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Kentucky Law Survey: Workers' Compensation

Norman E. Harned
Cole, Harned & Broderick

Scott A. Bachert
Cole, Harned & Broderick

Workers' Compensation

BY NORMAN E. HARNED* AND SCOTT A. BACHERT**

INTRODUCTION

Historically, the most troublesome aspects of the Kentucky Workers' Compensation Act[1] (Act) have been the questions of disability and apportionment of liability. This Survey[2] examines recent court decisions that deal with these concepts, as well as decisions clarifying or confusing the Act's substantive and procedural aspects.[3]

I. DISABILITY

After the Act was amended in 1980, many practitioners throughout Kentucky understood[4] Kentucky Revised Statutes

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* Partner in the firm of Cole, Harned & Broderick, Bowling Green, Kentucky. L.L.B., 1965, University of Kentucky.

** Associate in the firm of Cole, Harned & Broderick, Bowling Green, Kentucky. J.D., 1982, University of Kentucky.

[1] KY. REV. STAT. ANN. §§ 342.012-.990 (Bobbs-Merrill 1983 & Cum. Supp. 1984) [hereinafter cited as KRS].

[2] The survey period runs from July 1, 1983 to July 1, 1985. For a discussion of court decisions rendered during the preceding survey period, see Harned, *Kentucky Law Survey—Workers' Compensation*, 72 KY. L.J. 479 (1983-84).

[3] A number of court decisions, published and unpublished, have been omitted from discussion in the text of this Survey. Many of these cases reiterate established principles; others are of lesser importance and had to be excluded. For example, Stovall v. Williams, 675 S.W.2d 6 (Ky. Ct. App. 1984), which held that an award of total and permanent disability for so long as claimant shall live will continue for the employee's physical life and not occupational life as actuarially calculated; Armco, Inc. v. Felty, 683 S.W.2d 641 (Ky. Ct. App. 1985), which held that the notice requirement of KRS § 342.186, now repealed, did not apply to occupational disease cases under KRS § 342.316; and Boothe v. Special Fund, 668 S.W.2d 66 (Ky. Ct. App. 1984), wherein the court of appeals held that the repeal of KRS § 342.180 took effect immediately so that any existing and unfiled claims were barred thirty days after the date of the statute's repeal.

[4] *See generally* Harned, *supra* note 2.

(KRS) section 342.730(1)(b), as amended,[5] to provide a claimant who had sustained a work-related injury the greater of his occupational disability or medical functional impairment as measured by the American Medical Association (AMA) Guides to Evaluation of Permanent Impairment (AMA Guides).[6] Practitioners believed that the amendments allowed an employee to recover income benefits for a work-related injury that left him with a physical disability, even if the Board later determined that he was not occupationally disabled.

Nevertheless, the Kentucky Supreme Court, in *Cook v. Paducah Recapping Service*,[7] interpreted KRS section 342.730 to impose a finding of occupational disability as a threshold requirement for recovery. The Court stated:

> We construe K.R.S. 342.730(1)(b) to mean that when the claimant has some degree of disability as defined under K.R.S. 342.620(11) [sic], *viz.*, decrease of wage earning capacity or loss of ability to compete due to his injury, then and only then is he entitled to the greater of his bodily function impairment under the guidelines or his percentage of disability under K.R.S. 342.620(11) [sic].[8]

The Court emphasized the use of the word "disability" in the introductory phrases of KRS section 342.730(1)(b) and gave it meaning as it is defined in KRS section 342.620(2).[9] This is,

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[5] KRS § 342.730(1)(b) (Bobbs-Merrill 1983) provides in part:
For permanent, partial disability, sixty-six and two-thirds [percent] (66 2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by his percentage of disability caused by the injury or occupational disease as determined by "guides to the evaluation of permanent impairment," American medical association, 1977 edition, or by his percentage of disability as determined under KRS 342.620(11), whichever is greater, for a maximum period, from the date the disability arises, of four hundred twenty-five (425) weeks.

[6] THE AMERICAN MEDICAL ASS'N COMMITTEE ON RATING OF MENTAL AND PHYSICAL IMPAIRMENT, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (2d ed. 1977).

[7] No. 84-SC-1031-TRG (Ky. May 23), *reh'g denied,* (Ky. Sept. 5, 1985).

[8] *Id.*, slip op. at 7. Except for the quotation above, the Court otherwise correctly cited KRS § 342.620(12) (Cum. Supp. 1984) as the section defining "disability." KRS § 342.620(11) was the applicable provision prior to a 1984 amendment.

[9] KRS § 342.620(2): "Disability" means a decrease of wage earning capacity due to injury or loss of ability to compete to obtain the kind of work the employee is

of course, a strict interpretation of the statute, but not one without precedent. For instance, in *Couliette v. International Harvester Co.*,[10] the applicable statutory language entitled a claimant to benefits for "lost wages due to his injury, or bodily functions disability benefits, whichever is greater."[11] The claimant argued that "disability," as used in the statute, includes functional as well as occupational disability.[12] The Court disagreed, stating: "The answer, we think, lies in the word 'benefits.' Bodily functional *disability* is not one and the same as bodily functional disability *benefits*. The latter term, used in the statute, can mean nothing other than 'benefits allowable by reason of bodily functional disability' vis-a-vis lost wages."[13] The Court concluded that there was nothing in the statute to modify its holding in *Osborne v. Johnson*,[14] "that 'disability' means occupational as distinguished from purely functional impairment."[15]

The effect of *Cook* may well be to deny compensation benefits to a number of injured workers. It is not unusual for a worker who has suffered physical impairment measurable under the AMA Guides to return to his normal employment without occupational restrictions. These workers will be denied an award absent a showing of occupational disability.[16] Consequently, if legislative intent is to award a claimant income benefits based upon the percentage of bodily impairment as measured under the AMA Guides, then the legislature should amend KRS section 342.730(1)(b), substituting the term "impairment" for the word "disability."

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customarily able to do, in the area where he lives, taking into consideration his age, occupation, education, effect upon employee's general health of continuing in the kind of work he is customarily able to do, and impairment or disfigurement.

[10] 545 S.W.2d 936 (Ky. 1976).

[11] KRS § 342.620(9) as enacted in 1972. Similar language was also included in KRS § 342.730, prior to its amendment.

[12] *See* 545 S.W.2d at 938.

[13] *Id.*

[14] 432 S.W.2d 800 (Ky. 1968).

[15] 545 S.W.2d at 937.

[16] An interpretation of the statute that would deny the claimant at least a functional impairment will discourage many attorneys from accepting cases that involve otherwise minor injuries. Without some guarantee of a recovery, not only of income benefits, but also of attorney's fees, there may be many cases that will go unfiled.

In *Stovall v. Stumbo*,[17] a case of first impression, the court of appeals ruled that an employee cannot be found to have suffered total and permanent injury resulting from the same cause on two separate occasions. In *Stovall*, an employee was found to have been totally disabled as a result of pneumoconiosis in 1973. Four years later, the worker returned to work with a different employer, subsequently filed another case, and was again found to be totally disabled by reason of pneumoconiosis.[18]

The court of appeals reversed the findings of the Worker's Compensation Board (Board) because the Board failed to take into consideration KRS section 342.730(3),[19] which requires reduction of an award "on account of a prior injury if income benefits in both cases are for disability of the same member or function. . . ."[20] There was no evidence that the employee had recovered from the prior disability.[21]

An employee is possibly subject to a second reduction under KRS section 342.120(5), which may permit reduction of an award to the extent of the employee's prior active disability.[22] Consequently, if the employee in *Stovall* had not recovered from the disability that resulted from prior injury, the employee would have had to overcome section 342.730 and section 342.120. There has been no indication, however, as to how these statutes would work together.[23]

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[17] 676 S.W.2d 468 (Ky. Ct. App. 1984).

[18] *Id.* at 469.

[19] KRS § 342.730(3), effective from January 1, 1973, through July 15, 1982, provided:

> The period of any income benefits payable under this section on account of any injury shall be reduced by the period of income benefits paid or payable under this Chapter on account of a prior injury if income benefits in both cases are for disability of the same member or function or different part of the same member of [sic] function, and the income benefits payable on account of the subsequent disability in whole or in part would duplicate the income benefits payable on account of the pre-existing disability.

See 676 S.W.2d at 469. Nearly identical language now appears in KRS § 342.730(2).

[20] 676 S.W.2d at 469.

[21] *Id.* The court noted that the doctors' depositions indicated that the disease is progressive and results from long-term exposure to coal dust. Further, the plaintiff himself stated that he had suffered for six or seven years without any recovery.

[22] *See* KRS § 342.120(5) (Cum. Supp. 1984).

[23] There is some question whether KRS § 342.120 excludes prior active conditions

In Eaton Axle Corp. v. Nally,[24] the Kentucky Supreme Court discussed the proof necessary to prove a "disability." In *Eaton Axle Corp.* the Board found that the employee was one hundred percent occupationally disabled,[25] but the court of appeals reversed, finding that the evidence supported only a partial disability. The court based its decision on the employee's testimony that he was a self-trained welder, and that he had available to him this form of employment. The court apparently dismissed, however, the medical evidence indicating that the employee could not lift over twenty pounds, and the employee's own testimony that welding requires the ability to lift. The Kentucky Supreme Court, upon motion of both the claimant and the employer, granted discretionary review.[26]

The Kentucky Supreme Court, relying on *Caudill v. Maloney's Discount Store*,[27] reversed, ruling that the employee's testimony did not compel a finding of partial disability.[28] The Court further stated that testimony by occupational experts that there might be certain jobs available to the employee, even with his restrictions, "is not such evidence as *compels* any specific findings by the Workers' Compensation Board, which body is the fact finder, with the right to 'believe part of the evidence and disbelieve other parts of the evidence.' "[29]

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from an employee's award. The answer will turn upon the interpretation of the language "resulting condition" as found in KRS § 342.120(5). If this phrase refers only to disability caused by the second injury, as opposed to the previous conditions as well, then the Special Fund may not be liable to the employee for the prior active disability. The Board and courts, however, have continued to carve out an award of prior active disability. The question of the meaning of this amendment apparently has not been presented to the courts.

[24] 688 S.W.2d 334 (Ky. 1985).

[25] *Id.* at 336. The Board assessed 50% compensation against the employer and 50% against the Special Fund, as provided for in KRS § 342.120.

[26] 688 S.W.2d at 336.

[27] 560 S.W.2d 15 (Ky. 1977). The Court in *Caudill* stated:

> We conclude that Caudill's own testimony, education, work experience and physical condition, together with the medical evidence introduced by her, established an evidentiary foundation sufficient to support, but not to compel, a finding by the Board that she was incapable of performing any kind of work of regular employment and, therefore, was totally disabled under the *Osborne v. Johnson* formula.

Id. at 16.

[28] *See* 688 S.W.2d at 337.

[29] *Id.* (quoting 560 S.W.2d at 16).

As to the definition of disability, the Court stated that KRS section 342.620(11) did not alter the concept of disability as set forth in *Osborne v. Johnson*.[30] Although the statutory definition of disability, "work the employee is customarily able to do,"[31] is different from the language of *Osborne*, which speaks of "the work the man is capable of performing,"[32] the Court ruled that these standards are essentially the same.[33] The Court, in making this determination, referred to *Couliette v. International Harvester Co.*,[34] the same case that it relied upon in *Cook v. Paducah Racapping Service*.[35]

II. APPORTIONMENT OF LIABILITY

In the last survey of workers' compensation law, the author noted that the court of appeals, in at least one opinion,[36] continued to confuse the concepts of apportionment and liability.[37] The Supreme Court's decision in *Stovall v. Dal-Camp, Inc.*,[38] however, should dispel this confusion and clarify that when medical evidence establishes a "work-related exertion would have produced no disability had it not been for an underlying nondisabling condition,"[39] the entire liability should be apportioned to the Special Fund.

In *Stovall*, the medical evidence established that the employees[40] would not have suffered heart attacks while performing work-related activities had they not suffered from arteriosclerotic heart disease.[41] Although neither the arteriosclerotic

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[30] 432 S.W.2d 800 (Ky. 1968). *See* 688 S.W.2d at 337 ("[T]he statute is a mere codification of *Osborne*. . . .").

[31] KRS § 342.620(12).

[32] 432 S.W.2d at 803.

[33] 688 S.W.2d at 337.

[34] 545 S.W.2d 936 (Ky. 1976).

[35] No. 84-SC-1031-TRG (Ky. May 23), *reh'g denied*, (Ky. Sept. 5, 1985).

[36] Wells v. Collins, 30 KY. L. SUMM. 6, at 3 (Ky. Ct. App. May 12, 1983) [hereinafter cited as KLS].

[37] *See* Harned, *supra* note 2, at 488.

[38] 669 S.W.2d 531 (Ky. 1984).

[39] *Id.* at 536.

[40] *Stovall* was a consolidated action involving three different cases in which the claimants had suffered heart attacks as a result of work-related stress. *See* 669 S.W.2d at 532.

[41] 669 S.W.2d at 534.

heart disease nor the work-related stress alone would have resulted in a work-related disability, the arteriosclerosis, being a pre-existing nondisabling condition, was capable of being aroused into disabling reality by work-related stress.[42] The Court stated:

> In logic it would appear that liability for the resulting disability should be apportioned in the ratio that the work-connected exertion or stress and the underlying disease each contributed to bring about the heart attack.
>
> Apportionment, however, is not dictated by logic but by statute, and the statute plainly directs that "the employer shall be liable only for the degree of disability which would have resulted from the latter injury or occupational disease had there been no pre-existing disability or dormant, but aroused disease or condition."[43]

Stovall is not a reinterpretation of the apportionment statute, rather it is a reaffirmation of existing case law.[44] Prior court decisions have recognized other situations in which liability for disability benefits should be apportioned entirely to the Special Fund.[45] Therefore, the impact of *Stovall* should not be limited merely to heart attack cases, but applied to all cases in which the medical evidence establishes that had it not been for the pre-existing but dormant disease or condition, the employee would have suffered no permanency as a result of the work-related incident.[46]

Even though liability for all income benefits may be apportioned to the Special Fund, the employer is still responsible for medical and hospital expenses.[47] In *Claude N. Fannin Wholesale*

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[42] *Id.* at 525.

[43] *Id.* at 535 (quoting KRS § 342.120(4) (Bobbs-Merrill Cum. Supp. 1984)).

[44] *See, e.g.*, Land v. Starks, 628 S.W.2d 346, 346 (Ky. Ct. App. 1981) (fact that none of claimant's occupational disability was attributable to his work-related injury alone, and thus employer was not liable, does not preclude imposition of liability for compensation on the Special Fund); Land v. Burden, 626 S.W.2d 221, 222 (Ky. Ct. App. 1981) (shift of liability to Special Fund does not render an otherwise compensable injury noncompensable).

[45] *See, e.g.*, Young v. Fulkerson, 463 S.W.2d 118, 119 (Ky. 1971) (Special Fund is liable for portion of worker's disability remaining after deducting portion attributable solely to subsequent injury, which employer must pay.).

[46] For example, back injuries.

[47] *See* Claude N. Fannin Wholesale Co. v. Thacker, 661 S.W.2d 477, 479 (Ky. Ct. App. 1983).

Co. v. Thacker,[48] the court of appeals noted that KRS section 342.120 addresses only income benefits.[49] The *Thacker* court further stated that KRS section 342.020, which provides that "the employer shall pay for the cure and relief from the effects of an injury or occupational disease such medical, surgical, and hospital treatment . . . as may reasonably be required,"[50] clearly places the burden of these expenses upon the employer regardless of the employer's liability for the income benefits.[51]

In separate cases, the Supreme Court and the court of appeals examined situations in which the pre-existing dormant condition in question was itself work-related. In 1976, the Supreme Court, in *Haycraft v. Corhart Refractories Co.*,[52] apportioned liability to the employer for the disability portion that arose out of a gradual type of injury occurring over a number of years. The Special Fund had to contribute for the portion existing regardless of employment.[53] Haycraft, the employee, suffered from a chronic back problem, which medical evidence established was a direct result of fifteen years employment with the same employer.[54] The Court found that the nature of the employment caused the degenerative disc disease to manifest itself into an active disability sooner than it would have had the work been of a less physical nature.[55] Consequently, the Court found that the pre-existing condition itself was a work-related injury as defined by the workers' compensation statutes.[56]

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[48] 661 S.W.2d 477 (Ky. Ct. App. 1983).

[49] *Id.* at 479.

[50] KRS § 342.020(1) (1983) provides in full:

> In addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury or occupational disease such 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, or as may be required for the cure and treatment of an occupational disease. The employee may select a physician to treat his injury, and the hospital in which he shall be treated.

[51] *See* 661 S.W.2d at 479-80.

[52] 544 S.W.2d 222 (Ky. 1976).

[53] *Id.* at 225.

[54] *Id.* at 225-27.

[55] *See id.* at 225-28.

[56] *Id.* at 225.

In *Southern Kentucky Concrete Contractors, Inc. v. Campbell*,[57] the employee's disability was not the result of a single incident, but the result of twenty-four years of heavy labor.[58] The employee in *Southern*, unlike the life-long employee of Corhart Refractories Company in *Haycraft*, had worked for several employers over the years, but had been employed by Southern for only one and one-half years when he became disabled. In *Haycraft*, liability was apportioned to the employer "based upon the percentage of disability attributable to the work."[59] The *Southern* court found "that the 'work' referred to in *Haycraft* is the 'work' that occurred while the claimant was in the employ of that company."[60] Consequently, the *Southern* court found: "[a]bsent evidence to the contrary, Southern shall be liable for that percentage of Campbell's disability which is equal to the percentage of Campbell's worklife spent with Southern. The remainder of his disability is the responsibility of the Special Fund."[61]

In *O.K. Precision Tool & Die Co. v. Wells*,[62] the Supreme Court affirmed *Southern* and distinguished *Haycraft*. The employee in *O.K.*, like the employee in *Southern*, suffered from a gradual injury resulting from fifteen years of assembly line work, but had been employed by O.K. for only two and one-half months when she became disabled.[63]

The Court noted that "[t]he reason for apportionment in *Haycraft* was because the condition involved degenerative disc changes unrelated to employment as well as gradual type injury related to the work, whereas here we have a work related condition pre-existing present employment."[64] Continuing, however, the Court stated:

> KRS 342.120 does not restrict pre-existing conditions to degenerative changes unrelated to employment. The language of the

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[57] 662 S.W.2d 221 (Ky. Ct. App. 1984).
[58] *Id.* at 222.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 222-23.
[62] 678 S.W.2d 397 (Ky. 1984).
[63] *Id.* at 398.
[64] *Id.* at 399.

> statute creating the Special Fund is broad enough to cover a pre-existing condition mechanically induced by the nature of past employment, such as the present case, as well as degenerative changes unrelated to employment.[65]

The Court said "[i]t would be arbitrary and unreasonable to interpret *Haycraft* to mandate that the last employer is 'at risk' for the entire condition if induced by work performed over many years with multiple employers."[66] Furthermore, "it would conflict with a reasonable interpretation of the language in KRS 342.120"[67] as well as defeat "the legislative purpose for establishing the Special Fund."[68] The Court concluded that *Southern* was consistent with present law and appropriate to a disposition of this case.[69]

The fact that a work-related injury may lead to the discovery of a pre-existing disease or condition may not support a finding that such condition was aroused or brought into disabling reality by reason of that work-related injury. In *Wells v. Davidson*,[70] an employee's lower back pain during the course of his employment led to the diagnosis of multiple myeloma, a type of cancer.[71] The court of appeals found that the exposure of cancer was not an equivalent of aggravation or arousal under the language of KRS section 342.120.[72] Quoting from Professor Larson's treatise on workers' compensation, the court noted:

> Trauma as an inciting or aggravating mechanism does not have a place in cancer development, and schooled pathologists do not include injury as a mechanism by which cancer is initiated or stimulated. It will be found, then, that denials of compensation in this category are almost entirely the result of holdings

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[65] *Id.* at 399-400.

[66] *Id.* at 400.

[67] *Id.* The Court noted that the purpose of KRS § 342.120 "is to prevent the employer from being held responsible for more of a compensation award than is attributable to a disability incurred in the course of an employee's employment with him." *Id.* (quoting Transport Motor Express, Inc. v. Finn, 574 S.W.2d 277 (Ky. 1978)).

[68] 678 S.W.2d at 400.

[69] *Id.* at 401.

[70] 689 S.W.2d 610 (Ky. Ct. App. 1985).

[71] *Id.* at 611.

[72] The court noted that the medical evidence showed that there was no causal connection between the injury and the myeloma. *Id.* at 612.

> that the evidence did not support a finding that the employment contributed to the final result.[73]

The court, however, did not foreclose the possibility that cancer could be a pre-existing condition capable of being aroused into disabling reality, but left the question to be answered by medical evidence.[74]

In an interesting case, the court of appeals reversed a Board decision apportioning liability for an employee's depression to the Special Fund. In *Stovall v. Swanson*,[75] an employee suffered a temporary back injury that triggered an episode of depression.[76] The Board found that the employee was totally occupationally disabled and apportioned liability to the Special Fund. Psychiatrists testified that there were no pre-existing conditions and, if it had not been for the back injury, that there would have been no depression.[77]

The psychiatrists apparently testified that the depression was in part due to the stress of everyday life, rather than an identifiable neurosis. The court held, "To attempt to label these stresses of living as pre-existing conditions that would trigger liability of the Special Fund is to stretch the meaning of the statute far beyond what was contemplated by the Legislature."[78] A condition will be considered dormant and pre-existing for purposes of KRS section 342.120 only if it is reasonably foreseeable that the condition will become disabling.[79] Consequently, the court remanded the case for entry of an order apportioning one hundred percent of the liability to the employer.[80]

For an award in an occupational disease case to be apportioned between the employer and the Special Fund, there must be affirmative evidence that the employee has been exposed to the causing agent while working for another employer. In *Stovall*

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[73] *Id.* (quoting 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 12.24 (1985)).

[74] *See* 689 S.W.2d at 612-13.

[75] 681 S.W.2d 438 (Ky. Ct. App. 1984).

[76] *Id.* at 439.

[77] *Id.* at 440.

[78] *Id.*

[79] *Id.* (citing Yocom v. Jackson, 554 S.W.2d 891, 896 (Ky. Ct. App. 1977)).

[80] 681 S.W.2d at 440.

v. Mullen,[81] the Board apportioned an award seventy-five percent to the Special Fund and twenty-five percent to the employer.[82] The court of appeals reversed finding that there was no evidence of exposure during prior employment.[83] The initial burden of proof is on the employer to establish exposure at more than one place of employment.[84] Once that burden is met, the Special Fund then must attempt to prove that the disability was caused solely by the last exposure.[85]

In *Sovereign Coal Corp. v. Adkins*,[86] the Board found that an employee was fifty percent disabled as a result of a back injury and fifty percent disabled as result of pneumoconiosis.[87] One-half of the liability for the back injury and twenty-five percent of the liability for the pneumoconiosis was apportioned to the employer. The Board ordered that benefits be paid for so long as the employee remained disabled. The employer appealed, arguing that it should pay benefits for only 425 weeks, as if the employee had sustained a permanent partial disability, and that the Special Fund should pay all income benefits due thereafter.[88]

The court of appeals rejected the employer's argument, finding that the two partial disabilities left the employee with a total occupational disability, thus entitling the claimant to lifetime benefits. Once this determination was made, the court then wrestled with the question of liability between the employer and the Special Fund.[89] The court, citing *Transport Motor Express, Inc. v. Finn*[90] for the proper method of computation, held: "[T]he employer and the Special Fund [should] each be required to pay a share of the whole award based upon the ratio that their assigned percentages of disability bear to each other."[91] The court noted that it "would have little difficulty resolving

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[81] 674 S.W.2d 526 (Ky. Ct. App. 1984).
[82] *Id.* at 527.
[83] *Id.* at 528.
[84] *See id.*
[85] *Id.*
[86] 690 S.W.2d 129 (Ky. Ct. App. 1985).
[87] *Id.* at 130.
[88] *Id.*
[89] *Id.* at 130-31.
[90] 574 S.W.2d 277 (Ky. 1978).
[91] 690 S.W.2d at 131.

this question if it were governed by the present version of KRS 342.120[4]."[92] Unfortunately, the present version of KRS section 342.120(4) did not apply to this case since the action arose in 1981.[93]

III. INJURIES ARISING OUT OF COURSE OF EMPLOYMENT

During this survey period, both the Kentucky Supreme Court and the court of appeals examined the issue of whether an injury arose out of the course of employment. Kentucky may have adopted the positional risk doctrine[94] in *Tommy Thompson Produce Co. v. Coulter*.[95] In this case, employees from both Thompson Produce and Netter Produce were engaged in friendly discussion when the owner of Netter Produce, Mr. Netter, brought out a pistol and fired a shot into the air.[96] Mr. Netter then tossed the gun to the claimant, Coulter, an employee of Thompson Produce, but when Coulter caught the gun, the gun discharged and Netter was shot.[97] Coulter, still carrying the gun, stumbled into Thompson Produce. Within minutes, Netter's son went into Thompson Produce, wrestled the gun away from Coulter, and shot and killed Coulter. The employer, Thompson Produce, argued that Coulter's death was not work-related because the positional risk theory did not apply to this case. The court of appeals disagreed.[98]

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[92] *Id.* KRS § 342.120(4) states that the employer is liable to pay "a percentage of the full income benefits awarded . . . equal to the percentage of disability which would have resulted from the latter injury or occupational disease. . . ." *Id.*

[93] *See* 690 S.W.2d at 131.

[94] *See* notes 99-112 *infra* and accompanying text. Larson defines the "positional risk" doctrine as:

> An injury arises out of the employment if it would not have occured *but for* the fact that the conditions and obligations of the employment placed claimant in the position where he was injured. . . . This theory supports compensation, for example, in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he was injured by some neutral force. . . .

1 A. LARSON, *supra* note 73, at § 6.50.

[95] 678 S.W.2d 794 (Ky. Ct. App. 1984).

[96] 678 S.W.2d at 794.

[97] *Id.* at 795.

[98] *Id.*

The court of appeals relied upon *Corken v. Corken Steel Products, Inc.*,[99] a case in which an employee was shot by a stranger without any reason or provocation.[100] In *Corken*, the Court held: "Corken's employment was the reason for his presence at what turned out to be a place of danger, and except for his presence there he would not have been killed. Hence it is our opinion that his death arose out of the employment."[101] While the court of appeals in neither case specifically adopted the concept of positional risk, it is apparent that the court applied the doctrine.[102]

Coulter, however, does not present a factual situation to which the positional risk doctrine can be properly applied. The doctrine applies to those situations in which the employment requires the employee to be in the place of danger.[103] "When the animosity of dispute that culminates in an assault is imported into the employment from claimant's domestic or private life, and is not exacerbated by the employment, the assault does not arise out of the employment under any test."[104] Since in *Coulter* there was apparently no evidence that employment placed the employee and his assailant in the same location or caused any additional friction between them, the court should have treated it as a noncompensable injury.

In *Rabbitt Hash Iron Works, Inc. v. Strubel*,[105] the court of appeals refused to find that an injury was work-related where an employee was injured on the employer's premises, but while he was off the employee's payroll and working for his own benefit.[106] The employee in *Rabbitt* had no set work schedule and no minimum hours. Instead, "he was paid only for that time during which he was actually working for the iron works and . . . received no compensation for the time which he spent

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[99] 385 S.W.2d 949 (Ky. 1965).

[100] *Id.* at 949.

[101] *Id.* at 950.

[102] "The Court of Appeals . . . held that husband's death was work-related under the 'positional risk' theory and, thus, compensable. . . ." 678 S.W.2d at 794.

[103] *See* A. LARSON, *supra* note 73, at § 10.12.

[104] *Id.* at § 11.21.

[105] 689 S.W.2d 606 (Ky. Ct. App. 1985).

[106] *Id.* at 607. The employee was hired to perform general maintenance, carpentry, and mechanical duties.

on the employer's premises waiting for work to be assigned."[107] He was permitted, however, while awaiting his next assignment, to use the company's equipment for his personal use. It was during such a time that the employee was injured.[108]

The court of appeals refused to find that this injury was work-related under the four-part test set forth in *W.R. Grace & Co. v. Payne*.[109] According to *Payne*, an injury is work-related if:

> (1) [T]he injury occurred during working hours, (2) the injury occurred on the employer's premises, (3) the injury occurred during a period in which there was a lull in the work to be performed for the employer, and (4) the employer had acquiesced in the employee's use of his tools during such periods.[110]

Although Larson's treatise on workers' compensation law, the source of this four-prong test, states that an injury is work-related only if it occurs during working hours,[111] the Kentucky courts appear to require that the employee be on the payroll at the time of the injury. The *Rabbitt* court seemed to clarify this fact when it stated: "Unlike the situation in *W.R. Grace & Co.*, . . . where the claimant was injured during his normal, set work hours but during a lull period for which he was being paid, Strubel [(the employee in *Rabbitt*)] was off duty, off the payroll, and working solely for his own benefit."[112] This may not, however, be a sound basis for determining whether an injury is work-related, especially in those cases in which an employee, although not on the payroll, is required to be on the employer's premises and available for work at all times.

IV. EXCLUSIVE REMEDY PROVISION

In one of the most important cases decided during this survey period, the Kentucky Supreme Court again confronted the ex-

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[107] *Id.*

[108] *Id.*

[109] 501 S.W.2d 252 (Ky. 1973). *See* 689 S.W.2d at 607-08.

[110] 689 S.W.2d at 607-08 (citing W.R. Grace & Co. v. Payne, 501 S.W.2d 252). The four-prong test was adopted by the *Payne* Court from Larson's treatise. *See* 1A A. LARSON, *supra* note 73, at § 27.31(b).

[111] 1A A. LARSON, *supra* note 73, at § 27.31(b).

[112] 689 S.W.2d at 608.

clusive remedy provisions of KRS section 342.690.[113] In *Burrell v. Electric Plant Board of Franklin*,[114] an employee was injured on his employer's premises when he came into contact with a high voltage electric line.[115] The employee brought an action in circuit court alleging negligence by the Electric Plant Board.[116] Subsequently, the Plant Board, alleging employer negligence and seeking contribution and indemnity, filed pleadings against the employer.[117] The circuit court dismissed the claims against the employer since the employer had already paid all compensation benefits due the employee.[118] The court of appeals affirmed the circuit court decision as to contribution, but reversed on the issue of indemnity.[119] The case was presented to the Kentucky Supreme Court on appeal.[120]

The Supreme Court, writing through Justice Liebson, held that an action for indemnity and contribution could be maintained by a third party against the employer, but that an award of contribution could not exceed the employer's liability for workers' compensation benefits.[121] The Court found that Ken-

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[113] KRS § 342.690(1) (Bobbs-Merrill 1983) provides, in part:

(1) If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . . The liability of an employer to another person who may be liable for or who has paid damages on account of injury or death of an employee of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and other benefits for which such employer is liable under this chapter on account of such injury or death, unless such other and the employer by written contract have agreed to share liability in a different manner.

Id.

[114] 676 S.W.2d 231 (Ky. 1984).

[115] *Id.* at 232.

[116] *Id.*

[117] *Id.* at 232-33.

[118] *See id.* (action against employer barred under KRS § 342.690(1)).

[119] 676 S.W.2d at 233.

[120] *Id.* at 232-33.

[121] *Id.* at 233.

tucky's unusual contribution statute[122] did not require joint liability but only joint causation, and concluded that such an interpretation would not conflict with the language of KRS section 342.690.[123] The Supreme Court did not rule on the issue of indemnity limits, as that issue was not presented on appeal.[124]

In ruling that a third party has a right to maintain an indemnity action, the Supreme Court, as well as the court of appeals, relied on *Kentucky Utilities Co. v. Jackson County Rural Electric Cooperative Corp.*[125] and *Louisville Gas & Electric Co. v. Koenig*[126] for the proposition that indemnity is a constitutionally protected right.[127]

The Court rejected the employer's argument in *Burrell* that *Kentucky Utilities* and *Louisville Gas* had been "implicitly overrule[d]" by *Fireman's Fund Insurance v. Government Employees Insurance.*[128] In *Fireman's Fund*, former Chief Justice Palmore held that indemnity was not a jural right within the field of no-fault insurance, since the rights under the no-fault act and the Workers' Compensation Act did not exist at the time the present Kentucky Constitution was adopted.[129] The *Burrell* Court, however, found that the *Fireman's Fund* decision actually dealt with the right of subrogation and not indemnity.[130] If Chief Justice Palmore's rationale does not apply within the context of workers' compensation, and indemnity is, in fact, a jural right, then it logically follows that not only is the legislature precluded from barring an indemnity action, but it is also precluded from limiting the right of indemnity to workers' compensation benefits payable under the Act.

Burrell leaves open many questions that must be decided in future decisions, especially cases involving the recently adopted

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[122] KRS § 412.030 (1983), which provides: "Contribution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude." *Id.*

[123] *See* 676 S.W.2d at 234-35.

[124] *Id.* at 237.

[125] 438 S.W.2d 788 (Ky. 1968).

[126] 438 S.W.2d 791 (Ky. 1968).

[127] 676 S.W.2d at 235.

[128] *Id.* at 235-36. *See* Fireman's Fund Ins. v. Government Employees Ins., 635 S.W.2d 475 (Ky. 1982).

[129] *See* 635 S.W.2d at 477.

[130] 676 S.W.2d at 236.

doctrine of comparative negligence[131] and cases in which an employer seeks to assert its subrogation rights.[132] Specifically, for instance, if a jury apportions liability for an employee's injuries thirty percent to the employee, twenty percent to the employer and fifty percent to the third-party defendant, may the employer seek reimbursement under its subrogation claim for eighty percent of the benefits paid or for only fifty percent? Will the third-party defendant's right of contribution continue to be a fifty percent liability, regardless of the percentage of negligence, or will contribution begin to reflect the actual percentage of negligence assessed by the jury? Since the Court's final word on *Burrell* was not issued until after the Court had adopted the doctrine of comparative negligence,[133] the Court should have examined, and answered, some of these questions.

In *Allied Machinery, Inc. v. Wilson*,[134] the court of appeals applied the exclusive remedy provision[135] to prevent a "loaned servant" from recovering common law damages. The claimant was employed by Dingo Coal Mining Company "as a 'greaser' for its heavy equipment."[136] At the time of his injury, however, he was *assisting* a field mechanic of Allied Machinery in repairing a Dingo truck that had broken down. The claimant had assisted the Allied mechanic for three days when the claimant was injured during the course of those repairs. The evidence established that the claimant was working at the mechanic's direction.[137] The claimant won a jury verdict against Allied Machinery and the mechanic in circuit court, but the court of appeals reversed.[138]

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[131] *See* Hilen v. Hayes, 673 S.W.2d 713 (Ky. 1984).

[132] *See* KRS § 342.700 (1983), which expressly gives the employer the right of subrogation.

[133] The original decision in *Burrell* was issued on February 16, 1984, but was modified on a denial of rehearing on October 4, 1984, after the decision in *Hilen*.

[134] 673 S.W.2d 728 (Ky. Ct. App. 1984).

[135] *See* KRS § 342.700. The exclusive remedy provision "permits an injured employee to proceed both against the employer for compensation and by civil action against the . . . 'statutory' employer but limits recovery to one entity." 673 S.W.2d at 729. *See* notes 142-43 *infra* and accompanying text.

[136] 673 S.W.2d at 729.

[137] *See id.* at 730.

[138] *Id.* at 729-30.

The court of appeals found, based on the evidence presented, that the employee was a "loaned servant" of Allied Machinery and that his recovery was limited to compensation benefits.[139]

In Kentucky, whether an individual is a "loaned servant" is determined by a three-part test.[140] An individual is a "loaned servant" if:

> (a) [T]he employee has made a contract of hire expressed or implied with the special employer, (b) the work being done is essentially that of the special employer, [and] (c) the special employer has the right to control the details of the work.[141]

KRS section 342.700 provides that when an employee is injured through the actions of some third person "the injured employee may either claim compensation or proceed at law by civil action against *such other person* to recover damages. . . ."[142] But, if it is determined that the employee is a "loaned servant" of the special employer, then that special employer is not considered to be "some other person" as envisioned by the statute and is entitled to the protection of the exclusive remedy provision.[143]

In *M.J. Daly Co. v. Varney*,[144] however, the Kentucky Supreme Court found that an employee working for another as contract labor did not fall within the "loaned servant" doctrine.[145] In *M.J. Daly*, the employee, Varney, filed a common law action against M.J. Daly Company (Daly) after collecting workers' compensation benefits from his employer. Daly had contracted for Varney's services through Varney's employer, a labor service company. The evidence in the case indicated that Daly had offered employment directly to Varney, but that Varney had refused, electing to remain on his employer's payroll.[146]

Recognizing that the labor service industry is a relatively new and fast-growing development, and applying the three-part test

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[139] *Id.* at 730.

[140] *See* Rice v. Conley, 414 S.W.2d 138, 140 (Ky. 1967) (adopting 1C A. LARSON, *supra* note 73, § 48.00 (1982)).

[141] 414 S.W.2d at 140.

[142] KRS § 342.700(1) (emphasis added).

[143] *See id.*

[144] No. 84-SC-523-DG (Ky. May 3, 1985).

[145] *Id.*, slip op. at 5.

[146] *Id.*, slip op. at 1-2.

previously mentioned, the Supreme Court found that Varney was not a special servant of Daly. The Supreme Court found that no contract for hire, either express or implied, existed between Daly and Varney. The Court referred to KRS section 342.640(1), which requires that such a contract for hire must exist for there to be an employer-employee relationship. The Court believed that it could not find such a contract since Varney had specifically rejected employment with Daly. The Supreme Court also relied upon the fact that Daly and the employer had agreed that the employer would provide workers' compensation benefits.[147] The significance of this fact, however, is questionable since the relationship to be examined is that between the employee and special employer, not the relationship between the employers.

The Court overlooked the possibility that compensation coverage was provided under KRS section 342.700. This statute allows the employee of an independent contractor to recover compensation benefits from the employer of the independent contractor, when the work being performed is a regular or recurrent part of the trade, business, or profession of the employer of the independent contractor.[148] The application of this statute would have barred the common law action by Varney against Daly under the exclusive remedy provision.[149]

The court of appeals, however, has refused to apply the exclusive remedy provision in a common law action for bad faith brought by an employee against an employer and an insurer. In *Mitchell v. Zurich American Life Insurance Co.*,[150] after a Board award in favor of the employee had been affirmed by all appellate courts, the employer and its insurance carrier began refusing to pay the employee's medical expenses that were part of the award. After finally securing payment, the employee filed a tort action alleging bad faith by the employer and the insurer.[151]

The court stated that once the award becomes final "the employee has a vested right to receive *timely* compensation ben-

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[147] *Id.*, slip op. at 4-5.

[148] *See* KRS § 342.700(2) (1983).

[149] KRS § 342.690 (1983).

[150] No. 84-CA-2693-MR (Ky. Ct. App.), 32 KLS 7, at 6 (Ky. Ct. App. May 3, 1985), *discretionary rev. granted,* 32 KLS 13, at 20 (Sept. 18, 1985).

[151] *Id.*, slip op. at 2.

efits and *timely* payment of medical expenses."[152] Since the Act provides sufficient avenues for relief if the employer has an objection to a medical bill,[153] the employer has no right to arbitrarily cease payment of the expenses. The court refused to apply the exclusive remedy provisions of KRS section 342.690 to ban the claim against the employer, finding that this section was enacted to combat the occasional breakdowns inherent in any administrative process and not to provide a bullet-proof shield for a continuing course of bad faith conduct.[154]

The court failed to discuss, however, the Supreme Court's decision in *Brown Badgett, Inc. v. Calloway*,[155] in which the Court held that the Board has exclusive jurisdiction over disputes concerning medical bills.[156] Furthermore, the Act provides an administrative remedy in these cases under which either the employer or employee can file a motion with the Board to resolve the dispute.[157] In the appropriate case, if the Board finds the actions unreasonable, it may award the prevailing party its costs and expenses, including attorney fees.[158]

Since the Supreme Court in *Brown Badgett* stated, regarding the payment of medical bills, that "[i]t is perfectly apparent that this legislation [KRS sections 342.035(1), 342.320(1), and 342.325] reposes exclusive jurisdiction in the Workers' Compensation Board to determine the issue in this case,"[159] the court of appeals may have taken a long step astray in allowing the bad faith claim in *Mitchell*. As can be seen from the other cases discussed in this section, the exclusive remedy provision of KRS section 342.690 is more expansive in scope than characterized by the Court in *Mitchell*, which merely stated that the statute was

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[152] *Id.*, slip op. at 3.

[153] The employer could have contested the payment of these bills before the Board pursuant to KRS §§ 342.320 (1983) and 342.325 (1983), or through a declaratory judgment action pursuant to KRS §§ 418.040 and 418.045.

[154] No. 84-CA-2693-MR, slip op. at 4.

[155] 675 S.W.2d 389 (Ky. 1984).

[156] The Court, in so holding, found erroneous Hale v. Nugent Sand Co., 657 S.W.2d 246 (Ky. Ct. App. 1983), in which the appellate court estopped an employer from disputing a medical bill that the employee sought to enforce in circuit court because the employer had not brought a proceeding before the Board.

[157] *See* 675 S.W.2d at 391.

[158] *See* KRS § 342.310 (Cum. Supp. 1984).

[159] 675 S.W.2d at 391.

designed "to combat the occasional breakdowns inherent in any administrative process."[160] Since the Act provides a mechanism for regulation of doctors' fees, a forum for dispute resolution, and a penalty for unreasonable actions, it would appear that the Act has afforded a complete and full remedy.

In *Mastin v. Liberal Markets*,[161] the Supreme Court allowed an employer to recover from an employee a share of the employee's settlement in a products liability action in which the employee failed to notify the employer or its insurance carrier of the action. In this case, the employee, after filing a compensation claim, filed a civil action against those third parties allegedly responsible for her injuries.[162] The employee reached a settlement with one of the defendants for $50,000, of which $5,000 was allocated to lost wages and earning capacity, and $5,000 to past and future medical expenses. Subsequently, the Board awarded the employee a thirty-five percent permanent partial disability. When the employer learned of the settlement ten months later, the employer suspended payment of compensation benefits. The employee brought suit in circuit court to enforce the compensation award; the employer counterclaimed, seeking to recover the amount it had paid under the award for which the employee had gotten a double recovery. The circuit court ruled that the employer was entitled only to a credit against future payments. The court of appeals reversed, and the case was accepted on discretionary review by the Kentucky Supreme Court.[163]

The Supreme Court ruled that the settlement qualified as a "legal liability to pay damages" as contemplated under KRS section 342.700, which precludes double recovery from both the employer and any third party.[164] The Court rejected the employee's argument that KRS section 342.700 entitles an employer only to a credit against future payments.[165] Consequently, the Court strictly interpreted the statute, which provides that an

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[160] 84-CA-2693-MR, slip op. at 4.
[161] 674 S.W.2d 7 (Ky. 1984).
[162] *Id.* at 9.
[163] *Id.* at 10.
[164] *Id.* at 11-12.
[165] *Id.* at 11.

employee "shall not collect from both," and ruled that the employer was entitled to restitution from the employee for the overpayments.[166]

Allocation of the settlement funds was governed by the Court's prior decision in *Hillman v. American Mutual Liberty Insurance Co.*[167] This decision outlines the method by which such settlements, or jury verdicts, are to be divided between the employer and the employee.[168] Since there was no jury verdict itemizing the recovery to which the employee was entitled, the Court held that the employer was entitled to have the case remanded to the trial court for a determination of the damages to which the employee was entitled to recover and for allocation of those damages to the categories of recovery which might, or might not, be subject to the employer's statutory subrogation rights.[169]

V. REOPENING

In *Continental Air Filter Co. v. Blair*,[170] the Kentucky Supreme Court injected more uncertainty into the standard for

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[166] *Id.* at 14. In those cases in which the employee has not received payment of compensation benefits, it is proper to credit the settlement of the civil action against future compensation payments, under the authority of Southern Quarries & Contracting Co. v. Hensley, 232 S.W.2d 999 (Ky. 1950).

[167] 631 S.W.2d 848 (Ky. 1982).

[168] *See id.* at 850.

[169] 674 S.W.2d at 13. The Court held:

> They [employer and Special Fund] are entitled to have the case remanded to the trial court to decide the proper amount which should be awarded Ms. Mastin in damages for each of the various elements of damages specified in the release evidencing the transaction between the Mastins and Rose Exterminators [third party]. They are entitled to have such allocation made initially without regard to prospects for obtaining from others the payment of money necessary to pay for the various elements of damages involved. Then they are entitled to subrogation credit against those elements of damages which duplicate worker's compensation benefits, viz.: medical expenses, lost wages and impairment or destruction of earning power. As to these elements, less their proportionate share of attorneys' fees and expenses incurred in effecting the recovery from Rose Exterminators, the appellees have immediate entitlement by statutory subrogation as soon as the facts can be determined.

Id.

[170] 681 S.W.2d 427 (Ky. 1984).

reopening a claim under KRS section 342.125. This statute permits a party to move the Workers' Compensation Board to reopen a case, and review an otherwise final order, upon a showing of change of condition.[171] As discussed in the prior Survey,[172] the court of appeals in *Continental Air Filter Co.*[173] expanded the interpretation of change of condition to include a change in economic conditions. The Supreme Court, however, reversed the court of appeals,[174] finding that a change in economic condition must be a change in physical condition as originally required in the case of *Osborne v. Johnson.*[175]

Either intentionally or through oversight, the majority opinion failed to mention *Mitsch v. Stauffer Chemical Co.*,[176] a prior case in which the Court reinterpreted the phrase "change of condition" to encompass a change in occupational disability as distinguished from physical condition.[177] The Court in *Mitsch* reasoned that since the Act was designed to compensate occupational disability, a change in that occupational disability was a basis for reopening.[178] The failure to mention *Mitsch*, and the statement that "[a] reopening must be based on a change in physical condition,"[179] may cause some concern that the Court has abandoned the "occupational disability" standard.

The majority opinion in *Continental Air Filter Co.* also appears to ignore the fact that the employee, at the time of the original opinion, was working in a "made work" job.[180] Once the Board opinion had become final the employer eliminated the position.[181] In a dissenting opinion, Justice Liebson recognized the economic realities of the Court's decision.[182] He stated:

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[171] *See* KRS § 342.125(1) (Bobbs-Merrill 1983).

[172] *See* Harned, *supra* note 2, at 492.

[173] No. 82-CA-1660-MR, 30 KLS 8 (Ky. Ct. App. 1983), *rev'd*, 681 S.W.2d 427 (Ky. 1984).

[174] 681 S.W.2d at 428.

[175] 432 S.W.2d 800 (Ky. 1968).

[176] 487 S.W.2d 938 (Ky. 1972).

[177] *Id.* at 939-40.

[178] *Id.*

[179] 681 S.W.2d at 428.

[180] *Id.* at 427.

[181] *See id.*

[182] *Id.* at 429 (Liebson, J., dissenting).

> It [the Board] found the employee had undergone a "change of conditions" entitling him to an increased award of total occupational disability, limiting its decision to the facts of this case. Had the Board found otherwise, it would encourage employers to place a seriously injured employee in a light duty position, and then effect his termination after the occupational disability award becomes final. The majority opinion of this case may provide such encouragement.[183]

The majority opinion takes from the Board the flexibility that could encourage the employment of injured employees. The social goal of the Act is not only compensation, but also "restoration of the injured employee to gainful employment."[184] This goal is frustrated if the Board is unable to reduce an award when the employer has paid wages to the employee or to increase the award when that employment is terminated.

VI. SETOFFS AND CREDITS

A. Private Disability Plans

Since *South Central Bell Telephone Co. v. George*,[185] it has been clear that an employer may not take a credit against a compensation award for disability benefits paid under a privately negotiated disability plan, except to the extent represented by the employer's weekly liability for compensation. To the extent that voluntary disability benefits paid in a given week exceed the compensation rate, no credit will be allowed.[186] The plan at question in *South Central Bell* supplemented workers' compensation.[187] The court of appeals, in *Beth-Elkhorn Corp. v. Lucas*,[188] expanded the rule of *South Central Bell* holding that an employer is entitled to such a credit whenever it provides additional disability benefits at no cost to the employee.[189]

In *Beth-Elkhorn*, the employer had provided, as part of the compensation package, a disability plan that provided benefits

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[183] *Id.*
[184] KRS § 342.710(1) (Cum. Supp. 1984).
[185] 619 S.W.2d 723 (Ky. Ct. App. 1981).
[186] *Id.* at 725.
[187] *Id.* at 724.
[188] 670 S.W.2d 480 (Ky. Ct. App. 1983).
[189] *Id.* at 482.

at the employee's regular rate of pay for disability caused by sickness, accident, or pregnancy.[190] The employee argued that the employer should not be entitled to a credit since there was no integration between the disability plan and the Act.[191] The employee argued that this was the determinative factor in *South Central Bell*.[192] The court of appeals, in *Beth-Elkhorn*, however, said that an expression that the disability plan is supplemental to workers' compensation is not, in fact, determinative.[193] The court stated: "We deem important the fact that the employer herein provided these additional disability benefits at no apparent cost to the employee."[194]

B. Voluntary Worker's Compensation Benefits

In prior case law, the courts had made a distinction between voluntary disability benefits and voluntary payment of compensation benefits when allowing a credit against future payments. In *Western Casualty & Surety Co. v. Adkins*,[195] the court of appeals allowed a dollar-for-dollar credit when compensation benefits were voluntarily overpaid.[196] In *General Electric Co. v. Morris*,[197] a case involving a claim of credit for compensation benefits previously paid, the Supreme Court announced that any credit taken by an employer is not a dollar-for-dollar credit.[198] In this case, the employer had voluntarily paid its employee compensation benefits for temporary total disability at the rate of ninety-six dollars per week.[199] After the employee's case was reopened, the Board entered an award under which General Electric was ordered to pay the worker $12.74 per week.[200] The

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[190] *Id.* at 481.

[191] *See id.* at 482.

[192] *Id.* at 481.

[193] *See id.* at 482.

[194] *Id.* The court of appeals also ruled that the Special Fund was not entitled to take a credit for disability payments made by the employer, as the cost of that disability plan was borne solely by the employer. *Id.*

[195] 619 S.W.2d 502 (Ky. Ct. App. 1981).

[196] *See id.* at 502-03.

[197] 670 S.W.2d 854 (Ky. 1984).

[198] *See id.* at 856.

[199] *Id.* at 855.

[200] *Id.*

employer argued that it was entitled to a dollar-for-dollar credit for all voluntary benefits paid.[201] The Court, however, ruled that the employer could credit only the weeks for which voluntary payments were made against the weeks for which workers' compensation benefits were due pursuant to the Board award.[202] The Court ruled:

> [A] dollar-for-dollar credit for voluntary payments in excess of the compensation found to be due would seem to frustrate the purpose of the compensation act that periodic payments over a statutorily set period be made, absent agreement by the parties and approval by the Board. *See* KRS 342.040 and 342.150. By allowing full credit, the claimant, as would be the case here, could be deprived of many future periodic payments.[203]

The dissenting opinion recognized the merit of General Electric's argument that the denial of a full credit will discourage employers from making voluntary payments in the future.[204] The dissenting opinion was written by Justice Vance, who, while on the court of appeals, wrote the opinion in *Western Casualty & Surety Co. v. Adkins*.[205] The *Adkins* court expressed concern over penalizing an employer who makes voluntary payments.[206] The Supreme Court did not even mention this opinion when deciding *General Electric*. The Supreme Court did not even squarely address the fact that they were allowing a double recovery by the employee, although in *Mastin v. Liberal Markets*,[207] albeit a different fact situation, the Court ruled that the employee was not entitled to double recovery.[208] It appears that in reaching the decision the Court confused the concept of credits for compensation benefits and credits for voluntary disability benefits, in relying in part on *South Central Bell*[209] rather than *Western Casualty & Surety*.

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[201] *Id.* at 856.
[202] *Id.* at 855-57.
[203] *Id.* at 856.
[204] *Id.* at 857 (Vance, J., dissenting).
[205] 619 S.W.2d 502 (Ky. Ct. App. 1981).
[206] *Id.* at 502-03.
[207] 674 S.W.2d 7 (Ky. 1984).
[208] *Id.* at 11-12. *See* notes 161-66 *supra* and accompanying text.
[209] *See* text accompanying notes 185-87 *supra*.

The dissenting opinion in *General Electric* is probably correct in its concern that employers will refuse to make voluntary payments to employees, rather than risk overpayment. This result will be to the detriment of those employees who need such compensation payments. The employee has already received the compensation benefits awarded, and consequently is not penalized by a dollar-for-dollar credit.[210] Since *General Electric* was decided by a 4-3 vote, the ramifications of this decision may be reexamined in the future with hopefully a different result.

VII. APPELLATE PRACTICE

A number of decisions were written during the survey period regarding appellate practice within the field of workers' compensation. In *Stewart v. Lawson*,[211] the Board originally found that the employee had not contracted pneumoconiosis "while in the employ of the defendant coal company."[212] The circuit court reversed, remanding the case to the Board for findings as to whether the employee suffered from an occupational disease and, if so, whether the employee received an injurious exposure while employed by the defendant. On remand, the Board found that the movant employee suffered from an occupational disease in the form of pneumoconiosis and that the employee had, in fact, received his last injurious exposure while employed by the defendant. The defendant successfully appealed to the court of appeals, but the Supreme Court reversed, affirming the Board award.[213]

The Supreme Court found that the Board's second opinion was proper because it did not conflict with the Board's first opinion.[214] In its first opinion, the Board found only that the employee did not contract pneumoconiosis "while in the employ of the defendant coal company."[215] Therefore, the Board's subsequent findings that the employee suffered an occupational disease and that the defendant employer was his last "injurious

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[210] *See* 670 S.W.2d at 857 (Vance, J., dissenting).
[211] 689 S.W.2d 21 (Ky. 1985).
[212] *Id.* at 22.
[213] *Id.*
[214] *Id.* at 23.
[215] *Id.* at 22.

exposure," did not in any way conflict with the Board's initial findings.[216]

In *Eaton Axle Corp. v. Nally*,[217] the Supreme Court noted that the Board in its opinions has repeatedly failed to make the necessary factual findings.[218] The Court shifted the burden for correcting this error, however, to the attorneys handling the cases.[219] Since the Act provides for reconsideration by the Board of its opinions and orders,[220] the Court held that a party must avail itself of this procedure before a case will be reversed for failure to make factual findings.[221] The Court further stated that prospectively from the date of this decision, no Board award will be reversed for failure to make a requisite finding until the Board has been given the opportunity to first correct its error.[222]

The practicing bar came under criticism in an unpublished decision for the number of compensation appeals being brought before the court of appeals. In *Woolum v. Woolum*,[223] the court noted that thirteen percent of its cases were workers' compensation cases, many of which only contested the findings of fact by the Board. Since such findings will not be disturbed if there is any substantive evidence in the record to support them, "an appeal on this point is an exercise in futility and a waste of judicial time and energy."[224] The court stated that in future cases it will not hesitate to assess costs or other penalties against the offending parties under either KRS section 342.310 or Kentucky Rule of Civil Procedure 73.02.[225]

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[216] *Id.* at 23.

[217] 688 S.W.2d 334 (Ky. 1985).

[218] *See id.* at 337.

[219] *See id.* at 338.

[220] *See* KRS § 342.281 (Bobbs-Merrill 1983).

[221] *See* 688 S.W.2d at 338.

[222] *Id.* The Court equated KRS § 342.281 with Kentucky Rule of Civil Procedure 52.04, which prohibits a civil judgment from being reversed unless the failure to make a factual finding is brought to the attention of the trial court for correction. *Id.*

[223] No. 84-CA-758-MR (Ky. Ct. App. Sept. 14, 1984).

[224] *Id.*, slip op. at 4. The court was referring to cases in which the Board had found in favor of the claimant. The standard of review when the Board finds against a claimant is even more exacting, as the claimant must show on appeal that the evidence in his favor is so strong as to compel a ruling in his favor. *See* Semet-Solvay, Div. of Allied Chem. Corp. v. Workmen's Compensation Bd., 410 S.W.2d 405 (Ky. 1966).

[225] No. 84-CA-758-MR, slip op. at 4.