurance) and 806 KAR 12:095 (property/casualty insurance). Specific exclusion for workers' compensation claims from these regulations.

II. **UNFAIR CLAIMS SETTLEMENT PRACTICES IN WORKERS' COMPENSATION CLAIMS**

- A. **KRS 342.267 adopted December 12, 1996.**
 - 1. Applicable to all insurance carriers, self-insurance groups, and self-insured employers.
 - 2. Commissioner is empowered to assess fines of \$1,000 to \$5,000 for each violation.
 - 3. For a pattern of violations, Commissioner may revoke self-insurance certificate or request that Insurance Commissioner revoke certificate of insurance carrier.
- B. **KRS 342.267 incorporates by reference all provisions of KRS 304.12-230.**
- C. **803 KAR 25:240 establishes standards for conduct in workers' compensation claims by carriers in file and record documentation, notice of policy provisions, claims investigation, prompt notification and payment, equitable settlement provisions, and acknowledgement of communications.**
 - 1. **FILE AND RECORD DOCUMENTATION –**
 - a. All claim files must be readily accessible and retrievable for examination by Commissioner. If carrier does not maintain

c. An employee should not be forced to file a claim in order to recover benefits.

d. Carrier should not offer settlement of "substantially less" than value of claim.

e. Threat of appeal should not be used to compel settlement for less than value of ALJ award.

f. Employee should not be required to obtain information which is readily accessible to carrier.

6. ACKNOWLEDGEMENT OF COMMUNICATIONS

a. Carrier must furnish full response within 15 days to inquiries from DWC.

b. Carrier must make "prompt and appropriate" reply to employee communications.

D. COMPLAINTS AND INVESTIGATION PROCESS

1. Complaints received through several avenues.

a. DWC Division of Workers' Compensation Specialists – 24 employees, including 4 attorneys – receive telephone complaints.

b. Letters to Governor, Specialists, legislators, etc.

c. Attorneys file complaints.

d. ALJ opinion and award may request UCP investigation.

2. DWC Investigation

a. Specialists and Ombudsmen attempt mediation in order to expedite benefits or resolve dispute.

b. If mediation fails or is inappropriate, complaint is assigned to Workers' Compensation Specialist attorney for investigation.

c. Attorney Specialist sends report to Division Director who is also an attorney.

d. Director sends memorandum to Commissioner with recommendation.

hard copies, information must be capable of ready duplication into legible hard copy.

b. All claim files must contain documentation of the foundation for carrier's actions.

c. Each document must contain notation re: date received, date processed, or date mailed.

d. Claim file must be maintained for 5 years.

2. NOTICE OF POLICY PROVISIONS AND COVERAGE.

a. Affirmative duty to provide adequate notice of policy provisions, coverage, and benefits.

b. Failure to post workplace notice required by KRS 342.610(6) is UCSP.

3. DUTY TO INVESTIGATE

a. Must diligently investigate facts of claim after notice or injury.

4. STANDARDS FOR PROMPT AND TIMELY ACTIONS

a. Employee must be notified "as soon as practicable" whether claim will be accepted or denied. Specific reasons must be given in writing for denial of a claim.

b. If a carrier needs additional information, it shall inform claimant of that addition information.

c. Indemnity benefits shall be paid within 15 days after award or order becomes final, or within 15 days after an acknowledgement of disability or death. KRS 342.040.

5. STANDARDS OF FAIR AND EQUITABLE SETTLEMENTS

a. Good faith requirement to promptly pay claim in which liability is clear.

b. Carrier shall not misrepresent facts or law with regard to a claim.

e. Commissioner Turner may refer matter back to Division of Ombudsmen/Workers' Compensation Specialists for more information or forward to Office of General Counsel for review.

f. Show Cause Order issued, if appropriate. Commissioner determines whether good cause shown.

3. Show Cause Hearing – 803 KAR 25:015

a. Prior to issuance of citation for alleged violation of the Workers Compensation Act, Commissioner may issue show cause order.

b. Show cause order shall contain detailed explanation of alleged violations, including statutory references, date, time, and location of show cause hearing, and identity of any hearing officer other than Commissioner.

c. Show cause hearing is deemed "informal" although transcript is taken by court reporter.

d. Attendance is mandatory.

e. All show cause hearings thus far have resulted in an agreed order.

f. If no agreement, hearing officer shall issue recommended findings of fact and conclusions of law to Commissioner who may issue citation, issue statement that no citation is warranted, or request additional evidence for review.

E. ISSUANCE OF CITATION

1. Notice of Citation of Penalty shall be hand-delivered or delivered by certified mail.

2. Written Notice of Contest must be filed within 15 days thereafter.

3. If Notice of Contest is not timely filed, citation is deemed final and penalty must be paid.

F. HEARING UPON NOTICE OF CONTEST

1. Matter shall be assigned to an ALJ, who may require stipulations of uncontested facts and lists of witnesses and exhibits no later than 5 days prior to hearing.
2. Prehearing orders may be issued.
3. ALJ will conduct formal hearing under KRS Chapter 13B.
4. Proof may be submitted at hearing or by deposition.
5. ALJ will determine whether Commissioner's citation was properly assessed and issue final order in accordance with KRS 342.990(5) and KRS 13B.120.

G. APPEAL OF ALJ FINAL ORDER TO FRANKLIN CIRCUIT COURT OR PAYMENT OF PENALTY

KENTUCKY WORKERS' COMPENSATION

SUMMARY OF 1999 PUBLISHED COURT OPINIONS

**James G. Fogle
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SECTION G

**KENTUCKY WORKERS' COMPENSATION
SUMMARY OF 1999 PUBLISHED COURT OPINIONS**

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**KENTUCKY WORKERS' COMPENSATION
SUMMARY OF 1999 PUBLISHED COURT OPINIONS**

APPORTIONMENT

Whittaker v. Perry,

Ky., 988 S.W.2d 497 (1999).

Perry was injured on 9/15/94 when he was struck on the chin by a bar while strapping down logs on the back of his truck. The only medical evidence with regard to the question of apportionment was given by Dr. Eggers, the treating neurosurgeon. He testified that an MRI scan revealed a large C6-C7 disc herniation. He indicated that the type of injury which Perry had received could cause a disc to rupture in the presence of degenerative disease, and that Perry's injury had caused his disc to rupture. It was his opinion that Perry had pre-existing degenerative disc disease at the time of the injury, because a normal disc would not be expected to rupture under those circumstances. He concluded that one-half of Perry's 8% functional impairment was due to the injury, itself, and one-half was due to the arousal of the pre-existing condition. ALJ found 20% PPD and apportioned equally between the employer and Special Fund. WCB, CA and SC affirmed.

The Special Fund asserts that there was insufficient evidence of a prior, dormant condition such as would support apportionment of the award. Related arguments are that there was no evidence that degenerative disc disease constituted a departure from the normal state of health for a 42-year-old laborer or that the condition would eventually become disabling of its own accord.

Dr. Eggers' testimony makes it clear that **degenerative disc disease is a departure from the normal state of health**, that it is progressive in nature, that the condition existed but was dormant prior to Perry's injury, and that the condition was aroused into disability by the injury. It is apparent that degenerative disc disease is not a mere characteristic, but is the type of condition for which the Special Fund bears liability.

COMMENT: This decision may provide some ammunition for the plaintiff's argument on the 1996 amendments that degenerative disc disease is not part of the natural aging process.

Whittaker v. Troutman,

Ky., 7 S.W.3d 363 (1999).

Troutman was severely burned and also developed significant and disabling mental problems. The employer moved to join the Special Fund. ALJ denied the motion. WCB reversed. CA and SC affirmed.

The Special Fund relies on Fisher Packing Co. V. Lanham, Ky., 804 S.W.2d 4, (1991), for the proposition that any mental disability caused by a compensable injury must be apportioned the same as the underlying physical disability; ergo, since there was no apportionment of Troutman's physical disability, there can be no apportionment of his mental disability and the employer is liable for the entire award. This argument ignores the factual and legal bases for our decision in Lanham. There was no separate apportionment in Lanham because there was no

evidence that Lanham's mental disability was caused by the arousal of a pre-existing dormant, mental condition into disabling reality. Thus, KRS 342.120 did not apply. Here, there is such evidence. Thus, KRS 342.120 does apply and the ALJ should have joined the Special Fund as a party to these proceedings.

ATTORNEY FEE

Baker v. Shamrock Coal Company, Inc.,

Ky., 985 S.W.2d 755 (1999).

Baker was a working miner who was not engaged in retraining and whose claim was pending on April 4, 1994. On 10/6/97, ALJ entered a **RIB award** for the following 208 consecutive weeks. The award was entered in compliance with Meade v. Spud Mining, Ky., 949 S.W.2d 584 (1997), which meant that he could not collect RIB (retraining incentive benefits) until he stopped working in the coal mining industry. The Supreme Court held that the award of the plaintiff's attorney fee is premature until such time as the claimant is entitled to receive the RIB.

Earthgrains v. Cranz,

Ky. App., 999 S.W.2d 218 (1999).

The employer challenged the constitutionality of KRS 342.320(2)(c), which requires an employer to pay up to \$5,000.00 in an attorney fee to the plaintiff's attorney if the employer appeals a benefit review determination of an arbitrator or an order of an ALJ and does not prevail. The Court held that the amendment was constitutional. The discrepancy of financial resources available to an employer and its insurance carrier is comparison to the financial resources available to a partially or wholly disabled employee is a rational basis sufficient to justify requiring employers to pay attorney fees upon losing an appeal, while not requiring employees to do likewise.

COMMENT: This issue has been appealed to the Kentucky Supreme Court in another City of Louisville v. Slack, 98-CA-2330-WC.

Duff Truck Lines, Inc. v. Vezolles,

Ky. App., 999 S.W.2d 224 (1999).

Vezolles was injured on 8/30/85. He settled in 1989 for a lump sum payment. In 1997, the employer filed a motion to reopen to contest its liability for chiropractic expenses. The Arbitrator found the chiropractic treatment to be reasonable and necessary. Duff appealed to the ALJ, who also found the treatment to be reasonable and necessary. Scott Miller filed a motion for approval of an attorney fee in the amount of \$500.00. ALJ denied the motion on the ground that no additional income benefits were recovered. WCB reversed, holding that the attorney was entitled to an appropriate recompense to be taken from the amount recovered in medical benefits. CA affirmed.

KRS 342.320 does not confine the award of attorney fee to actions involving income benefits. The claim was remanded to the ALJ for a determination of the amount of an appropriate attorney fee **and the method of payment.**

COMMENT: The Kentucky Supreme Court had hinted in two prior decisions that a plaintiff's attorney is entitled to an attorney fee based upon the recovery of medical benefits. According to Scott Miller, **the ALJ on remand ordered that the \$500.00 fee be paid by the insurance company by withholding that amount from the amount to be paid to the chiropractor.** The ALJ also awarded Mr. Miller an additional \$3,200.00 attorney fee from the employer for its failure to prevail on appeal.

AVERAGE WEEEEKLY WAGE

Hale v. Bell Aluminum,

Ky., 986 S.W.2d 152 (1999).

Hale worked for Bell in the installation of aluminum siding. At the same time, Hale operated his own aluminum siding business. He would complete his own jobs in between those for which he was hired by Bell. Hale was injured while working for Bell on 8/25/95. An unsigned federal income tax return was introduced which showed that Hale's earnings for 1995 amounted to \$14,466.45. Hale's earnings for the 13 weeks prior to the injury consisted of the following:

Domino Partners – Bluegrass	
6/30/95 – 7/3/95	\$2,038.76
Bell Aluminum	
6/30/95 – 8/1/95	1,367.14
Gatchell's – Market Street	
7/27/95 – 8/19/95	5,966.28
Bell Aluminum	
8/23/95 – 8/25/95	766.00

ALJ found that the average weekly wage was sufficient to justify maximum benefits, based upon his earnings with Bell, regardless of whether or not his self-employment income is considered. WCB affirmed. CA reversed. SC affirmed.

It has previously been held that a worker's wages from a concurrent employment relationship are not to be included in the computation of the workers'; average weekly wage pursuant to KRS 342.120(3) when such employment has been specifically excluded from coverage under the Act. Since it has previously been determined that independent contractors are not employees and, thus, fall outside the scope of the Act, Hale's earnings as an independent contractor per his own aluminum siding company should not be added to those wages earned per Bell in order to compute his average weekly wage.

Subsection (e) of KRS 342.140(1), i.e. the less than 13 week employee, should be utilized in computing Hale's average weekly wage. Such application allows for a true reflection of Hale's actual weekly earning capacity with Bell. Namely, not unlike the situation in **C & D Bulldozing v. Brock**, Ky., 820 S.W.2d 482 (1991), Hale's employment periods with Bell were sporadic due

to the nature of the employment relationship, and it is only appropriate to conclude that Hale's wages would have continued to be the same based on the pattern of his actual employment with Bell. Thus, we are persuaded that Hale's average weekly wage is to be calculated by dividing what he received from Bell during the five week period by 13. This results in an average weekly wage of \$164.00.

COMMENT: There was no reason to publish this opinion, as it is simply an application of Brock and not a new announcement of law.

Huff v. Smith Trucking,
Ky., 6 S.W.3d 819 (1999).

Smith bought timber rights to a parcel of land and hired Huff as a timber cutter. Huff and Smith were the only persons working on the tract. Smith anticipated that the project would take 15 to 20 days of actual work, however, it was expected to extend over a longer period because the work could only be performed in good weather. Huff was paid a daily wage of \$75.00 for the days that he worked. Huff worked for five days over a two-week period when he sustained a head injury on January 18, 1993. The Administrative Law Judge concluded that the most appropriate way to measure average weekly wage would be to divide the total salary (\$375.00) by the number of weeks worked (2) to produce a figure of \$187.50. Workers' Compensation Board reversed and remanded to the Administrative Law Judge for further findings and for a determination of average weekly wage pursuant to KRS 342.140 (1) (e). WCB construed the statute to provide that the average weekly wage should reflect what the claimant would have earned had he been employed for a full 13 weeks in the same occupation before being injured and that this could be based upon evidence concerning whether work was available to workers employed by other employers. On remand, the Administrative Law Judge determined from Huff's testimony that timber cutting work was available in the area where he resided and that typically it pays \$75.00 per day. Based upon that evidence, the Administrative Law Judge concluded that the average weekly wage was \$375.00. WCB affirmed. CA reversed, concluding that there was no evidence concerning the practices of other employers and no substantial evidence that Huff would have worked every day and earned \$375.00 per week. CA was persuaded by the employer's argument that Huff's total earnings of \$375.00 must be divided by 13 weeks to yield an average weekly wage of \$28.85. SC reversed.

Although KRS 342.140 (1) (e) may be less than artfully drafted with regard to a casual labor situation, it is clear that casual laborers are not exempted from workers' compensation coverage under the Act and that no special provision has been enacted for computing their average weekly wage. The same holds true for workers employed by newly established businesses which have been in operation for less than 13 weeks when a work injury occurs.

In view of the unique facts which were present in this case, we conclude that the Board properly construed KRS 342.140 (1) (e) as authorizing a consideration of evidence concerning the wages earned by timber cutters who worked for other employers in the area where the claimant lived and concerning the availability of such work. We are persuaded that claimant's uncontradicted testimony sufficiently demonstrated that timber cutting work was available at \$75.00 per day in the area in which he resided. It is clear, however, that in arriving at an average weekly wage of \$375.00, the Administrative Law Judge and Board failed to consider the effect of the weather

upon the average weekly wage that Huff could reasonably have expected to earn as a timber cutter during the 13 weeks preceding his injury. The only evidence in that regard came from Huff's actual experience and indicated that the weather permitted timber cutting approximately 50 percent of the time. In view of the uncontradicted evidence, we conclude that there was no substantial evidence indicating Huff would have worked everyday during the relevant 13-week period. The claim was remanded to the Administrative Law Judge for the entry of an award based upon an average weekly wage of \$187.50, which was calculated by \$75.00 per day multiplied by 5 days per week multiplied by 50 percent weather factor.

CALCULATION OF BENEFITS

Robinson v. Bailey Mining Company,

Ky., 996 S.W.2d 38 (1999).

Robinson severed his left forearm in 1980 while employed by Bailey Mining Co. That claim was settled for a lump sum payment representing 78.268% PPD. He returned to work, and was injured on 1/8/94 while working for Consol of Kentucky. He filed a claim for the 1994 injury and a motion to reopen the 1980 injury. ALJ found 100% permanent total disability, and apportioned 50% to prior active disability due to the 1980 injury and 50% due to psychiatric residuals of the 1994 injury. ALJ awarded 50% PTD benefits for the 1980 injury based upon Campbell v. Sextet Mining Company, Ky., 912 S.W.2d 25 (1995). WCB reversed the application of Sextet. CA and SC affirmed.

The imposition of additional liability pursuant to reopening is authorized only in those instances where an increase in occupational disability is the direct and proximate result of the injury which is the subject of the award.

COMMENT: A few of the demons were recaptured and put back into Pandora's box.

Coots v. Whittaker,

Ky., 998 S.W.2d 491 (1999).

Coots settled with the employer. ALJ found 100% disability due to cwp (coal worker's pneumoconiosis, more commonly known as black lung), and apportioned 75% to the Special Fund. ALJ also found 70% PPD due to injury, and apportioned 50% to the Special Fund. ALJ required the Special Fund to pay both awards during the 520 weeks that the awards overlapped up to a maximum weekly benefit of \$415.94, which was the statutory maximum for total disability. After the 520 weeks, the Special Fund was ordered to pay its share of the cwp award (\$311.96 per week), until benefit were tiered down at age 65. WCB, CA, and SC affirmed.

Computation of the Special Fund's share of the combined benefits for each of the 520 weeks that the two awards overlap may be summarized as follows:

- I. Compute the effective amount of the weekly occupational disease benefit as follows:

Maximum weekly benefit for 100% disability	\$415.94
Less weekly injury benefit	<u>-218.37</u>
Effective weekly occupational disease benefit	\$197.57

- II. Compute the Special Fund's liability for each weekly benefit.
 Injury: 50% of \$218.37
 Disease: 75% of \$197.57
- III. The sum of its liabilities for the two benefits equals the Special Fund's combined weekly liability.
- | | |
|------------------------|----------------|
| 50% of injury benefit | \$109.19 |
| 75% of disease benefit | <u>+148.18</u> |
| TOTAL | \$257.37 |

COMMENT: These black lung and injury combination calculation cases are very boring and tedious. Memo to the Court of Appeals and Supreme Court: Please stop publishing these cases!!!!

CONSTITUTIONALITY

Shamrock Coal Company v. Maricle, Ky., 5 S.W.3d 130 (1999).

Nineteen former employees of Shamrock filed a civil action in Leslie Circuit Court alleging that they contracted coal worker's pneumoconiosis as a consequence of their employment and were entitled to damages. The plaintiffs alleged that Shamrock was negligent, careless, and reckless in its mining operations, and conducted its operations in gross disregard of their health, safety, and welfare. They also alleged that Shamrock intentionally violated safety procedures established by statutes and regulations. The plaintiff's alleged that they contracted category 1 cwp and have respiratory of less than 20%. All 19 employees would potentially have been entitled to RIB under the Act prior to the 1996 amendments, but they are not entitled to any benefit after the 1996 amendments.

Shamrock filed a motion to dismiss based upon lack of subject matter jurisdiction, CR 12.01(a), and failure to state a claim upon which relief could be granted. Judge Maricle held that the exclusive remedy provision of KRS 342.732 was unconstitutional because it denied the plaintiffs a jural right to a remedy. Judge Maricle also ruled that the opt out provisions of the Act were unconstitutional because it amounts to a waiver by mere inaction of the right to bring a tort action.

Shamrock sought a writ of prohibition in the Court of Appeals, which was denied. The Court held that the judge had jurisdiction because the pleadings alleged intentional acts. The Court of Appeals also held that the exclusive remedy provision of the Act does not confer exclusive jurisdiction on the DWC to decide matters within the purview of the Act, but is merely an affirmative defense that must be pled and proven in circuit court. SC reversed.

In the case at bar, the plaintiffs brought suit under the Workers' Compensation Act. Therefore, Shamrock, on the face of the complaint, was entitled to the protection of the exclusive liability provision. Consequently, the Leslie Circuit court has no subject matter jurisdiction over this case, and the writ is appropriate.

This Court specifically upheld the constitutionality of the presumptive acceptance provision of the Workers' Compensation Act in Wells v. Jefferson County, Ky., 255 S.W.2d 462 (1953). We find nothing raised herein which compels us to revisit the issue and, therefore, we reaffirm our decision in Wells.

Shamrock's exclusive liability to the plaintiffs is workers' compensation benefits. **There is no other remedy available.** There was no common law cause of action for non-disabling category one pneumoconiosis in existence at the time of the adoption of the present Constitution; therefore the jural rights doctrine is inapplicable. Regardless, the fact that a remedy for a work-related injury is unavailable under the Workers' Compensation Act does not authorize bringing a civil action for damages in circuit court.

Absent willful and unprovoked physical aggression by an employee, officer, or director, there is no exception to the exclusive liability provision of the Act.

COMMENT: Justice Graves pointed out in his dissent that the Court did not explain why the plaintiffs are not entitled to a remedy in circuit court if a remedy for their injuries is not available to them in KRS Chapter 342, and if the Kentucky Constitution guarantees a remedy for any injury. Section 14 of the Kentucky Constitution provides as follows: All courts shall be open, and **every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.** (This author does not pretend to be a constitutional law scholar, but it appears that Justice Graves has presented an argument that the Court did not adequately address.)

In discussing the "intentional acts" exception to the exclusive remedy provision, the Court considered only the language of KRS 342.690(1). The Court did not consider KRS 342.610(4), which provides: If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependent *** **may bring suit against the employer** for any amount they desire *** (and) **may take under this chapter, or in lieu thereof, have a cause of action at law against the employer as if this chapter had not been passed**, for such damage so sustained by the employee as is recoverable at law. The language in KRS 342.690 was taken out of context by the Court. In fact, the language relied upon by the Court does not address the exemption from liability given **to the employer**, but rather the extension of that exemption that is given to the employer's carrier and personally to all employees, officers, directors or such employer or carrier while acting in the course of their employment, unless the injury or death is caused personally by one of those persons through unprovoked and willful physical aggression. This part of the decision is a major ruling by the Court, that was dispatched with in a single short paragraph. The Supreme Court really laid an egg with this part of its decision, and we are all left to speculate about the reasons. Perhaps this issue needs to be revisited with the Court when the case does not involve broad issues of constitutionality?

COURSE AND SCOPE OF EMPLOYMENT

Phillips v. Jenmar, Inc.,

Ky., 998 S.W.2d 483 (1999).

Phillips suffered from alcoholism. A day or two before the accident, he was taken to a clinic for emergency medical treatment during working hours by the owner's secretary. Phillips decided to quit drinking, and began to suffer symptoms associated with delirium tremens. Phillips returned to work at some time before 8:00 a.m. on Friday, experienced severe tremors, fell from a rack, and struck his head on concrete. The evidence was conflicting, and the ALJ chose to believe the testimony of the employer that he had told Phillips not to return to work until the following Monday. ALJ determined that the injury did not occur within the course and scope of the employment, and dismissed the claim. Phillips argued that instead of dismissing the claim, the ALJ should have only reduced benefits by 15% for a violation of a safety rule. WCB, CA, and SC affirmed.

More was involved than the mere disobedience of an order concerning the manner in which work duties should be performed. The employer had an unqualified right to limit the scope of the employment, and the employer had expressly ordered the employee not to undertake any work on the day in question. The worker's conduct was on a purely voluntary basis, unknown to and unaccepted by the employer. Phillips was injured because he disobeyed an order not to work due to his physical condition.

CUMULATIVE TRAUMA

Special Fund v. Clark,

Ky., 998 S.W.2d 487 (1999).

In 1985, Clark injured his **right knee**. He received TTD benefits and returned to work. In 1987, he underwent surgery to **both knees**, and missed five months of work. The benefits were paid under the employer's sickness and accident program. He returned to work without restrictions. His symptoms grew progressively worse over time. He continued to work until 7/27/94, and then underwent a total knee replacement on his **left knee**. ALJ ruled that Clark suffered an injury in 1985, which required surgery in 1987; that the 1985 injury resulted in 30% prior active disability; that the 1985 injury was followed by work-related cumulative trauma to Clark's knees which became manifest on 7/27/94, and which accounted for 45% PPD.

WCB reversed on the grounds that the 1985 injury involved only the right knee, and there was no evidence that the 1987 surgery on both knees was related to the 1985 injury. On remand, the ALJ concluded that the entire 75% PPD was due to cumulative trauma, that the cumulative trauma became manifest in 1987, that Clark continued to be subject to cumulative trauma through 7/27/94, and that his disability progressively increased during the period between his return to work from the 1987 surgery until the 1994 surgery. Based upon his conclusion that Clark's disability was related to his entire career, of which only 55 weeks came within the two-year period of limitations, the ALJ prorated the 75% PPD over Clark's work life, and awarded benefits for 3.3% PPD and medical benefits. WCB affirmed. CA reversed. SC reversed.

In Alcan v. Huff, Ky., 2 S.W.3d 96 (1999), we construed the meaning of the term "**manifestation of disability**", as it was used in Randall Co. v. Pendland, Ky. App., 770 S.W.2d 687 (1988), as referring to **physically and/or occupationally disabling symptoms which lead the worker to**

discover that a work-related injury has been sustained. Once a worker is aware of the existence of a disabling condition and the fact that it is caused by work, the worker would also be aware that continuing to perform the same or similar duties was likely to cause additional injury. For that reason, the rationale which supports the decision in Randall Co. v. Pendland does not support tolling the period of limitations for **whatever additional injury is caused by trauma incurred after the worker discovers the existence of a work-related gradual injury.** KRS 342.185 would operate to prohibit compensation for whatever occupational disability is attributable to trauma incurred more than two years preceding the filing of the claim. The claim was remanded to the ALJ for a finding as to when Clark became aware that work contributed to the development of the degenerative condition in his knees.

Alcan Foil Products v. Huff,

Ky., 2 S.W.3d 96 (1999).

Huff, Cox and Grant were long time employees of Alcan. Beginning in 1967, Alcan conducted annual audiological examinations of all employees. Each of these three employees had a documented hearing loss by the early 1970's, and very little progression of the hearing loss since that time. The medical evidence was that any present restrictions on the employees' ability to work as a result of hearing loss were the same as would have been imposed in the mid-70's. ALJ found that each of these three employees was **aware of their hearing loss and its cause** prior to 1985. ALJ then found that the three claims, all filed on 9/7/95, were barred by the two-year statute of limitations. WCB reversed. CA affirmed. SC reversed and reinstated the ALJ decision.

In Randall Co. v. Pendland, Ky. App., 770 S.W.2d 687 (1988), the court concluded that in cases where the injury is the result of many mini-traumas, the date for giving notice and the date for clocking the statute of limitations begins when the disabling reality of the injuries becomes manifest.

The question remains whether the phrase "*manifestation of disability*" refers to the physical disability or symptoms which cause a worker to discover that an injury has been sustained or whether it refers to the occupational disability due to the injury. **We conclude that it refers to the worker's discovery that an injury had been sustained.** Nothing in Pendland indicated that the period of limitations should be tolled in instances where a worker discovers that a physically disabling injury has been sustained, knows it is caused by work, and fails to file a claim until more than two years thereafter simply because he is able to continue performing the same work.

COMMENT: Does Clark in any way change the ruling in Alcan, or is Clark simply an extension of Alcan to the fact situation involving the compensability of continuing cumulative trauma that occurs after the manifestation of disability?

EMPLOYMENT RELATIONSHIP

Jecker v. Plumbers' Local 107,

Ky. App., 2 S.W.3d 107 (1999).

In 1993, Jecker's application to a five-year apprenticeship program was accepted by Local 107. The program required the apprentice to work for member contractors for 1700 hours each year and to attend 216 hours of classroom instruction. The apprentices were not paid by Local 107. Rather, each contractor paid the apprentice wages for the hours he worked for that contractor. The apprentices were not paid for attending the mandatory training classes. On 3/25/94, Jecker was injured during a training class. ALJ found that he was an employee of Local 107. WCB reversed. CA affirmed.

In Salvation Army v. Mathews, Ky. App., 847 S.W.2d 751 (1993), the court stated that it is axiomatic that one of the threshold requirements in a compensation claim is that the claimant must be an employee for hire. Where there is an issue as to whether or not the claimant is an employee for hire, **the claimant must show that a contract of employment existed between him and the purported employer** as required by KRS 342.640. Since Jecker was injured while being instructed in the classroom, as activity for which he received no remuneration from either Local 107 or the member contractors, the holding of Salvation Army v. Mathews was, we believe, correctly applied to this case.

EXCLUSIVE REMEDY

Matthews v. G & B Trucking, Inc.,

Ky. App., 987 S.W.2d 328 (1999).

Matthews was employed by G & B as a coal truck driver. G & B contracted with Pyramid Mining, Inc. to haul coal. G & B was uninsured for workers' compensation liability. Matthews brought a civil action against G & B, and filed a workers' compensation claim against Pyramid as the "up the ladder" employer. The workers' compensation claim was settled. The trial court granted summary judgment for G & B finding that Matthews' claim was barred by the exclusive remedy provision of the Workers' Compensation Act. CA reversed.

Pyramid, having become liable for workers' compensation benefits as the general contractor who contracted with an **uninsured subcontractor**, is immune from tort liability under KRS 342.690(1). However, we do not agree that Pyramid's statutory immunity should extend to G & B. To have protection of the Workers' Compensation Act, KRS 342.690 requires an employer to secure payment of compensation as a condition of benefiting from the exclusive liability provision. KRS 342.610 and 342.690(1) were not intended to insulate the immediate employer from liability if it has failed to obtain coverage.

EXTRA TERRITORIAL COVERAGE

HANEY V. BUTLER,

Ky., 990 S.W. 2d 611 (1999).

Haney Leasing was in the business of hauling cargo on the waterways of Kentucky, Alabama, Mississippi, Tennessee, and Louisiana, and was responsible for maintaining the barges and tow boats which it leased for use in its operations. Its business offices were located in Paducah. Butler was hired in Kentucky and had an office at the Paducah facility, although he resided near

Nashville. There was no evidence that Haney owned or leased any property at an Alabama port or maintained a business office in Alabama. Butler acted as a trouble shooter, inspecting casualty damage and supervising repairs. Approximately 80% of his work was performed in Alabama, although he performed some work in Tennessee, Kentucky, Mississippi, and Louisiana. There was no evidence concerning what portion his work time was spent in each state. On 11/29/92 Butler was sent to Mobile, Alabama to supervise the inspection and repair of a leased tow boat and barges which had sustained storm damage. He subsequently died in a vehicular accident near Greensboro, Alabama. ALJ determined that there were several places of business in Alabama which the corporation operated and that the decedent presumably was working out of one those places of business. ALJ concluded that Butler's employment was principally localized in Alabama and because there was no evidence that Alabama law did not apply to the claim, the ALJ concluded that the claim did not come within the jurisdictional requisites of KRS 342.670; therefore, it was dismissed. WCB affirmed. CA reversed. Supreme Court affirmed.

We conclude that for an employment to be principally localized within a particular state for the purpose of KRS 342.379 (4)(d)(1), the employer must either lease or own a location in the state at which it regularly conducts its business affairs, and the subject employee must regularly work at or from that location. There was no substantial evidence that Haney Leasing maintained a place of business in Alabama. Because neither party disputes the finding that the employment was not principally localized in Kentucky and because there is no substantial evidence that the employment was principally localized in Alabama, Tennessee, or any other state, it must be concluded that Kentucky has jurisdiction over the claim pursuant to KRS 342.670 (1)(b).

COMMENT: It would have been a much more simple and correct resolution of this appeal to have ruled that Butler worked at or from the office in Paducah. The primary impact of this case being published is that it will now become more difficult to determine when an employee works **at or from** a business location. If these facts were not enough to make that conclusion, then what does "working from" a business location mean?

FUNCTIONAL IMPAIRMENT

Whittaker v. Johnson,

Ky., 987 S.W.2d 320 (1999).

Johnson sustained a back injury in 1995, and returned to light duty work at full wages. ALJ found that the injury resulted in 2.5% functional impairment to the body as a whole, but that the injury had not resulted in any appreciable degree of permanent occupational disability. ALJ awarded income benefits based upon the functional impairment rating. WCB and CA affirmed. SC reversed.

Just as KRS 342.730(1)(c) [formerly KRS 342.730 (1)(b)] requires the worker to have sustained at least some occupational disability as a threshold requirement for becoming entitled to an award of income benefits for permanent partial disability, the amended version of KRS 342.730(1)(b) requires the worker to have sustained at least some occupational disability before becoming entitled to such an award. Cook v. Paducah Recapping Service, Inc., Ky., 694 S.W.2d 684

(1985).

COMMENT: It would have been nice for employers to have had this opinion from the Court while they were still litigating the bulk of the 1994 Amendment claims. With our super-fast track litigation, by the time the Supreme Court decides what the law means, most of the claims for which that law applies have already been adjudicated by the original fact-finder. Then, there is the specter of the \$5,000.00 attorney fee if the employer appeals and does not prevail, which has a chilling affect on the employer's right to appeal issues such as this. Prior to this decision, there were several unpublished Court of Appeals opinions holding to the contrary, and the Arbitrators and ALJ's generally did not agree that Cook applied to 1994 Amendment claims. That is small consolation for the employers that did not appeal the incorrect application of the law in hundreds or thousands of claims that this ruling could have affected.

INTERLOCUTORY ORDER

KI USA Corp. v. Hall,
Ky., 3 S.W.2d 355 (1999).

On 6/5/97, Hall filed a claim for an injury on 3/21/95. Following the benefit review conference, the Arbitrator entered an order placing the claim in abeyance and ordering the employer to pay interlocutory TTD and medical benefits to continue until further order. ALJ denied the employer's appeal as having been brought from a non-final, non-appealable order. WCB, CA, and SC affirmed.

We are persuaded that the conclusion which we reached in Ramada Inn v. Thomas remains valid after the 12/12/96 amendments to the Act. We conclude that a "benefit review determination" is a written document which resolves "all matters at issue" with regard to a particular claim and, therefore, does not include an interlocutory award of TTD. An arbitrator's order granting interlocutory benefits is not a "final order" as defined in 803 KAR 25:010, Section 12(1) and, therefore, may not be directly appealed to an ALJ.

COMMENT: This opinion has been a soundly criticized by the defense bar, who have experienced awards of interlocutory relief when there are material issues of fact and law, and when there is no way that the Arbitrator or ALJ can later return the employer to its original position in the event that the proof ultimately results in an adjudication of less benefits than provided by the interlocutory award.

JOINDER

Uninsured Employers' Fund v. Turner,
Ky., 981 S.W.2d 544 (1999).

Kidd was injured on 7/1/93 while employed by B & E Hydroseeding & Contracting. He filed a claim, and the UEF was joined because B & E was uninsured at the time of the injury. On 12/11/95, at the pre-hearing conference, Kidd, the UEF, and the Special Fund agreed to settlement for 10% PPD. The agreement was approved on that date, and provided in part that Kidd would

be deposed within 90 days to enable UEF to determine whether there was a statutory employer from whom it could pursue a claim for reimbursement or subrogation. Kidd's deposition was taken, and on 5/30/96, UEF moved to join Coal Mac, Inc. as a statutory employer. The motion was overruled. WCB, CA and SC affirmed.

When an award becomes final, relief from its terms may be obtained only if it is reopened pursuant to the provisions of KRS 342.125. The terms of the settlement agreement were approved by an ALJ and became a final award which terminated the action, precluding the subsequent joinder of an additional party. No motion to reopen was filed, and the UEF has asserted none of the statutory grounds for reopening the award. Furthermore, the evidence upon which the UEF bases its assertion that Coal Mac was a statutory employer was available before the UEF agreed to settle the claim. UEF may be entitled to relief by means of a common law action for indemnity if it can demonstrate that it discharged an obligation that rightfully should have been discharged by Coal Mac.

COMMENT: There was no reason to publish this opinion.

OPERATING PREMISES

Pierson v. Lexington Public Library,

Ky., 987 S.W.2d 316 (1999).

Pierson was employed at the main branch of the Library. The Library leased approximately 144 parking spaces for staff and patrons from the owner of a parking garage which is located adjacent to the Library but is a separate structure. Employees were requested to park on the seventh floor of the garage, although particular spaces were not reserved for their use. The Library provided free parking for its employees. They were required to descend to the first floor in order to enter the Library. On 1/12/94, Pierson was returning from lunch when the elevator dropped as she was exiting and caused her to injure her left knee and elbow. ALJ concluded that the injury was compensable. WCB reversed. CA affirmed. SC reversed.

Workers' compensation legislation was not intended to protect workers against the risks of the street. As a general rule, injuries which occur while an employee is on the way to or from the worksite are not compensable. This principle is commonly known as the "going and coming rule". However, an employer is responsible for work-related injuries that occur on its entire "operating premises" and not just at the injured workers' worksite. Whether a particular area comes within an employer's operating premises depends on the facts and circumstances of the case. Hayes v. Gibson Hart Co., Ky., 789 S.W.2d 775 (1990); K-Mart Discount Stores v. Schroeder, Ky., 623 S.W.2d 900 (1981); Harlan Appalachian Regional Hospital v. Taylor, Ky., 424 S.W.2d 580 (1968); Smith v. Klarer, Ky., 405 S.W.2d 736 (1966).

The facts of this case are not controlled by Hayes. More accurately, they fall somewhere between those present in K-Mart and Taylor. The Library did not own, operate, or maintain the parking structure, and it was used by the general public as well as the Library. **However, the evidence also indicates that the Library leased approximately 144 spaces in the structure, making it a major customer with some degree of influence over the owner.** Furthermore,

the Library influenced claimant's decision over where to park by providing her with free parking in that particular garage as a part of its employee benefit package. If claimant had chosen to park elsewhere in downtown Lexington, she would have been required to pay the cost of parking herself. Under those circumstances, we are persuaded that there were sufficient indicia of employer control to support the ALJ's conclusion that the Library should be responsible for the effects of an injury to an employee which occurred in the garage.

COMMENT: This was bad law. This case should have been ruled by K-Mart, as that case cannot legitimately be distinguished from the facts in this claim. According to the defense attorney, there was **no actual evidence in the record** as to whether the Library had any influence over the owner of the parking lot. This was apparently merely convenient speculation by the court. Other than parking meters on the street, this is the only parking structure within several blocks of the library.

REOPENING

Mountain Clay, Inc. v. Frazier,

Ky. App., 988 S.W.2d 503 (1999).

Frazier injured his neck and back as the result of a 6/91 work injury. ALJ found that Frazier suffered a compression fracture at T5, but found no permanent disability, and the award made no mention of medical benefits. Frazier filed a motion to reopen in 12/96 alleging an increase in disability. A different ALJ found no increase in disability, but did award medical benefits related to the T5 injury. WCB and CA affirmed.

The first ALJ should have awarded medical benefits for the T5 injury in the original opinion. We find no reason why the second ALJ was precluded from awarding such benefits on reopening. KRS 342.125 allows the ALJ to reopen and review any award or order ending, diminishing or increasing the compensation previously awarded or change or revoke his previous order.

Wheatly v. Bryant Auto Service, Ky., 800 S.W.2d 767 (1993).

COMMENT: Why publish a case that applies to only one claim in a million?

Whitaker v. Rowland,

Ky., 998 S.W.2d 479 (1999).

Rowland was injured in 2/87. He settled for a lump sum payment representing 28.84% PPD. On 7/3/96, he filed a motion to reopen. ALJ found that at the time of settlement, Rowland was actually 40% PPD, and that his condition had worsened to 100% PTD. ALJ ordered that benefits be paid for 100% PTD from the date of the motion to reopen, and allowed the employer and Special Fund a **credit in the amount of 40% PPD** for the period that the original 425 period overlapped with the award on reopening. WCB, CA, and SC affirmed.

Defendants argued that Rowland waived the compensability for 40% of his ultimate disability by settling the initial claim, and that credit for the proceeds of the settlement should equal 40% of a permanent, total disability award for its entire duration.

Rowland's actual occupational disability at settlement was 40%; therefore, it was the benefit for a 40% PPD that was compromised for the lump sum, not 40% of the benefits for 100% PTD. Rowland was entitled to receive the applicable statutory benefit for total disability, less the statutory benefit for 40% PPD during the remainder of the overlapping 425 week period, and then was entitled to receive the statutory benefit for total disability.

RE-OPENING RIB

Neace v. Adena Processing,

98-CA-2763-WC 11/24/99

Neace filed an application for RIB in January of 1994. He submitted X-ray reports from Dr. Anderson showing 1/1 and Dr. Lane showing 1/0. The claim was settled for a lump sum of \$16,000. In July 1997, Neace filed a Motion to Re-Open based upon an alleged worsening of his pulmonary condition. He submitted the report of Dr. Myers, who interpreted a chest X-ray as showing 1/1 pneumoconiosis. He also submitted spirometric test results showing values less than 80% as predicted. Administrative Law Judge dismissed the re-opening. WCB and CA affirmed.

Re-openings are governed by KRS 342.125. That section provides that an affected employee may move to re-open his rib claim upon a showing of progression of his previously-diagnosed occupational pneumoconiosis resulting from exposure to cold dust and development of respiratory impairment due to that pneumoconiosis. In determining whether there was a progression in the disease on chest X-ray, the Administrative Law Judge was presented with conflicting medical opinions from Dr. Anderson and Dr. Lane. It is well-settled that when the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the Administrative Law Judge. The Administrative Law Judge compared the X-ray interpretation of Dr. Anderson with the subsequent X-ray interpretation on re-opening by Dr. Myers, and found that there had been no progression of the disease. The evidence does not compel a contrary result.

SUBROGATION

Jefferson County Board of Education v. Estate of Cowles,

Ky. App., 982 S.W.2d 224 (1998).

Stith, an employee of the Board, was injured when the school bus she was driving collided with a car driven by Cowles. The Board is self-insured under the Workers' Compensation Act, and it paid \$11,966.17 to Stith in workers' compensation benefits. Pursuant to KRS 342.700, the Board filed suit in circuit court against Cowles to recover the benefits it had paid to Stith. Stith subsequently filed a separate suit against Cowles, which was consolidated with the Board's suit.

Prior to trial, Cowles moved the court to grant her a \$10,000 "credit" against the Board's subrogation claim. The basis of Cowles' motion was KRS 304.39-060, which "abolished" a person's right to recover damages for automobile accidents due to bodily injury, sickness or disease to the extent that such injuries are payable by basic reparation benefits (BRB). The maximum amount of BRB is \$10,000. Thus, Cowles argued that the Board should not be entitled to recover **the first \$10,000 of BRB** since Stith would not be entitled to recover that amount.

The trial court granted the motion. CA reversed.

The issue is apparently one of first impression in the Commonwealth. We do not perceive that allowing the Board to recover the first \$10,000 in benefits paid to Stith would be allowing the Board to have a more elevated status than Stith. If Stith were allowed to recover the \$10,000 from Cowles in addition to the benefits she received from the Board, then she would be enjoying double compensation, which is clearly forbidden. No such double compensation would exist if the Board recovered the first \$10,000 paid to Stith. Rather, such a recovery would merely make the Board whole, which appears to be one of the goals of KRS 342.700. Furthermore, if the Board is unable to recover the \$10,000 in question, then the tort-feasor would avoid any liability for that \$10,000 while the Board, an innocent party, would be forced to assume that responsibility.

Philadelphia Indemnity Ins. Co. v. Morris,

Ky., 990 S.W.2d 621 (1999).

On 12/20/93, Morris was struck and injured (severed leg and closed head injury) by a vehicle driven by Tedford while he was loading refuse onto a sanitation truck owned by his employer, Medora Sanitation. The sanitation truck was covered by a liability insurance policy purchased by Medora and issued by Philadelphia. Medora's workers' compensation carrier paid \$200,000 in TTD and medical benefits. Morris filed a civil action against Tedford, who was insured by Allstate. Allstate tendered its policy limits of \$25,000.00, and the claim against Tedford was dismissed. Morris then added Philadelphia as a defendant, and sought a declaration of rights as to whether he was entitled to UIM benefits. Circuit court dismissed the amended complaint. Court of appeals reversed. SC affirmed.

The Kentucky Supreme Court decided two issues:

KRS 342.690(1), the exclusive remedy provision of the Workers' Compensation Act, does not bar an employee from recovering **under-insured motorist benefits (UIM)** from his employer's motor vehicle insurance policy.

Any **provision in the employer's UIM endorsement**, which requires that workers' compensation benefits be reduced or set off against the UIM policy limits is unenforceable because it is a violation of public policy.

The Court noted that the Court of Appeals also ruled that **workers' compensation benefits were properly deducted from the total amount of damages incurred to determine the extent to which there remained uncompensated damages** to which the UIM coverage would apply, but that this issue was not raised on appeal to the Supreme Court.

COMMENT: When the Supreme Court goes out of its way to identify an issue that was not presented on appeal, that is a strong hint to litigants that it would hold contrary to the court below.

SURVIVOR'S BENEFITS

Whitaker v. Smith,

Ky., 998 S. W. 2d 476 (1999).

Smith was injured on 1/6/84. He filed a claim and was awarded benefits for 100% PTD. Smith died on 1/10/95 from a nonwork-related cause. On 9/3/96, the widow filed a motion to be substituted as a plaintiff for continuation of benefits. Employer did not object. Special Fund, relying upon Hammons v. Tremco, Inc., Ky., 887 S.W.2d 336 (1994), filed a special answer on 10/22/96 asserting that the one-year statute of limitations contained in KRS 395.278 had expired. ALJ awarded the continuation of benefits. WCB, CA, and SC affirmed.

This appeal does not concern the revival of an action that was pending and, therefore, abated upon the plaintiff's death. It concerns compliance with the provisions of a final workers' compensation award with regard to surviving dependents. Unlike a pending action, a judgment survives the death of a judgment creditor. For that reason, the rules concerning the survival of a pending cause of action do not apply to this case. We view the provision of KRS 342.730 with regard to a continuation of benefits to a survivor to be implicit in the terms of the original award.

Riddle v. Scotty's Development, Inc.,

Ky. App., 7 S.W.3d 395 (1999).

Riddle was killed at work on 10/18/94. She was not married, but was the mother of four children whose ages ranged from 4 to 13. ALJ found that her average weekly wage was \$8.46, and noting that KRS 342.750 contained no provision for a minimum amount of benefits in such a claim, awarded the children 50% of that wage, or \$4.23 per week during their dependency. On petition for reconsideration, benefits were increased to 75% of the average weekly wage, or \$6.34 per week. The benefits were awarded against the up-the-ladder employer. WCB reversed on the grounds that the ALJ failed to find that the uninsured employer was primarily liable for the award of benefits, and determining *sua sponte* that the award should be increased to the statutory minimum of \$83.19 per week. The Board relied upon KRS 342.740(2), which it believed clearly indicated a legislative intent to provide a minimum benefit rate for death claims. The Board remanded the claim to the ALJ with directions that the ALJ enter an award holding the uninsured employer primarily liable for it. On remand, the ALJ awarded benefits based upon the statutory minimum. WCB reversed, because the employer cited Mills v. Vaughn, Ky. App., 581 S.W.2d 29 (1979), which specifically held that dependents were not entitled to a minimum weekly death benefit. CA affirmed.

Prior to 1972, KRS 342.070, the predecessor to KRS 342.750, provided for both a maximum and a minimum weekly benefit payable for death. In 1972, KRS 342.070 was repealed and replaced with KRS 342.750. Since its enactment in 1972, KRS 342.750 has never provided for a minimum weekly death benefit.

VOCATIONAL REHABILITATION

Pinkston v. Teletronics, Inc.,

Ky., 4 S.W.3d 130 (1999).

Pinkston was injured in 3/90. He had a GED, had studied electronics, and had a master electrician's license. He was awarded benefits for 60% PPD. The ALJ also ordered a vocational rehabilitation program. Pinkston subsequently enrolled in a 22 month full-time program in major appliance repair. Pinkston traveled 97 miles round-trip from his home to the vocational school five days per week. The employer voluntarily paid for registration fees, books, and tuition, but refused to pay mileage expenses. Pinkston filed a motion to reopen arguing that he was entitled to mileage expense, that he was not limited to a 52 week program, and that he was entitled to an increase in income benefits to 80% of his average weekly wage during the period of rehabilitation.

The Supreme Court affirmed the award of mileage expense, even though the statute specifically provides that travel was compensable only where rehabilitation requires residence at or near the facility or institution, away from the employee's customary residence. Here, claimant could not avail himself of the vocational rehabilitation services to which he was entitled without making a daily commute of 97 miles. We conclude that because the training facility was a significant distance from claimant's customary residence, the payment of mileage would come within the travel expenses contemplated by KRS 342.710(4). See C & L Construction v. Cannon, Ky., 884 S.W.2d 647 (1994).

The Supreme Court reversed the Court of Appeals on the issue of allowing 22 months of vocational rehabilitation benefits, rather than limiting this to 52 weeks. The statute limits the award to 52 weeks, **except in unusual cases** when by special order of the ALJ after hearing and upon a finding, **determined by sound medical evidence** which indicates such further rehabilitation is **feasible, practical and justifiable**. Considering claimant's age (born in 1944) and his occupational and educational background, we are persuaded that the medical evidence offered in the initial claim was sufficient to support the ALJ's determination that the 22 month program was compensable.

The Supreme Court reversed the award of income benefits at the rate of 80% of the average weekly wage during the period of rehabilitation. KRS 342.715 authorizes enhanced income benefits only where the injured worker is eligible for permanent total disability benefits.

COMMENT: Justice Cooper presented a well-reasoned dissent on these two issues. He first pointed out that the ALJ based his decision to award benefits in excess of 52 weeks on the testimony of the claimant and the director of the school, not on any medical evidence, and went on to note that **no medical evidence whatsoever was offered in support of this motion for an extension of the 52 week period**. None of the doctors testified as to the need for rehabilitation or whether it should exceed 52 weeks. The Court re-wrote the statute, which specifically does not authorize the payment of mileage expenses in this fact situation. Justice Cooper addressed the travel expense issue in two pages of text, noting that **the majority undertook to provide workers' compensation benefits which the legislature has chosen not to provide**.

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SATURDAY, JUNE 10, 2000
LEXINGTON, KENTUCKY

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PUBLISHED KENTUCKY COURT OPINIONS FOR 2000

EXCLUSIVE REMEDY

Brewer v. Hillard,

Ky. App., 15 S.W.3d 1 (2000).

Kenneth Hillard was employed by Consolidated Freightways as a local deliveryman. Jeff Brewer was employed by CF as a dispatcher and supervisor. According to Hillard, beginning in 1992 Brewer called him sexually explicit names, would grab his buttocks and make sexual comments, would rub his crotch and make lewd comments, and made requests for oral and anal sex. Hillard alleged that he developed psychological conditions as a result of the actions of Brewer. Hillard brought a civil action against Brewer for intentional infliction of emotional distress and against CF for same-gender hostile environment sexual harassment. In May of 1993, Hillard was advised by his treating physician to stay off work for several weeks. He filed a workers' compensation claim, and ultimately received TTD benefits for the time he missed. Brewer's motion for judgment as a matter of law was denied. CA affirmed.

Brewer contends that by having filed a workers' compensation claim, Hillard is precluded from maintaining a tort action against him. Brewer relies upon the exclusivity provisions of KRS 342.690(1) and Zurich American Ins. Co. v. Brierly, Ky., 936 S.W.2d 561 (1997), holding that if death of employee results from deliberate intent of employer to cause death, employee's dependents can either proceed under Chapter 342 or sue at law. Hillard relies on Zurich Ins. Co. v. Mitchell, Ky., 712 S.W.2d 340 (1986) and General Accident Ins. Co. v. Blank, Ky. App., 873 S.W.2d 580 (1993) for the proposition that the tort of outrage has

been accepted as an exception to the exclusivity provisions.

We believe that all of the cases cited by the parties on this argument are distinguishable because they focus on the liability of the employer and/or the employer's compensation carrier for a tort claim arising from a work-related injury. In this case, Hillard's tort claims are raised only in regard to Brewer's conduct, not the conduct of the employer.

In Russell v. Able, Ky. App., 931 S.W.2d 460 (1996), this Court used both KRS 342.690(1) and KRS 342.700(1) to hold that an employee who received workers' compensation for an injury caused by the intentional act of a co-employee was not precluded from maintaining an action in tort against the co-employee. The situation before us is analogous to that in Russell. Hillard claims that he sustained injury as a result of Brewer's intentional acts. Therefore, the exclusivity provisions of KRS 342.690(1) are not applicable to Brewer and the trial court did not err in allowing Hillard's civil action against Brewer to proceed.

NOTICE - INJURY

Smith v. Cardinal Construction Company,
Ky., 13 S.W.3d 623 (2000).

Jentry Smith operated a bulldozer at a landfill. He alleged that he injured his back on January 7, 1996 when he slipped on some snow and ice, causing him to fall from the deck of the bulldozer onto the ground. On the following day, he fell while attempting to open a gate. He continued working, until he underwent lumbar spine surgery on January 17, 1996. An MRI scan of the cervical spine had been performed on January 16, 1996. In the operative note, Dr. Powell noted in addition to the lumbar spine conditions that the patient had

sustained a central cord injury of the cervical spine secondary to the fall. The cervical symptoms worsened, and on March 4, 1996, Dr. Powell indicated on an insurance form that cervical discectomy and fusion were contemplated, and that this condition was related to the January 7, 1996 injury. On March 11, 1996, Smith filed an Application for Resolution of Claim, alleging a work-related **back** injury. For the nature of his injury, he described only the lumbar condition, but the medical records submitted with the Form 101 included an insurance form also describing unknown injuries to cervical spine. On March 15, 1996, he underwent surgery to his cervical spine, and the employer denied payment of those medical expenses. A motion to amend the Form 101 to allege a cervical spine injury was filed on August 29, 1996. The ALJ found a seven month delay between the onset of symptoms of neck pain and notice to the employer, and that the notice was not timely. The ALJ found 100% disability due to the low back injury alone, and concluded that the medical expenses for treatment of the cervical spine were not compensable. WCB and CA affirmed. SC reversed.

Contrary to the ALJ's finding that notice of the cervical injury was not given until seven months after it occurred, the record indicates that the employer was informed that the claimant suffered a cervical injury no later than March of 1996 when the claim was filed. There is no assertion that the medical treatment which was given for the cervical injury was not appropriate, and there is no assertion that, had the employer known any earlier that claimant's back injury involved the cervical spine as well as the lumbar spine, there is anything it could have done to reduce claimant's disability or its ultimate liability. We conclude that the purposes for which the notice requirement was created were accomplished in this case and that the employer was not prejudiced by any delay in being informed of the cervical injury.

We recognize that it would have been better practice to have given the employer written notice of both conditions as soon as they became apparent. We are convinced, however, that ***under the particular circumstances which are presented by this appeal***, the two-month delay in giving the additional information to the employer was not so unreasonable that an otherwise meritorious claim should be dismissed.

COMMENT: This case could be a severe blow to the notice defense, if the employer is now required to prove prejudice. This is a departure from prior case law. How much will the Court limit this ruling to cases involving similar "particular circumstances"? The court did not discuss the other purposes of the requirement that notice be given as soon as practicable, which include allowing the employer to conduct an immediate investigation of the alleged facts.

PENALTY FOR SAFETY VIOLATION

Lexington-Fayette County Urban Government v. Offutt,
Ky. App., 11 S.W.3d 598 (2000).

Karen Offutt was a member of a new recruit class to become a police officer. Prior to her acceptance into the class, she was required to complete a training course. On July 11, 1996, during the second day of the recruit training, Offutt sustained a heat stroke after participating in a two-mile running exercise directed by the LFUCG. Offutt suffered a permanent brain injury and numerous neurological impairments as a result of the heat stroke. She settled her claim, with the exception of an allegation that the employer intentionally violated KRS 338.031, its general statutory duty to furnish its employees with a place of employment free from recognized hazards that were causing or likely to cause death or serious physical

harm, such that she was entitled to a 15% increase in benefits pursuant to KRS 342.165. The ALJ awarded the 15% penalty. WCB and CA affirmed.

The ALJ relied on Nelson Tree Services, Inc. v. OSHA, 60 F.3d 1207 (6th Cir., 1995) as persuasive authority to determine whether there had been a violation of KRS 330.031. Nelson Tree set forth the required elements to establish a violation of a similar federal general duty clause:

- a. a condition or activity in the workplace presented a hazard to employees;
- b. the cited employer or employer's industry recognized the hazard;
- c. the hazard was likely to cause death or serious physical harm; and
- d. a feasible means existed to eliminate or materially reduce the hazard.

The first part of the test was met in that the running exercise in the heat conditions that existed was a hazard that directly caused physical evidence to Offutt. There is sufficient evidence in the record in the form of weather reports, safety guides, and medical testimony to support the finding that this hazard existed.

Substantial evidence of the second element existed because the testimony of each of the LFUCG training officers revealed that they were aware that high heat creates a potential for hazard to individuals engaged in physical activities. A safety newsletter had included an article on overexposure to summer heat, which explained heat stroke and how to prevent it, identify it, and treat it. The officers in charge had been trained on the dangers of exercising in heat.

LFUCG argued that the third element was not met because the hazard on that day was not found to be "likely" to

cause an injury. However, KRS 338.031 requires a workplace to be free from a hazard that "is causing" or is likely to cause death or serious physical harm. There is substantial evidence that this hazard did in fact cause Offutt's injury.

There was also substantial evidence to support the findings that part four of the test was met. While LFUCG argues that water was provided, in some form and availability, there was evidence that other means were available to the officers in charge to reduce the hazard, which included not requiring the recruits to exercise to the extent that they did at that particular time and at that temperature. The training materials and information available to the officers in charge made them aware of the danger, but they chose instead to conduct this running exercise under the rationale that police must be able to function in all conditions.

COMMENT: This case would expand the application of the 15% penalty against employers beyond the prior boundaries of Apex Mining v. Blankenship, Ky., 918 S.W.2d 225 (1996), and Cabinet for Workforce Development v. Cummins, Ky., 950 S.W.2d 834 (1997), which had appeared to limit the availability of the general duty clause to those claims involving a gross disregard of basic safety concepts that are apparent even to a lay man. If the court in Cummins had used the test in Nelson Tree, rather than the test in Apex Mining, the result may have been different.

REOPENING

Meade v. Reedy Coal Company,
Ky., 13 S.W.3d 619 (2000).

Dannie Meade injured his left knee in February of 1992 and his right knee in February of 1994. On December 21, 1995, he was awarded benefits for 50% PPD. On

January 30, 1997, he filed a motion to reopen alleging an increase in occupational disability. Reedy argued that reopening was prohibited by the December 12, 1996 amendment to KRS 342.125 because less than two years had passed since the award was entered. Arbitrator dismissed the claim. ALJ dismissed the claim on de novo review. WCB reversed. CA reversed and reinstated the ALJ's Order dismissing the reopening. SC reversed.

We conclude, therefore, that the exceptions to reopening established in KRS 342.125(1) and (3) permit the reopening of any claim, at any time, upon proof of the requisite facts. ***The two-year waiting periods and the four-year limitation contained in KRS 342.125(3) govern the reopening of claims in which an award is entered on or after December 12, 1996. The four-year limitation contained in KRS 342.125(8) governs the reopening of claims decided prior to December 12, 1996.***

COMMENT: The amendments to KRS 342.125, which become effective on July 15, 2000 entirely eliminate the two year waiting period following the finality of a settlement or award, and reduce the two-year waiting period following a prior motion to reopen to one year. The four-year limitation period remains in effect after July 15, 2000.

SETTLEMENT

Huff Contracting v. Sark,
Ky. App., 12 S.W.3d 704 (2000).

Jimmy Sark injured his knees at work on October 23, 1996. The parties agreed to settle the claim based upon 3% impairment to the body as a whole. On June 6, 1998, the claims adjuster sent a letter to Sark's attorney with the settlement agreement. The letter included this statement: "I did include all the future medical expenses since this is a subrogation claim, I

have to wrap up these expenses or we can't settle with the third party." The settlement agreement contained the following language:

A lump sum settlement of 3%, discounted at 6%. Total to be paid by employer is \$2,685.20. Employer has already paid medicals totaling \$10,868.53 and TTD 3-11/97 to 7-23-97 totaling \$4,034.05. **This settlement is inclusive of all attorney fees and also includes all future medical expenses beyond that already paid of \$10,868.53. The employee retains his right to pursue any third party action.** This agreement is full and final settlement for the injury arising on 10-23-96.

The agreement was signed by Sark, his attorney, and the claims adjuster, and was approved by an Arbitrator on July 1, 1998. The third-party claim was settled for \$52,000.00. According to Sark, Huff intervened, pursued its subrogation rights in the civil action, and recovered almost the entire amount of money paid out to Sark. On October 14, 1998, another Arbitrator denied a motion by Sark to set aside the settlement agreement or in the alternative to reopen his claim based upon mistake, fraud, and/or constructive fraud. The ALJ on de novo review dismissed the matter finding no evidence of mistake or fraud and further finding that Sark knowingly waived future medical benefits. WCB reversed. CA affirmed.

The determination as to whether there was consideration for the waiver of future medical benefits constitutes an issue of fact to be found by the ALJ. The record does not contain substantial evidence to support the ALJ's factual finding that consideration had been given for the waiver. If Huff had in fact given up a right to pursue a portion of its subrogation claim, then perhaps there would have been valid consideration. However, Sark specifically denies that Huff gave up its right to pursue the remainder of its subrogation claim.

COMMENT: The current Form 110 includes specific blanks for the parties to indicate whether there is a waiver of past and/or future medical benefits, and the consideration for that term of the agreement. In this case, that form was probably not used. The claim was settled for the present value of 3% impairment, and that was the only consideration that the evidence in the record established. This is a situation in which the claims adjuster should have consulted with legal counsel in the preparation of the agreement. If the agreement had stated that the employer did in fact waive part of its subrogation claim, then the waiver would apparently have been enforceable.

UTILIZATION REVIEW

E-town Quarry v. Goodman,
Ky. App., 12 S.W.3d 708 (2000).

In February of 1995, Gary Goodman's arm was crushed in a conveyor. He developed post-traumatic stress disorder and depression. He was awarded benefits for 100% disability. In May of 1997, E-town sought utilization review to assess the reasonableness and necessity of the continued psychiatric treatment by Dr. Shared Patel. On May 29, 1997, Dr. Daniel Wolens conducted a medical records review and concluded that since Goodman's psychological condition had not changed in a year, and he was no longer suicidal, the counseling sessions could be significantly reduced or eliminated with a lower level of care by a psychologist or social worker and only occasional visits to a psychiatrist for review of his drug treatment. In July, 1997, Dr. Brian Monsma, a clinical psychologist, interviewed Goodman and performed testing. He felt that Goodman's condition had been treated appropriately and was improving. He recommended a limited 3-month period of continued group therapy sessions with

appointments with a family physician to monitor his drugs.

Following the completion of UR, E-town refused to continue paying Dr. Patel. On January 5, 1998, E-town filed a motion to reopen to resolve a medical fee dispute. E-town filed a motion to require Goodman to complete or exhaust the UR process, but the motion was denied. The Arbitrator found that the treatment was compensable. On de novo review, the ALJ also found that the treatment was compensable. WCB and CA affirmed.

Exhaustion of the utilization review administrative procedure is not required in order to make medical costs compensable under the workers' compensation law. While the regulation requires that the employer provide a reconsideration process for appeal of an initial decision by a reviewer, there is nothing in the regulation mandating exhaustion or giving the opinion of a UR reviewer presumptive weight in a subsequent medical fee dispute for failing to seek reconsideration.

The utilization review process is designed to provide additional expert opinions on medical treatment rather than resolve disputes through an adjudicatory procedure. As such, applying a procedural bar for failure to complete the review process would be inappropriate.

COMMENT: The purpose of utilization review was to provide additional expert opinions on medical treatment. If that is the punchline, what was the joke? If that is the purpose of UR, then what is the purpose of the additional medical opinions? In the situation of a claim that has been resolved by an award or settlement, this decision reduced the entire UR process to virtually meaningless expense. Still, UR is required before the employer can file a motion to

reopen to resolve medical fee dispute concerning the reasonableness or necessity of medical treatment.

As with every other issue in the workers' compensation system, the bottom line is the ALJ. If the ALJ's demonstrate a general attitude of giving weight to the utilization review physician, then UR system can become a useful tool and a worthwhile expense. However, to date, in practice the opposite result appears to more often be the case.

TO BE PUBLISHED COURT OPINIONS FOR 2000

AIDS

Barren River District Health Dept. v. Hussey,

47 K.L.S. 4, p. 17 (4/14/00)

1998-WC-001387-WC

The primary issue addressed by the court was whether AIDS is an occupational disease or an injury. The Court of Appeals ruled that AIDS is an occupational disease.

There was also an issue as to which insurance carrier was on the risk for this employer. The evidence of whether and when the employee was exposed to AIDS at work was conflicting. The court relied upon evidence of the first evidence as to an alleged needle stick from an AIDS patient, which was in 1992, and the medical evidence that as of February of 1995 the patient had been infected with AIDS for at least two years, to identify the carrier on the risk.

COMMENT: This case has been appealed to the Kentucky Supreme Court.

APPEAL

Appalachian Steel Construction, Inc. v. Honaker,

___ K.L.S. ___, p. ___ (5/26/00)

1999-CA-002013-WC

Allen Honaker injured his low back at work on September 19, 1997. The Arbitrator found 19% impairment due to the back injury, but denied a claim for psychological impairment. Appalachian attempted to seek further review of the Arbitrator's decision by filing a document titled "Notice of Appeal" which stated:

"Comes now the Petitioner, Appalachian Steel Construction, Inc., by and through counsel, and files this **Notice of Appeal to the Kentucky Workers' Compensation Board** from the Opinion and Award by Hon. Bonnie Kittinger, dated March 26, 1999." In spite of the clear attempt to appeal to the Board, the matter was assigned to an ALJ. Honaker moved to dismiss the appeal on the grounds that the notice was not sufficient to seek a hearing before the ALJ. The ALJ sustained the motion and dismissed the appeal. WCB and CA affirmed.

The appellant recites many cases applying the doctrine of substantial compliance to the filing of a notice of appeal seeking review of a circuit court decision by the Court of Appeals. However, what characterizes each of those cases is some deficiency in the text of the filing which can be easily supplied by reference to the context of the litigation. When there are true omissions, as failure to name an indispensable party or unexplained failure to pay the filing fee, dismissal is required. The situation before us is closer to the facts of Beard v. Commonwealth, Ky., 891 S.W.2d 382 (1994), in which a party adversely affected by an appellate decision of the circuit court filed a notice of appeal to the Court of Appeals rather than filing a motion for discretionary review under CR 76.20. The Supreme Court affirmed dismissal of the attempted appeal on the ground that the court's jurisdiction had not been properly invoked. The Supreme Court specifically noted that the doctrine of substantial compliance applies only to non-jurisdictional defects.

Here, the appellant simply sought the wrong relief from the wrong tribunal. The decision of the Board dismissing the appeal is affirmed.

APPORTIONMENT

Whittaker v. Chaffin,

47 K.L.S. 2, p.21 (2/28/00)

1999-CA-000476-WC

On September 3, 1993, Jimmy Chaffin was robbed while working at Tina's Cross Road Market. He was attacked during the robbery and suffered severe stab wounds. While his physical injuries did not cause any permanent occupational disability, he did suffer a disabling psychological impairment as a result of post-traumatic stress disorder. Dr. Robert Granacher, a psychiatrist, also diagnosed a pre-existing personality disorder, found 8% impairment, and apportioned the cause of the impairment equally between the attack and the pre-existing personality disorder. ALJ apportioned all liability to the employer. WCB reversed. On remand, the ALJ apportioned the liability for PPD benefits 50/50 between the employer and Special Fund. WCB and CA affirmed.

The Special Fund argued that Dr. Granacher's medical opinion did not meet the standard set forth in Yocum v. Jackson, Ky. App., 554 S.W.2d 891 (1977). However, the court noted that Dr. Granacher's report specifically stated his medical opinion within reasonable medical probability that Chaffin's personality disorder was a departure from the normal state of health and was capable of being aroused by the ordinary stresses of life. Dr Granacher's medical opinion constitutes substantial evidence to support the ALJ's findings.

COMMENT: The Special Fund has appealed this case to the Kentucky Supreme Court.

DISCRIMINATION

Pike County Coal Corp. v. Ratliff,

Ky. App., 47 K.L.S. 3, p. 7 (3/10/00)

On January 1, 1991, Ratliff entered into a contract to haul coal for Pike. The contract provided that Ratliff would be responsible for obtaining various forms of insurance coverage. Ratliff's employees hauled coal under this contract for nearly two years until December 14, 1992, when the contract was terminated by Pike, allegedly for Ratliff's failure to provide proof that he had both workers' compensation coverage and liability coverage on his coal trucks.

On January 20, 1993, Ratliff filed a civil action against Pike in which he alleged that Pike terminated its contract with him because he refused to violate KRS 342.197, a statute which prohibits the threatened discharge and/or intimidation of an employee for asserting a claim for workers' compensation benefits.

The factual basis for Ratliff's claim involved Johnny Smith, one of Ratliff's employees who injured his back on March 31, 1992, and filed a workers' compensation claim against a subsidiary of Pike, and not his employer. Ratliff testified that Pike looked to him to get Pike dismissed as a party to that workers' compensation claim. Ratliff testified that he had no control over Smith's claim, and that despite the pressure from Pike he at no time attempted to coerce or harass Smith, because he knew it was wrong. However, in response to a request from Pike, Ratliff caused his attorney to provide Smith's attorney with the name of Ratliff's workers' compensation insurance carrier. The workers' compensation claim against Pike was eventually dismissed. Smith was eventually awarded benefits against Ratliff's carrier. Before Pike was dismissed from the workers' compensation claim, it terminated its contract with Ratliff.

The jury awarded Ratliff \$46,964.00, and the Pike Circuit Court awarded attorney fees of 32,745.00 based

upon Ratliff's claim that Pike violated KRS 342.197.
CA reversed.

We agree with Pike that KRS 342.197 has no application to the facts underpinning Ratliff's claim and conclude that the judgement must be reversed and this matter remanded for dismissal of the complaint. The statute's purpose and the Legislature's intent is to protect employees **from acts by their employers** intended to prevent such employees from exercising their rights under the Workers' Compensation Act. The Legislature's intent was to codify an exception to the terminable-at-will doctrine, not to benefit employers, or to subject a contracting party, who is not otherwise responsible for the payment of workers' compensation benefits, to claims of retaliation. There was no evidence from which the jury could reasonably infer that Pike asked Ratliff to harass or coerce Smith with the purpose of dropping his workers' compensation claim.

COMMENT: If you are an employer with an insurance policy, stay out of Pike Circuit Court. The Court of Appeals entered an Order on 5/19/00 denying rehearing.

Noel v. Elk Brand Manufacturing Co.,

47 K.I.S. 4, p. 6 (3/31/00)
1998-CA-2052-MR

Noel developed bilateral carpal tunnel syndrome. On January 15, 1996, she filed a workers' compensation claim. Following surgery, she returned to work on January 22, 1996. The hearing in her claim was held on July 3, 1996. Thirty days later, she, along with 29 other employees, was laid off. Twenty of the employees were to be off work for five days or less. The remaining employees were eligible for recall according to the company's need for their work in the order of their productivity. Noel had the lowest production average of all the seamstresses in the plant. Two of the nine were recalled within two months, but Noel did

not apply for reemployment. In January of 1997, she was awarded benefits for 50% PPD. She filed a civil action seeking damages for retaliatory discharge pursuant to KRS 342.197. Trigg Circuit Court granted the employer's motion for summary judgment. CA affirmed.

While Noes avers that Elk Brand retaliated by discharging her because she sought workers' compensation benefits, the circuit court correctly determined that the evidence of record, viewed in the light most favorable to Noel, does not support her claim.

COMMENT: Motion for discretionary review is pending before the Kentucky Supreme Court.

EXCLUSIVE REMEDY

Turner v. The Pendennis Club,
47 K.L.S. 5, p. 20 (5/12/00)
1999-CA-00425-MR

Turner worked as a dishwasher. In 1990, she injured her leg at work. She was unable to work for approximately six weeks, and then returned to work. She later resigned and filed a civil action based upon racial and gender discrimination. She further alleged in that civil action that the employer had violated the Workers' Compensation Act as to her injury. The employer's motion for summary judgment was granted on all counts. With respect to the workers' compensation issue, the court held that her claim was barred by the two-year statute of limitations regarding workers' compensation claims. CA affirmed.

The record shows that Turner has never filed a workers' compensation claim, nor has she previously sought compensation for her medical expenses. Turner states

that she notified her supervisor of her injury and that the Club failed to notify her of her rights or to fulfill any of its statutory duties. The Workers' Compensation Act is the exclusive remedy of an injured employee against an employer covered by the Act. Based upon the exclusivity of the Act, the court properly dismissed her claim since her remedy for any work-related injury comes solely within the purview of the Act. Her failure to seek compensation for her work-related injury pursuant to the Act cannot be salvaged in an improvidently asserted tort claim.

COMMENT: The trial court was wrong. The issue was not whether a civil action for workers' compensation benefits was barred by the two-year statute of limitations. In fact, if the employer did not file the proper forms with the DWC, the workers' compensation claim may not be barred, even today. As to exclusive remedy, there are discrimination issues under the Workers' Compensation Act that can be litigated in a civil action, but it did not appear from the court's summary of the plaintiff's allegations that there was any allegation of a violation of that part of the Act.

FALSE STATEMENT IN JOB APPLICATION

Gutermuth v. Excel,

___ K.L.S. ___, p. ___ (6/2/00)
1999-CA-002031-WC

Cheryl Gutermuth started working for Excel on July 8, 1996. As part of the hiring process, she completed a "medical history questionnaire" and underwent a physical examination on July 2, 1996. Gutermuth filed a claim for a September 4, 1997 injury to her neck, back and arms, when the cherry picker she was driving struck a hole in the floor. ALJ found that Gutermuth had knowingly and willfully made a false representation as to her physical condition on the medical history,

that the employer relied upon that false representation in the hiring process, and that there was a causal connection between the false representation and the injury. The claim was denied pursuant to KRS 342.165(2). WCB and CA affirmed.

In the medical history questionnaire, Gutermuth had indicated:

1. she denied having been off work due to a work injury when in fact, she had been off work for six upper extremity surgeries;
2. she denied ever having trouble with recurring back, knee or shoulder problems, but the record was replete with evidence that she has had prior neck, knee, and shoulder problems; 1992 diagnostic tests revealed hypertrophic degenerative disc disease of the cervical spine and a herniated disc in her neck; a course of cervical traction; a cervical MRI scan in 1996 which showed a herniated disc; and four days prior to completing the medical history questionnaire, treatment with a doctor for chronic musculoskeletal pains related to repetitive motion injury with cervical degenerative disc disease.

On appeal, Gutermuth contended:

- a. that a more accurate and complete medical history had been related to the doctor who performed the pre-employment physical examination, than was reflected on the written questionnaire;
- b. that the general manager had testified that if he had been aware of the prior physical complaints, he would still have hired her, but he would have required a medical clearance to perform the work before allowing her to work;

- c. that the university evaluator's opinion as to causation was entitled to presumptive weight;
- d. that the ALJ had misunderstood and made erroneous conclusions about the testimony of the employer representative;
- e. that there was no false representation because she told her prospective employer she had surgery to her hands;

There was no evidence in the record so overwhelming to compel a finding contrary to the ALJ's.

MINORS

Roberts v. George W. Hill & Co.,

47 K.L.S. 4, p. 43 (4/20/00)

1998-SC-0937-TG

Michael Chad Roberts, age 15, injured his hand on October 9, 1997 while working for Hill. Two months after the injury, he completed and forwarded to the employer a notice of rejection of the Act. He then filed a civil action against Hill in Boone Circuit Court. The trial judge sustained Hill's motion for summary judgment on the grounds of the exclusive remedy provisions of the Act. CA affirmed.

Roberts argued that his employment was illegal because minors are forbidden by law to operate dangerous machinery. KRS 342.650 provides that every person, including a minor, whether lawfully or unlawfully employed, is subject to the provisions of Chapter 342.

Roberts' second argument was that KRS 342.210 provides that no time limitation shall run against a minor, and that this prohibition applies to the time requirement that the notice of rejection of the Act be filed prior to the date of the injury. The Court first noted that this statute applies only to minors who have no

committee, guardian, next friend, or other person authorized to claim compensation for him. Here, Roberts had brought the civil action through his parents acting as his next friends. Additionally, we note that KRS 342.210 refers to the filing of claims, not to the filing of a notice of rejection of workers' compensation coverage. Therefore, it does not apply to the timing of an election permitted by KRS 342.650(6).

Roberts argued that KRS 342.395 is unconstitutional when applied to a minor because it is a denial of rights ensured under the jural rights doctrine. Because implied consent hangs on one's action, in this case one's acceptance of employment, rather than on the failure to reject, the parent's act of causing or permitting a child to participate in the action covered by the statute subjects the child to the limitations imposed by the law.

Roberts finally argued that workers' compensation benefits are so negligible as to render it a violation of jural rights. The court noted that the trade-off of workers' compensation benefits for a civil action included medical benefits, and was not negligible, while a recovery in a civil action is always speculative.

COMMENT: A petition for rehearing is currently pending.

PENALTY FOR SAFETY VIOLATION

Brusman v. Newport Steel Corporation,

47 K.L.S. 5, p. 22 (5/18/00)

1999-SC-0430-WC

Brusman was employed as a switchperson on a railway within the employer's facility. Her duties involved moving along the railway line with the train and

throwing the switches necessary to route the train to its destination. On February 28, 1997, Brusman was riding on a personnel ladder attached to the side of the first of three rail cars which was being pushed by an engine on the main railway line. Another car, which had been designated to be scrapped or repaired because its sides were bowed out approximately two feet, was parked on an adjoining spur line near the point where it joined the main line. When the car on which Brusman was riding passed the pinch point, the clearance between the train and the damaged car was only five inches. As a result, Brusman was caught between the two cars and crushed to death.

There is no specific statute or regulation pertaining to in-plant railways. A KOSH inspector investigated the accident, and issued a citation for a serious violation of KRS 338.031(1)(a), the "general duty" provision. The citation recited that transportation employees were not trained in common railway safety procedures and listed several specific examples, including the failure to instruct workers in the recognition and avoidance of unsafe conditions in their work environment. The KOSH citation was contested and settled with no admission of violation. The ALJ awarded the 15% penalty pursuant to KRS 342.167. WCB affirmed. CA reversed. SC reversed.

The ALJ's finding was supported by evidence that (1) an obvious hazard was created by the presence of the railroad cars with bowed sides; (2) complaints about such cars had been raised at a safety meeting a month before the accident; and (3) workers' routinely rode railway cars, including the lead car, without punishment. Although the evidence in this case was not as egregious as in Apex Mining v. Blankenship, Ky., 918 S.W.2d 225 (1996), it was substantial and sufficient to support the ALJ's award of a 15% penalty. The fact that the employer settled the KOSH citation without admitting a violation is immaterial. In the context of a workers' compensation claim, it is the responsibility

of the ALJ to determine whether a violation of a statute or administrative regulation has occurred.

COMMENT: Here, the Court resolved the issue based upon an analysis of its prior decisions in Apex Mining v. Blankenship and Cabinet for Workforce Development v. Cumins, Ky., 950 S.W.2d 834 (1997), rather than upon an analysis of the four-pronged test of Nelson Tree Services, Inc. v. OSHA, 60 F.3d 1207 (6th Cir., 1995), which was used by the Court of Appeals in resolving Lexington-Fayette Urban County Government v. Offutt, 1998-CA-001430-WC. Under the test in Nelson Tree, the 15% penalty would likely have been awarded, as this is a less burdensome test for a plaintiff to meet, since there is no requirement of establishing that the safety violation was "patently obvious to a layperson" as required by Apex Mining.

PERSONAL COMFORT DOCTRINE

Meredith v. Jefferson County Property Valuation Administrator,

47 K.L.S. 5, p. 35 (5/18/00)
1999-SC-0592-WC

Meredith served as a field representative. His primary duties were to travel to various local banks to inventory the contents of safe deposit boxes in conjunction with the administration of estates, and to release assets held by the bank. He reported to his office at the beginning of each workday, obtained a list of appointments for the day from his supervisor, and then met throughout the day with various administrators, executors, and attorneys at various banks and conducted the inventories. His work hours were from 8:00 to 4:30 and he was free to take breaks between appointments. On the morning of October 28, 1998, Meredith reported to the PVA's office shortly before 8:00, received a list of appointments, and

traveled to his first appointment, which was scheduled at a bank at 9:00. He arrived at the bank between 8:30 and 9:00. The bank did not open until 9:00, and he could not get the attention of a bank employee to let him inside the bank. He then drove to a fast-food restaurant 5 to 10 minutes away for a cup of coffee. He slipped and fell while inside the restaurant. ALJ denied the claim. WCB and CA affirmed. SC reversed.

As a rule, a deviation from a business trip for personal reasons takes the worker out of the course of the employment unless the deviation is so small that it may be disregarded as insubstantial. For that reason, an injury sustained during a personal mission generally is viewed as having occurred outside the course of the employment; however, under certain circumstances, an injury resulting from acts by a worker which minister to his personal comfort while at work may be considered related to work pursuant to the doctrine of comfort and convenience. Pursuant to this doctrine, some workers are deemed not to have left the course of their employment while ministering to personal needs, provided that the departure from the employment is not so great that an intent to abandon the job temporarily may be inferred or that the manner of the departure is not so unreasonable that it cannot be considered an incident of the employment.

Although workplace injuries which occur shortly before or after the usual working hours generally are considered to have occurred in the course of employment, the course of employment is considered to be suspended if a worker, having arrived early, takes a coffee break before beginning work. Larson indicates, however, that during **an enforced hiatus in work**, a certain amount of wandering around and even undertaking what otherwise might seem to be distinctly personal activities has been permitted in a number of jurisdictions unless there was evidence that the

worker's duties required him to remain in a particular place.

We agree that it is not unreasonable to place some limit on the distance a worker may travel in pursuit of personal comfort and still be viewed as working, particularly in those instances where the accident occurs while the worker is traveling. In the instant case, the accident could just as easily have occurred had the restaurant been located next door to the bank or in the same building. For that reason, although distance may be a significant factor in deciding other claims, we are not persuaded that the distance between the bank and the restaurant should be dispositive on these particular facts.

The nature of Meredith's work included periods of enforced hiatus. There was no evidence that his employer restricted his activities during such periods or that he was prohibited from taking a coffee break if there was time to spare between appointments. Finally, the type of activity in which he was engaged when he was injured was not so unreasonable that it must be viewed as a departure from his duties. Under those circumstances, we are persuaded that Meredith's injuries should be viewed as arising out of and in the course of his employment and, therefore, to be compensable.

PETITION FOR RECONSIDERATION

Halls Hardwood Floor Co. v. Stapleton,

47 K.L.S. 4, p. 11 (4/7/00)

1999CA-001333-WC

Charles Stapleton was injured in August of 1997. He was awarded income benefits based upon 7% impairment with the 1.5 multiplier for loss of physical capacity to return to the type of work he performed at the time

of the injury. Halls argued on appeal to the Board that the ALJ did not properly calculate the PPD benefits, because the Judge based the calculation of PPD benefits on the average weekly wage multiplied by 66 2/3% and then reduced to the statutory maximum for total disability, rather than to the statutory maximum for partial disability. WCB affirmed. CA affirmed.

This issue was not properly preserved for appeal because Halls did not file a petition for reconsideration with the ALJ. KRS 342.281 was amended effective December 12, 1996 to delete the provision that the failure to file a petition for reconsideration shall not preclude an appeal on any issue. The issue of the effect of the 1996 version of KRS 342.281 is apparently one of first impression. It is clear that the General Assembly intended to reinstate the requirement in Eaton Axle v. Nally, Ky., 688 S.W.2d 334 (1985) that a petition for reconsideration be filed in order to preserve an issue for appellate review.

COMMENT: This decision was not appealed to the Kentucky Supreme Court, and became final on 5/17/00.

The rule in Eaton Axle was not that a petition for reconsideration must be filed in every claim to preserve every issue for appellate review. Rather, the requirement was directed only at **issues of fact, not issues of law**. The Supreme Court in Eaton Axle was reacting to the multitude of cases that were appealed on issues of fact, and which then had to be remanded to the ALJ for additional or corrected findings of fact. It is only those types of fact issues that the Supreme Court intended to be subject to a petition for reconsideration. To require a petition for reconsideration on issues of law would be an absurdity, since the ALJ is precluded from making a different ruling on the merits of the claim when ruling on a petition for reconsideration.

REOPENING - PNEUMOCONIOSIS

Whittaker v. Hurst,

47 K.L.S. 4, p. 14 (4/7/00)

1999-CA-000414-WC

Jack Hurst was last exposed to coal dust on February 16, 1994. He filed a black lung claim on February 23, 1994. He settled with the Special Fund based upon Tier II benefits for \$282.35 per week for 318.75 weeks. The settlement was approved on October 20, 1994. Hurst moved to reopen his settlement against the Special Fund based upon a worsening of his pulmonary impairment. The ALJ dismissed the motion to reopen on the grounds that KRS 342.125(2)(a) requires evidence of both a progression of pneumoconiosis on x-ray and increased respiratory impairment. WCB reversed. CA affirmed.

The statute does not require evidence of progression of the disease to reopen a Tier II award.

COMMENT: This case has been appealed to the Kentucky Supreme Court.

RETIREMENT BENEFITS

Rue v. Kentucky Retirement Systems,

47 K.L.S. 5, p. 19 (5/12/00)

1999-CA-001071-MR

Rue was unable to return to work after sustaining a back injury in the course of his employment as a mechanic with the Kentucky State Police. RRS 61.607 provides that the maximum disability retirement benefit shall be determined by a formula that adds the monthly benefit from the retirement plan with any amount received from Social Security and any monthly benefit

received from workers' compensation. Rue argued that the formula should not use the gross amount of his workers' compensation award, but rather the net amount he actually receives after the reduction to recover his attorney fee. Kentucky Retirement Systems calculated the amount of retirement benefits by using the gross award of workers' compensation benefits. CA affirmed.

The plain language of the statute dictates that the combined monthly benefit is to be determined using the basic disability allowance, not the amount the employee receives if he selects any of the various optional plans available to him. If the General Assembly intended to reduce the amount of the workers' compensation award by applicable attorney's fees, the wording of the statute would have reflected that intent. Kentucky is not one of the several states that treat attorney's fees as an "add-on" or double benefit that the employer must pay in addition to the compensation award itself. Furthermore, in a similar vein, we are convinced that it cannot be legitimately argued that because a paycheck is reduced by voluntary deductions for insurance, car payments, deferred compensation and the like the amount of take-home pay presents the true amount of one's compensation. We view Rue's suggested methodology for computing the amount of his workers' compensation award to I much the same light.

RETRAINING INCENTIVE BENEFIT

Whitaker Coal Company v. Melton,

47 K.L.S. 5, p. 1 (4/21/00)

1998-CA-002861-WC

Melton was last injuriously⁷ exposed to coal dust on March 30, 1995, and filed a RIB claim on February 10, 1997. He was first diagnosed with the disease in

November of 1996, and gave notice to the employer two weeks later. ALJ awarded RIB. WCB and CA affirmed.

Whitaker contends that enrollment in a retraining program is a prerequisite to receiving RIB, on the grounds that the 1996 amendments to KRS 342.732 were remedial and retroactive. In our opinion, the 1996 amendment to KRS 342.732, unlike the 1994 amendment, affects vested rights of claimants and cannot therefore be applied retrospectively without a specific expression by the Legislature of its intent for the provision to be so applied.

Whitaker further argued pursuant to Newberg v. Slone, Ky., 84 S.W.2d 694 (1992) that Melton failed to give due and timely notice of this claim. In Slone, the notice was not given until six months after the diagnosis. In the instant claim, notice was given within two weeks of the diagnosis, and there is no evidence that Melton had experienced a distinct manifestation of the disease in the form of symptoms reasonably sufficient to apprise him that he had the disease.

Golden Oak Mining Company v. Kentucky Coal Workers' Pneumoconiosis Fund,

47 K.L.S. 5, p. 30 (5/18/00)
1999-SC-0638-WC

Claimant was last exposed to coal dust on December 26, 1996. On January 14, 1997, he enrolled in a program of study at a diesel college. On February 7, 1997, he filed a claim for RIB. Dr. Myers and Zadeh found category 1.0 cwp. Dr. Zadeh reported an FVC of 75% of predicted and an FEV-1 of 57% of predicted. The employer's expert, Dr. Westerfield, found category 1/1 cwp. Dr. Joyce, the university evaluator found 0/0 cwp. The employer and claimant settled the RIB claim for a lump sum payment of \$6,500.00. The employer requested participation of the KCWPF, but the Director

denied the request. The employer appealed the denial to an ALJ, who ordered the KCWPF to reimburse the employer for one-half of the settlement. WCB reversed. CA and SC affirmed.

Although an approved settlement agreement is binding upon the parties, the KCWPF may not be required to participate in a settled RIB claim unless there is prima facie medical evidence of record which would authorize a RIB award. 803 KAR 25:010 Section 29(1)(c) requires the employer to certify that a worker receiving a RIB meets the relevant statutory criteria and makes no exception for those RIB claims that are settled. We conclude, therefore, that the KCWPF may not be required to participate in a settled RIB claim unless the employer so certifies. In this claim, the employer failed to provide the required certification. Because this was a case of first impression, and because the parties and the ALJ were unclear about precisely what was required, the case was remanded to the ALJ to allow the employer an opportunity upon remand to provide that certification.

SURVIVOR'S BENEFITS

Brusman v. Newport Steel Corporation,
47 K.L.S. 5, p. 22 (5/18/00)
1999-SC-0430-WC

Donna Sue Brusman was fatally injured on February 28, 1997. She was survived by her husband, Robert, and two children. Donna and Robert were separated, and a divorce action had been filed and was pending at the time of her death. ALJ awarded death benefits to the children, but not to the husband on the grounds that he was neither actually nor presumptively dependent upon Donna at the time of her death. WCB reversed with respect to the denial of benefits to Robert. CA reversed. SC reversed.

Three things are apparent from the language of KRS 342.750 and KRS 342.730(3):

- (1) With respect to widows, widowers and children, the statutory schemes are virtually identical, except that the benefits are greater if the employee's death was work-related;
- (2) Whereas former versions of KRS 342.750 had required a widow, widower or child to be actually dependent in order to be entitled to death benefits, the present statutes contain no such requirement; and
- (3) Whereas KRS 342.075(1)(b) presumes that a child is wholly dependent only up to age sixteen, a child is entitled to benefits under KRS 342.750 and KRS 342.730(3) up to age eighteen regardless of dependency.

The Supreme Court overruled White v. Stewart's Dry Goods Company, Ky., 531 S.W.2d 504 (1975), and reaffirmed Palmore v. Jones, Ky., 774 S.W.2d 434 (1989).

TEMPORARY TOTAL DISABILITY

Halls Hardwood Floor Co. v. Stapleton,
47 K.L.S. 4, p. 11 (4/7/00)
1999CA-001333-WC

Stapleton injured his knee in August of 1997. He did not return to work until January of 1998. After he returned to work, he was still experiencing pain in his knee and was unable to perform all of his previous duties (i.e. installing, sanding, coating and refinishing hardwood floors). In March of 1998, Stapleton advised Halls that he was unable to perform his duties without assistance and he left Hall's employ. On August 30, 1997, Dr. Richard Hoblitzell, the

treating physician, released Stapleton to return to work at his regular hours at modified duty, which provided that he did not lift more than ten pounds, did not kneel, did not bend or squat, and did not climb stairs. Hall testified that he did not have any light duty jobs available for Stapleton. Dr. Hoblitzell released him to return to work with no restrictions on December 26, 1997.

ALJ awarded TTD benefits for the period from the date of injury in August of 1997 through December 27, 1997. WCB and CA affirmed.

Temporary total disability is statutorily defined as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment. It is clear that one would have to kneel, squat, and bend over in order to perform the type of work in which Stapleton has engaged. Stapleton's adult work history was in manual labor jobs, meaning that it would have been very difficult for him to return to any type of gainful employment on August 30, 1997. Finally, the ALJ had the right to reject Dr. Hoblitzell's opinion as to when Stapleton was able to return to work. In short, the ALJ's decision is supported by substantial evidence and must be affirmed.

COMMENT: COMMENT: This decision was not appealed to the Kentucky Supreme Court, and became final on 5/17/00.

This case should have been appealed to the Kentucky Supreme Court, as these issues need to be addressed in a more comprehensive manner than occurred in this decision. Further, the Supreme Court issued an unpublished opinion on December 16, 1999 in Leach v. James River Corporation, 99-SC-0248-WC, which is arguably at odds with the Court of Appeals decision in

Stapleton. The definition of TTD does not include a consideration of whether the employer cannot or does not accommodate modified duty restrictions.

The court in Stapleton curiously did not identify exactly what other evidence in the record constituted substantial evidence that the claimant was temporarily totally disabled during the contested period. If the medical opinion of Dr. Hoblitzell was uncontradicted that Stapleton was physically able to return to work with restrictions, then the court was correct that the ALJ could reject that evidence, but the ALJ would have to provide a reasonable explanation for rejecting that uncontradicted opinion. The court did not identify any conflicting medical opinion in that regard, and did not identify any reasonable explanation that may have been made by the ALJ for rejecting uncontradicted medical evidence. Further, there was no discussion of Stapleton's level of education or vocational skills, and whether those factors were considered by the Court in making its decision that he was totally unable to work. The Court seems to equate "**very difficult for him to return to work**" with TTD, and that is not in accordance with the statute. If the only evidence in the record was that the employee was physically capable of returning to employment during the contested period, then the statute provides that he is not entitled to TTD benefits.

TERMINATION OF INCOME BENEFITS

McDowell v. Jackson Energy RECC,

K.L.S. (2/25/00)

1999-CA-001086-WC

McDowell was sixty years of age at the time she became totally disabled as a result of bilateral carpal tunnel syndrome in May of 1997. ALJ awarded income benefits of \$387.31 per week beginning on May 30, 1997 and

terminating on December 18, 2001, her 65th birthday, pursuant to KRS 342.730(4) as amended effective December 12, 1996. McDowell argued that the 1996 amendment was unconstitutional. CA ruled that the statute could be construed to be constitutional.

We hold that in its most recent passage of KRS 342.730(4), the Legislature intended the statute to mean "that all income benefits payable ... shall terminate as of the date upon which the employee qualifies for, [**and to the extent she is entitled to receive**] normal old-age Social Security retirement benefits ... " Our interpretation that **workers' compensation benefits** under this statute **are set-off, dollar-for-dollar, by the amount of old-age Social Security benefits to which the claimant is entitled**, is consistent with both purposes of the statute, this is, avoiding duplication of benefits and lowering insurance premiums. At the same time, this interpretation insures that no injured worker, regardless of her age, is deprived of receiving an amount that equals the higher of her workers' compensation benefits attributable to a work-related injury or her old-age Social Security retirement benefits.

COMMENT: This case has been appealed to the Kentucky Supreme Court.

UNIVERSITY EVALUATOR

Magic Coal Company v. Fox,
47 K.L.S. 5, p. 32 (5/18/00)
1999-SC-0163-WC

These workers' compensation claims concern the portion of KRS 342.315(2) which became effective December 12, 1996, and which states that the findings and opinions of designated university medical evaluators "shall be afforded presumptive weight". At issue is whether the

amendment governs claims which arose before its effective date, and what type of evidence is necessary to overcome presumptive weight.

We view KRS 342.0015 as expressing a clear legislative intent for KRS 342.315 and KRS 342.316(3)(b)4.b to apply to all claims pending before an arbitrator or ALJ on or after December 12, 1996.

The term "presumptive weight" is one which the parties concede is not found in prior Kentucky law and one which is not defined in Chapter 342. KRS 342.315(2) does not evince a legislative intent for the clinical findings and opinions of a university evaluator to be conclusive. It anticipates that the opponent of a university evaluator's report may introduce countervailing evidence which will overcome the report; furthermore, KRS 342.315(2) does not prohibit the fact-finder from rejecting a finding or opinion of a university evaluator but requires only that the reasons for doing so must be specifically stated. In the absence of a definition of the term "presumptive weight", either by prior judicial decision or by statute, we conclude that the legislature intended to create a rebuttable presumption.

Unless evidence is introduced which rebuts the clinical findings and opinions of the university evaluator, they may not be disregarded by the fact-finder. To the extent that the university evaluator's testimony favors a particular party, it shifts to the opponent the burden of going forward with evidence which rebuts the testimony. If the opponent fails to do so, the party whom the testimony favors is entitled to prevail by operation of the presumption. Stated otherwise, the clinical findings and opinions of the university evaluator constitute substantial evidence with regard to medical questions which, if uncontradicted, may not be disregarded by the fact-finder.

COMMENT: As a practical matter, unless the medical evidence is uncontradicted, the university evaluator's opinions just became "other evidence" for the ALJ to consider. Of course, if the ALJ's as a whole show a tendency that they will choose to give more weight to the university evaluator's opinion, then university evaluator program will become much more significant. Whether to request a university evaluation in an injury claim is a point of crucial litigation strategy for plaintiff's and employers.