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# Kentucky Law Survey: Workers' Compensation

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# Workers' Compensation

BY NORMAN E. HARNED\*

## INTRODUCTION

Kentucky's Workers' Compensation Act<sup>1</sup> (Act) continues to be a topic of frequent legislative revision and judicial interpretation. While the appellate courts were attempting to interpret the sweeping legislative amendments of 1980,<sup>2</sup> the 1982 General Assembly returned to make additional changes to the Act.<sup>3</sup> This Survey will examine the noteworthy 1982 legislative changes, as well as significant court decisions from the Survey period, 1981 to 1983. The cases address such issues as apportionment, reopening of decisions, presumptions and coverage.

## I. LEGISLATIVE CHANGES

Although a number of changes made by the 1982 Kentucky General Assembly could be classified as housekeeping,<sup>4</sup> and were not of the scope of the 1980 amendments,<sup>5</sup> these recent changes will have a practical effect on the practitioner. The most important changes altered the method of benefit payments between the

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<sup>1</sup> KY. REV. STAT. ANN. §§ 342.010-.990 (Bobbs-Merrill 1983) [hereinafter cited as KRS].

<sup>2</sup> See, e.g., Act of Apr. 2, 1980, ch. 104, §§ 1-23, 1980 Ky. Acts 191, 191. See generally Basil, *Kentucky Law Survey—Workers' Compensation*, 69 KY. L.J. 687 (1980-81)(discusses the 1980 legislative changes).

<sup>3</sup> See Act of Apr. 12, 1982, ch. 447 § 11, 1982 Ky. Acts 1510, 1518 (codified at KRS § 342.350 (1983)); Act of Apr. 2, 1982, ch. 426 §§ 1-3, 1982 Ky. Acts 1436, 1436 (codified at KRS § 342.316, .340, .710 (1983)); Act of Apr. 2, 1982, ch. 278 §§ 16-23, 1982 Ky. Acts 729, 735 (codified at KRS § 342.120, .121, .122, .123, .185, .316, .720, .730 (1983)); Act of Mar. 26, 1982, ch. 141, § 91, 1982 Ky. Acts 245, 291 (codified at 342.160 (1983)); Act of Feb. 18, 1982, ch. 7, § 1, 1982 Ky. Acts 12, 12 (codified at KRS § 342.040 (1983)).

<sup>4</sup> See, e.g., Act of Apr. 2, 1982, ch. 278, § 22, 1982 Ky. Acts 729, 741 (codified at KRS § 342.720 (1983)) (increasing the employer's liability for burial expenses from \$1,500 to \$2,500); Act of Feb. 18, 1982, ch. 7, § 1, 1982 Ky. Acts 12, 12 (codified at § KRS 342.040) (increasing the interest rate on past due benefits from six percent to twelve percent per annum).

<sup>5</sup> See, e.g., Act of Apr. 2, 1980, ch. 104, §§ 1-23, 1980 Ky. Acts 191, 191 (codified in scattered sections of KRS ch. 342).

employer and the Special Fund and created the Kentucky Reinsurance Association.<sup>6</sup>

A. *Payment of Apportioned Benefits and Kentucky Reinsurance Association*

The 1982 General Assembly made no changes in the law as it affects apportionment of liability for income benefits between the employer and employee; however, that legislature did change the procedure for the payment of such benefits.<sup>7</sup> Prior to the 1982 amendments, upon an award of compensation or settlement, the Workers' Compensation Board (Board) fixed the respective liabilities of the employer and the Special Fund on a percentage basis as directed by Kentucky Revised Statutes (KRS) section 342.120.<sup>8</sup> The employer and the Special Fund would then pay their corresponding percentages of the weekly benefits awarded to the worker.<sup>9</sup> As a result of the amendments, the employer is now obligated to pay all the benefits to the employee until the percentage of income benefits paid equals the percentage of disability apportioned to the employer.<sup>10</sup> Thus, only after the employer's liability has been exhausted does the Special Fund begin to pay the percentage of liability attributed to it.<sup>11</sup> For example, on a permanent partial disability award for 425 weeks in which liability was apportioned on a fifty percent basis between the employer and the Fund, the employer would pay all benefits awarded for the first 212 1/2 weeks, then the Special Fund would begin paying benefits following this period. For total disability awards, or awards for death, benefits are to be paid based upon an actuarial table to be adopted by the Board.<sup>12</sup>

The new statute is silent as to any method by which the employer can recoup benefits paid in the event the benefits awarded

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<sup>6</sup> See Act of Apr. 2, 1982, ch. 278, § 16-17, 19, 1982 Ky. Acts 729, 735 (codified at KRS § 342.120, .122, .123).

<sup>7</sup> *Id.*

<sup>8</sup> KRS § 342.120 (Cum. Supp. 1980) (amended 1982).

<sup>9</sup> See KRS § 342.120(3)-(4) (Cum. Supp. 1980).

<sup>10</sup> See KRS § 342.120(4) (1983).

<sup>11</sup> KRS § 342.120(5) (1983).

<sup>12</sup> KRS § 342.120(6)(b) (1983). The Board has not yet adopted the necessary actuarial regulations to effectuate this statute. Telephone interview with Betsy Garriott, Workers' Compensation Board Clerk-Administrative Specialist, Frankfort, Kentucky (Oct. 31, 1983).

to a worker or surviving spouse are terminated prior to the end of the period of recovery.<sup>13</sup> Presumably, the employer would be in a position to seek reimbursement from the Special Fund for the portion of benefits paid which is greater than its percentage of the actual award made by the Board.<sup>14</sup>

While changing the method of payment by the Special Fund, the 1982 General Assembly also empowered the Special Fund to retain and invest the benefits owed to the employee. To enable these sums to be invested and handled properly, the legislature created the Kentucky Reinsurance Association.<sup>15</sup>

These changes allowed the Kentucky Reinsurance Association to receive the insurance premiums paid into the Special Fund by the subscribers to the workers' compensation system and to invest those sums prior to paying awarded benefits to the employees.<sup>16</sup> Allowing the Kentucky Reinsurance Association to hold these moneys for a period of years and earn the investment income should, in theory, prevent or at least limit increases in the sums levied upon the subscribers to the compensation system.

On initial evaluation, this legislative enactment appears to offer a potential reduction in the future cost of workers' compensation coverage to the employers and insurance carriers. One could question, however, whether the Kentucky Reinsurance Association will in fact be a better investor or curator of these funds than the insurance carriers, self-insured groups and the individual self-employed employers. The only certainty is that another bureaucracy has been created and substantial additional expense has been incurred<sup>17</sup> without a corresponding certainty of benefit.

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<sup>13</sup> See KRS § 342.120(4)-(5) (1983).

<sup>14</sup> Cf. 803 Ky. ADMIN. REGS 25:030 (1983) (mechanism whereby the employer could seek reimbursement from the Special Fund under the former method of payment of benefits). This regulation would not apply to the statute as amended.

<sup>15</sup> See Act of Apr. 2, 1982, ch. 278, § 16, 1982 Ky. Acts 729, 735 (codified at KRS § 342.123).

<sup>16</sup> See KRS § 342.123 (1983). Prior to the amendment, the Special Fund was funded by a tax on all insurance carriers which write workers' compensation insurance, self insurance groups and self-insured employers. KRS § 342.122(2) (Cum. Supp. 1980) (amended 1982). Additional assessments were authorized to be made if the Secretary of Finance and the Commissioner of Labor found that the Special Fund tax levied was insufficient. KRS § 342.122(5) (Cum. Supp. 1980) (amended 1982). The investment income earned subsequent to the 1982 amendments now provides an additional source of income. See KRS § 342.122-.123 (1983).

<sup>17</sup> See, e.g., Act of Apr. 2, 1982, ch. 278, § 19, 1982 Ky. Acts 729, 738 (codified at KRS § 342.122(5)(a)):

## B. *Expansion of Benefits for Permanent Partial Disability*

During the 1982 session, the General Assembly continued its recent experiments with changing the formula for payment of permanent partial disability benefits.<sup>18</sup> Prior to the 1980 amendments, permanent partial benefits had been lifetime benefits.<sup>19</sup> As a part of an effort to reduce compensation costs to employers, the 1980 General Assembly curtailed the benefits for permanent partial disability to a maximum of 425 weeks, less any period of temporary total disability for which the employee was compensated.<sup>20</sup> These benefits were subject, however, to the further limitation that all benefits for permanent partial disability would cease when the employee became eligible for the normal old-age benefits payable under the Federal Old Age Survivors and Disability Insurance Act.<sup>21</sup>

Apparently, the legislature decided that the benefits to the workers had been curtailed too much, and in 1982 once again amended KRS section 342.730 to remove the limitations for the

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*(a) For liabilities for injuries & occupational diseases incurred on or after July 1, 1983: 1. If on an annual review of the special fund the secretary of finance [commissioner of labor] finds that the special fund tax to be levied pursuant to this section may be [is] insufficient to pay prospective amounts which may be [such claims] awarded under the special fund provisions, he shall advise the Kentucky reinsurance association [commissioner of revenue] in writing of such fact and shall further request and give specifications for the association to make a proposal for reinsuring the liabilities of the special fund and for distributing the cost of such reinsurance to the subscribers of the association. The proposal will contain a total cost for such reinsurance, including the administrative costs of making benefit payments from subscribers and collecting premiums from subscribers. The total cost of reinsurance shall be distributed among the subscribers based on the "adjusted cost" of every subscriber unless the proposal sets forth another basis of cost distribution that the secretary of finance finds to be more equitable than "adjusted cost."*

*2. The secretary of finance shall then advertise for bids from qualified bidders for reinsurance of the liabilities of the special fund as set out in the proposal of the Kentucky reinsurance association.*

(Italicized words indicate additions. Bracketed words indicate repealed segments).

<sup>18</sup> Compare Act of Apr. 2, 1980, ch. 104, § 15, 1980 Ky. Acts, 191.200 (codified at KRS 342.730) (Cum. Supp. 1980) with Act of Apr. 2, 1982, ch. 278, § 23, 1982 Ky. Acts, 729, 742 (codified at KRS 342.730).

<sup>19</sup> See KRS § 342.730(1)(b) (1977) (amended 1980, 1982). The use of the term "lifetime" is somewhat misleading, as income benefits were paid only for the duration of disability.

<sup>20</sup> See KRS § 342.730(1)(b) (Cum. Supp. 1980) (amended 1982).

<sup>21</sup> *Id.* See also The Federal Old-Age, Survivors, and Disability Insurance Benefits Act, 42 U.S.C. §§ 401-433 (1976 & West Supp. 1982).

period of temporary total disability<sup>22</sup> and the provisions preventing payment beyond age sixty-five.<sup>23</sup> Thus, an award for permanent partial disability will extend for 425 weeks regardless of any period of temporary disability or the age of the worker. The legislature also added that "medical benefits shall be paid for the duration of the disability."<sup>24</sup> This segment of the amendment apparently extends the period of the employer's liability for medical expenses to the duration of the worker's disability, instead of limiting the employer's liability for medical expenses to the period of time for which income benefits are paid. Previously, employers and insurance carriers would not pay the medical expenses incurred by an employee after the 425 weeks of income benefits expired. Whether carriers will begin to pay medical benefits beyond the 425 week period without a court decision interpreting the amendment remains to be seen.

### C. *Miscellaneous Housekeeping Changes*

The 1982 Kentucky legislature made a number of other minor changes in the Act.<sup>25</sup> The amendment to KRS section 342.185 changes the period for filing an application of adjustment following the suspension of payment of voluntary benefits from one year to two years.<sup>26</sup> Prior to the 1982 amendments, both KRS section 342.185 and section 342.270 required that a claim be filed within

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<sup>22</sup> Act of Apr. 2, 1982, ch. 278, § 23, 1982 Ky. Acts 729, 742 (codified at KRS § 342.730 makes the following changes in KRS § 342.730(1)(b) (Cum. Supp. 1980):

Any temporary total disability period within the maximum period for permanent, partial disability payments shall [not] extend the maximum period *but shall not* [not] make payable a weekly benefit exceeding that determined in subsection (1)(a) of this section. Notwithstanding any section of KRS 342 to the contrary, there shall be no minimum weekly income benefit for permanent partial disability *and medical benefits shall be paid for the duration of the disability.* (bracketed material deleted by Amendment, italicized material added by Amendment).

<sup>23</sup> Act of Apr. 2, 1982, ch. 278, § 23, 1982 Ky. Acts 729, 742 (codified at KRS § 342.730) eliminates the phrase, "but such benefits shall not be paid after the employe[e] becomes eligible for normal old age benefits under the federal old age, survivors and disability act," from KRS § 342.730(1)(b) (Cum. Supp. 1980). 42 U.S.C.S. § 402(a) (1973 & Cum. Supp. 1983) provides that individuals complying with the statute are entitled to old age benefits at age 65.

<sup>24</sup> See KRS § 342.730(1)(b).

<sup>25</sup> See note 3, *supra* for a list of the sections amended.

<sup>26</sup> See Act of Apr. 2, 1982, ch. 278, § 20, 1982 Ky. Acts 729, 738 (codified at KRS § 342.185 (1983)).

two years after an injury, but section 342.185 provided only one year for filing a claim after suspension of voluntary benefits, and section 342.270 allowed two years.<sup>27</sup> Both sections now require a claim to be filed within two years after the suspension of voluntary income benefits.<sup>28</sup>

No specific statutory authorization existed prior to 1982 for the use of vocational or occupational experts, although their use has long been a part of the practice of workers' compensation. The amendment to KRS section 342.316(2)(b)(4) now grants the employer, Special Fund or other interested party the right to have an evaluation by a vocational expert.<sup>29</sup> This amendment would not be worthy of comment were it not for the fact that the authorization for vocational evaluation was only granted for occupational diseases.<sup>30</sup> However, in light of the prevalent use of vocational experts in both occupational disease and injury cases, the legislature likely did not intend to limit the use of vocational experts to only occupational disease cases. Perhaps this statutory authorization for the use of vocational experts was intended to have been made a part of KRS section 342.205, which gives the employer and the Special Fund the right to have an independent medical evaluation.

## II. JUDICIAL HIGHLIGHTS

### A. *Apportionment*

The courts and litigants continue to grapple with the conceptual basis for allocating the liability for disability benefits between employers and the Special Fund.<sup>31</sup> In two recent cases involving the liability of the Special Fund, the court of appeals clearly delineated the distinction between the compensable injury and

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<sup>27</sup> See KRS § 342.185 (Cum. Supp. 1980) (amended 1982); KRS § 342.270 (1983).

<sup>28</sup> See KRS § 342.185, .270 (1983). For a definition of voluntary payments of compensation, see *Hetteberg v. City of Newport*, 616 S.W.2d 35 (Ky. 1981) (voluntary payments under KRS § 342.185 include both income benefits and medical benefits).

<sup>29</sup> See Act of Apr. 2, 1982, ch. 426, § 1, 1982 Ky. Acts 1436, 1436 (codified at KRS § 342.316 (1983)).

<sup>30</sup> Cf. § 342.316(2)(b)(l) ("The application shall set forth the work history of the applicant with a concise description of injurious exposure to a specific occupational disease . . . and shall also include . . . two (2) written medical reports supporting his claim.")

<sup>31</sup> The relative contributions from employer and Special Fund are fixed by statute in occupational disease cases. See KRS § 342.316(13). But apportionment of liability for an injury is determined on a case by case basis. See KRS § 342.120.

liability for benefits once compensability has been established. In *Land v. Sparks*<sup>32</sup> and *Land v. Burden*<sup>33</sup> the court affirmed Workers' Compensation Board decisions which had allocated liability to the Special Fund for all disability resulting from an arousal of a pre-existing, non-disabling disease or condition,<sup>34</sup> excepting only that disability attributable to a prior active condition.<sup>35</sup> The Board had found in both cases that none of the resulting disability was attributable to the new injury alone,<sup>36</sup> which effectively relieved the employer of any liability to the employee for weekly income benefits.<sup>37</sup>

In each case the Special Fund contended on appeal that because the new injury which aroused the dormant, non-disabling condition was not compensable by the employer, no liability should be imposed upon the Special Fund.<sup>38</sup> The court in both *Starks* and *Burden* found that an employer is liable for payment of benefits when an employee has suffered a "work-related harmful change in the human organism."<sup>39</sup> Once compensability is established, a different statute, KRS section 342.120 governs the apportionment of liability for compensation payments as between the employer and the Special Fund.<sup>40</sup> The fact that KRS section 342.120 shifts liability for payment of compensation to the Special Fund "does not render an otherwise compensable injury non-compensable."<sup>41</sup>

The rationale of the 1981 *Starks* and *Burden* decisions was not

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<sup>32</sup> 628 S.W.2d 346 (Ky. Ct. App. 1981).

<sup>33</sup> 626 S.W.2d 221 (Ky. Ct. App. 1981).

<sup>34</sup> 628 S.W.2d at 348; 626 S.W.2d at 222.

<sup>35</sup> 628 S.W.2d at 348; 626 S.W.2d at 222. An employee's prior active disability is not compensable. KRS § 342.120.

<sup>36</sup> See 628 S.W.2d at 347; 626 S.W.2d at 222.

<sup>37</sup> See KRS § 342.120(3).

<sup>38</sup> The Special Fund based its argument in both cases on the use of the phrase "subsequent compensable injury" found in KRS § 342.120(1)(b),(3). The Fund contended that since the employee in both *Burden* and *Starks* did not receive compensation benefits from the employer for his latest injury, there had been no "subsequent compensable injury" and therefore no liability for the Special Fund. 628 S.W.2d at 346; 626 S.W.2d at 221.

<sup>39</sup> 628 S.W.2d at 348; 626 S.W.2d at 222. KRS § 342.620(1) (1983) defines injury as "any work related harmful change in the human organism arising out of and in the course of employment." KRS § 342.610(1) (1983) provides that "[e]very employer subject to the Workers' Compensation Act shall be liable for compensation for injury . . . without regard to fault as to the cause of the injury."

<sup>40</sup> KRS § 342.120(4)-(5). See 628 S.W.2d at 348; 626 S.W.2d at 222.

<sup>41</sup> 628 S.W.2d at 348; 626 S.W.2d at 222.



applied to two cases decided in 1983 involving heart attacks. In *Wells v. Collins*<sup>42</sup> and *Wells v. Dal-Camp, Inc.*,<sup>43</sup> the respective employees had an underlying condition of arteriosclerotic heart disease<sup>44</sup> and suffered a work-related heart attack. The Board in each case apportioned 75 percent of the liability to the Special Fund and 25 percent to the employer.<sup>45</sup>

In *Wells v. Dal-Camp, Inc.*, all of the physicians testified that the exertion by the employee at work would not have brought on the fatal heart attack or any other disability had it not been for the presence of the underlying abnormal blood vessel condition.<sup>46</sup> The court of appeals concluded, based upon the unanimity of the testimony of the physicians, that as matter of law there was no substantial evidence to support the apportionment made by the Board.<sup>47</sup> In *Wells v. Collins*, all but one physician testified that the exertional trauma alone would not have caused the death of the employee were it not for the underlying arteriosclerotic heart disease.<sup>48</sup> The Board-appointed physician, however, still attributed 25 percent of the disability to the exertional trauma.<sup>49</sup> The opinion does not disclose whether the Board-appointed physician was asked to determine whether the employee would have suffered an injury as a result of the work he was performing in the absence of any pre-existing dormant arteriosclerotic condition.<sup>50</sup> Since adequate medical evidence in the record supported the findings, the decision was affirmed.<sup>51</sup>

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<sup>42</sup> 30 KY. L. SUMM. 6, at 3 (Ky. Ct. App. Mar. 12, 1983), *reh'g denied*, No. 82-CA-1539-MR (Ky. Ct. App. Mar. 6, 1983) [hereinafter cited as KLS], *discretionary rev. granted*, 83-SC-389-DG (June 29, 1983).

<sup>43</sup> 30 KLS 4, at 5 (Ky. Ct. App. Mar. 31, 1983), *discretionary rev. granted*, 30 KLS 8, at 15 (June 29, 1983).

<sup>44</sup> 30 KLS 6, at 3-4 (employee had a dormant coronary arteriosclerotic condition); 30 KLS 4, at 5-6 (employee had abnormal coronary vessels).

<sup>45</sup> 30 KLS 6, at 4; 30 KLS 4, at 6.

<sup>46</sup> 30 KLS 4, at 6.

<sup>47</sup> *Id.*

<sup>48</sup> 30 KLS 6, at 4. One physician attributed the sole cause of the heart attack to the pre-existing arteriosclerotic heart disease, as opposed to the physical exertion. This physician expressed the opinion that the heart disease was not dormant. *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* In order to achieve 100% apportionment to the Special Fund, it is necessary that the employee would have suffered no disability had it not been for the dormant, pre-existing disease or condition. KRS § 342.120(3).

<sup>51</sup> 30 KLS 6, at 5.

Of more interest than the ultimate result in *Collins* was the reasoning used to achieve that result. The court concluded that the Board cannot find complete liability against either the employer or the Special Fund, but *must* apportion liability between the employer and the Fund.<sup>52</sup> The court acknowledged that generally an individual without an underlying health problem will not suffer a heart attack under simple physical exertion, and that arteriosclerosis alone will probably culminate in a heart attack without the intervention of work related stress.<sup>53</sup> Judge McDonald, writing for the court, stated, however, that if the Special Fund were held liable for the full amount of the benefits under such facts, the employer would probably never be liable for benefits in heart attack cases.<sup>54</sup> Further, the court viewed the very word "apportionment" to mean that liability must be divided between two or more parties; one cannot place the entire liability for benefits on one party and still "apportion."<sup>55</sup> From this perspective, the court concluded that neither the statute nor case law supported an interpretation that the Special Fund could be liable for the entire award.<sup>56</sup>

The court's conclusion is plainly contrary to the language of KRS section 342.120 that the employer is liable only for the degree of disability which would have resulted had there been *no* pre-existing disability or dormant disease or condition which had been aroused by the injury.<sup>57</sup> The court stated that if a work connection exists between an incident of exertion and the heart attack, "then the employer is liable for a proportionate part of the

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 4.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 5. The Court relied, in part, on the decision of *Moore v. Square D Co.*, 518 S.W.2d 781 (Ky. 1975). However, any reliance upon this case was misplaced, as *Moore* dealt with the question of causation in heart attack cases, as opposed to apportionment. In *Moore*, a Board decision which apportioned 100% liability to the employer was reversed by the Court on the basis that once the evidence of pre-existing condition is before the Board, the Board should have demanded evidence of apportionment be produced. *Id.* at 784-85. The *Collins* court mistakenly relied on this holding to require an apportionment between the Fund and the employer in every heart attack case.

<sup>56</sup> The court, in effect, ignored the cases of *Wells v. Dal-Camp*, 30 KLS 4, at 5; *Land v. Starks*, 628 S.W.2d at 346; *Land v. Burden*, 626 S.W.2d at 221 in making this determination.

<sup>57</sup> See KRS § 342.120(4).

award, even if the same exertion and stress would have caused no injury to a healthy individual."<sup>58</sup> It is clear that the *Collins* decision confused the concept of compensability with apportionment. This language could be considered only dicta in light of the fact that the court of appeals in *Collins* needed only to decide whether testimony of the Board-appointed physician was sufficient to support the Board's findings, but this decision will still cast some uncertainty on the law of apportionment when compared with *Starks*, *Burden* and *Dal-Camp*.

### B. *Adequacy of Findings of Fact by the Board*

The extent to which the Board is required to make findings of fact to support its ultimate conclusions has been a topic for frequent appellate review. In *Shields v. Pittsburgh and Midway Coal Mining Co.*,<sup>59</sup> the court reviewed prior decisions dealing with the sufficiency of Board findings and distilled these decisions into concrete guidelines.<sup>60</sup> The court affirmed the fundamental administrative law principle that the Board, as the fact finder, must set forth in its opinion the basic facts which support the ultimate conclusion.<sup>61</sup> This principle would "require the Board to support its conclusions with facts drawn from the evidence in each case so that both sides may be dealt with fairly and be properly apprised of the basis for the decision."<sup>62</sup> Such an opinion is necessary in order for "the [c]ourt, upon review, to determine whether the administrative agency had acted within its powers"<sup>63</sup> in its conclusions on such issues as work-related injury<sup>64</sup> and occupational disability.<sup>65</sup>

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<sup>58</sup> 30 KLS 6, at 5.

<sup>59</sup> 634 S.W.2d 440 (Ky. Ct. App. 1982).

<sup>60</sup> *Id.* at 444 (construing *Marshall County v. South Central Bell Tel. Co.*, 519 S.W.2d 616 (Ky. 1975); *Caller v. Ison*, 508 S.W.2d 776 (Ky. 1974); *Pearl v. Marshall*, 491 S.W.2d 837 (Ky. 1973); *Energy Regulation Comm'n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. Ct. App. 1980); *Chemetron Corp. v. McKinley*, 574 S.W.2d 332 (Ky. Ct. App. 1978); *McCracken County Health Spa v. Henson*, 568 S.W.2d 240 (Ky. Ct. App. 1977).

<sup>61</sup> 634 S.W.2d at 444. KRS § 342.275 (1983) requires the Board to submit with the record "[t]he award, order or decision, together with a statement of the findings of fact, rulings of law and any other matters pertinent to the question at issue."

<sup>62</sup> 634 S.W.2d at 444.

<sup>63</sup> *Id.* at 443.

<sup>64</sup> *See id.* at 443-44 (citing *McCracken County Health Spa v. Henson*, 568 S.W.2d at 240).

<sup>65</sup> *See id.* (citing *Chemetron Corp. v. McKinley*, 574 S.W.2d at 332).

### C. *Defining an Injury of Appreciable Proportions*

In *Hester v. United Parcel Services*,<sup>66</sup> the court of appeals, in an unpublished opinion, once again had the opportunity to consider the elusive concept of whether an employee had suffered an injury of appreciable proportions.<sup>67</sup> *Hester* is the first case to interpret the 1980 amendments to KRS section 342.730(1)(b).<sup>68</sup> In *Hester*, the employee severed his Achilles tendon and, after thirteen weeks of temporary total disability, returned to his regular job. The medical testimony ascribed a ten percent functional impairment to the injury, but the physician was of the opinion that the employee could perform his regular job and do just about anything with minimal pain.<sup>69</sup> The Board denied an award of permanent disability and concluded the injury was not of appreciable proportions since there was no probable loss of future earning capacity.<sup>70</sup> The Board's decision was affirmed since the employee failed to show a decrease in wage earning capacity or loss of ability to compete for employment,<sup>71</sup> as required under the KRS section 342.620(11) definition of disability.<sup>72</sup>

<sup>66</sup> 30 KLS 8, at 6 (Ky. Ct. App. July 7, 1983), *discretionary rev. denied*, 30 KLS 14, at 13 (Nov. 24, 1983). Opinion ordered not to be published.

<sup>67</sup> *Id.* The concept of an "injury of appreciable proportions" was introduced in *Osborne v. Johnson*, 432 S.W.2d 800 (Ky. 1968).

<sup>68</sup> KRS § 342.730(1)(b) currently provides:

(1) Income benefits for disability shall be paid to the employe as follows:

. . . .

(b) For permanent, partial disability, sixty-six and two-thirds [percent] (66⅔%) of the employe'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. Any temporary total disability period within the maximum period for permanent, partial disability benefits shall extend the maximum period but shall not make payable a weekly benefit exceeding that determined in subsection (1)(a) of this section. Notwithstanding any section of KRS Chapter 342 to the contrary, there shall be no minimum weekly income benefit for permanent partial disability and medical benefits shall be paid for the duration of the disability.

<sup>69</sup> 30 KLS 8, at 6.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 7.

<sup>72</sup> KRS § 342.620(11) defines "disability" to mean:

[A] decrease of wage earning capacity due to injury or loss of ability to com-

The 1980 amendments to section 342.730(1)(b) provide for a permanent partial disability award based upon the greater of occupational disability, as determined under section 342.620(11), or the functional impairment as determined by the "American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment," 1977 Edition.<sup>73</sup> *Hester* made clear that any functional disability must be compensated, even if an employee does not have an injury of appreciable proportions under KRS section 342.620(11).<sup>74</sup> The court concluded, however, that the employee bears the burden of proving a medical functional impairment under the AMA guides. Without such evidence, the Board was unable to make the comparison mandated by statute and had no choice but to proceed to the determination of occupational disability under section 342.620(11).<sup>75</sup> Since the only medical evidence in the record showed that the employee returned to work and could do anything necessary, the Board's finding of no occupational disability was not clearly erroneous.<sup>76</sup>

A precursor to the decision in *Hester* came in *Jones v. Institute of Electronic Technology*,<sup>77</sup> decided under the statutes as they existed prior to the 1980 amendments.<sup>78</sup> Jones was employed by the Institute of Electronic Technology when he "suffered a work-related injury which resulted in the amputation of a portion of the distal phalange of his ring and little fingers on his right hand."<sup>79</sup>

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

<sup>73</sup> See KRS § 342.730(1)(b). The AMERICAN MEDICAL ASS'N COMMITTEE ON RATING OF MENTAL AND PHYSICAL IMPAIRMENT, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (2d ed. 1977) provides a comprehensive system for the evaluation of physical impairment and defines "permanent impairment" as "any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved, which abnormality or loss the physician considers stable or nonprogressive at the time evaluation is made." *Id.* at iii.

<sup>74</sup> "The [1980] amendment requiring . . . reference [to the American Medical Association Guides] obviously indicates the legislative intent to retain functional impairment as being compensable since the Guide's purpose is to determine functional disability." 30 KLS 8, at 6.

<sup>75</sup> *Id.* at 7.

<sup>76</sup> *Id.* at 6.

<sup>77</sup> 613 S.W.2d 420 (Ky. 1981).

<sup>78</sup> See *id.* at 423.

<sup>79</sup> *Id.* at 420.

The Board awarded Jones compensation under the schedule of benefits set forth in KRS section 342.730(1)(c).<sup>80</sup> No finding was made under KRS section 342.730(1)(c)(27), which provided:

If . . . the effects of any of the injuries, or disabilities, from occupational diseases, or losses, mentioned in this section adversely affect a workman's ability to labor, or limit his occupational opportunities to obtain the kind of work he is customarily able to do; his compensation benefits shall not be limited to the amounts provided by this section, and he shall be awarded compensation benefits under some other applicable or appropriate section of this chapter which would provide more compensation benefits for his disability.<sup>81</sup>

The Supreme Court of Kentucky held that an employee could recover under both the KRS section 342.730(1)(c) schedule of benefits and section 342.730(1)(c)(27).<sup>82</sup> Relying upon the earlier decision of *Blair v. General Electric Co.*,<sup>83</sup> the Court in *Jones* ruled:

[T]he Board must make a finding of whether the effects of any of the injuries or disabilities to a member of the body adversely affect claimant's ability to labor or limit his occupational opportunities to obtain the kind of work he is customarily able to do. If so, then, and in that event, his compensation benefits must not be limited to the price tag amounts, and he shall be awarded compensation benefits under some other applicable or appropriate section of KRS Chapter 342 which would provide more compensation benefits for his disability. In other words, as we have stated heretofore, the price tag statute provides a minimum amount of recovery.<sup>84</sup>

Even before the *Jones* decision was issued, section 342.730 was

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<sup>80</sup>*Id.* at 421. KRS § 342.730(1)(c) (1977) was amended in 1980 so as to eliminate the schedule of benefits. See Act of Apr. 2, 1980, ch. 104, § 15, 1980 Ky. Acts 191, 200 (codified at KRS § 342.730(1)(b) (1983)).

<sup>81</sup> KRS § 342.730(1)(c)(27) (1977), *repealed by* Act of Apr. 2, 1980, ch. 104, § 15, 1980 Ky. Acts, 191, 200.

<sup>82</sup> 613 S.W.2d at 423.

<sup>83</sup> 565 S.W.2d 631 (Ky. 1978). In *Blair*, an employee was awarded the scheduled benefits for total loss of vision in one eye, but the Court reasoned that a laborer who loses one eye will additionally suffer some loss of occupational opportunities. Thus, the Court ruled that the employee was also entitled to have the degree of his occupational disability determined by the Board under KRS § 342.730(1)(c)(27). *Id.* at 633.

<sup>84</sup> 613 S.W.2d at 423.

amended and the benefits schedule of subsection (1)(c) was eliminated.<sup>85</sup> These amendments, however, have not diminished the importance of *Jones*. The 1980 amendments have merely substituted the "AMA Guides to the Evaluation of Permanent Impairment" for the benefits schedule.<sup>86</sup> Thus, the concepts enunciated in *Jones* which require the Board to make a finding as to the existence of both occupational disability and medical functional impairment, and then award the claimant the greater of the two, are still being carried forward by the courts as evidenced by *Hester*.

#### D. *Reopening*

By statute, a party may ask the Board to reopen any case to review an otherwise final award or order upon "a showing of change of conditions, mistake or fraud or newly discovered evidence."<sup>87</sup> In the seminal case of *Osborne v. Johnson*,<sup>88</sup> the Court held that the term "change of conditions" meant a change of the worker's *physical* condition;<sup>89</sup> a mere change in the worker's economic conditions was not a change of conditions within the meaning of the statute.<sup>90</sup> In *Mitsch v. Stauffer Chemical Co.*,<sup>91</sup> the Court reinterpreted "change of conditions" to also encompass a change in occupational disability.<sup>92</sup> Although the Court did not expressly distinguish *Osborne*,<sup>93</sup> it was clear that the Court had expanded the basis for reopening a claim.

In the recent case of *Continental Air Filter v. Blair*,<sup>94</sup> the interpretation of "change of conditions" was expanded further. Blair had lost all fingers on both hands except one index finger and both thumbs. Initially, the Board awarded him fifty percent disability,

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<sup>85</sup> See Act of Apr. 2, 1980, ch. 104, § 15, 1980 Ky. Acts 200, 202.

<sup>86</sup> See KRS § 342.730(1).

<sup>87</sup> KRS § 342.125(1).

<sup>88</sup> 432 S.W.2d at 800.

<sup>89</sup> *Id.* at 805 (emphasis in original).

<sup>90</sup> *Id.* at 804-05.

<sup>91</sup> 487 S.W.2d 938 (Ky. 1972).

<sup>92</sup> *Id.* at 939. According to the Court, the Workers' Compensation Act was established to compensate occupational disability; thus, a subsequent change in occupational disability would be a sufficient basis to reopen a case. *Id.* at 939-40.

<sup>93</sup> The Court cites *Osborne* without any distinguishing language. See *id.* at 939.

<sup>94</sup> 30 KLS 8, at 5 (Ky. Ct. App. July 7, 1983), *reh'g denied*, 30 KLS 10, at 9 (Ky. Ct. App. Sept. 1, 1983), *discretionary rev. filed*, 30 KLS 11, at 24 (Sept. 22, 1983).

but noted that it would have found him 100 percent disabled if he had not been working.<sup>95</sup> The Board also said that the case could be reopened upon a change of condition.<sup>96</sup> At the time of the award, Blair was working as a quality control inspector requiring primarily visual duties. He was then transferred to foreman of the night shift. When the night shift was eliminated, he was returned to the day shift in a new capacity, conducting inventory. Following the issuance of the Board opinion, it became apparent that Blair could not perform these duties, and he was eventually discharged when the employer could not provide him with other work.<sup>97</sup> The court of appeals, distinguishing *Osborne v. Johnson* on the facts, held that such a change in the economic conditions of the worker was sufficient for a reopening.<sup>98</sup>

Although *Continental Air Filter Co. v. Blair* at first blush seems to plow new ground in Kentucky, this decision may be limited to its facts. At the time of the original opinion, Blair held a "made work" job, since the position in quality control did not exist prior to his injury and was not filled after his transfer.<sup>99</sup> The Board, in its discretion, had simply limited the amount of compensation to be paid by the employer so long as it provided a job to the employee. Once the employer became unable to provide a job, the employee was entitled to an award of total, permanent disability.<sup>100</sup> The court in *Continental Air Filter* referred to *Dolt & Dew, Inc. v. Smith*,<sup>101</sup> in which an award of permanent partial disability was changed to total disability when the employer went out of business. The Court in *Dolt & Dew* had ruled:

[T]hat the Board was justified in determining that Smith's

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<sup>95</sup> 30 KLS 8, at 6.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> The court held in part: "[B]ecause Blair could not perform the duties assigned to him after the 1975 accident, the Workers' Compensation Board correctly increased his disability from 50% to 100%." *Id.*

<sup>101</sup> 493 S.W.2d 711 (Ky. 1973). While *Dolt & Dew* is not a reopening case, the reasoning of the Court in that case should carry over. The court in *Continental Air Filter* obviously believed the reasoning applied since the case was cited as additional authority. See *Continental Air Filter v. Blair*, No. 82-CA-1660-MR, slip op. at 5-6 (Ky. Ct. App. July 1, 1983) (this discussion does not appear in KLS).



disability, the effects of which were not fully realized, permanent and partial so long as he was afforded work by his employer that he was able to do, proved to be total and permanent when his employer went out of business and no other work was available to him in the area's labor market.<sup>102</sup>

### E. *Presumptions*

In occupational disease cases, the Workers' Compensation Act provides that an employee may take advantage of certain presumptions concerning causation when a diagnosis of a compensable pneumoconiosis is made following an exposure of ten or more years.<sup>103</sup> For example, when an employee files an application for adjustment of a claim accompanied by two medical reports, the burden of proof shifts to the employer and the Special Fund.<sup>104</sup> In two recent cases, the court of appeals held that the presumptions do not entitle the employee to an award in the face of conflicting evidence,<sup>105</sup> nor do the presumptions relieve the worker of the ultimate burden of persuasion.<sup>106</sup>

In *Kington v. Zeigler Coal Co.*,<sup>107</sup> the employee had supported his claim with the testimony of two general practitioners, while a pulmonary specialist and a radiologist testified that the employee was not suffering from compensable pneumoconiosis.<sup>108</sup> When the Board denied benefits, the employee appealed, arguing that the statutory presumptions entitled him to an award.<sup>109</sup> The court of

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<sup>102</sup> 493 S.W.2d at 713.

<sup>103</sup> See KRS § 342.316(5). This statute provides: "Where the occupational disease is a compensable pneumoconiosis and there has been employment exposure for ten (10) years or more to an industrial hazard sufficient to cause the disability of pneumoconiosis there shall be a rebuttable presumption that the disability or death was due to the compensable pneumoconiosis." *Id.*

<sup>104</sup> KRS § 342.316(2)(b)(2) states:

The filing of a properly executed application for adjustment of claim, accompanied by the two medical reports described in subparagraph 1 of this paragraph, shall satisfy the requirements of the presumptive clause set out in subsection (5) of this section and the burden of proof shall immediately thereafter shift to the employer.

<sup>105</sup> See *Wells v. Hamilton*, 645 S.W.2d 353 (Ky. Ct. App. 1983). For a discussion of this case see text accompanying notes 113-18 *infra*.

<sup>106</sup> See *Kington v. Zeigler Coal Co.*, 639 S.W.2d 560 (Ky. Ct. App. 1982). See text accompanying notes 107-12 *infra* for a discussion of this case.

<sup>107</sup> 639 S.W.2d at 560.

<sup>108</sup> *Id.* at 561.

<sup>109</sup> *Id.*

appeals held that the testimony of the pulmonary specialist and the radiologist rebutted the presumption created by the filing of the application supported by two medical reports.<sup>110</sup> If the employer had failed to introduce sufficient evidence to the contrary, the presumption would have won the case for the employee. Since the evidence introduced was deemed sufficient to rebut the presumption, the Board then found the employer's evidence that the employee did not suffer a compensable pneumoconiosis more convincing, and denied the employee's claim.<sup>111</sup> While the presumption will relieve the employee of the initial burden of production of evidence, it does not relieve the employee of the burden of persuasion.<sup>112</sup>

In *Wells v. Hamilton*,<sup>113</sup> the employee had filed a claim supported by two medical reports and then introduced the statements of three physicians attesting that he suffered from pneumoconiosis, while the employer and the Special Fund introduced the testimony of four physicians to the contrary.<sup>114</sup> The Board concluded that the case presented a close factual issue as to whether the employee suffered from pneumoconiosis but since the plaintiff was entitled to the presumptions contained in KRS section 342.316(2)(b)(2) and section 342.316(5), the Board found that the employee had a compensable occupational pneumoconiosis.<sup>115</sup>

In extending the holding of *Kington v. Zeigler Coal Co.*, the court of appeals stated that when the employer and the Special Fund have introduced probative medical evidence that the worker does not suffer from the disease, the Board is not entitled to rely upon the statutory presumptions.<sup>116</sup> By relying on the statutory presumptions, the Board had avoided having to determine which medical evidence to believe.<sup>117</sup> The presumptions may prevail only if no substantial evidence to the contrary is introduced. The Board may not abdicate its role as the fact finder by use of the statutory

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<sup>110</sup> *Id.* at 562.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> 645 S.W.2d at 353.

<sup>114</sup> *Id.* at 354.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

presumption when conflicting medical evidence is introduced.<sup>118</sup>

The effect of these two cases is to leave intact the presumption as a procedural hurdle for the employer to overcome after the employee has filed a claim properly supported by two medical reports. Once the employer introduces substantial evidence to the contrary, however, the presumptions in favor of the employee disappear and the Board must determine the dispute based upon the evidence presented in the record.<sup>119</sup>

#### F. *Statute of Limitations*

The period of limitation for an employee to bring an action under the Workers' Compensation Act is two years from the date of injury or two years after the cessation of voluntary payments of income benefits.<sup>120</sup> But, the limitations period for an employer to bring an indemnity or subrogation action before the Board of Claims against the Commonwealth of Kentucky is one year from the date of injury.<sup>121</sup> Thus, if an employee were injured but did not file his claim until more than a year after the date of the injury, the employer might be left without a corresponding remedy.

The court of appeals addressed this issue in *Continental Casualty Co. v. Commonwealth*,<sup>122</sup> in which an employee recovered an award from the Workers' Compensation Board more than one year after the injury occurred.<sup>123</sup> The compensation carrier brought an action before the Board of Claims to recoup those benefits under theories of subrogation and indemnity pursuant to KRS section 342.700.<sup>124</sup> The Board of Claims dismissed the carrier's action as barred by the one year statute of limitations.<sup>125</sup> However, in order to provide a remedy to the carrier, the court of appeals concluded that such a literal application of the statute defeated the

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<sup>118</sup> *Id.* at 354-55.

<sup>119</sup> *Id.* at 355.

<sup>120</sup> KRS § 342.185, .270.

<sup>121</sup> KRS § 44.110 (1980).

<sup>122</sup> 29 KLS 12, at 7 (Ky. Ct. App. Oct. 13, 1982), *discretionary rev. granted*, 29 KLS 15, at 14 (Ky. Dec. 15, 1982).

<sup>123</sup> *Id.* at 7.

<sup>124</sup> *Id.* For a discussion of the theories of subrogation and indemnity as they apply to workers' compensation, see text accompanying notes 158-75 *infra*.

<sup>125</sup> 29 KLS 12, at 7.

whole purpose for which the rights of the employer or insurance carrier had been created.<sup>126</sup> The court chose not to impute to the legislature an intent to produce such an absurd result. Relying upon *Taylor v. Fidelity & Casualty Co.*,<sup>127</sup> which stated that the court's supreme duty in construing a statute is to carry out the legislature's evident intention,<sup>128</sup> the court impliedly held that the time for commencing an action in such a case does not accrue until the obligation for payment of compensation benefits by the employer or carrier has occurred.<sup>129</sup>

In practical application, *Continental Casualty Co.* relieves employers and carriers of the burden of filing an action to preserve potential workers' compensation benefits not yet paid. On the other hand, non-employer parties who are liable for injuries suffered by an individual while working for another should be aware that the employer of the injured individual or the employer's carrier could bring an action for indemnity for compensation payments made to the employee even after the injured party's cause of action against the responsible party is time barred.

#### G. Coverage Under the Act-Exclusive Remedy

In a case of potentially far reaching significance, the Kentucky Supreme Court in *Firestone Textile Co. v. Meadows*,<sup>130</sup> held that an employee who was terminated for filing a workers' compensation claim had a cause of action for compensatory damages. Although the Court did not abandon the terminable at will doctrine, it did recognize the existence of exceptions to the doctrine. In defining what kind of exceptions should be recognized the Court quoted from the Wisconsin case of *Brockmeyer v. Dun & Bradstreet*:<sup>131</sup>

[A]n employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law . . . . The public policy

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<sup>126</sup> *Id.*

<sup>127</sup> 55 S.W.2d 410 (Ky. 1932).

<sup>128</sup> *Id.* at 413.

<sup>129</sup> See 29 KLS 12, at 7.

<sup>130</sup> 30 KLS 14, at 11 (Ky. Nov. 24, 1983).

<sup>131</sup> 335 N.W.2d 834 (Wis. 1983).

must be evidenced by a constitutional or statutory provision. An employee cannot be fired for refusing to violate the constitution or a statute. Employers will be held liable for those terminations that effectuate an unlawful end.<sup>132</sup>

The Court further noted that the Workers' Compensation Act provides a sufficient basis for an exception to the terminable at will doctrine.<sup>133</sup> While KRS section 342.690 provides that the Act is the exclusive remedy for an employee and is "in place of all other liability of such employer to the employe . . . on account of such injury,"<sup>134</sup> the Court nonetheless recognized that an employer who terminates an employee for filing a workers' compensation claim has interfered with an important public interest.<sup>135</sup> The Court stated: "The only effective way to prevent an employer from interfering with his employee's right to seek compensation is to recognize that the latter has a cause of action for retaliatory discharge when the discharge is motivated by the desire to punish the employee for seeking the benefits to which he is entitled by law."<sup>136</sup>

Now that an exception has been recognized to the old doctrine of terminable at will,<sup>137</sup> the question will be how far to take this

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<sup>132</sup> 30 KLS 14, at 11 (quoting *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d at 840). As further support, the Court referred to KRS § 446.070 (1975): "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation . . . ."

<sup>133</sup> 30 KLS 14, at 11.

<sup>134</sup> KRS § 342.690(1) (1983).

<sup>135</sup> 30 KLS 14, at 12. The Court stated:

It is an important public interest that injured employees shall receive, and employers shall be obligated to pay, for medical expenses, rehabilitative services and a portion of lost wages. Injured employees should not become public charges. If that is the public policy of Kentucky, and it is, then action on the part of an employer which prevents an employee from asserting his statutory right to medical treatment and compensation violates that policy.

*Id.*

<sup>136</sup> *Id.* The Court, in an effort to "suitably" control the cause of action for wrongful discharge, adopted the rule that the initial determination of whether the discharge was in violation of a constitutional or implicit statutory right was for the court as a question of law. 30 KLS 14, at 11 (citing *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d at 841).

<sup>137</sup> Under Kentucky case law, an employee hired for an indefinite term is subject to discharge at the discretion of his employer. See *Production Oil Co. v. Johnson*, 313 S.W.2d 411 (Ky. 1958); *Gambrel v. UMW*, 249 S.W.2d 158 (Ky. 1952); *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. Ct. App. 1977).

implied duty. Other courts have extended such a concept beyond the bounds of a statutory right such as workers' compensation and have found a basis for an implied duty to continue employment in employee manuals<sup>138</sup> or in the employer-employee relationship itself.<sup>139</sup> Only time will tell whether *Meadows* is the beginning of the end for "terminable at will" employment in Kentucky.

Further limiting the exclusive remedy doctrine of the compensation act, the court in *Columbia Sussex Corp. v. Hay*,<sup>140</sup> refused to extend the Act to cover alleged slander or false imprisonment.<sup>141</sup> The court drew a distinction based upon the purpose of the Act to compensate an employee for physical and mental injuries arising from the employment relationship as opposed to a claim not requiring a showing of actual damage and held that the Act remained limited to compensation for such actual injuries.<sup>142</sup>

In *Kentucky Farm and Power Equipment Dealers Association v. Fulkerson Brothers, Inc.*,<sup>143</sup> the Court ruled that an unpaid officer of a trade association was not an employee within the Act.<sup>144</sup> The plaintiff served as vice president of a family-owned corporation engaged in the sale of farm equipment, while he also served as president of Kentucky Farm and Power Equipment Dealers Association, Inc., an unpaid position of a nonprofit trade association. The plaintiff was injured while in the course of his duties with the trade association.<sup>145</sup> Concluding that he was not an "employee" of the trade association within the purview of the compensation act, the Court viewed the definition of employee under the Act as more narrow than that of "servant" in a master-servant relationship.<sup>146</sup> The "threshold requirement" is that the employee

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<sup>138</sup> See *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980). *But see* *Shaw v. S.S. Kresge Co.*, 328 N.E.2d 775 (Ind. 1975). See generally Annot., 12 A.L.R.4th 544, 567-72 (1982).

<sup>139</sup> See *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722 (Cal. Ct. App. 1980). *But see* *Martin v. Tapaley*, 360 So. 2d 708 (Ala. 1978). See generally Annot., *supra* note 138, at 560-67.

<sup>140</sup> 627 S.W.2d 270 (Ky. Ct. App. 1981).

<sup>141</sup> *Id.* at 278-79.

<sup>142</sup> *Id.* at 279.

<sup>143</sup> 631 S.W.2d 633 (Ky. 1982).

<sup>144</sup> *Id.* at 634.

<sup>145</sup> *Id.* at 634-35.

<sup>146</sup> *Id.* at 635.

must be one for hire, since the purpose of the Act is to compensate for lost wages.<sup>147</sup> The Court found the language of KRS section 342.640(2), which extends coverage of the Act to an "executive officer of a corporation" to refer to an employee for hire and not voluntary or honorary employees.<sup>148</sup> While the result in this case appears to be equitable, the Court may have written into the compensation act a distinction that might have been better left to the legislature.

Since *Miller v. Scott*,<sup>149</sup> the Act has prohibited an action by one employee against another for negligence in causing a work-related injury.<sup>150</sup> The Court in *Kearns v. Brown*,<sup>151</sup> however, ruled that if an employee by his actions removed himself from the course of his employment he would lose the immunity of the Act.<sup>152</sup> The decedent was a passenger in an automobile driven by a fellow employee at the request of their employer. They had maintained a steady course toward their intended destination. However, during this trip the driver was playing "chicken" with approaching vehicles by crossing over the center line and then attempting to switch back into the proper lane in time to pass safely.<sup>153</sup> While the case was remanded to the trial court for a determination as to whether the driver was acting in the course and scope of his employment,<sup>154</sup> the court still concluded that if the driver's acts were not within the scope of his employment, then he would not

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> 339 S.W.2d 941 (Ky. 1960).

<sup>150</sup> In *Miller v. Scott*, the plaintiff was injured in an accident during the course of his employment. *Id.* at 942. He was riding in a truck driven by a co-employee, when the truck collided with an automobile. The plaintiff filed a negligence action against the co-employee, but the trial court interpreted the Act to preclude this suit. *Id.* at 943. Although no specific statute prohibited the action, the Court contended that the intent of the Act was to cover all industrial accidents and provide the exclusive remedy unless expressly excluded by the statute. *Id.* at 943-44.

When KRS § 342.690 (1983) was enacted in 1972, the following provision was added: "The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier. . . ." See Act of Mar. 17, 1972, ch. 78 § 9, 1972 Ky. Acts 305, 315.

<sup>151</sup> 627 S.W.2d 589 (Ky. Ct. App. 1982).

<sup>152</sup> *Id.* at 591.

<sup>153</sup> *Id.* at 590-91.

<sup>154</sup> *Id.* at 591.

be entitled to immunity from his co-employee's action for damages.<sup>155</sup>

KRS section 342.610(3) grants the employer a defense from liability to the employee only for injuries primarily caused by the employee's intoxication or the employee's willful intention to injure himself or another.<sup>156</sup> No exclusion exists, however, under the statute for horseplay or gross negligence.<sup>157</sup> The court's conclusion in *Kearns* might have been different, if the decedent had filed a compensation claim against the employer and the employer had argued that the driver/employee had removed himself from the course of his employment. In this situation, a potentially inconsistent result is possible since an employer could be held liable by the Board because the injury was not intentional. The employee would then seem entitled to immunity under KRS section 342.690, yet under *Kearns* the co-employee could be liable because his actions, though unintentional, removed him from the course of employment. If the intent of the Act is to provide an exclusive remedy, then such inconsistent results should not be allowed.

#### H. *Indemnity and Subrogation*

Through a series of recent cases, the Kentucky courts have reevaluated the rules as to the application of indemnity and subrogation in workers' compensation. It has long been recognized in Kentucky that a third party tortfeasor may not obtain contribution from an injured employee's employer.<sup>158</sup> But, the rights of subrogation and indemnity, also once well established, have recently been changed. In *American States Insurance Co. v. Audubon Country Club*,<sup>159</sup> the Court ruled that a compensation carrier does not have an independent right of indemnity against a third party tortfeasor when an injured employee obtains recovery from such

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<sup>155</sup> *Id.*

<sup>156</sup> "[L]iability for compensation shall not apply where injury, occupational disease or death to the employe was proximately caused primarily by his intoxication or by his willful intention to injure or kill himself or another." KRS § 342.610(3) (1983).

<sup>157</sup> *See id.* The parties had for some reason stipulated that the driver/employee was engaged in horseplay. 627 S.W.2d at 590.

<sup>158</sup> *See, e.g.,* *Ashland Oil & Ref. Co. v. Bertram & Thacker*, 453 S.W.2d 591 (Ky. 1970); *Employers Mut. Liab. Ins. Co. v. Griffin Constr. Co.*, 280 S.W.2d 179 (Ky. 1955).

<sup>159</sup> 650 S.W.2d 252 (Ky. 1983).



third party, but is limited to its right of subrogation as governed by KRS section 342.700.<sup>160</sup> The Court found no need to preserve the independent right of indemnity since KRS section 342.700 provided a complete and adequate remedy to the compensation carrier.<sup>161</sup> If the carrier wants to protect its subrogation right, then an action must be filed in the carrier's name or employee's name at the time the employee files an action against the third party tortfeasor.<sup>162</sup> With the recent holding in *Continental Casualty Co. v. Commonwealth*, which extends the statute of limitations on the employer's and the insurance carrier's right of indemnity until liability is known,<sup>163</sup> the need for a separate and independent action on the part of the carrier or the employer would be remote.

In 1981, in *Union Carbide Corp. v. Sweco, Inc.*,<sup>164</sup> the court

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<sup>160</sup> *Id.* at 255. KRS § 342.700 (1983) provides:

Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages, the injured employe may either claim compensation or proceed at law by civil action against such other person to recover damages, or proceed both against the employer for compensation and such other person to recover damages, but he shall not collect from both. If the injured employe elects to proceed at law by civil action against such other person to recover damages, he shall give due and timely notice to the employer of the filing of such action. If compensation is awarded under this chapter, the employer, his insurance carrier, the special fund, and the uninsured employer's fund, or any of them, having paid the compensation or having become liable therefor, may recover in his or its own name or that of the injured employe from the other person in whom legal liability for damages exists, not to exceed the indemnity paid and payable to the injured employe, less the employe's legal fees and expense.

<sup>161</sup> 650 S.W.2d at 255. A prior case, *Hillman v. American Mut. Liab. Ins. Co.*, 631 S.W.2d 848 (Ky. 1982), set forth a formula under which damages recovered by the employee from a third party are to be divided with the subrogating insurance carrier. For a discussion of this case, see Harned & Hopgood, *Kentucky Law Survey—Workers' Compensation*, 70 Ky. L.J. 499 (1981-82).

<sup>162</sup> 650 S.W.2d at 255. The court of appeals, in an unpublished decision, has held that the insurance carrier has no separate cause of action for indemnity, and if the employee files an action against the third party tortfeasor, the insurance carrier must intervene in the employee's action in order to assert its subrogation rights. *United States Fidelity & Guar. Co. v. Fireman's Fund*, No. 80-CA-2054-MR (Ky. Ct. App. May 22, 1981), *discretionary rev. granted*, 81-SC-583-D (Ky. Oct. 27, 1981), *discretionary rev. dismissed*, 81-SC-583-DG (Ky. Mar. 9, 1982).

<sup>163</sup> 29 KLS 12, at 7. For a discussion of this case see text accompanying notes 122-29 *supra*.

<sup>164</sup> 610 S.W.2d 932 (Ky. Ct. App. 1980), *discretionary rev. denied*, 613 S.W.2d 138 (Ky. 1981).

of appeals reaffirmed the proposition that the exclusive remedy provision of the Act would not bar a third party from maintaining an indemnity action against the employer.<sup>165</sup> The court of appeals followed precedent<sup>166</sup> and held that the common law right of indemnity is a jural right which may not be abolished by the legislature.<sup>167</sup>

The decision in *Union Carbide Corp. v. Sweco*, however, was overruled *sub silentio* by *Fireman's Fund Insurance Co. v. Government Employees Insurance Co.*<sup>168</sup> This decision held that the provisions of the Motor Vehicle Reparations Act,<sup>169</sup> which limited the insurance carrier's right to seek recoupment from a third party tortfeasor,<sup>170</sup> did not violate the Kentucky Constitution.<sup>171</sup> The Court reasoned that since the no-fault and compensation acts did not exist in 1891, the indemnity sought under such acts also did not exist in 1891 and thus could be abolished by the legislature.<sup>172</sup>

While *Fireman's Fund* does not involve a workers' compensation situation, the Court's reasoning paves the way for a strict application of KRS section 342.690. This statute states, in relevant 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 employe, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise en-

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<sup>165</sup> *Id.* at 934. These cases typically arise when an employee files an action against a negligent third party, who in turn files a third party complaint against the employer seeking indemnity and alleges that its negligence was merely passive while the negligence of the employer was active.

<sup>166</sup> *See, e.g.,* *Kentucky Utils. Co. v. Jackson County Rural Elec. Coop.*, 438 S.W.2d 788 (Ky. 1968). Based on extensive case law, the Court said the existence of the common law right of indemnity in Kentucky is "unquestionable." *Id.* at 790.

<sup>167</sup> 610 S.W.2d at 934.

<sup>168</sup> *See* 635 S.W.2d 475 (Ky. 1982) (opinion does not mention *Union Carbide*).

<sup>169</sup> KRS §§ 304.39-010 to -340 (1981), otherwise known as the no-fault act.

<sup>170</sup> *See* KRS §§ 304.39-070(3)-(4), .39-140(3) (1981).

<sup>171</sup> 635 S.W.2d at 475. KY. CONST. § 14 provides that "[a]ll 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." *See also* KY. CONST. § 54 which denies the legislature the power "to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."

<sup>172</sup> 635 S.W.2d at 477.

titled 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 employe of such employer arising out of the 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* and 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.<sup>173</sup>

A strict application of this statute would deny a third party an independent right of indemnity against the employer beyond the amount of compensation benefits awarded under the Act. Once the compensation benefits are paid, the liability of the employer to both the employee and the third party ceases.

While the decision in *Fireman's Fund* establishes that the legislature may abolish the right of indemnity without violating the constitution, the question still remains as to whether the legislature may only *limit* the right of indemnity. This question was expressly left undecided by the court of appeals in *Union Carbide Corp. v. Sweco, Inc.*<sup>174</sup> It seems illogical that the legislature could abolish indemnity but could not limit this right. A limitation on the right of indemnity of a third party is arguably unfortunate, since the third party could be held liable by the employee for passive negligence in light of the employer's active negligence and have no right of recourse as against the employer. Under the specific statutory provisions, however, no other result is possible.

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<sup>173</sup> KRS § 342.690 (emphasis added).

<sup>174</sup> See 610 S.W.2d at 934.