Kentucky Law Journal

Volume 47 | Issue 3 Article 1

1959

An Historical Analysis of the Kentucky Workmen's Compensation Law

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In enacting the Kentucky Workmen's Compensation Law in 1916 the General Assembly sought to:

> provide an elective system of workmen's compensation for industrial accidents, prescribing the manner of election and the rights and liabilities of employers, employes and third parties; making provision for medical and surgical care of injured employes; establishing rates of compensation for personal injuries or death; providing methods of insuring and securing the payments of such compensation; . . . creating a board to administer this Act, prescribing the duties, powers and rights thereof and imposing a tax upon insurance premiums, also a tax upon employers who carry their own risk, for the maintenance of such board and providing a system of appeal to the courts from the decisions of such board. . . .[1]

As a contemporary commentator remarked:

> The passage of a Workmen's Compensation Law by the 1916 General Assembly marks a new epoch in the development of the law of this State. It puts Kentucky in the front

* [Ed. Note]. In this article, Mr. Segal traces the statutory history of the present Workmen's Compensation Act and has cited numerous cases of the Court of Appeals interpreting the Act. Throughout the article, Mr. Segal's plan is to set forth the major portions of the Act, section by section, following each section with his commentary. Asterisks preceding a KRS section indicate that the section about to be presented deals with a different general area of the law than the former section. It is hoped that this article will serve as a useful reference to and source of information regarding problems of statutory interpretation.

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[1] Title—Original Act, see Reynolds Metals Co. v. Glass, 302 Ky. 622, 195 S.W. 2d 280 (1946); Black Mountain Corp. v. Adkins, 280 Ky. 617, 133 S.W. 2d 900 (1939).

> rank of progressive American Commonwealths. This law will undoubtedly prove to be a most beneficial and praiseworthy piece of legislation. The cumbersome and often unfair remedies of the common law are displaced by a system of rules and remedies which aim to do substantial justice to all concerned, fairly and impartially.[2]

The 1916 Act was not the first compensation legislation passed by the Kentucky General Assembly since the previous Legislature had enacted the Workmen's Compensation Act of 1914. The 1914 Act, however, was declared unconstitutional, over strong dissents, on the ground, among other reasons, that it was a compulsory system violating Section 54 of the Kentucky Constitution.[3]

Historically workmen's compensation laws had their beginning in the United States approximately fifty years ago. The Federal Government led the way with the passage of a Compensation Act in 1908 covering civil employees and by 1911 ten states had adopted such laws.[4] Since that time every state and territory of the United States has adopted such legislation, with the last state, Mississippi, passing its Act in 1948.[5]

On June 6, 1916, the Court of Appeals unanimously declared the 1916 Act constitutional.[6]

Although the original Act has been amended by numerous Legislatures since 1916, the basic pattern for compensable recovery established at that time has remained substantially unchanged.

An historical analysis of the key sections of the present Act will demonstrate this conclusion.

* * *

342.003 Definition of "employer" and "hazardous occupations" as used in KRS 342.016 and 342.017. As used in KRS 342.016 and 342.017:

(1) "Employer" shall mean and include individuals, partnerships, voluntary associations, and private corporations.

[2] Dosker, Workmen's Compensation Law of Kentucky, "Preface to First Edition," 1916.

[3] Kentucky State Journal Co. v. Workmen's Compensation Board, 161 Ky. 562, 170 S.W. 1166 (1914); 162 Ky. 387, 172 S.W. 674 (1915).

[4] U. S. Dept. of Labor, State Workmen's Compensation Laws, Bulletin 161 (1957).

[5] U. S. Dept. of Labor, Workmen's Compensation in the United States, Bulletin 1149 (1954).

[6] Greene v. Caldwell, 170 Ky. 571, 186 S.W. 648 (1916).

(2) "Hazardous occupations" shall mean and include:

(a) All work in and about quarries and mines of all kinds;

(b) All work in the construction and repair of tunnels, subways, and viaducts;

(c) All work when making, using, or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive;

(d) The erection or demolition of any bridge, building or structure;

(e) The operation of all elevators, elevating machines, or derricks, or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure;

(f) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground, water, or floor beneath, in the erection, construction, repair, painting, or alteration of any building, bridge, or structure, or other work in which the same are used;

(g) All work of construction, operation, alteration, or repair where wires, cables, switchboards or other apparatus or machinery are in use charged with electrical current;

(h) All work in the construction, alteration or repair of pole lines for telegraph, telephone or other purposes;

(i) All work in mills, shops, works, yards, plants and factories where steam, electricity or any other mechanical power is used to operate machinery and appliances in and about such premises;

(j) All other employments not heretofore enumerated carried on by any employer in which there are engaged or employed three or more workmen or operatives regularly in the same business or in or about the same establishment, either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, express or implied, oral or written, except farm laborers, domestic servants, sales people and store clerks, clerks, stenographers, and professional assistants engaged wholly in office work.

The original Act contained no separate section wherein definitions were contained as is found in the Act as it reads today. The present form of this section was enacted by the 1946 Assembly.

An attempt in 1946 to again introduce the compulsory feature for an employer carrying on hazardous occupations was short lived, when during the same session another amendment was passed permitting an employer to reject the Act and operate at

common law on furnishing financial security. The Court of Appeals held that the eariler amendment was repealed by implication.[7]

Rejecting the artificial distinctions of "dual capacity doctrine," the Court of Appeals has held that the president of a corporation is an employee within the meaning of the Act.[8]

Whether or not an alleged partner is an employee is a question of fact; where an alleged partner had no equipment or money in the business and had signed the compensation register (at the time signing was required) he was held to be an employee.[9]

* * *

342.004 Liberal construction of chapter. This chapter shall be liberally construed on questions of law, as distinguished from evidence, and the rule of law requiring strict construction of statutes in derogation of the common law shall not apply to this chapter.

Prior to 1950 there was no specific provision providing for liberal construction of the Act. Previously the Court of Appeals has ruled that "it devolved upon the Workmen's Compensation Board to construe evidence liberally in favor of claimants in workmen's compensation cases.[10] Although this language was specifically nullified by the 1950 amendment,[11] any doubt as to the scope of the Act or its application with respect to disabilities or injuries where the facts have been found must be resolved in favor of the workman or his dependents with all presumptions being indulged to accomplish that end.[12]

* * *

342.005 [4880] *Employers and employees to whom chapter applies; voluntary election to come under chapter.* (1) This chapter shall apply to all employers having three or more employes[13] regularly engaged in the same occupation or business, and to their em-

[7] *Sumpter v. Burchett,* 304 Ky. 858, 202 S.W. 2d 735 (1947).

[8] *Mine Service Co. v. Green,* 265 S.W. 2d 944 (Ky. 1954).

[9] *Bartley v. Bartley,* 280 S.W. 2d 549 (1955), but see *Angel v Brown,* 313 Ky. 135, 230 S.W. 2d 623 (1950).

[10] Yocum Creek Coal Co. v. Jones, 308 Ky. 335, 214 S.W. 2d 410 (1948).

[11] Wells v. General Electric Co., 318 S.W. 2d 865 (Ky. 1958); Doan v. Cornett-Lewis Coal Co., 317 S.W. 2d 876 (Ky. 1958).

[12] Dick v. International Harvester Co., 310 S.W. 2d 514 (Ky. 1958); Brewer v. Millich, 276 S.W. 2d 12 (Ky. 1955).

[13] For the determining factors involved in the question whether an individual is an employee or independent contractor, see Mahan v. Litton, 321 S.W. 2d 243 (Ky. 1959); Elkhorn Coal Co. v. Adams, 313 S.W. 2d 421 (Ky. 1958); M. H. & H. Coal Co. v. Joseph, 310 S.W. 2d 257 (Ky 1958); Hall v. Spurlock, 310 S.W. 2d 259 (Ky. 1958); Cutshin Coal Co. v. Campbell, 309 S.W 2d 39 (Ky. 1958); Partin-Lambdin Lumber Co. v. Frazier, 308 S.W. 2d 792 (Ky. 1958);

ployes, except that it shall not apply to domestic employment, agriculture,[13a] steam railways, or such common carriers other than steam railways for which a rule of liability is provided by the laws of the United States; provided, however, it shall apply to the operators of threshing machines used in threshing or hulling grain or seeds. It shall affect the liability of the employers subject thereto to their employes for a traumatic personal injury sustained by the employe by accident,[14] and for disability resulting from occupational diseases as defined in this chapter, arising out of[15] and in the course of[16] his employment, or for death resulting from such accidental[17] injury or occupational disease; provided, however, that 'traumatic personal injury by accident' as herein defined shall not include diseases except where the disease is the natural and direct result of a traumatic injury by accident nor shall it include the results of a pre-existing disease, whether previously disabling or not, but shall include injury or death due to inhalation in mines of noxious gases[18] or smoke, commonly known as 'bad air,'[19] and also shall include

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Shephard Elevator Co. v. Thomas, 300 S.W. 2d 782 (Ky. 1957); Sigmond Ikerd Co. v. Napier, 297 S.W. 2d 917 (Ky. 1957); Hacker v. Hacker, 296 S.W. 2d 713 (Ky. 1956); New Independent Tobacco Warehouse v. Latham, 282 S.W. 2d 846 (Ky. 1955); Bartley v. Bartley, 280 S.W. 2d 549 (Ky. 1955); Sam Horne Motor Co. v. Gregg, 279 S.W. 2d 755 (Ky. 1955); Brewer v. Millich, 276 S.W. 2d 12 (Ky. 1955); Mine Service Co. v| Green, 265 S.W. 2d 944 (Ky. 1954).

[13a] Smith v. Supreme Feed Mills, 291 S.W. 2d 830 (Ky. 1956); Ginn v. Walker, 273 S.W. 2d 840 (Ky. 1954); Robinson v. Lytle, 276 Ky. 397, 124 S.W. 2d 78 (1939).

[14] Karger v. Cissell Mfg. Co., 299 S.W. 2d 788 (Ky. 1957) [circulatory disturbance held not compensable]; Eastern Coal Corp. v. Thacker, 290 S.W. 2d 468 (1956) [mental neurosis]; Ironton Fire Brick Co. v. Madden, 285 S.W. 2d 897 (Ky. 1956) [herniated disc]; Adams v. Bryant, 274 S.W. 2d 791 (Ky. 1955) [heart attack]; Nally, Ballard & Saltsman v. Richards, 248 S.W. 2d 918 (Ky. 1952) [electric shock].

[15] Chesser v. Louisville Country Club, 313 S.W. 2d 410 (Ky. 1958); King v. Lexington Herald-Leaedr Co., 313 S.W. 2d 423 (Ky. 1958); Ellis v. Litteral, 296 S.W. 2d 883 (Ky. 1954); Tyler-Couch Construction Co. v. Elmore, 264 S.W. 2d 56 (Ky. 1954); Harbison-Walker Refractories Co. v. Brown, 296 Ky. 629, 178 S.W. 2d 39 (1944). For cases concerning the "going to and from work" rule, see King v. Lexington Herald-Leader Co., 313 S.W. 2d 423 (Ky. 1958); Harlan-Wallins Coal Corp. v. Foster, 277 S.W. 2d 14 (Ky. 1955); Harlan-Wallins Coal Corp. v. Stewart, 275 S.W. 2d 912 (Ky. 1955); N. S. Steel Co. v. Isbell, 275 S.W. 2d 917 (Ky. 1955); Miracle v. Harlan-Wallins Coal Corp., 311 Ky. 169, 223 S.W. 2d 738 (1949).

[16] Colwell v. Mosley, 309 S.W. 2d 350 (Ky. 1958); Stapleton v. Fork Junction Coal Co., 247 S.W. 2d 372 (Ky. 1952); Harlan Collieries v. Shell, 239 S.W. 2d 923 (Ky. 1951).

[17] Travis Creek Fuel Co. v. Maggard, 293 S.W. 2d 720 (Ky. 1956) [assault]; Hayes Freight Lines v. Burns, 290 S.W. 2d 836 (Ky. 1956) and Tyler-Couch Construction Co. v. Elmore, 264 S.W. 2d 56 (Ky. 1954) [horseplay]; Henry Vogt Machine Co. Chamberlain, 279 S.W. 2d 224 (Ky. 1955); York v. City of Hazard, 301 Ky. 306, 191 S.W. 2d 239 (Ky. 1946).

[18] Clear Branch Mining Co. v. Holbrook, 247 S.W. 2d 48 (Ky. 1953); Blue Diamond Coal Co. v. Neace, 303 Ky. 519, 198 S.W. 2d 223 (1946); Black Mountain Corp. v. Williams, 301 Ky. 789, 193 S.W. 2d 416 (1946).

[19] Elkhorn Coal Corp. v. Manns, 314 Ky. 647, 236 S.W. 2d 910 (1951).

injuries or death due to the inhalation of any kind of gas, and shall also include occupational disease as defined in this chapter.

(2) Any employers and employes who are by the provisions of this section excepted from the provisions of this chapter, including employers having less than three employes, may subject themselves thereto by joint voluntary application to the board, in writing, for such period as may be stated in the application, which shall be irrevocable during such period and effective thereafter until a written revocation be filed with the board or the employment be terminated.

The first major change in KRS 342.005 was by the 1918 amendment.[20] In that year the requirement of three or more employees was placed in the Act. By the 1922 amendment the words "including employers having less than three employees" were inserted in the second paragraph of this section, after the word "chapter." In 1924, paragraph (1) of this section was amended so as to make it apply to "operators of threshing machines used in threshing or hulling grain or seeds," and by inserting the words "but shall include injury or death due to inhalation of noxious gases or smoke commonly known as 'bad air,' and also shall include injuries or death due to the inhalation of any kind of gas.[21]

The inclusion of recovery in bad air and gases or smoke cases overruled the Court of Appeals decisions in Jellico Coal Co. v. Adkins, 197 Ky. 684, 247 S.W. 972 (1923); Elkhorn Coal Corp. v. Kerr, 203 Ky. 804, 263 S.W. 342 (1924); Midland Coal Co. v. Rucker's Adm'r., 211 Ky. 582, 277 S.W. 838 (1925).

In 1934 this section had been amended to provide that "employers and their employees engaged in the operation of glass manufacturing plants, quarries, sand mines or in the manufacturing, treating or handling of sand may, with respect to the disease of silicosis caused by the inhalation of silica dust, . . . voluntarily subject themselves thereto as to such disease."

By an amendment in 1944, the 1934 amendment was made into a separate section (subsection 2) and coverage for sili-

[20] All information pertaining to amendments prior to 1926 was secured from Dosker & Caldwell, Kentucky Workmen's Compensation Law, Annotated (rev. ed. 1927), a brilliant and comprehensive work, without which the early history would not have been available for discussion here.

[21] Id. at p. 91.

cosis by joint vountary application was enlarged to include "any employers and their employees."[21a]

In 1946 the Assembly attempted to make any employer engaged in a hazardous occupation subject to the Act. This attempt failed when the amendment was held to have been impliedly repealed by a later amendment during the same session pliedly repealed by a later amendment during the same session.[21b]

The 1948 Assembly added in paragraph (1) after the words "pre-existing disease" the words "whether previously disabling or not." This amendment apparently was enacted because the Court of Appeals had held that compensation could be awarded for disability from a pre-existing disease provided such disease had lain dormant and had not manifested its active disabling effects prior to the time of the traumatic injury.[22]

The 1956 Assembly added in paragraph (1) the word "traumatic" before "personal injury sustained by an employee." Also, the requirement in paragraph (2) for election for coverage with respect to the disease of silicosis was eliminated.

In this section, as well as throughout the Act, the words "occupational disease" were added to conform with the Occupational Disease Act as passed by the 1956 General Assembly, as will be more specifically discussed under KRS 342.316.

The Court of Appeals has not ruled on the effect, if any, of the insertion of the word "traumatic" in this section (and in other sections). It has been and will no doubt be argued that the inclusion of the word "traumatic" overrules decisions allowing compensation for heart attacks[23] and heat exhaustion.[24]

The Workmen's Compensation Act, though elective, is impotent to take jurisdiction from "admiralty" and to confer upon the Board and state courts jurisdiction because of the "maritime clause."[25]

[21a] Inland Steel Co. v. Byrd, 316 S.W. 2d 215 (Ky. 1958).

[21b] Sumpter v. Burchett, 202 S.W. 2d 735 (Ky. 1947).

[22] Wood-Mosaic Co. v. Shumate, 305 Ky. 368, 204 S.W. 2d 331 (1947). Also see Belcher v. Cornman's Adm'x., et. al., 265 S.W. 2d 492 (Ky. 1954) and Highland Co., Inc. v. Goben, 295 Ky. 803, 175 S.W. 2d 124 (1943).

[23] Salmon v. Armco Steel Corp., 275 S.W. 2d 590 (Ky. 1955); Adams v. Bryant, 274 S.W. 2d 798 (Ky. 1955); Hoosier Engineering Co. v. Sparks, 302 Ky. 375, 194 S.W. 2d 843 (1946).

[24] Central Lumber Co. v. Wood, 284 S.W. 2d 688 (Ky. 1955), but see Mellon v. Ashland Coca Cola Bottling Co., 302 Ky. 176, 194 S.W. 2d 171 (1946).

[25] Lee v. Licking Valley Coal Digger Co., 209 Ky. 780, 273 S.W. 2d 542 (1925).

Jurisdiction cannot be waived but the employer may be estopped from pleading lack of jurisdiction.[26]

* * *

342.010 [4881] *"Employer" to include municipal corporations and state.* "Employer" as used in this chapter includes municipal corporations and any subdivision or corporation thereof. Any election with reference to this chapter shall be exercised by the law-making or other governing body thereof. "Employer" as used in this chapter also includes all departments, boards, commissions, and all superintendents or receivers of penal or eleemosynary institutions managed or directed by the Department of Welfare or any other department or agency of the Commonwealth of Kentucky. Any election with reference to this chapter shall be exercised by the Commissioner of Finance. Nothing contained in this chapter shall amend, repeal or interfere with any statute or ordinance relating to associations or funds for the relief, pensioning, retirement or other benefit of any employe of such municipal employer, or any of the employes of any state department, or the widows, children or dependents of such employes.

Prior to the 1926 amendment counties were not subject to Workmen's Compensation Act.[27] By the amendment of 1926, the term "employer" was made to include all departments in the State Government. By the amendment of 1956 the term "employer" was re-defined to include "all departments, boards, commissions, and all superintendents or receivers of penal or eleemosynary institutions managed or directed by the Department of Welfare or any other department or agency of the Commonwealth of Kentucky." Also included in the 1956 amendments was the provision that "Any election . . . shall be exercised by the Commissioner of Finance."

* * *

342.015 [4882] *Acceptance of chapter relieves of other liability; exceptions; willful misconduct.* (1) Where at the time of the injury both employer and employe have elected to furnish or accept compensation under the provisions of this chapter for a traumatic personal injury, received by an employe by accident and arising out of

[26] Carrs Fork Coal Co. v. Yancey, 297 S.W. 2d 914 (Ky. 1957); Smith v. Supreme Feed Mills, 291 S.W. 2d 830 (Ky. 1956); Eastern Coal Corp. v. Morris, 287 S.W. 2d 603 (Ky. 1956); Ginn v. Walker, 273 S.W. 2d 840 (Ky. 1954).

[27] Forsythe v. Pendleton County, 205 Ky. 770, 266 S.W. 639 (1924).

such injury, within two years thereafter, or for disability or death resulting from occupational disease as defined in this chapter, the employer shall be liable to provide and pay compensation under the provisions of this chapter and shall, except as provided in subsection (2) of this section and in KRS 342.170, be released from all other liability.[27a]

(2) If injury or death results to an employe through the deliberate intention[28] of his employer to produce such injury or death, the employe or his dependent as herein defined shall receive the amount provided in this chapter in a lump sum to be used, if desired, to prosecute the employer. The dependents may bring suit again the employer for any amount they desire. If injury or death results to an employe through the deliberate intention of his employer to produce such injury or death, the employe or his dependents may take under this chapter, or in lieu thereof, have a cause of action at law against the employer as if this chapter, had not been passed, for such damage so sustained by the employe, his dependents or personal representatives as is recoverable at law. If a suit is brought under this section, all right to compensation under this chapter shall thereby be waived as to all persons. If a claim is made for the payment of compensation or any other benefit provided by this chapter, all rights to sue the employer for damages on account of such injury or death shall be waived as to all persons.

(3) No employe or dependent of any employe may receive compensation on account of any injury to or death of an employe caused by a willful self-inflicted injury, wilful misconduct or intoxication of such employe.

(4) "Willful misconduct" as used in this section, when relating to occupational disease, shall include:

(a) Failure or omission on the part of an employe to observe rules and recommendations adopted by the employer and approved by the Workmen's Compensation Board and kept posted in a conspicuous place in and about the plant;

(b) Failure or omission on the part of an employe truthfully to state to the best of his knowledge in answer to inquiry made by the employer the place, duration, and nature of previous employment;

(c) Failure and omission on the part of an employe truthfully to furnish to the best of his knowledge in answer to an inquiry made by the employer full information about the previous status of his and in the course of his employment, or for death resulting from

[27a] Mahan v. Litton, 321 S.W. 2d 243 (Ky. 1959); Commonwealth of Kentucky v. Meyers, 307 S.W. 2d 179 (Ky. 1957).

[28] Fryman v. Electric Steam Radiator Corp., 277 S.W. 2d 25 (1955).

health, habits, and medical attention that he or his blood relatives may have received;

(d) Failure to submit to medical examination to determine his physical condition with reference to occupational diseases when ordered by the board, or evasion or obstruction of such examination.

This section is substantially the same as enacted in the original Act of 1916 but the above paragraph (1) providing for payment of compensation under the provisions of the chapter and the releasing of the employer from all other liability was subsequently further limited by KRS 342.170 (minors illegally employed). Further, "willfull misconduct" was by subsequent amendment defined as set out in the present paragraphs 4(a), (b), (c) and (d). Changes in KRS 342.015(1) are the inclusion of the word "traumatic" and the substitution of "occupational disease" for "silicosis."

The acceptance of the Act by the employer and the employee controls the rights of the parties and is a contract between them for payment of compensation for injuries in accordance with the Act in effect at the time the injury occurred[29] and acceptance of the Act releases the employer from all common law liability,[30] except for violations of KRS 342.015(2).

As stated supra where the Legislature at one session first amended the Act thereby compelling employers engaged in hazardous operations to accept and operate under the Act, and during the same session further amended the Act to permit employers to reject the Compensation Act and operate under the common law if security were furnished to protect judgments, the first amendment was repealed by implication.[31]

* * *

342.016 Bond, security or insurance policy to be filed by employer in hazardous occupation who does not elect to operate under chapter; conditions; penal sum; renewal. (1) Every employer now or hereafter doing business in this Commonwealth who regularly employs three or more persons in a hazardous occupation and who is not excepted from the application of the provisions of the Workmen's Compensation Act but fails to elect to operate thereunder, or having

[29] Thomas v. Crummies Creek Coal Co., 297 Ky. 210, 179 S.W. 2d 882 (1944).

[30] Sears, Roebuck & Co. v. Broughton, 195 F. 2d 95 (1952); Comm. of Ky. v. Meyers, 307 S.W. 2d 179 (Ky. 1957).

[31] Sumpter v. Burchett, 304 Ky. 858, 202 S.W. 2d 735 (1947).

so elected withdraws such election, shall file with the Commissioner of Industrial Relations, within thirty days after June 19, 1946, or such employment is begun, or such previous election is withdrawn, a good and sufficient security, indemnity bond or insurance policy issued by a surety or insurance company or other insurance carrier authorized to transact such business in this state, which shall insure the payment of any final judgment of a court of competent jurisdiction obtained against such an employer by an employe or his personal representative for damages resulting from injuries to the person or death of such employe, by accident arising out of and in the course of his employment. The bond or policy shall contain such terms and shall be in such penal sum or maximum amount as the Commissioner of Industrial Relations shall deem necessary, taking into consideration the solvency of the employer, the number of employes and the hazard of the employment in which they are engaged, for the reasonable protection of such judgment creditors in the collection of the amounts adjudged to be due them.

(2) It shall be a condition of such security, indemnity bond or insurance policy that the obligor will promptly pay such judgments to the persons entitled thereto. Such security, indemnity bond and insurance policy shall be renewed annually or when the first and succeeding bonds or policies expire or are terminated, or when the protection afforded by the bonds or security has been so diminished by reason of judgments covered thereby so as to render the same inadequate.

* * *

342.017 Hearing concerning giving of bond or security, and amount and terms thereof; appeal. (1) The amount and terms of such security or bond shall be determined by the commissioner upon reasonable notice and opportunity for hearing. Any person, firm or corporation affected by such security or bond may, within forty days after a final order or determination by the commissioner requiring or fixing such security or bond, or refusing to require same, bring an action in the Franklin Circuit Court to modify or set aside such order or determination of the commissioner.

(2) The court shall hear the cause and enter judgment affirming, modifying or setting aside the order or determination of the commissioner, or may, in its discretion, in advance of judgment, remand the cause to the commissioner for further proceedings consistent with the direction of the court.

(3) Either party to the action may, within forty days after the entry of a final judgment by the circuit court, appeal to the Court of Appeals, and the appeal, when filed in the office of the Clerk of

the Court of Appeals, shall be docketed and advanced in the same manner as in Commonwealth cases.

KRS 342.016 and KRS 342.017 were originally enacted by the 1946 Legislature and have remained unchanged to date.

An employer willfully violating these sections "shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than five hundred dollars," and each day's wrongful violation "shall constitute a separate offense."[32]

* * *

342.020 [4883] *Medical treatment at expense of employer; artificial members and braces.* (1) In addition to all other compensation provided in this chapter, the employer shall furnish 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, but not exceeding a total expense to the employer of more than twenty-five hundred dollars. If the employer fails to furnish such treatment reasonably, he shall be liable for the reasonable expense, within the limits of this section, incurred by or on behalf of the employe in providing such treatments. In an emergency, the employe may call in any available physician or surgeon to administer any first aid reasonably necessary at the expense of the employer within the limits of this section. The board, in its discretion, may apportion payments to be made under this section between hospitals and physicians in cases where their aggregate fees and charges would exceed the maximum for which the employer is liable.

(2) Where a compensable injury or occupational disease results in the amputation of an arm, hand, leg or foot, or the loss of hearing, or the enucleation of an eye or the loss of natural teeth, the employer shall initially furnish in addition to other medical, surgical and hospital treatment enumerated in subsection (1) of this section, a modern artificial member, and where required, proper braces but the employer's liability for such artificial member or braces shall not, including his liability for medical, surgical and hospital treatment exceed twenty-five hundred dollars.

The 1920 Amendment empowered the Board, by order made within ninety days after the injury, to extend the period of

[32] KRS 342.990(8).

treatment beyond ninety days or increase the limit of expense but not to exceed $200.00. This section remained substantially unchanged, except for amendments increasing the amounts of medical benefits, until 1946. In 1946 the employer was made responsible for medical payments "during disability, not exceeding a total expense to the employer of more than $400.00," with the ninety day cutoffs being eliminated.

By amendment in 1948 this amount was raised to $500.00 and the following clause added in the first paragraph:

> The Board may, by order made upon application within a period of six months from date of the accident, extend the limit of expense to not exceeding a total of eight hundred dollars.

Further, in 1948 a new paragraph was added:

> (2) Where a compensable injury results in the amputation of an arm, hand, leg or foot, or the loss of hearing, or the enucleation of an eye or the loss of natural teeth, the employer shall initially furnish in addition to the medical, surgical, and hospital treatment enumerated in subsection (1) of this section a modern artificial member, and where required, proper braces.

The 1950 Assembly removed the six months provision and raised the amount of medical expenses for which the employer may be liable to $2,500.00, which amount has remained unchanged to date. Further, paragraph (2) which was added by the 1948 Legislature was removed.

In 1952 paragraph (2) of the 1948 amendment was re-enacted and has remained in the Act with this additional language:

> but the employer's liability for such artificial member or braces shall not, including his liability for medical, surgival and hospital treatment exceed twenty-five hundred dollars.

The only change made by the 1956 Assembly was to include medical payments for occupational diseases.

The present Act does not contain a rehabilitation section. Since the Act provides "the employer shall furnish for the care and *relief* from the effects of an injury or occupational disease,

etc.", it might be argued that the word "relief" includes rehabilitation.

It is generally felt that the next major change in the Act will be an amendment to provide a full and complete rehabilitation program for occupationally injured employees.

The payment of medical expenses under this section, in addition to all other compensation, is mandatory;[33] however, it is not necessary to show that the medical bills had been tendered or paid by the employee.[34]

If an employer voluntarily pays more than the amount of his statutory liability under this section, he is not entitled to credit against compensation awarded employee in the absence of agreement with the employee.[35]

* * *

342.021 Employer's duty to furnish copies of examination or treatment report; employe's duty if doctor chosen by him. (1) Whenever an employe receives a personal injury which is or may be compensated under the Workmen's Compensation Law and said employe is examined or treated for such injury by a doctor or physician under the provisions of KRS 342.020 the employer shall cause to be furnished to the employe, if requested by him, and to the board, if required by it, immediately following said examination or treatment a copy of the report of the doctor or physician showing the nature and condition and effect of the employe's injury. Upon any future examination or examinations by a doctor or physician the employer shall cause to be furnished to the employe, if requested by him, and to the board, if required by it, immediately following such examination copies of the reports thereof containing the information mentioned above.

(2) If the employe should be examined or treated by any doctor of his own choosing the employe shall, immediately following said examination, cause a copy of the report thereof to be furnished to his employer or to the board, if required by either.

This section was originally enacted in 1952 and has remained unchanged to date.

[33] Black Mountain Corp. v. Stewart, 272 Ky. 140, 113 S.W. 2d 1141 (1938).
[34] Black Mountain Corp. v. Seward, 275 Ky. 177, 121 S.W. 2d 4 (1938).
[35] Harlan Collieries Co. v. Johnson, 308 Ky. 89, 212 S.W. 2d 540 (1948); Blue Grass Mining Co. v. Stamper, 267 Ky. 643, 103 S.W. 2d 112 (1937).

342.025 [4884] *Hernia.* (1) In all claims for hernia resulting from injury received in the course of and resulting from the employe's employment it must be definitely proved to the satisfaction of the board that:

(a) There was an injury resulting in hernia;

(b) The hernia appeared suddenly and immediately following the injury; and

(c) The hernia did not exist in any degree, including the primary or incomplete stage, prior to the injury for which compensation is claimed.[35a]

(2) In all such cases where liability for compensation exists, the employer shall, within the limits of KRS 342.020, provide competent surgical treatment by radical operatoin. In case the injured employe refuses to submit to the operation, the employer may require a medical examiantion as provided in KRS 342.205.

(3) If it is shown by such examination that the employe has any chronic disease or is otherwise in such physical condition so as to render it more than ordinarily unsafe to submit to such operation, he shall, if unwilling to submit to the operation, be entitled to compensation for disability under the general provisions of this chapter. If the examination does not disclose the existence of disease or other physical condition rendering the operation more than ordinarily unsafe, and the employe, with the knowledge of the result of such examination, thereafter refuses to submit to such operation, he shall be entitled to compensation for disability under the general provisions of this chapter for not exceeding one year. If the employe submits to the operation he shall, in addition to the surgical benefits herein provided for, be entitled to compensation for his actual disability following such operation. If the hernia results in death within one year after it is sustained, or the operation results in death, such death shall be deemed a result of the injury causing such hernia and compensated accordingly under the provisions of this chapter. This subsection shall not apply where the employe has refused to submit to an operation which has been found by the examination herein provided for not to be more than ordinarily unsafe.

Prior to 1948 this section remained substantially unchanged from the original Act of 1916 except in 1924 when it was amended so that an employee who submits to the operation set out above

[35a] Jenkins v. Tube Turns, 320 S.W. 2d 48 (Ky. 1959).

is entitled to compensation for his actual disability following such operation rather than compensation for 26 weeks only.[36]

In 1948 the words "including the primary or incomplete stage" were added in subsection (1)(c) after the word "degree" so that the section read:

> (c) The hernia did not exist in any degree, including the primary or incomplete stage, prior to the injury for which compensation is claimed.

Mere predisposition to the development of a hernia would not render an injury from hernia noncompensable where, but for the mishap, there would have been no protrusion and subsequent disability.[37]

An employer could not, three years after an employee sustained an injury resulting in hernia, require the employee to submit to an operation as a condition of receiving compensation.[38]

Delay in giving notice occasioned by mistake or other reasonable cause is not fatal to recovery.[39]

* * *

342.030 [4885] *Improper physician or treatment.* (1) If it is shown that the employer is furnishing the requirements provided by KRS 342.020 in such manner that there is reasonable ground for believing that the life, health or recovery of the employe is being endangered or impaired thereby, the board may order a change in the physician or other requirement. If the employer fails promptly to comply with such order after receiving it, the board may permit the employe or some one for him to provide the same at the expense of the employer under such reasonable regulations as may be provided by the board.

(2) No action shall be brought against any employer subject to this chapter by any person to recover damages for malpractice or improper treatment received by any employe from any physician, hospital or attendant thereof.

This section was part of the original Act of 1916 and has remained unchanged to date. An employer is not liable at law

[36] Dosker, *op. cit. supra* note 20 at 271.
[37] Mullins v. Ky.-W. Va. Gas Co., 300 S.W. 2d 553 (Ky. 1957).
[38] Mullins v. Ky.-W. Va. Gas Co., 307 S.W. 2d 169 (Ky. 1957); Larson v. Harlan Wallins Coal Corp., 253 S.W. 2d 860 (Ky. 1953).
[39] Mengel Co. v. Axley, 224 S.W. 2d 923 (Ky. 1949).

for damages for malpractice or improper treatment.[40] However, if an employer helps select the hospital and surgeon, and the employee's death is caused by an alleged slip of the surgeon's knife during an operation to remedy a condition incurred by compensable accident, death of the employee is compensable.[41]

* * *

342.035 [4886] *Medical fees to be reasonable; failure to follow advice.* (1) All fees and charges under KRS 342.020 and 342.030 shall be fair and reasonable, shall be subject to regulation by the board and shall be limited to such charges as are reasonable for similar treatment of injured persons of a like standard of living in the same community and where such treatment is paid for by the injured person himself. In determining what fees are reasonable, the board may also consider the increased security of payment afforded by this chapter.

(2) Where such requirements are furnished by a public hospital or other institution, payment thereof shall be made to the proper authorities conducting it. No compensation shall be payable for the death or disability of an employe if his death is caused, or if and in so far as his disability is aggravated, caused or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice.

This section has remained substantially unchanged since the original Act of 1916.

Whether or not an injured employee's refusal to undergo operation is unreasonable is a question of fact.[42] An injured employee is under no duty to submit to an amputation,[43] nor will the courts require a patient to follow the findings of one doctor in preference to another,[44] or require a litigant to twice risk his life in order to provide an opportunity to reduce liability.[45] For the test as to what is an unreasonable refusal see *Mullins v. Ky.-W. Va. Gas Co.*, 307 S.W. 2d 169 (Ky. 1957); *United Electric Coal Co. v. Adams*, 299 S.W. 2d 246 (Ky. 1956); *Melcher v. Drummond Mfg. Co.*, 229 S.W. 2d 52 (Ky. 1950); *Black Star Coal Co. v. Sergener*, 297 Ky. 633, 181 S.W. 2d 53 (1944).

[40] Black Mountain Corp. v. Middleton, 243 Ky. 527, 49 S.W. 2d 318 (1932), but see Powers v. Middlesboro Hospital, 258 Ky. 20, 79 S.W. 2d 391 (1935).
[41] McCorkle v. McCorkle, 265 S.W. 2d 779 (Ky. 1954).
[42] Fordson Coal Co. v. Palko, 282 Ky. 397, 138 S.W. 2d 456 (1940).
[43] Ky.-Jellico Coal Co. v. Lee, 289 Ky. 821, 158 S.W. 2d 385 (1942).
[44] Schaab v. Irwin, 298 Ky. 626, 183 S.W. 2d 814 (1944).
[45] Id. at 815.

342.040 [4887] *Time of payment of compensation.* Except as provided in KRS 342.020 and 342.030 no compensation shall be payable for the first seven days of disability unless disability continues for a period of more than two weeks in which case compensation shall be allowed from the first day of disability. All compensation shall be payable on the regular pay day of the employer, commencing with the first regular pay day after seven days after the injury or disability resulting from an occupational disease, with interest, at the rate of six per cent per annum on each installment from the time it is due until paid.[46]

The original Act of 1916 provided that compensation shall not be payable for the first two weeks from the date of injury. By the 1918 amendment the waiting period was reduced to seven days. A subsequent amendment which remained in effect until 1948 provided that no compensation shall be payable for the first seven days of disability unless disability continued for a period of more than four weeks, in which case the compensation was made retroactive to the first day of disability. By the 1948 amendment the period of duration of disability before retroactive payment from the first day of injury was reduced from four weeks to three weeks. In 1956 this period was further reduced to two weeks.

The rate of interest for due but unpaid payments was set at 6% per annum in the original Act and has remained unchanged to date. Where a bona fide tender of compensation is made and is continued, liability for interest on the award stops.[47]

* * *

342.045 [4888] *Injury out of state to person employed here.* Any employer who hires employes within this state to work in whole or in part without this state, may agree in writing with such employes to exempt from the operation of this chapter injuries received outside of this state. In the absence of such an agreement, the remedies provided by this chapter shall be exclusive as regards injuries received outside this state and shall be upon the same terms and conditions as if the injuries were received within this state.[48]

[46] Schaab v. Irwin, 298 Ky. 626, 183 S.W. 2d 814 (-944); Maryland Casualty Co. v. Reeves, 254 Ky. 83, 70 S.W. 2d 992 (1934).
[47] Pfoff v. Osborne, 269 S.W. 2d 710 (Ky. 1954).
[48] Sloan v. Appalachian Mountain Electric Co., 27 F. Supp. 118 (1939).

This section has remained unchanged since the original Act of 1916.

Where a Kentucky resident and Ohio employer entered into an employment contract in Ohio providing for labor to be performed in Kentucky and provided that employee's exclusive remedy was to be under Ohio Compensation Act, public policy of Kentucky did not preclude contract being given effect so as to bar suit at common law in Kentucky.[49]

* * *

342.050 [4889] *No employer to be relieved of obligation of this chapter.* Except as provided in this chapter, no contract or agreement, written or implied, no rule, regulation or other device, shall in any manner operate to relieve any employer in whole or in part of any obligation created by this chapter.[50]

This section has remained unchanged since the original Act of 1916.

Where there was an agreement to pay lump sum compensation and the case was dismissed as settled, the agreement was held void under this section because not approved by the Board as otherwise provided in the Act.[51]

* * *

342.055 [4890] *Remedies when third party is legally liable.* 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, either the employer or his insurance carrier, having paid the compensation or having become liable therefor, may recover in his or its own name or that of the injured employe from

[49] Buckman v. Republic Structural Painting Corp., 302 S.W. 2d 855 (Ky. 1957).

[50] Buckman v. Republic Structural Painting Corp., 302 S.W. 2d 855 (Ky. 1957); Brewer v. Millich, 276 S.W. 2d 12 (Ky. 1955); Morrison v. C. & C. Chemicals Corp., 278 Ky. 746, 129 S.W. 2d 547 (1939).

[51] Stewart v. Model Coal Co., 216 Ky. 742, 288 S.W. 696 (1926).

the other person in whom legal liability for damages exists, not to exceed the indemnity paid and payable to the injured employe.[52]

This section has remained substantially the same as set out in the original Act except for the addition in 1922 of the words "or his insurance carrier" after the word "employer" in the last sentence,[53] and, in 1948 the addition of the following clause which completes the section as it now exists:

> If the injured employee 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.

For a thorough discussion of credits to be allowed in relation to attorney's fees, medical and hospital expenses see Southern Quarries & Contracting Co. v. Hensley, 232 S.W. 2d 999 (1950).

* * *

342.060 [4891] *Liability of contractor and subcontractor.* A principal contractor, intermediate or subcontractor shall be liable for compensation[54] to any employe injured while in the employ of any one of his intermediate or subcontractors and engaged upon the subject matter of the contract, to the same extent as the immediate employer. Any principal, intermediate or subcontractor who pays such compensation may recover the amount paid from any subordinate contractor through whom he has been rendered liable under this section. Every claim to compensation under this section shall in the first instance be presented to and instituted against the immediate employer, but such proceedings shall not constitute a waiver of the employe's rights to recover compensation under this chapter from the principal or intermediate contractor. The collection of full compensation from one employer shall bar recovery by the employe against any other. But he shall not collect from all a total compensation in excess of the amount for which his immediate employer is liable. This section shall apply only in cases where the injury occurred on, in or about the premises on which the principal contractor has undertaken to execute work or which are under his control otherwise or management.

This section has remained substantially unchanged since the

[52] Bumpus v. Drinkard's Adm'x., 279 S.W. 2d 4 (Ky. 1955); Roberts v. U. S. Fidelity & Guaranty Co., 273 S.W. 2d 39 (Ky. 1954).
[53] Dosker, Workmen's Compensation Law in Kentucky 299 (1st ed. 1916).
[54] Statton v. Reynolds Metals Co., 58 F. Supp. 657.

original Act except the words "or subcontractor" and "or their insurance carrier" were added by a 1922 amendment.[55]

In 1924 the words "or other insurance carrier" were deleted from the Act, as was a comma on the first line of the section after the word "principal."[56]

For definitions of independent contractor as contrasted with subcontractor see Ruth Bros v. Roberts, 270 Ky. 339, 109 S.W. 2d 800 (1937).

* * *

342.065 [4892] *Certain minors considered sui Juris.* A minor sixteen years of age or over or a minor under sixteen years of age who has procured his employment upon the written certification of his parent, guardian or one having legal authority over him that he is over sixteen years of age[57] shall be considered sui juris[58] for the purposes of this chapter, and no other person shall have cause of action or right to compensation for his injury or death for loss of service on account thereof, by reason of the minority of such employe. If a lump sum of compensation is made to such minor employe, payment shall be made to his guardian. Such certificate shall be in form as follows: "To (name of employer); This is to certify that (name of minor employe), of whom the undersigned is the ....., is over the age of sixteen years. Signed this ..... day of ....." Identification of such signature of the parent, guardian or person having legal authority over such minor employe shall constitute conclusive proof of such procurement of his employment in any hearing or proceeding in which it is material or in issue.

This section as it now reads has remained substantially unchanged since the amendments of 1924.

There must be willful and known violation of the child labor laws before the employer is subject to common law actions for damages.[59]

* * *

342.070 [4893; 4896] *Compensation in case of death.* If death should result within two years from an accident for which compensation is payable under this chapter, or from an occupational disease, the employer or his insurer shall pay to the person entitled to com-

[55] Dosker, op cit supra note 53 at 304.
[56] Ibid.
[57] Riddell's Adm'r. v. Berry, 298 S.W. 2d 1 (Ky. 1956).
[58] Sears, Roebuck & Co. v. Broughton, 195 F. 2d 95.
[59] Caldwell v. Jarvis, 299 Ky. 439, 185 S.W. 2d 552 (1945) [overruling Wynn Coal Co. v. Lindsey, 230 Ky. 43, 18 S.W. 2d 864 (1929)].

pensation, or, if none, then to the personal representative of the deceased employe, reasonable burial expenses of a person of the standard of living of the deceased, not to exceed the sum of three hundred dollars, and shall also pay to or for the following persons compensation as follows:

(1) If there are one or more wholly dependent persons, sixty-five per cent of the average weekly earnings of the deceased employe, but not to exceed thirty dollars nor less than twelve dollars per week shall be payable, all such payments to be made for the period between the date of death and four hundred weeks after the date of accident to the employe or after the date his disability from an occupational disease began, or until the intervening termination of dependency, but in no case to exceed the maximum sum of twelve thousand dollars.

(2) (a) If there are partly dependent persons, the payments shall be such part of what would be payable for total dependency as the partial dependency existing at the time of the accident or after the date his disability from an occupational disease began to the employe is proportionate to total dependency, and all such payments to be made for the period between the date of death and four hundred weeks after the date of the accident to the deceased employe, or after the date his disability from an occupational disease began, or until the intervening termination of dependency, but in no case to exceed in the aggregate of compensation on account of such death the maximum sum of twelve thousand dollars.

(b) Partial dependency shall be determined by the proportion of the earnings of the employe which have been contributed to such partial dependent during one year next preceding the date of injury or after the date his disability from an occupational disease began; if the relation of partial dependency did not exist for one year next preceding the date of injury, the board shall consider all the facts and circumstances and fix such proportion as is fair and reasonable thereunder.

(3) All relations of dependency referred to in this section shall mean dependency existing at the time of the accident to the employe or at the time his disability from an occupational disease began.

(4) If death occurs as a result of the injury or an occupational disease after a period of total or partial disability, the period of disability shall be deducted from the total period of compensation and the benefits paid thereunder from the maximum allowed for death by this section.

Except for subsection (4) and the mandatory amounts payable, this section has remained substantially unchanged since

its enactment in 1916. The original Act provided for a sum not to exceed $75.00 for funeral expenses and maximum death benefits of $4,000.00. By 1946 the total amount for death benefits was increased to $6,000.00. The 1948 Assembly increased the amount allowable for funeral expenses to $300.00 and the amount payable to the personal representative, if there were no dependents, to $200.00, and death benefits to $8,000.00. The 1950, 1952 and 1956 Assemblies raised the death benefits to $8,500.00, $9,500.00 and $12,000.00 respectively, with the 1956 amendment further conforming this section to include recovery for occupational disease and eliminating the provision for payment of the sum of $200.00 to personal representatives of the deceased employee if there are no dependents.

The burden is on claimant to establish that deceased employee's injury was the primary cause of death,[60] but where death follows soon after injury to an able-bodied man a presumption arises that death was caused by the injury in the absence of other conjectural testimony to the contrary.[60a]

Relation of dependency is a question of fact and is determined as of the time of the accident.[61]

A dependent does not lose his status of total dependency merely because he sporadically earns small amounts of money.[62]

* * *

342.075 [4894] *Determination of dependency.* (1) The following persons shall be presumed to be wholly dependent upon a deceased employe:

(a) A wife upon a husband whom she had not voluntarily abandoned at the time of the accident, or who having been abandoned by her husband has not engaged in such conduct since his abandonment as would at common law constitute grounds justifying the abandonment of such wife by her husband;[63]

(b) A husband incapacitated from wage-earning, upon a wife whom he has not voluntarily abandoned at the time of the accident to the wife; and

[60] Ratliff v. Cubbage, 314 Ky. 716, 236 S.W. 2d 944 (1951); January-Wood Co. v. Brambel, 252 Ky. 258, 67 S.W. 2d 14 (1934).

[60a] Blue Bird Mining Co. v. Kelly, 237 S.W. 2d 530 (Ky. 1951); Ellis v. Litteral, 296 Ky. 287, 176 S.W. 2d 883 (1944).

[61] Miller v. Elkhorn Coal Corp., 284 Ky. 737, 145 S.W. 2d 822 (1940).

[62] Schaab v. Townsend, 302 Ky. 121, 190 S.W. 2d 1014 (1945).

[63] Combs v. Elkhorn Coal Corp., 281 S.W. 2d 424 (Ky. 1955); also see Ritchey v. Katy Coal Co., 313 Ky. 310, 231 S.W. 2d 57 (1950); Blue Diamond Coal Co. v. Hensley, 314 Ky. 85, 234 S.W. 2d 317 (1950).

(c) A child or children under the age of sixteen years, or over sixteen years if incapacitated from wage-earning, upon the parent with whom such child or children are living, or by whom actually supported, or from whom support is legally required by judgment of a court, at the time of the accident.

(2) In all other cases the relation of dependency in whole or in part shall be determined in accordance with the facts of each case existing at the time of the accident.[63a]

(3) No person shall be considered a dependent in any degree unless he is living in the household of the employe at the time of the accident, or unless such person bears to the employe the relation of father, mother, husband or wife, father-in-law or mother-in-law, grandfather or grandmother, child, or grandchild, or brother or sister of the whole or half blood.

This section has remained substantially unchanged from the original Act except for the following:

> or who having been abandoned by her husband has not engaged in such conduct since his abandonment as would at common law constitute grounds justifying the abandonment of such wife by her husband;

which was added by the 1950 Assembly to 1(a).

The 1952 Legislature added to subsection 1(c) "or from whom support is legally required by judgment of a court." It is interesting to note that the 1952 amendment restored what had been provided in the 1916 Act and for some unknown reason had been deleted by subsequent amendment.

The question of dependency or the degree of dependency is one of fact to be determined by the Board, and its findings are conclusive when supported by evidence having probative value.[64]

* * *

342.080 [4894] *When compensation ceases.* Compensation to any dependent shall cease at the death[65] or legal or common-law marriage[66] of such dependent or, in the case of a child or children, upon attaining the age of twenty years unless incapacitated from wage earning. Upon the cessation of compensation to or on account of any person the compensation of the remaining persons entitled to

[63a] Vogt & Conant Co. v. Boelhauf, 317 S.W. 2d 163 (Ky. 1958).
[64] Young v. Waters Construction Co., 281 S.W. 2d 888 (Ky. 1955).
[65] Maryland Casualty Co. v. Huffaker's Adm'r., 227 Ky. 358, 13 S.W. 2d 260 (1929).
[66] Elkhorn Coal Co. v. Tackett, 243 Ky. 694, 49 S.W. 2d 571 (1932).

compensation shall, for the unexpired period during which their compensation is payable, be that which such persons would have received during such unexpired period if they had been the only persons entitled to compensation at the time of the accident.

This section remained as enacted in the original Act until 1948 when the following phrase was added after the word "dependent" in the first sentence:

> Or, in the case of a child or children, upon attaining the age of twenty years unless incapacitated from wage earning.

* * *

342.085 [4895] *Definition of certain dependents.* As used in this chapter:

(1) "Child"[67] includes step-children, legally adopted children, posthumous children and recognized illegitimate children, but does not include married children unless actually dependent;

(2) "Brother" and "sister" includes step-brothers, step-sisters and brothers and sisters of the halfblood or by adoption, but excludes married brothers or sisters unless actually dependent;

(3) "Grandchild" includes children of adopted children or step-children, but excludes step-children of children or of adopted children and married children;

(4) "Parent" includes step-parents and parents by adoption; and

(5) "Adopted" and "adoption" includes cases where the persons are legally adopted.

This section has remained substantially unchanged from the original Act except for minor improvements in language.

* * *

342.090 [4896] *Payment of death benefits in good faith; payor protected.* Payment of death benefits, in good faith,[68] to a supposed dependent or to a dependent subsequent in right to another or other dependents shall protect and discharge the employer and insurer unless and until the lawful dependent or dependents prior in right have given the employer or insurer written notice of his or their claim. In case the employer or insurer is in doubt as to who are dependents or as to their respective rights, the board shall, on application, decide

[67] Lockhart's Guardian v. Bailey Pond Creek Coal Co., 235 Ky. 278, 30 S.W. 2d 955 (1930) (Illegitimate child where recognized); Ramey v. Portsmouth By-Products Coke Co., 234 Ky. 75, 27 S.W. 2d 415 (1930) (step-child included).

[68] W. M. Ritter Lumber Co. v. Begley, 288 Ky. 481, 156 S.W. 2d 501 (1941); Johnson v. Hardy-Burlingham Mining Co., 205 Ky. 752, 266 S.W. 635 (1924).

and direct to whom payment shall be made, and payment made under such direction shall release the employer and insurer from all liability. If an appeal is taken from the order of the board directing payment, persons receiving payment under such order shall furnish bond for the protection of adverse claimants pending the outcome of the proceedings.

The present Act reads exactly as the original Act except for the following paragraph which was contained in the original Act but was eliminated by a subsequent amendment:

> In case death occurs as a result of the injuries, after a period of total or partial disability, period of disability shall be deducted from the total period of compensation and the benefits paid thereunder from the maximum allowed for the death respectively stated in (KRS 342.070).

* * *

342.095 [4897] *Compensation for total disability.* (1) When the injury or occupational disease causes total disability for work, the employer, during such disability, except for the first seven days thereof, shall pay the employe a weekly compensation equal to sixty-five per cent of his average weekly earnings, not to exceed thirty-two dollars nor less than twelve dollars per week, such payments to be made during the period of total disability but not longer than four hundred twenty-five weeks after the date of the injury, or after the date his disability from an occupational disease began, nor in any case to exceed a maximum sum of thirteen thousand six hundred dollars. If the period of total disability begins after a period of partial disability, the period of partial disability shall be deducted from the total period of four hundred twenty-five weeks during which compensation for total disability may be payable, and the payments made on account of such partial disability shall be deducted from the maximum of thirteen thousand, six hundred dollars.

(2) In case of the following injuries or disabilities from occupational disease the disability shall be considered total and permanent:

(a) The total permanent loss of sight in both eyes.

(b) The loss of both feet at or above the ankle.

(c) The loss of both hands at or above the wrist.

(d) A similar loss of one hand and one foot.

(e) A similar loss of one hand and one eye.

(f) A similar loss of one foot and one eye.

(g) A disability to the spine, resulting in permanent and complete paralysis of both arms or both legs, or of one arm and one leg.

(h) A disability to the skull resulting in incurable insanity or imbecility.

(3) The enumeration in subsection (2) is not exclusive, but in all other cases the burden of proof shall be on the claimant to prove that his injuries or disability resulting from an occupational disease have resulted in permanent total disability.

The general language of this section has remained unchanged from the original Act; however, the amount of benefits payable under this section has been frequently increased. The 1916 Act provided for the payment of $12.00 per week not to exceed a maximum sum of $5,000.00. By the amendment of 1918 the waiting period was reduced from two weeks to one week. The 1920 Assembly raised the amount of weekly benefits to $15.00 with total benefits not to exceed a maximum of $6,000.00. By 1950 the benefits had been raised to a maximum of $24.00 per week not to exceed $10,000.00 with the following additional injuries being considered total and permanent disabilities:

(e) A similar loss of one hand and one eye.
(f) A similar loss of one foot and one eye.

In 1956 the benefits were raised to $32.00 per week not to exceed a maximum sum of $13,600.00, and the section was amended to conform to the occupational disease amendments.

Total disability does not mean absolute prostration or complete physical helplessness under the Act.[69] The fact that an employee worked during the period that he was totally disabled does not disprove total disability.[70] Disability is measured by the ability of the injured employee to do the kind of work he is, by training and experience, fitted to do, his ability to compete in the labor market, the nature of the injuries and the kind of work the claimant was employed to do before he sustained the injury.[71] Multiple injuries may be considered jointly as the basis of a total disability award.[72]

Although not the subject of this article, a study based on the Illionis Workmen's Compensation Statute comparing workmen's

[69] Clark v. Gilley, 311 S.W. 2d 391 (Ky. 1958); Peabody Coal Co. v. Taulbee, 294 S.W. 2d 925 (1956); Anderson v. Whitaker, 247 S.W. 2d 980 (1952); Olson v. Triplett, 255 Ky. 724, 75 S.W. 2d 366 (1934).
[70] Cornett-Lewis Coal Co. v. Day, 226 S.W. 2d 951 (Ky. 1950).
[71] Garmeada Coal Co. v. Marsee, 300 Ky. 414, 189 S.W. 2d 399 (1945).
[72] Central Truckaway System v. May, 299 Ky. 85, 184 S.W. 2d 889 (1945).

compensation benefits with actual wages earned[73] reveals the failure of compensation benefits to maintain today the same percentage to wages earned when compensation acts were initially enacted. Although the Acts of the various states are different and comparisons are deceptive, the comparisons to average wages are significant and seem generally comparable to the scale in Kentucky.

> Since the passage of the law in 1912, maximum amounts payable for injuries which temporarily totally incapacitate a worker have been increased from $12 to $25.50 per week for a worker without children or with one child. This increase of slightly more than double has occurred during a period when wages rose to six times their earlier level. Average weekly earnings rose from $12.24 in 1914 to $74.54 per week in October, 1952.
>
> In 1913-1914, when the law first was in effect, the maximum workmen's compensation payment of $12 per week was just a few cents less than average weekly earnings of $12.24 for the United States. Thus, the maximum workmen's compensation benefits were at a level which was 98 per cent of the average earnings of production workers. By 1941 workmen's compensation benefits were only 53 per cent of earnings. In the wartime years of the 1940's, earnings increased at a much faster rate due to some wage increases plus longer hours of work and premium payments for overtime hours. As a result, maximum workmen's compensation benefits experienced a marked decline to a low point representing only 36 per cent of average weekly earnings.
>
> In October, 1952, with earnings averaging $74.54 per week, workmen's compensation benefits were $25.50 at the maximum for a family with no children or one child, which payment represented 34 per cent of average earnings. A family with two children received only $1.70 more each week, which payment amounted to 38 per cent of average earnings.[74]

In a subsequent article originally appearing in the August, 1958 issue of the *Insurance Law Journal* and later reported in the

[73] Katz and Wirpel, Workmen's Compensation 1910-1952: Are Present Benefits Adequate?, 4 Labor Law Journal, No. 3 (March 1953).
[74] Id at 169-70.

November, 1958 issue of *Labor Law Journal,* the same Mr. Katz brings his facts and figures "up to date" and states the following:

> Average wages have far outstripped compensation rates generally. Michigan, with an average weekly wage in 1957 of $97.91, has a maximum compensation rate for single workers of $33.00 per week. A study showed that between 1914 and 1952 maximum weekly workmen's compensation payments as a percentage of average weekly wages in Illinois declined from 98 per cent to 35 per cent. Based on real wages and real compensation rates, the ratio in Illinois between wages and weekly compensation rates is seen to decline from over 100 per cent in 1914 to 53.8 per cent in 1957. Arizona alone gives a relatively free play to the compensation-wage ratio, allowing the worker 65 per cent of his actual wages during periods of temporary total disability if it does not exceed $150.00 per week. In 1957, the western states in a solid surge moved against low weekly maximum rates. Oregon increased its weekly maximum from $61.15 to $66.92, California from $40 to $50, Nevada from $41.54 to $51.92, Washington from $42.69 to $56.77, Utah from $40.50 to $47.25 and Montana from $32.50 to $42.50. In the six major industrial states, the percentage the maximum weekly compensation rate bore to average weekly factory earnings in 1957 was as follows: New York, 44.1 per cent; California, 43.8 per cent; Ohio, 43.1 per cent; Pennsylvania, 45 per cent; Michigan, 33.7-58.2 per cent; Illinois, 44-50.7 per cent.[75]

* * *

342.100 [4898] *Compensation for temporary partial disability.* In case of an injury or disability from an occupational disease resulting in temporary partial disability,[76] the employe shall receive during such disability, except the first seven days thereof, a weekly compensation equal to sixty-five per cent of the difference between his average weekly earnings before the injury or disability from an occupational disease and the average weekly earnings that he earns, or is able to earn, in some suitable employment during such disability, not

[75] Katz, Workmen's Compensation in the United States, 9 Labor Law Journal, No. 11, at 868-69.

[76] Mary Helen Coal Corp. v. Miller, 302 Ky. 99, 194 S.W. 2d 69 (1946); Maynard v. Pond Creek Colliery Co., 299 Ky. 157, 184 S.W. 2d 991 (1945).

to exceed four hundred weeks from the date of injury, or from the date his disability from an occupational disease began; nor exceeding the sum of twenty-seven dollars per week nor the maximum sum of nine thousand, five hundred dollars. If partial disability follows a period of total disability, the period of total disability shall be deducted from the maximum period allowed for partial disability.

This section remains substantially as enacted in 1916, except for amounts being raised through the years from $12.00 per week in 1916 not to exceed a maximum sum of $4,000.00, to $27.00 per week by the 1956 amendment not to exceed a maximum sum of $9,500.00. The amendment of 1956 also reduced the waiting period from two weeks to one week.

* * *

342.105 [4899] *Compensation for enumerated permanent partial* disabilities. For injuries or disabilities from an occupational disease enumerated in the following schedule the employe shall receive, in addition to temporary total disability compensation for the period of actual total disability, not exceeding twenty weeks, a weekly compensation equal to sixty-five percent of his average weekly earnings, but not less than twelve dollars per week nor exceeding twenty-six dollars per week for the periods stated thereon:

(1) For the loss of a thumb, sixty-five percent of the average weekly wages during sixty weeks.

(2) For the loss of a first finger, commonly called the index finger, sixty-five per cent of the average weekly wages during forty-five weeks.

(3) For the loss of a second finger, sixty-five per cent of the average weekly wages during thirty weeks.

(4) For the loss of a third finger, sixty-five per cent of the average weekly wages during twenty weeks.

(5) For the loss of a fourth finger, commonly known as the little finger, sixty-five per cent of the average weekly wages during fifteen weeks.

(6) The loss of the second, or distal phalange, of the thumb shall be considered to be equal to the loss of one-half of the thumb, the loss of more than one-half of the thumb shall be considered equal to the loss of the whole thumb.

(7) The loss of the third, or distal phalange of any finger shall be considered to be equal to the loss of one-third of the finger.

(8) The loss of the middle, or second phalange, of any finger shall be considered equal to the loss of two-thirds of the finger.

(9) The loss of more than the middle and distal phalanges of any finger shall be considered equal to the loss of the whole finger, but in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

(10) For the loss of a metacarpal bone (bone of the palm) for the corresponding thumb, finger or fingers above add ten weeks to the number of weeks as above.

(11) For ankylosis (total stiffness of) or contractures (due to sears or injuries) which makes the fingers more than useless, the same number of weeks apply to such finger or fingers (not thumb) as given above.

(12) For the loss of a hand, sixty-five per cent of the average weekly wages during one hundred fifty weeks.

(13) For the loss of an arm, sixty-five per cent of the average weekly wages during two hundred weeks.

(14) For the loss of one of the toes, other than the great toe, sixty-five percent of the average weekly wages during ten weeks.

(15)For the loss of the great toe, sixty-five per cent of the average weekly wages during thirty weeks.

(16) The loss of more than two-thirds of any toe shall be considered to be equal to the loss of the whole toe.

(17) The loss of less than two-thirds of any toe shall be considered to be equal to the loss of one-half toe.

(18) For the loss of a foot, sixty-five per cent of the average weekly wages during one hundred twenty-five weeks.

(19) For the loss of a leg, sixty-five per cent of the average weekly wages during two hundred weeks.

(20) For the total and permanent loss of the sight of an eye, sixty-five per cent of the average weekly wages during one hundred weeks, plus an additional twenty weeks in cases where the eyeball is enucleated.

(21) For the total and permanent loss of hearing in one ear, sixty-five per cent of the average weekly wages during seventy-five weeks.

The original Act stated that the payments under this section shall be "in lieu of all other compensation." This clause was subsequently deleted. However, the section generally has remained unchanged except that the latter part of the original Act pertaining to "all other cases of permanent partial disability" was subsequently made a separate section and is now KRS 342.110.

In 1948 the Assembly amended this section to provide that the compensation enumerated therein is payable:

> in addition to temporary total disability, compensation for the period of actual total disability, not exceeding twenty weeks, . . .

The 1948 Assembly added subsection (21). The 1956 Assembly raised the temporary total benefits to $26.00 per week and the total amounts payable under this section.

In cases involving injuries enumerated in this section the amount of compensation is automatically fixed by the Statute and neither the Compensation Board nor the courts may increase or reduce the amount.[77]

Where there is no severence and there is no physical injury beyond the member itself, disability as distinguished from injury must be computed to the body as a whole under KRS 342.110 without regard to the mathematical computations of KRS 342.105.[78] The latter covers payments of benefits for severance or loss of members outlined in the schedule.[79]

* * *

342.110 [4899] *Other permanent partial disability; compensation.* In all other cases of permanent partial disability, including any disfigurement which will impair the future usefulness or occupational opportunities of the injured employe, or employe disabled by an occupational disease, compensation shall be determined according to the percentage of disability, taking into account, among other things, any previous disability, the nature of the physical injury or disfigurement, the occupation of the injured employe and age at the time of injury or at the time the disability from an occupational disease began. In no event shall compensation for an injury or disability to a member exceed the amount allowable for the loss of such member. The compensation paid therefor shall be sixty-five per cent of the average weekly earnings of the employe but not less than twelve dollars nor more than twenty-seven dollars, multiplied by the percentage of disability caused by the injury or occupational disease, for such period as the board determines, not exceeding four hundred weeks nor a maximum sum of ten thousand,

[77] Atlas Coal Co. v. Moore, 298 Ky. 767, 184 S.W. 2d 76 (Ky. 1944).

[78] Stumbo & Vance Coal Co. v. Tackett, 300 S.W. 2d 232 (Ky. 1957); also see C. & C. Coal Co. v. Sheckles, 299 S.W. 2d 615 (Ky. 1957); Old King Mining Co. v. Pankey, 288 S.W. 2d 667 (Ky. 1957); Caney Creek Coal Co. v. Rager, 264 S.W. 2d 677 (Ky. 1954).

[79] Black Mountain Corp. v. Lettler, 303 Ky. 807, 199 S.W. 2d 611 (1947) [decided prior to the 1946 amendment limiting recovery to an amount not greater than for loss of member]; Crummies Creek Coal Co. v. Boyd, 311 Ky. 307, 223 S.W. 2d 990 (1949).

eight hundred dollars. Compensation payable under this section shall not be affected by the earnings of the employe after the accident,[80] or after his disability from an occupational disease, whether they be the same, or greater, or less than prior to the accident or disability from an occupational disease. Whenever the weekly payments under this section would be less than twelve dollars per week, the period may be shortened and the payments correspondingly increased to that amount. Where compensation, except as provided in KRS 342.020 and 342.030, is paid under any other provision of this chapter, the period during which such other compensation is paid shall be deducted from the maximum period which may be paid under this section.

What is now KRS 342.110 had its origin as part of Section 18 of the original Act (KRS 342.105). Other than the change in benefits this section remained substantially unchanged from the original Act until 1946. In 1946 the following sentence was included:,

> In no event shall compensation for an injury or disability to a member exceed the amount allowable for the loss of such member.[80a]

In 1948 the following amendment was added:

> Compensation payable under this section shall not be affected by the earnings of the employe after the accident, whether they be the same, or greater, or less than prior to the accident.

Also in 1948 the provisions for deduction of compensation paid under other sections of the chapter from the maximum paid under this section were eliminated. The original Act provided that "whenever the weekly payments under this paragraph would be less than $3.00 per week, the period may be shortened and the payments correspondingly increased to that amount.[81]

All other amendments increased benefits (not less than $7.00 nor more than $18.00 per week; not less than $7.00 nor more than $21.00 per week; not less than $7.00 nor more than $24.00 per

[80] Doan v. Cornett-Lewis Coal Co., 317 S.W. 2d 876 (Ky. 1958); Mary Helen Coal Corp. v. Duisina, 308 Ky. 658, 215 S.W. 2d 563 (1948); Bell Coal Co. v. Jackson, 301 Ky. 673, 192 S.W. 2d 947 (1946).

[80a] Old King Mining Co. v. Pankey, 288 S.W. 2d 667 (Ky. 1956); Caney Creek Mining Co. v. Rager, 264 S.W. 2d 677 (Ky. 1954).

[81] Dosker, op cit supra note 53, at 390.

week; not less than $12.00 nor more than $27.00 per week by amendments in 1948, 1950, 1952 and 1956 respectively); the 1956 amendment also conformed this section to include recovery for occupational diseases. By the 1956 amendment the basis for shortening the period and increasing payment correspondingly was raised to weekly benefits not less than $12.00 per week.

The 1946 amendment prohibiting compensation for an injury to a member from exceeding an amount greater than payable for the loss of the member has been the subject of much litigation. It seems well established now, however, that if there is total disability for work from the injury to the member and the provisions of KRS 342.095 apply, then there is no limitation.[82] But if there is less than total disability and the physical injury does not extend beyond the member, the limitations of this section applies.[83]

Under this section industry takes a man as it finds him and if by reason of an injury some latent congenital or pre-existing condition is lighted up, excited or aggravated, disability flowing therefrom is compensable with due apportionment.[84] "Neurosis" is compensable when caused by trauma, and if pre-existing, compensable to the extent that the impairment is aggravated.[85] Permanent facial disfigurement is a permanent partial disability within the meaning of this section.[86] Determination of apportionment must be based on competent medical testimony.[87]

Where the Board finds that the claimant is totally disabled, the award for an injury to a member is made under KRS 342.095 without consideration of the limitation of KRS 342.110.[88]

* * *

342.111 Continuance of disability payments to dependents when employe dies before all of disability award has been paid. (1) When

[82] Clark v. Gilley, 311 S.W. 2d 391 (Ky. 1958).

[83] Stumbo & Vance Coal Co. v. Tackett, 300 S.W. 2d 232 (Ky. 1957), and cases cited therein as to how an award should be computed in reference to KRS 342.105 and KRS 342.110.

[84] Parrott v. Healy, 290 S.W. 2d 798 (Ky. 1956); does "condition" include "disease," and, if so, what effect does this disease have on KRS 342.005, where "pre-existing disease" but not 'condition" is mentioned.

[85] Eastern Coal Co. v. Mullins, 290 S.W. 2d 468 (Ky. 1956); Old King Mining Co. v. Mullins, 252 E.W. 2d 871 (Ky. 1952).

[86] National Distilleries Products Corp. v. Jones, 309 Ky. 394, 217 S.W. 2d 813 (1949).

[87] Contractors Service & Supply Co. v. Chism. 316 S.W. 2d 840 (Ky. 1958); Hardman v. Owensboro Forging Co., 309 S.W. 2d 339 (Ky. 1958); Parrott v. Healy, 290 S.W. 2d 798 (Ky. 1956).

[88] Clark v. Gilley, 311 S.W. 2d 391 (Ky. 1958).

an employe, who has been awarded diasbility compensation by the Workmen's Compensation Board, shall die as a result of such injury or occupational disease prior to the payment to him of the amount of the award, then the dependents of the deceased employe shall be allowed and paid all allowed and unpaid awards made to such employe. Provided, however, that the dependents of such deceased employe shall, within six months after the death of such employe, file with the Workmen's Compensation Board, in such form as the board may require, a written verified application, stating therein the date of the death of such deceased employe; the amount of such allowed and uncollected award; the name, age, postoffice address, and the relation of each said dependents to the deceased. Thereupon the Workmen's Compensation Board shall notify in writing the company, person or insurance carrier against whom such award was made; and shall fix a time and place for a hearing, of which notice shall be given, to determine the dependency of those making such claim; and shall make an award or order for the benefit of those found to be entitled thereto. Provided, however, that the number of weekly payments to be paid to the dependents shall be the number of weeks remaining after deducting the number of weekly payments made to the decedent from the number of weeks allowed in the original award.

(2) The total amount paid and payable to the decedent and his dependents shall not exceed the amount now payable for death at the average weekly wage of the decedent at the time of his injury, and the weekly payments to the dependents shall not exceed the sum of fifteen dollars a week.

This section appeared for the first time in the 1942 Act and has remained substantially unchanged except for an increase in benefits through the years to the present amount.

In 1956 this section was amended to provide for occupational diseases.

The time for filing the application provided in subsection (1) of this section is mandatory, but the form is merely directory.[89]

The continuation of disability payments to dependents of employees after his death are payable only where there has been an award of compensation by the Board.[90]

* * *

342.115 [4900] *Refusal of proper employment forfeits compensation.* If an injured employe refuses employment reasonably suited

[89] Manchester Coal Co. v. Haynes, 307 Ky. 838, 212 S.W. 2d 315 (1948).
[90] Adkins v. International Harvester Co., 286 S.W. 2d 528 (Ky. 1956).

to his capacity and physical condition procured for him, he shall not be entitled to compensation during the period of such refusal unless, in the opinion of the board, such refusal was justifiable.[91]

This section is exactly as written in the original Act.

An injured employee is not required to report to either his former employer or the Board when he obtains new employment.[92]

* * *

342.120 [4901] *Subsequent injury, compensation in case of; payments from Subsequent Injury Fund.* (1) If any employe who is permanently partially disabled, whether from a compensable injury or otherwise receives a subsequent compensable injury by accident resulting in additional permanent disability so that the degree of disability caused by the combined disabilities is greater than that which would have resulted from the subsequent injury alone, and such employe is entitled to receive compensation on the basis of the combined disabilities, the employer shall be liable only for the degree of disability which would have resulted from the latter injury had there been no pre-existing disability. After the compensation liability of the employer, or his insurance carrier, if any, has been fully discharged, the remaining compensation to which such resulting condition would entitle the employe, less all compensation which the provisions of this chapter would have afforded on account of the prior disability had it been compensated for thereunder, shall be paid out of the Subsequent Injury Fund provided for in subsection (1) of KRS 342.122.

(2) The term "permanent partial disability" under the provisions of this section shall not include disease or pre-existing disease, except where the disease or pre-existing disease was the natural and direct result of a compensable injury, or the disease or pre-existing disease was contracted by the employe while a member of the Armed Forces of the United States and was sustained in line of duty while the United States was engaged in war.

* * *

342.121 Reference of medical questions in subsequent injury cases to panel of physicians; conclusiveness of findings; review. (1) If on a claim for compensation for disability resulting from a subsequent injury by accident any medical question shall be in controversy, or a determination thereof necessary to the proper apportionment of

[91] Black Mountain Corp. v. Gilbert, 296 Ky. 514, 177 S.W. 2d 894 (1944).
[92] Bell Coal Co. v. Jackson, 301 Ky. 673, 192 S.W. 2d 947 (1946).

liability therefor, the board shall refer the case to a panel appointed by it of not less than two nor more than three disinterested physicians in the territory where the controversy occurred, for the purpose of investigating and reporting to the board on the medical questions involved. The panel shall make its report to the Workmen's Compensation Board in writing with respect to all medical questions at issue or necessary to the apportionment of disability between the subsequent injury and the prior existing disability at the time of employment. The report shall show the date of prior disablement which, if in dispute, shall be deemed a medical question.

(2) The physicians appointed as provided in subsection (1) of this section shall be allowed necessary traveling expenses and reasonable fees, to be fixed by the board but not to exceed a fee of twenty dollars to each physician for making such examination and report, plus a reasonable allowance for expenses incurred in making such examination. The board may also allow traveling expenses to the employe. Such fees and expenses so approved by the board shall be paid out of the Subsequent Injury Fund in cases for subsequent injuries.

(3) The medical panel shall, as soon as practicable after it has completed its consideration of the case, report in writing its findings on every medical question in controversy. The medical panel shall also include in its report a statement indicating the physician or physicians, if any, who appeared before it, and what, if any, medical reports and X-rays were considered by it.

(4) The decision or award in the case shall conform to the findings and conclusions in such report in so far as restricted to medical questions; provided, however, that any such findings and conclusions may be set aside, reversed or modified, by the board's award or decision, in case an application for review is made to the board within ten days after the report is filed with the board and the interested parties notified, subject, however, to the following special provisions; no such findings of the medical panel shall be subject to review unless specific objections thereto shall be filed with the board by a party in interest within the time limited in which to apply for review of such report.

(5) The provisions of this section shall apply only to persons mentioned in KRS 342.120.

The original Act, which contained a "subsequent injury" section, remained unaltered until 1946, and read as follows:

> If a previously injured employe sustains a subsequent injury which results in a condition to which both injuries,

> or their effects, contribute the employer in whose employment the subsequent injury is sustained shall be liable only for the compensation to which such reulting condition entitled the employe, less all compensation which the provisions of this law would have afforded on account of the prior injury or injuries had they been compensated for thereunder.[93]

The 1946 amendment changed this section to its present form except for a new section which was added, becoming KRS 342.121.[94] With the 1948 amendment these sections were amended to their present form.

The leading case on the Subsequent Injury Fund and what constitutes an "original" disability is *Combs v. Gaffney*, 282 S.W. 2d 817 (Ky. 1955).[95]

* * *

342.122 Subsequent Injury Fund; tax for; credits and withdrawals; continuance from year to year; maximum limit. (1) In addition to the taxes and assesments imposed by KRS 342.450 and 342.475, a Subsequent Injury Fund Tax at the rate of three-fourths of one per cent of the amount of premiums received shall be paid by every insurance carrier as defined in KRS 342.445, subject to the credits therein set out, and the board shall assess against the payrolls of every employer carrying his own risk a Subsequent Injury Fund Tax computed by taking three-fourths of one per cent of the basic premiums determined as provided in KRS 342.475. The provisions of KRS 342.450, 342.455, 342.460, 342.465 and 342.470 shall, so far as applicable, also apply to the levy and collection of such additional tax of three-fourths of one per cent of such premiums of insurance carriers.

(2) All taxes and assessments imposed by subsection (1) of this section shall be paid into the State Treasury and shall be credited to the Subsequent Injury Fund for the board, which fund shall be used only for the payment of awards of compensation made by the board and chargeable against said fund, expenses of legal representation thereof, fees and expenses of the Medical Committee in connection therewith, and shall be withdrawn for that purpose under the supervision of the Commissioner of Industrial Relations.

[93] Dosker *op cit* supra note 53 at 416.

[94] Alfred v. Jones Construction Co., 313 S.W. 2d 867 (Ky. 1958); Mary Helen Coal Corp. v. Anderson, 262 S.W. 2d 841 (Ky. 1953).

[95] For other significant cases on subsequent injuries see Pioneer Coal Co. v. Sparks, 249 S.W. 2d 725 (Ky. 1952), and cases cited therein.

(3) Any sum remaining in the Subsequent Injury Fund to the credit of the Workmen's Compensation Board at the end of any fiscal year shall be set up by the Department of Finance to the credit of the board in such fund for the next ensuing fiscal year.

(4) If the amount to the credit of the Subsequent Injury Fund as of June 30 of any year exceeds $75,000, the tax of three-fourths of one per cent upon insurance premiums provided for under subsection (1) of this section and the three-fourths of one per cent assessment upon employers carrying their own risk provided for under subsection (1) of this section shall not be assessed or collected during the ensuing year.

This section was enacted originally in 1946 and has remained unchanged except for an amendment to subsection (2) in 1954 adding the words "expenses of legal representation thereof" following the words "chargeable against said fund."

* * *

342.125 [4902] *Review by board of previous award or order.* Upon its own motion or upon the application of any party interested and a showing of change of conditions, mistake or fraud, the board may at any time review any award or order, ending, diminishing or increasing the compensation previously awarded, within the maximum and minimum provided in this chapter, or change or revoke its previous order, sending immediately to the parties a copy of its subsequent order or award. Review under this section shall be had upon notice to the parties interested and shall not affect the previous order or award as to any sums already paid thereunder.

This section has remained unchanged from its original enactment in 1916.[95a]

In Harvey Coal Co. v. Colwell, 313 S.W. 2d 274, Ky. 1958), the Court of Appeals held where an employee was paid a lump sum in satisfaction of an award for disability from the Occupational disease of silicosis, a claim for further compensation made moer than one year after the last payment was barred by KRS 342.316(3) because KRS

[95a] For a thorough discussion of this section and its interpretation by the Court of Appeals see: Doan v. Cornett-Lewis Coal Co., 317 S.W. 2d 876 (Ky. 1958); Blue Diamond Coal Co. v. Meade, 289 S.W. 2d 503 (Ky. 1956); Clear Fork Coal Co. v. Gaylord, 286 S.W. 2d 519 (Ky. 1956); Jude v. Cubbage, 251 S.W. 2d 584 (Ky. 1952); Wells v. Fox Ridge Mining Co., 243 S.W. 2d 676 (Ky. 1951); W. E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W. 2d 453 (1946); Dept. of Highways v. Harrell, 291 Ky. 90, 163 S.W. 2d 287 (1942); Crummies Creek Coal Co. v. Hensley, 284 Ky. 243, 144, S. W. 2d 206 (1940); Ray v. Black Mountain Corp., 254 Ky. 800, 72 S.W. 2d 477 (1934).

342.316(3) was enacted after KRS 342.125 and therefore was controlling.[96]

As to what is necessary to reopen a claim when the settlement agreement has not been filed with the board, see: *Low Moisture Co. v. Vandiver*, 260 S.W. 2d 395 (Ky. 1953); *Hodgkin* v. *Webb*, 310 Ky. 745, 221 S.W. 2d 664 (1949); but also see *Fiorella* v. *Clark*, 298 Ky. 817, 184 S.W. 2d 208 (1944).

* * *

342.130 [4903] *Compensation of alien dependents.* Compensation under this chapter to alien dependent widows and children, not residents of the United States, shall be one-half of the amount provided in each case for residents. The employer may at any time commute all future installments of compensation to alien dependents the then value thereof. Alien widowers, parents, brothers and sisters not residents of the United States, shall not be entitled to any compensation.

This section has remained unchanged from its enactment in 1916 and has survived constitutional attack in *Maryland Casualty Co. v. Vidigoj*, 207 Ky. 841, 270 S.W. 472 (1925); nor is the denial of benefits to parents living in Italy of an unnaturalized native of Italy in conflict with a treaty with Italy.[97]

* * *

342.135 [4904] *Notive, how served; notice to nonresident alien.* Any notice required to be given under this chapter shall be considered properly given and served when deposited in the mail in a registered letter or package properly stamped and addressed to the person to whom notice is to be given at his last known address and in time to reach him in due time to act thereon. Notice may also be given and served like notices in civil actions. Any notice given and served as provided in this section to the consular representative of the nation of which any nonresident dependent of a deceased employe is a citizen or subject, or to the authorized agent or representa-

[96] A motion to reopen may be filed with the Board even though a suit to enforce the award is pending in circuit court, Oldham v. Officers' Club of Fort Knox, 244 S.W. 2d 478 (Ky. 1951), but see Lincoln Coal Co. v. Watts, 275 Ky. 130, 120 S.W. 2d 1026 (1938) and Farmer Motor Co. v. Smith, 249 Ky. 445, 60 S.W. 2d 929 (1933). As to the date that increased payments begin, the date of the motion to reopen, where the award is reopened and the amount of compensation increased, see Thompson v. Harlan-Wallins Coal Co., 256 S.W. 2d 10 (Ky. 1953); Hayden v. Elkhorn Coal Corp., 238 S.W. 2d 138 (Ky. 1951); Williams v. Gordon, 313 Ky. 377, 231 S.W. 2d 89 (1950).

[97] Norella v. Maryland Casualty Co., 216 Ky. 29, 289 S.W. 18 (1926).

tive of any such official residing in this state, shall be deemed to have been properly given and served upon such dependent.

This section has remained unchanged since its enactment in 1916.

* * *

342.140 [4905] *Compensation computed on average weekly wage; computation for employe who has worked only a short time; computation at highest grade.* (1) Compensation shall be computed at the average weekly wage earned by the employe at the time of injury reckoning wages as earned while working at fulltime. "At full time" as used herein means a full working day for five days in every week of the year regardless of whether the injured employe actually worked all or part of the time. If the employe shall not have been employed a sufficient length of time to establish an average weekly wage, then compensation shall be based upon the average weekly wage as herein defined of those employes of the same employer in the same or most similar type of employment.

(2) If the employe, at the time of the injury, is regularly employed in a higher grade of work or occupation than formerly during the year, and with larger regular wages, only such higher grade or work or occupation, if it is not seasonal, shall be taken into consideration in computing his average weekly wages.

This section remained unchanged until 1946. In that year the language defining "at full time" was added. The 1946 amendment may have been enacted because of a 1944 Court of Appeals decision wherein "full time" was held to be, following a long line of Court of Appeals decisions, a six-day week.[98]

* * *

342.145 [4906] *Deduction of voluntary payments; payments monthly or quartely.* (1) Any payments made or the value of supplies furnished by the employer or his insurer during the period of disability, to the employe or his dependents, which by the terms of this chapter were not due or payable when made or furnished, may, with the approval of the board, be deducted from the amount payable as compensation.

(2) The board may, on the application of either party, with regard both to the welfare of the employe and the convenience and financial ability of the employer, authorize compensation to be paid monthly or quarterly.

[98] Chickasaw Wood Products Co. v. Babbs, 298 Ky. 409, 182 S.W. 2d 953 (1944).

This section has remained unchanged since its enactment in 1916, except that the words "in its discretion" were deleted in subsection (2) after the word "party." The Board's approval of credit for money and supplies furnished the injured employee is within the sound discretion of the Board and the courts should not interfere with that discretion unless the Board acts in a capricious, arbitrary or unreasonable manner.[99]

* * *

342.150 [4907] *Lump sum compensation; when and how made.* Whenever compensation has been paid for not less than six months, thereafter, on the application of either party and upon notice to the other party, in any case where the board determines that it will be for the best interests of either party and will not subject the employer or his insurer to an undue risk of overpayment, future payments of compensation or any part thereof may be commuted to a lump sum of an amount which will equal the total sum of the probable future payments so commuted, discounted at five per cent per annum on each payment. Upon payment of such lump sum all liability for the payments therein commuted shall cease.

This section has remained unchanged since its enactment in 1916. In the absence of fraud the Board has complete discretion in directing or refusing to direct a lump sum settlement, and in the absence of fraud the Court of Appeals does not have jurisdiction of any appeal from the Board's order.[100]

* * *

342.155 [4908] *Lump sum compensation may be paid to trustee.* Whenever the board considers it expedient, any lump sum which is paid as provided in KRS 342.150 hereof shall be paid to any suitable person appointed by the county judge of the county of the residence of the injured employe or of his dependents as trustee to administer or apply the same for the benefit of the person or persons entitled thereto. The receipt of such trustee for the amount so paid to him shall discharge the employer and his insurer. Except as otherwise herein specifically provided, the manner of qualification and the rights, duties and liabilities of such trustee shall be determined by the general laws of this state.

[99] Harlan Collieries Co. v. Johnson, 308 Ky. 89, 212 S.W. 2d 540 (1948).
[100] Black Mountain Corp. v. Davenport, 280 Ky. 302, 133 S.W. 2d 102 (1939) and cases cited therein.

Except for a minor change in the language of the first sentence, this section has remained as enacted in the 1916 Act.

* * *

342.160 [4909] *Payments to certain dependents for others; application when dependents under legal disability.* (1) The benefits in case of death shall be paid to such one or more dependents of the deceased employe for the benefit of all the dependents entitled thereto, as are determined by the board.[101] The dependents to whom payments are made shall apply the same to the use of the persons entitled thereto under this chapter, according to their respective claims on the deceased for support. The compensation of an insane person shall be paid to his committee.

(2) If the dependents are a widow or other head of a family of minor children and one or more minor children, it shall be sufficient for the widow or head of the family to make application for compensation on behalf of all. Where the dependents are mentally incapacitated or are minors the head of whose family is not a dependent, the application may be made by the committee, guardian or next friend of such dependents.

This section is substantially the same as when enacted into the 1916 Act. A recognized minor illegitimate child can make application by next friend for benefits.[102]

* * *

342.165 [4910] *Increase or decrease in compensation for failure* to comply with safety law. If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful regulation made thereunder, communicated to such employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this act shall be increased fifteen per cent in the amount of each payment. If an accident is caused in any degree by the intentional failure of the employe to use any safety appliance furnished by the employer or to obey any lawful and reasonable rule, order or regulation of the board or the employer for the safety of employes or the public, the compensation for which the employer would otherwise have been liable under this chapter, shall be decreased fifteen per cent in the amount of each payment.

[101] Davis v. Mitchell, 266 Ky. 151, 98 S.W. 2d 474 (1936).
[102] Lockhart's Guardian v. Bailey Pond Creek Coal Co., 235 Ky. 278, 30 S.W. 2d 955 (1930).

Nothing in this section shall be construed to conflict with or impair KRS 342.015.

This section is substantially the same as when enacted into the 1916 Act. The question of willful or intentional violation of a safety rule or intentional failure to comply with the statute or regulations is a matter for determination by the Board.[103] The intentional violation of a safety rule by the employee shall cause the compensation award to be diminished by 15%.[104]

* * *

342.170 [4911] *Minor illegally employed.* If any minor employe is injured or killed while being employed by the employer in willful and known violation[105] of any law of this state regulating the employment of minors, the statutory guardian or personal representative of the minor may claim compensation under this chapter or may sue to recover damages as if this chapter did not exist. But if a minor under sixteen years of age who has procured his employment upon written certification that he is over sixteen years of age, as provided in KRS 342.065, is killed, his parents, statutory guardian or personal representative may not sue to recover damages, but must rely on his claim, if any, for compensation under the terms of this chapter. If a claim for compensation is made under this section, the making of such claim shall be a waiver and bar to all rights of action on account of that injury or death as to all persons, and the institution of an action to recover damages on account of such injury or death shall be a waiver and bar of all rights to compensation under this chapter.

Except for minor changes in language the 1916 Act as amended by the 1924 Assembly is the same as the present section.

* * *

342.175 [4912] *Lien for compensation.* All rights of compensation granted by this chapter shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor.

This section has remained unchanged from the Act of 1916. The purpose of this section is clearly to protect the disabled employee's loss of power by reason of his disability or injury suffered to earn a livelihood and should be given a liberal con-

[103] Black Mountain Corp. v. Vaughn, 280 Ky. 270, 132 S.W. 2d 938 (1939).
[104] Big Elkhorn Coal Co. v. Burke, 206 Ky. 989, 267 S.W. 142 (1925).
[105] Riddell's Adm'r. v. Berry, 298 S.W. 2d 1 (Ky. 1957); Caldwell v. Jarvis, 299 Ky. 439, 185 S.W. 2d 552 (1945).

struction.[106] In a bankruptcy proceeding in Kentucky a claim against the bankrupt employer arising out of a workmen's compensation award in a death case was entitled to priority over claims of the general creditors.[107] However, the lien on the employer's property to secure unemployment compensation contributions under KRS 341.310, is superior to a lien on the employer's assets to secure workmen's compensation awards under this section.[108]

* * *

342.180 [4913] *Compensation claim not assignable; exempt from debts.* No claim for compensation under this chapter shall be assignable; and all compensation and claims therefor shall be exempt from all claims of creditors.

This section has remained unchanged from the 1916 enactment. However, it has been held that property purchased with money received through a lump sum settlement of a workmen's compensation award as a result of a death of an injured employee was not exempt from execution under this section.[109]

* * *

342.185 [4914] *Notice of accident; claim for compensation; time of filing.* No proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless a claim for compensation with respect to such injury shall have been made within one year after the date of the accident, or, in case of death, within one year after such death, whether or not a claim has been made by the employe himself for compensation. Such notice and such claim may be given or made by any person claiming to be entitled to compensation or by some one in his behalf. If payments of compensation as such have been made voluntarily the making of a claim within such period shall not be required, but shall become requisite following the suspension of such voluntary payments. In cases of the disease of silicosis, caused by the inhalation of silica dust, no application for

[106] Atkins v. Carroll, 281 Ky. 328, 136 S.W. 2d 32 (1940).
[107] In re Hall-Luton Coal Mining Co., 29 F. Supp. 484 (1939).
[108] Commonwealth of Kentucky v. Durham, 290 Ky. 403, 161 S.W. 2d 610 (1942).
[109] Ball v. Smiddy, 249 S.W. 2d 715 (Ky. 1952). As to the right of a second spouse to the benefits of his wife's estate made up of sums from a workmen's compensation settlement from wife's first husband's death, see Smith v. Vanover, 264 S.W. 2d 884 (Ky. 1954).

compensation shall be considered unless notice is given and claim is made within three years after the last injurious exposure to silica dust.

This section remained substantially unchanged until 1948 when it was amended by adding the last sentence which established the section as it reads today. It is interesting to note that this section was not amended when the Occupational Disease Act was passed in 1956. Therefore, to the extent of the limitations of this section and the other limitations set out in KRS 342.316 as to silicosis, the occupational disease of silicosis is considered differently from the other occupational disease provided for in KRS 342.316 [for a discussion of related problems and the effect of a subsequent amendment being controlling, particularly in relation to KRS 342.316(3), see *Harvey Coal Co. v. Colwell,* 313 S.W. 2d 274 (Ky. 1958)].

The section has been the subject of much litigation. As to what is the giving of notice "as soon as practicable," each case turns on its own facts, with the employer having to show that he was in some way prejudiced[110] or misled by the delay in giving notice. Or the employee must show that there was some justifying excuse for the delay.[111]

* * *

342.190 [4915] *Notice and claim to be in writing; contents. The* notice and claim shall be in writing. The notice shall contain the name and address of the employe, and shall state in ordinary language the time, place of occurrence, nature and cause of the accident, with names of witnesses, the nature and extent of the injury sustained, and the work or employment in which the employe was at the time engaged, and shall be signed by him or a person on his behalf, or, in case of his death, by any one or more of his dependents or a person on their behalf. The notice may include the claim.

This section has remained unchanged from the 1916 Act. It has been held by the Court of Appeals, however, that giving of written notice is only directory and any verbal notice of the injury is sufficient.[112]

[110] Old King Mining Co. v. Mullins, 252 S.W. 2d 871 (Ky. 1952).
[111] Sexton v. Black Star Coal Co., 296 S.W. 2d 450 (Ky. 1956); Mengel Co. v. Axley, 311 Ky. 631, 224 S.W.2d 921 (1949). (Also see KRS 342.200).
[112] Carr v. Wheeler, 265 S.W. 2d 490 (Ky. 1954).

* * *

342.195 [4916] *Notice and claim; how served.* The notice and claim shall be given to the employer, or if the employer is a partnership, then to any one of the partners. If the employer is a corporation, the notice or claim may be given to any agent of the corporation upon whom process may be served, or to any officer of the corporation or agent of the corporation in charge of the business at the place where the injury occurred. Notice or claim may be given by delivery to any such person or as provided in KRS 342.135.

With the 1922 Amendment which inserted the words "or claim" in the first line, this section has remained unchanged to date.[113] Where an officer or agent in charge of the business of a corporation had personal knowledge of the injury, further notice was not necessary.[114]

* * *

342.200 [4917] *Certain defects or failure to give notice not to bar compensation.* The notice shall not be invalid or insufficient because of any inaccuracy in complying with KRS 342.190 unless it is shown that the employer was in fact misled to his injury thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this chapter if it is shown that the employer, his agent or representative had knowledge of the injury or that the delay or failure to give notice was occasioned by mistake or other reasonable cause.[114a]

This section has remained unchanged from the 1916 Act.[115] The Court of Appeals has ruled in several cases on what constitutes reasonable cause or excuse, with each case turning on its own facts in light of the statutory requirements.[116]

* * *

342.205 [4918] *Right of employer to require continued physical examination; effect of employe's refusal.* After an injury and so long as compensation is claimed, the workman, if requested by his employer or by the board, shall submit himself to examination, at reason-

[113] Dosker, op. cit supra note 53, at 476.

[114] Bates & Rogers Construction Co. v. Emmons, 205 Ky. 21, 265 S.W. 447 (1924).

[114a] See cases cited in footnotes 110 and 111, supra, and footnote 116, infra.

[115] See Ironto nFire Brick Co. v. Madden, 285 S.W. 2d 897 (Ky. 1956).

[116] Sexton v. Black Star Coal Corp., 296 S.W. 2d 450, (Ky. 1956) and cases cited therein; U. S. Steel Corp. v. Birchfield, 296 S.W. 2d 726 (Ky. 1956); Harlan Fuel Co. v. Burkhart, 296 S.W. 2d 722; Deal v. U. S. Steel Corp., 296 S.W. 2d 724 (Ky. 1956).

able time and places, to a duly qualified physician or surgeon designated and paid by the employer. The employe shall have the right to have a duly qualified physician or surgeon designated and paid by himself present at such examination, but this right shall not deny the employer's physician or surgeon the right to visit the injured employe at all reasonable times and under all reasonable conditions. If an employe refuses to submit himself to or in any way obstructs such examination his right to take or prosecute any proceedings under this chapter shall be suspended until such refusal or obstruction ceases. No compensation shall be payable for the period during which the refusal or obstruction continues.

This section has remained generally unchanged from the 1916 Act. However, it has been held that an employer could not for the first time three years after an employee had sustained an injury resulting in a hernia require that employee submit to an operation as a condition of receiving compensation.[117] It has been further held that a claimant's refusal to submit to an examination in another city, after the Referee had awarded plaintiff compensation and the plaintiff had already made three trips upon employer's request, did not violate this section.[118]

* * *

342.210 [4919] *Limitation of time not to run against minors or incompetents.* No limitation of time provided in this chapter shall run against any person who is mentally incompetent or who is a minor dependent so long as he has no committee, guardian or next friend, or other person authorized to claim compensation for him under KRS 342.160.[119]

Except for the 1924 amendment which added after the words "next friend" the words "or other persons authorized to claim compensation for him under KRS 342.160,"[119a] this section has remained unchanged from the original Act.

* * *

342.215 [4618-112; 4920] *Workmen's Compensation Board; appointment; term; vacancies; chairman.* (1) The Workmen's Compen-

[117] Mullins v. Ky.-W. Va. Gas Co., 307 S.W. 2d 169 (Ky. 1957).
[118] Stearns Coal & Lumber Co. v. Roberts, 293 Ky. 75, 168 S.W. 2d 573 (1943).
[119] See Inland Gas Corp. Flint, 269 S.W. 2d (Ky. 1954); Davis v. Mitchell, 266 Ky. 151, 98 S.W. 2d 474 (1936); McIntosh v. Gorman Coal Co. 253 Ky. 160 (1934).
[119a] Dosker, Workmen's Compensation in Kentucky 505 (1st ed. 1916).

sation Board shall consist of five members appointed by the Governor and shall be a part of the Department of Industrial Relations.

(2) Each member of the board shall hold office for four years and until his successor is appointed and qualified. Upon the expiration of the term of any member, his successor shall be appointed for a full term of four years. Vacancies shall be filled by appointment for the unexpired term.

(3) The Governor shall designate a member of the board to serve as chairman for a term of four years. Any vacancy in the chairmanship shall be filled by the Governor.

The Original Act provided for three Board members. The 1956 Legislature raised the number of Board members to five. Another amendment in 1956 also provides for a five member board and changed the method of designating the board chairman. Subsections (1) and (2) of KRS 342.215 as set forth in each of the two amendments are identical, with the only conflict appearing in subsection (3) as set forth therein. Under the authority of *Sumpter v. Burchett*, 304 Ky. 858, 202 S.W. 2d 735 (1947), effect is given to the later amendment.

KRS 342.220-KRS 342.255 concern administrative details relating to the Board, its employees and its operation.

The original Act of 1916 (which requirement is no longer part of the Act) provided that each member of the Board give a bond of $10,000 as surety for the faithful performance of his duties, with the premium to be paid out of the Maintenance Fund.[120]

The Board has historically met on the first and third Tuesdays of each month at its main office in Frankfort, Kentucky, with a majority of the Board constituting a quorum for the transaction of business.[121]

All proceedings of the Board are recorded in an Order Book and limitations on the time for filing a petition for review begins to run on the date an award is entered in the Order Book, even though the Order Book is not signed by the Chairman of the Board until the next regular meeting.[122]

The Referees hear the parties and their witnesses. After

[120] The requirement that the member give fulltime to the work of the Board was eliminated by Amendment in 1956.

[121] KRS 342.255.

[122] Carnahan Oil & Refining Co. v. Miller, 232 Ky. 78, 22 S.W. 2d 430 (1925).

all the evidence is filed, the case is submitted to a referee, who writes an opinion, including findings of facts and rulings of law. However, these orders and awards of the Referees do not become those of the Board until a majority of the Board have approved same and said orders or awards are entered on the record of the Board's proceedings.[123] Nor is an award by a Referee a final order reversible by the court until approved by the Board.[124]

The Court of Appeals has consistently held that the Board is not a court within the meaning of the Kentucky Constitution or Kentucky statutes, but rather is an administrative agency appointed by law to find the facts in cases submitted to it and apply the law to those facts[125] to effectuate the purpose of the statute.[126]

* * *

342.260 [4618-112; 4930] *Board to make rules; procedure; subpoena; duties of sheriff; circuit court.* (1) The board shall prepare such rules and regulations as it considers necessary to carry on its work and may make rules not inconsistent with this chapter for carrying out the provisions of this chapter.

(2) Processes and procedure under this chapter shall be as summary and simple as reasonably possible. The board or any member thereof for the purpose of this chapter, may subpoena witnesses, administer or cause to have administered oaths and examine or cause to have examined such parts of the books and records of the parties to a proceeding as relate to question in dispute.

(3) The sheriff shall serve all subpoenas of the board and shall receive the same fee as provided by law for like service in civil actions. Each witness who appears in obedience to such subpoena of the board shall receive for attendance the fees and mileage for witnesses in civil cases in the circuit courts.

(4) The circuit court shall, on application of the board or any member thereof, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records.

This section is substantially the same as found in the 1916 Act. The right of the Board to make procedural rules is limited by

[123] Spencer v. Chobies Coal Co., 280 Ky. 152, 132 S.W. 2d 746 (1939).
[124] Crummies Creek Coal Co. v. Hensley, 284 Ky. 243, 144 S.W. 2d 206 (1940).
[125] Sears v. Elcomb Coal Co., 253 Ky. 279, 69 S.W. 2d 382 (1934).
[126] Broadway & Fourth Avenue Realty Co. v. Metcalfe, 230 Ky. 800, 20 S.W. 2d 988 (1929).

the express restrictive provision that said rules must not be inconsistent with the provisions of this Act.[127]

The most recent rules of practice and procedure of the Board were promulgated in October, 1957, and on October 22, 1958.[128]

Administrative rules and regulations are not effective until thirty days after filing with Legislative Research Committee. [KRS 13.0857].

It has been consistently held by the Court of Appeals that technical rules of common law and code pleading are not generally to be observed in proceedings before the Board.[129]

The Board's control over its own proceedings is extensive and includes the right to refuse to consider a deposition of a witness, even though taken by agreement, where the deposition was taken after the Board's time for alloting of proof had passed.[130]

The Board has discretion in determining whether or not evidence which properly should have been introduced in chief but which was introduced in rebuttal may be considered.[131] The same is true as to newly discovered evidence. (United States Coal & Coke Co. v. Gilley, 296 Ky. 522, 177 S.W. 2d 877 (1944).

* * *

342.265 [4931] *Compensation agreements; subject to approval of board.* If the employe and employer reach an agreement conforming to the provisions of this chapter in regard to compensation, a memorandum of the agreement shall be filed with the board, and, if approved by it, shall be enforceable as is herein provided for the enforcement of awards of the board. Nothing herein shall prevent the voluntary payment of compensation in the amounts and for the periods prescribed in this chapter without formal agreement, but nothing shall operate as a final settlement except a memorandum of agreement filed with and approved by the board in accordance with this section or the expiration of the time limit prescribed in KRS 342.185.[132]

This section has remained unchanged from its enactment in 1916, but was re-enacted in 1952. It has been held that where

[127] Washington v. Clover Fork Coal Co., 269 Ky. 604, 108 S.W. 2d 502 (1939).

[128] The rules of practice and procedure adopted by the board are set forth in Appendix I.

[129] Perry McGlone Construction Co. v. Shaw, 283 Ky. 84, 140 S.W. 2d 829 (1940); Crutcher Dental Depot v. Miller, 251 Ky. 201, 64 S.W. 2d 466 (1933).

[130] Mitchell v. Jacks Creek Mining Co., 248 S.W. 2d 926 (Ky. 1952).

[131] Wells v. General Electric Co., 318 S.W. 2d 865 (Ky. 1958); International Harvester Co. v. Brown, 286 S.W. 2d 920 (Ky. 1956).

[132] Adkins v. International Harvester Co., 286 S.W. 2d 528 (Ky. 1956).

no claim is pending before the Board, it is not mandatory to file the voluntary settlement agreement and receipts with the Board.[133] However, where there is a memorandum of agreement under circumstances creating a duty in the employer to file the agreement with the Board as a final settlement, it might be held that the agreement was the equivalent of an award.[134] Nevertheless, where fraud is perpetrated, a claim may be reopened even though the agreement was not filed with the Board.[135]

* * *

342.270 [4932] *Board hearing; application for; time and place of; notice; informal conference with parties.* (1) If the parties fail to reach an agreement in regard to compensation under this chapter, or if they have previously filed such an agreement with the board and compensation has been paid or is due in accordance therewith and the parties thereafter disagree, either party may make written application to the board for a hearing in regard to the matter at issue and for a ruling thereon. Such application must be filed within one year after the accident, or, in case of death, within one year after such death, or within one year after the cessation of voluntary payments, if any have been made.

(2)As soon as possible after the application has been received the board shall set the date for a hearing, to be held as soon as is practicable in view of the matter involved, and shall notify the parties at issue of the time and place of such hearing.

(3) Unless otherwise agreed to by the parties and authorized by the board, the hearing shall be held at or convenient to the place where the injury was sustained or the ground for disagreement occurred. Before directing a hearing, the board, or a member thereof or referee authorized by the board, may confer informally with the parties at issue in an attempt to assist in adjusting their differences, but may not delay the granting of a hearing, over the objection of either party, for such purpose.

This section has remained substantially unchanged from the 1916 Act. In the original Act the application for a hearing must have been filed as soon as practicable after disagreement as to

[133] Fiorella v. Clark, 298 Ky. 817, 184 S.W. 2d 208 (1944); Langhorne & Langhorne Co. v. Newsome, 285 Ky. 519, 148 S.W. 2d 684 (1941); Edgemont Fuel Co. v. Patton, 256 Ky. 538, 76 S.W. 2d 284 (1934).

[134] Adkins v. International Harvester Co., 286 S.W. 2d 528 (Ky. 1956).

[135] Low Moisture Coal Co. v. Vandiver, 260 S.W. 2d 395 (Ky. 1953).

payment of compensation or after the cessation of voluntary payments.[136] In 1948 this section was changed and the entire language pertaining to "after disagreement"[137] eliminated; now the claim must be filed within one year after date of accident or one year after death or the cessation of payments. The filing of a claim within one year is mandatory as to time but merely directory as to form.[138] Where the last day for filing falls on Sunday or a legal holiday, the filing of the claim on the following day is too late.[139] However, where Saturday is the last day for filing and the registered letter containing the application would have been delivered to the Board on Saturday had it been open, the petition was timely filed.[140] One year from cessation of voluntary payments has been held by the Board to be one year from date employee received last payment even though payments cover an earlier period.[141]

Before an employer is found to be estopped from pleading the Statute of Limitations, there must be clear proof of estoppel.[142]

There has been considerable litigation on the question of what are "voluntary payments." "Payments" as used in this section mean payment of compensation[143] and not payments of medical expenses or doctor bills.[144] However, where the employee believes that he is drawing voluntary payments, even though the employer contends that these payments were gifts, the Court of Appeals has ruled that these were voluntary payments.[145]

* * *

342.275 [4933] *Board hearing; when award to be made; record filed; copy of award sent to parties.* The board, or any of its members, shall hear the parties at issue and their representatives and wit-

[136] Starks Realty Co. v. French, 267 Ky. 255, 101 S.W. 2d 946 (1937), [subsequently overruled by the 1948 amendment]; Dosker, op. cit. supra note 119a at 529.

[137] See Laswell v. Carrollton Furniture Co., 251 S.W. 2d 296 (Ky. 1952).

[138] Mary Gail Coal Corp. v. Rhodes , 284 S.W. 2d 97 (Ky. 1955); also see Charles v. Big Jim Coal Co., 237 S.W. 2d 68 (Ky. 1951); Manchester Coal Co. v. Haynes, 305 Ky. 105, 212 S.W. 2d 315 (1947).

[139] Inland Gas Co. v. Flint, 255 S.W. 2d 1006 (Ky. 1953).

[140] Mary Gail Coal Co. v. Rhodes, 284 S.W. 2d 97 (Ky. 1955).

[141] Mansfield v. Ashland Oil & Refining Co., W.C.B.D., #C-25528 (July 1, 1958).

[142] Old Republic Ins. Co. v. Begley, 314 S.W. 2d 552 (1958); Buchanan v. Buchanan Coal Co., 310 S.W. 2d 534 (Ky. 1958); Pipes Chevrolet Co. v. Bryant, 274 S.W. 2d 663 (Ky. 1954).

[143] Miles v. General Electric Co., 280 S.W. 2d 529 (Ky. 1955).

[144] Id. at 530.

[145] American Radiator & Standard Sanitary Corp. v. Crawford, 310 Ky. 711, 221 S.W. 2d 684 (1949).

nesses and shall determine the dispute in a summary manner. The award shall be made within thirty days after final submission, except in cases involving large or complicated records or unusual questions of law, and shall be made within ninety days after final submission in any event. The award, together with a statement of the findings of fact, rulings of law and any other matters pertinent to the question at issue shall be filed with the record of proceedings, and a copy of the award shall immediately be sent to the parties in dispute.

The original Act did not have any time limitation. The Board attempts to expedite cases as much as possible. It is well established that the Board's Findings of Fact (as contrasted with Rulings of Law or pure questions of law) are conclusive if there is competent evidence of probative value to support the facts.[146] The Board must make separate findings of fact and rulings of law as required by this section.[147] The claimant has the burden of proving by competent evidence all facts necessary to establish his claim.[148] However, upon the introduction of proof as to coverage under the Act, the burden may shift.[149]

* * *

342.280 [4934] *Review by full board; cost of attendance of certain witnesses.* (1) If an application for review is made to the board within fourteen days from the date of the award, the full board, if the first hearing was not held before the full board, shall, as soon as practicable, review the evidence, or, if deemed advisable, hear the parties at issue, their representativs and witnesses, and shall make an award and file it as specified in KRS 342.275.

(2) If a party introduces at a hearing before the full board a witness whose testimony at the original hearing appears in the transcript of evidence taken thereat, the costs accruing through the attendance of such witness and the transcribing of his testimony at the second hearing shall be borne by the party introducing him at that hearing, regardless of the outcome of the controversy.

The original Act of 1916 called for an appeal to the full Board within seven days. By the 1950 amendment the appeal time was

[146] Grisby v. Fraley, 322 S.W. 2d 108 (Ky. 1959); Wells v. General Electric Co., 318 S.W. 2d 865 (Ky. 1958); Salmon v. Armco Steel Corp., 275 S.W. 2d 590 (Ky. 1955); U. S. Coal & Coke Co. v. Lloyd, 305 Ky. 105, 203 S.W. 2d 47 (1947); Eastern Coal Corp. v. Thacker, 290 S.W. 2d 836 (Ky. 1956).

[147] H. H. Wagner & Co. v. Moock, 303 Ky. 222, 197 S.W. 2d 254 (1946); Wells v. General Electric Co. 318 S.W. 2d 865 (Ky. 1958).

[148] Walker v. Lebanon Stone Co., 312 Ky. 624, 229 S.W. 2d 163 (1950).

[149] Id at 163.

extended to fourteen days. It is well established that the Board acting in a quasi judicial capacity has control of cases pending before it the same as a court until a final investigation of a controversy on its merits, including the power to reconsider any of its awards and to make appropriate action regardless of previous rulings.[150] Once a final order is issued, however, the only remedy of the aggrieved is appeal to the circuit court.[151] The time limitation for making an application for review to the full Board is mandatory.[152] By virtue of the Act the findings of fact present and forseeable by the Board must be given greater consideration by the Courts than a verdict of a jury.[153]

* * *

342.285 [4935] *Appeal to circuit court.* (1) An award or order of the board as provided in KRS 342.275, if application for review is not filed as provided for in KRS 342.280, shall be conclusive and binding as to all questions of fact, but either party may, within twenty days after the rendition of such final award or order of the board, by petition appeal to the circuit court that would have jurisdiction to try an action for damages for the injuries if this chapter did not exist, for the review of such order or award, the board and the adverse party being made respondents.[153a]

(2) The petition shall state fully the grounds upon which a review is sought, assign all errors relied on and be verified by the petitioner, who shall furnish copies of the petition to the respondents at the time of filing it. Summons shall issue upon the petition directing the adverse party to file answer within fifteen days after service thereof and directing the board to send its entire original record, properly bound, to the clerk of the circuit court, after certifying that such record is its entire original record, which shall be filed by the clerk of the circuit court and such record shall then become and be considered by the circuit court on review.

(3) No new additional evidence may be introduced in the circuit court except as to the fraud or misconduct of some person engaged in the administration of this chapter and affecting the order, ruling or award, but the court shall otherwise hear the cause upon

[150] Sweeney v. Ky. State Highway Dept., 313 Ky. 503, 232 S.W. 2d 1018 (1950).

[151] Washington v. Clover Fork Coal Co., 269 Ky. 604, 108 S.W. 2d 502 (1932).

[152] Jones v. Davis, 246 Ky. 293, 54 S.W. 2d 681 (1932).

[153] Frennie May Coal Co. v. Snow, 299 S.W. 2d 56 (Ky. 1950).

[153a] Raley v. Pittsburg-Des Moines Steel Co., 317 S.W. 2d 900 (Ky. 1958); U. S. Coal & Coke Co. v. Gilley, 296 Ky. 522, 177 S.W. 2d 877 (1944).

the record as certified by the board and shall dispose of the cause in summary manner, its review being limited to determining whether or not:

(a) The board acted without or in excess of its powers;

(b) The order, decision or award was procured by fraud;

(c) The order, decision or award is not in conformity to the provisions of this chapter; and

(d) If findings of fact are in issue, whether such findings of fact support the order, decision or award.

(4) The board and each party may appear in such review proceedings; the court shall enter judgment affirming, modifying or setting aside the order, decision or award, or in its discretion remanding the cause to the board for further proceedings in conformity with the direction of the court. The court may, before judgment and upon a sufficient showing of fact, remand the cause to the board.

This section has remained substantially as written into the 1916 Act except as to the manner in which the record is tendered to the circuit court. As the section now reads the Board shall send "its entire record, properly bound, to the clerk of the circuit court, after certifying that such record is its entire original record," and "which shall be filed by the clerk of the circuit court" to be considered by the circuit court on review.[154] The twenty days allowed for filing a petition for review are computed from the active rendition of the award and not from the day of the award, and hence, the day the award was entered must be included in the twenty days.[155]

The circuit court is an intermediate appellate court in workmen's compensation cases and no new or additional evidence may be introduced in that court except as to fraud or misconduct of some person engaged in the administration of the Act.[156]

Construction of the statute, pure questions of law, and cases of no issue of fact are all fully reviewable on appeal to the courts.[157]

The orders that a circuit court may issue to the Board are limited.[158] The function of the circuit courts and the Court of

[154] 1948 amendment.

[155] Webb v. Montgomery Ward & Co., 303 Ky. 152, 197 S.W. 2d 90 (1946).

[156] Harvey Coal Corp. v. Morris, 237 S.W. 2d 70 (Ky. 1951).

[157] Childers v. Stephenson, 320 S.W. 2d 797 (Ky. 1959); Combs v. Gaffney, 282 S.W. 2d 817 (Ky. 1955).

[158] See Columbus Mining Co. v. Pelfrey, 237 S.W. 2d 847 (Ky. 1951); Hen-

Appeals on cases appealed from the Workmen's Compensation Board as to the facts is to review the record to determine whether or not the findings of the Board are supported by any evidence of probative value.[159] It has been held that directions by the circuit court limiting a case, after setting aside a Board's order denying an employer's motion to reopen, to hearing the parties and determining whether the claimant is entitled to any compensation payment for a certain period, is too broad since the court should have remanded the case with directions for the Board to take jurisdiction and to hear the motion of its merits with proceedings consistent therewith.[160]

* * *

342.290 [4936] *Appeal to Court of Appeals.* (1) Where an amount sufficient under KRS 21.060 to authorize an appeal to the Court of Appeals is involved, the judgment of the circuit court shall be subject to appeal to the Court of Appeals. The scope of review by the Court of Appeals shall include all matters subject to review by the circuit court[160a] and also errors of law arising in the circuit court and upon appeal made reviewable by the Civil Code of procedure where not in conflict with this chapter.

(2) The procedure as to appeal to the Court of Appeals shall be the same as in civil actions, so far as it is applicable to and not in conflict with this chapter, except as follows:

The appellant shall file with the clerk of the circuit court, together with proof or acknowledgment of service, a schedule which indicates the portions of the record to be incorporated into the transcript of the record to be used on appeal to the Court of Appeals. Should the appellee or his counsel desire additional portions of the record incorporated into the record to be filed in the Court of Appeals, he may file with the clerk of the circuit court his schedule also within ten days thereafter (unless the time is extended by order of the circuit court or the Court of Appeals), indicating the additional portions of the record desired by him. Provided, however, that if the original record of the Workmen's Compensation Board is desired by either party on appeal to the Court of Appeals, it shall not be neces-

dricks v. Ky. & Va. Leaf Tobacco Co., 312 Ky. 849, 229 S.W. 2d 953 (1950); H. H. Wagner & Co. v. Moock, 303 Ky. 222, 197 S.W. 2d 254 (Ky. 1946).

[159] Grisby v. Fraley 322 S.W. 2d 108 (Ky. 1959); Wells v. General Electric Co., 318 S.W. 2d 965 (Ky. 1958); Elkhorn Coal Co. v. Adams, 313 S.W. 2d 421 (Ky. 1958); Homer Brown Coal Co. v. Mays, 307 S.W. 2d 934 (Ky. 1957); Tyler-Couch Construction Co. v. Elmore, 264 S.W. 2d 56 (Ky. 1954).

[160] Oldham v. Officers' Club of Fort Knox, 244, S.W. 2d 478 (Ky. 1951).

[160a] Childers v. Stephenson, 320 S.W. 2d 797 (Ky. 1959).

sary for the clerk of the circuit court to copy said original record into the transcript, but the same shall be and become a part of the transcript and shall be forwarded to the Clerk of the Court of Appeals as a part of the record upon appeal to said court. The clerk shall not be entitled to any transcript fee for such original record.

(3) The clerk of the circuit court will transmit to the Court of Appeals as the transcript of the record only those portions of the record of the lower court as are designated by the parties as above.

Prior to 1948 this section remained substantially unchanged from the original Act of 1916. The 1948 amendments extensively changed the method for appeals to the Court of Appeals, thereby expediting this action. Where the total amount claimed is less than $2,000, the Court of Appeals has no jurisdiction of appeal in absence of a motion for appeal.[161] An order of the circuit court remanding a case back to the Board is appealable as a final order.[162]

* * *

342.295 [4937] *Safekeeping, transporting and return of original record of board.* The Circuit Court of the Court of Appeals may make such rule or order as it may deem necessary for the safekeeping, transporting and return of such original records of the Workmen's Compensation Board to the said board when the judgment in the case becomes final, provided that a copy of the final judgment shall be returnd with each record. When any appeal has become final the Clerk of the Court of Appeals shall return such original record to the Workmen's Compensation Board, who shall safely keep the same. At all times thereafter such record shall remain a part of the record of the case in the Court of Appeals, though kept in the possession of the Workmen's Compensation Board.[163]

This section remained unchanged from the original Act until 1948 when the present general procedure was adopted. However, in 1954, the General Assembly added the clause following the words "becomes final."

The original Act did not provide for the suspension of the

[161] Woolsey v. Price Chemical Co., 307 S.W. 2d 572 (Ky. 1957); also see Johnson v. McCoy's Admr., 284 S.W. 2d 676 (Ky. 1955).
[162] Mullins v. Ky.-W. Va. Gas Co., 307 S.W. 2d 169 (Ky. 1957); but see Green River Fuel Co. v. Sutton, 260 Ky. 288, 84 S.W. 2d 79 (1935), where it was held that an order of the circuit court remanding a case back to the Board without passing on the merits, with directions to make an award in compliance with the statute with separate findings of law and fact held to be interlocutory, not a "final order," hence not appealable.
[163] Cornett-Lewis Coal Co. v. Day, 312 Ky. 221, 226 S.W. 2d 951 (1950).

award, order or judgment upon the execution by the adverse party of a supersedes bond. The suspension provision was enacted by the 1926 legislature.[164]

* * *

342.300 [4938] *Continuation of award pending appeal.* Upon motion of either party and a sufficient showing of reason and necessity therefor, the circuit court to which an appeal is taken may continue in force the award, judgment, or order appealed from, pending its decision of such appeal, but to be suspended upon the execution by the adverse party of a supersedeas bond for appeal to the Court of Appeals.

Proceedings for the enforcement of an agreement that has become an award of the Board must be had in circuit court,[165] as the Board has no enforcement powers. An award is in the nature of a judgment and rights acquired under it cannot be destroyed by a refusal to recognize it.[166] The procedure outlined in this section is to be had only when the order of the Board has become final.[167]

* * *

342.305 [4939] *Enforcement by circuit court of agreement or award.* Any party in interest may file in the circuit court of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the board or of an order or decision of the board, or of an award of the board unappealed from, or of an award of the board rendered upon an appeal. The court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same as though it had been rendered in a suit duly heard and determined by that court. Any such judgment, unappealed from or affirmed on appeal or modified in obedience to the mandate of the Court of Appeals shall be modified to conform to any decision of the board ending, diminishing or increasing any weekly payment under the provisions of KRS 342.125 upon a presentation to it of a certified copy of such decision.

Except for the changing of the words "appellate court" to "Court of Appeals" this section has remained exactly as written in the original Act.

[164] Dosker, op. cit. supra note 119a at 581.
[165] See Cornwell v. Commonwealth of Kentucky, 304 Ky. 182, 200 S.W. 2d 286 (1947).
[166] Id. at 287.
[167] Owensboro Wagon Co. v. Adams, 309 Ky. 302, 216 S.W. 2d 637 (1949).

The sole purpose of this section is to enforce the agreement approved by the Board or order, decision or award of the Board if unappealed from, or affirmed on appeal.[168]

* * *

342.310 [4940] *Court may assess cost of unreasonable proceedings.* If the board or any court before whom any proceeedings are brought under this chapter determines that such proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who has so brought, prosecuted or defended them.

This section has remained unchanged since the original Act. The assessment of the whole costs referred to in this section applies exclusively to proceedings before the Board and has no reference to costs growing out of common law actions wholly outside of and independent of any of the Act's provisions.[169]

* * *

342.315 [4941] *Appointment of physicians to examine claimant employe; compensation and expenses of examination.* (1) The board, or any member thereof, may, upon the application of either party or upon its own motion, appoint not more than three disinterested and duly qualified physicians or surgeons to make any necessary medical examination of the employe and to testify in respect thereto. Such physicians or surgeons shall file with the board within fifteen days after such examination their joint report in writing. The physicians or surgeons shall be allowed a reasonable fee to be fixed by the board and paid out of the Maintenance Fund, not exceeding seventy-five dollars for each examination and report, except that the board may allow additional reasonable amounts in extraordinary cases and the reasonable cost of X-rays, if any; the board may in its discretion allow a fee not in excess of twenty-five dollars for any deposition given by such physicians or surgeons.

(2) The party filing the motion for an examination shall pay the necessary and reasonable traveling expenses incurred by the employe in submitting to such examination. If the examination is ordered on the board's own motion, then such traveling expenses shall be paid out of the Maintenance Fund.

[168] Stearns Coal & Lumber Co. v. Duncan, 271 Ky. 800, 113 S.W. 2d 436 (1938).

[169] Beattyville Co. v. Sizemore, 203 Ky. 7, 261, S.W. 2d 620 (1924).

The basic structure of this section was contained in the original Act which provided for the appointment of one disinterested physician or surgeon, allowing him traveling expenses and a reasonable fee not to exceed $10.00 except in extraordinary cases.

By the 1944 amendment in addition to raising the physician's or surgeon's fee to $15.00, the amendment provided for the appointment of a medical committee composed of three disinterested physicians with experience to diagnose and treat occupational diseases including silicosis, two of whom were to be qualified radiologists. Claims for silicosis were to be referred to this committee who were to examine the employees and certify their findings to the Board covering the stage, if any, of the silicosis, whether the disability was temporary partial or total, and the extent, if any, of impairment of capacity to work.

By an amendment in 1946 the 1944 amendment pertaining to the medical committee was repealed. In 1946 the following amendment was added:

> Upon the application of either party such appointment shall be made in any case where the amount of compensation claimed or reasonably to be anticipated exceeds the sum of $200.00.

By amendment of 1948 the $200.00 limitation was removed. The following change was also enacted in 1948:

> except that the Board may allow additional reasonable amounts in extraordinary cases and the reasonable costs of x-rays, if any;

By the 1950 amendment the Board could in its discretion allow a fee not in excess of $10.00 for any deposition given by such disinterested physician or surgeon. The 1956 amendment raised the number of disinterested physicians that could be appointed from one to three and required that said physicians file with the Board within fifteen days after their examination a written joint report of their findings.

The amendment further provided that the fees to be fixed by the Board could not exceed $75.00 for each examination, also raised the amount to be allowed for depositions not to ex-

ceed $25.00 in the Board's discretion. Section (2) relating to necessary and reasonable traveling expenses to the employee submitting to the examination was also added by the 1956 amendment.

The depositions of the disinterested physician or physicians, of course, can be taken, and usually are, by the Board with the right of the patries to cross-examine. Although there is no direct provision in this section for the taking of the disinterested physician's deposition, such authority is found in KRS 342.280. See *Tackett v. Eastern Coal Corp.*, 295 Ky. 422, 174 S.W. 2d 707 (1943); *Mills v. Casner*, 296 Ky. 678, 178 S.W. 2d 196 (1944).

* * *

342.316 Occupational disease; defined; claim and allowance of compensation for. (1) "Occupational Disease" as used in this chapter means a disease arising out of and in the course of the employment. Ordinary diseases of life to which the general public is equally exposed outside of the employment shall not be compensable, except where such diseases follow as an incident of an occupational disease as defined in this section.

(a) A disease shall be deemed to arise out of the employment only if there is apparent to the rational mind, upon consideration of all the circumstances, a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workmen would have been equally exposed outside of the employment. The disease shall be incidental to the character of the business and not independent of the relationship of employer and employe. The disease need not have been foreseen or expected but, after its contraction, it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

(b) "Injurious exposure" as used in this section shall mean that exposure to occupational hazard which would, independently of any other cause whatsoever produce or cause the disease for which claim is made.

(2) The procedure with respect to the giving of notice of disability or death, and as to the filing of claims and determination thereof in occupational disease cases and the compensation and

medical benefits payable for disability or death due to such disease shall be the same as in cases of accidental injury or death under the general provisions of this chapter, except that notice of disability shall be given to the employer as soon as practicable after the employe first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted such disease, or a diagnosis of such disease is first communicated to him, whichever shall first occur.

(3) The right to compensation under this chapter for disability resulting from an occupational disease shall be forever barred unless a claim is filed with the Workmen's Compensation Board within one year after the last injurious exposure to the occupational hazard or after the employe first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, whichever shall last occur; and if death results from the occupational disease within said period, unless a claim therefor be filed with the Workmen's Compensation Board within one year after such death; provided, however, that notice of such claim shall be deemed waived in case of disability or death where the employer, or his insurance carrier, voluntarily makes payment therefor, or, if the incurrence of the disease or the death of the employe, and its cause was known to the employer; and provided further, that where compensation has been paid or awarded, whether for disability or death from an occupational disease, and the payments have been discontinued, the claim for further compensation shall be made within one year after the last payment of compensation.

(4) In claims for compensation due to the occupational disease of silicosis it must be shown that the employe was exposed to the hazards of the disease in his employment within this state for at least two years before his disability or death.

(5) The amount of compensation payable for disability due to occupational disease or for death from such disease, and the time and manner of its payment, shall be the same as provided for accidental injury or death under the general provisions of the Workmen's Compensation Act, but in no event to exceed such amounts, and, provided further, that the time of the beginning of compensation payments shall be the date of the employe's last injurious exposure to the cause of the disease, or the date of actual disability, whichever is later, and provided further, that in case of death where the employe has been awarded compensation or made timely claim within the period provided for in this section, an employe has suffered continuous disability to the date of his death occurring at any time within

ten years from the date of disability, his dependents, if any, shall be awarded compensation for his death as provided for under the general provisions of the Workmen's Compensation Act and in this section.

(6) In case of disability or death from silicosis, an occupational disease, complicated with tuberculosis of the lungs, compensation shall be payable as for uncomplicated silicosis, provided, however, that silicosis was an essential factor in causing such disability or death.

(7) If an autopsy has been performed, no testimony relative thereto shall be competent unless the employer or his representative and a representative of the deaceasd employe shall have participated therein or been given reasonable opportunity to do so.

(8) No compensation shall be payable for occupational disease if the employe at the time of entering the employment of the employer by whom compensation would otherwise be payable, falsely represented himself, in writing, as not having been previously disabled, laid off, or compensated in damages or otherwise, because of such disease, or failed or omitted truthfully to state to the best of his knowledge, in answer to written inquiry made by the employer, the place, duration and nature of previous employment, or, to the best of his knowledge, the previous state of his health.

(9) Where an occupational disease is aggravated by other disease or infirmity not itself compensable, or where disability or death from any other cause, not itself compensable is aggravated, prolonged, accelerated or in anywise contributed to by occupational disease the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as a causative factor, bears to all causes of such disability or death, such reduction in compensation to be affected by reducing the number of weekly or monthly payments or the amount of such payments as under the circumstances of the particular case may be for the best interests of the claimant or claimants.

(10) No compensation for death from occupational disease shall be payable to any person whose relationship to the deceased, which, under the provisions of this chapter would give right to compensation arose, subsequent to the beginning of the first compensable disability, save only to after-born children of a marriage existing at the beginning of such disability.

(11) Whenever any claimant misconceives his remedy and files an application for adjustment of claim under the general provisions

of this chapter and it is subsequently discovered, at any time before the final disposition of such cause, that the claim for injury, disability or death which was the basis for such application should properly have been made under the provisions of this section, then the application so filed may be amended in form or substance, or both, to assert a claim for such injury, disability or death under the provisions of this section, and it shall be deemed to have been so filed as amended on the date of the original fillng thereof, and such compensation may be awarded as is warranted by the whole evidence pursuant to the provisions of this chapter. When such amendment is submitted, further or additional evidence may be heard by the board when deemed necessary. Nothing this section contains shall be construed to be or permit a waiver of any of the provisions of this chapter with reference to notice of time for filing a claim, but notice of filing a claim, if given or done, shall be deemed to be a notice of filing of a claim under provisions of this chapter, if given or done within the time required herein.

(12) When an employe has an occupational disease that is covered by this chapter, the employer in whose employment he was last injuriously exposed to the hazard of the disease, and the employer's insurance carrier, if any, at the time of the exposure, shall alone be liable therefor, without right to contribution from any prior employer or insurance carrier.

The original Act contained no provisions allowing recovery for any occupational diseases, not even for silicosis. In 1924 disability from noxious gases, smoke or bad air was made compensable as set out in the present KRS 342.005.[170]

Although the predecessor of the present section was first enacted in 1944, as discussed infra, by amendment of 1934 to KRS 342.005 employers and their employees engaged in the operation of glass manufacturing plants, quarries, sand mines or in the manufacturing, treating or handling of sand could, with respect to the disease of silicosis caused by the inhalation of silica dust, voluntarily by joint application subject themselves to the Act as to such disease.

By amendment in 1944 section KRS 342.005 was enlarged to include "any employers and their employees" and KRS 342.316 was first enacted.

The predecessor of the present section when first enacted in 1944 provided among other things that the section would not

[170] Dosker, Workmen's Compensation Law in Kentucky 91 (1st ed. 1916).

apply to cases of silicosis in which the last injurious exposure to the hazards of such disease occurred before March 20, 1944.[171] It also provided for the appointment of a medical committee to examine and pass upon silicosis claims.[172]

In 1948 the section was considerably changed as to procedure for recovery and eliminated the medical committee heretofore discussed in KRS 342.315 (See *General Refractories Co., Inc. v. Henderson,* 313 Ky. 613, 232 S.W. 2d 846 (1950), as to constitutionality when applying change to pending cases.

In 1956 this section was given its present form and became what is now commonly referred to as the Occupational Disease Act, and, although there are still some references directly to the occupational disease of silicosis,[173] in contrast to occupational disease in general, the disease of silicosis is treated, except where specifically otherwise provided, as an occupational disease as defined in this section.

The requirement of a joint application for election for coverage with respect to silicosis as formerly required by KRS 342.005[174] was eliminated by the 1956 amendment.

The Court of Appeals has not to date decided any cases based on the 1956 amendments of this section.

Where disability is claimed from silicosis the Board must first determine whether or not the claimant has silicosis before it considers the question of injurious exposure.[175] The degree of proof necessary for injurious exposure to free silica dust is considerably limited, it not being necessary to prove exposure by a high degree of scientific proof or technical requirements,[176] and if the disease is shown to exist, the question of exposure to the to the hazard will be determined in the light of that fact.[177]

The 60-day exposure period as set out in the 1948 amendment KRS 342.316(3) was eliminated by the 1956 amendment. For an interpretation of this section prior to its deletion see *Jones v. Crummies Creek Coal Co.,* 264 S.W. 2d 295 (Ky. 1954).

171 KRS 342.316(5)—1944 Act.
172 KRS 342.316(10), (11), (12), (13)—1944 Act.
173 KRS 342.316(4) and (6).
174 See discussion under KRS 342.005.
175 Kinker v. American Radiator & Standard Sanitary Corp., 268 S.W. 2d 948 (Ky. 1954).
176 Jones v. Crummies Creek Coal Co., 264 S.W. 2d 294 (Ky. 1954); Robinson v. Peabody Coal Co., 273 S.W. 2d 573 (Ky. 1954); U. S. Steel Co. v. Lockhart, 261 S.W. 2d 643 (Ky. 1953)
177 U. S. Coal & Coke Co. v. Hooks, 286 S.W. 2d 919 (Ky. 1956).

The purpose of the provision of this Act requiring a claimant to show that he has been exposed in his employment to the hazards of silicosis within this state for two years before its disability or death was to afford employers protection against claims of migrant workers and those who have incurred the disease in employment outside the state,[178] but it is not necessary to specify how frequent or how intense the exposure was during the two year period.[179]

Notice of disability must be given to the employer as soon as practicable after the employee "first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to appraise him that he has contracted such disease or a diagnosis of such disease if first communicated to him, whichever shall first occur."[180]

In case of death or disability from silicosis complicated with tuberculosis of the lungs, compensation shall be payable as for uncomplicated silicosis if the silicosis was an essential factor in causing such disability or death, it not being necessary to apportion between the two disabling causes.[181]

Prior to the 1956 amendment to KRS 342.005(2), which eliminated the requirement of a joint election by the employer and the employee before the coverage of silicosis became operative, it was held that where the employer obligated himself under a collective bargaining agreement to comply with the Act, even though there had been no formal acceptance of the silicosis section, as a matter of law the employee was covered.[182]

Where compensation has been paid or awarded either for disability or death from an occupational disease, and the payments have been discontinued, the claim for further compensation shall be made within one year after the last payment of compensation;[183] this section circumscribes the provisions of KRS 342.125.[184]

[178] Mary Helen Coal Corp. v. Parrott, 290 S.W. 2d 477 (Ky. 1956).
[179] Id. at 478.
[180] KRS 342.316(2); Inland Steel Co. v. Byrd, 316 S.W. 2d 215 (Ky. 1958); Llewellyn v. Peabody Coal Co., 306 S.W. 2d 262 (Ky. 1957); Harlan Fuel Co. v. Burkhart, 296 S.W. 2d 722 (Ky. 1956); Deal v. U. S. Steel Corp., 296 S.W. 2d 724 (Ky. 1956); U. S. Steel Corp. v. Birchfield, 296 S.W. 2d 796 (Ky. 1956).
[181] KRS 342.316(6); Pond Creek Colliery v. Taylor, 302 S.W. 2d 838 (Ky. 1957).
[182] Dick v. International Harvester Co., 310 S.W. 2d 514 (Ky. 1958).
[183] KRS 342.316(3).
[184] Harvey Coal Co. v. Caldwell, 313 S.W. 2d 274 (Ky. 1958); see discussion under KRS 342.125 supra.

342.320 [4942] *Regulation of charges by attorneys, physicians and hospitals.* (1) All fees of attorneys and physicians, and all charges of hospitals under this chapter, shall be subject to the approval of the board. No attorney fees shall be allowed or approved against any party not represented by said attorney, nor shall any attorney fee be allowed or approved exceeding an amount equal to twenty percent of the amount recovered. The board may reduce the attorney's fee to an amount commensurate with the services performed, or may deny or reduce an attorney's fee upon proof of solicitation of employment.

(2) The entire attorney's fee in a lump sum shall be paid directly to the attorney of record, and the board in allowing or approving an attorney's fee, as provided in this section, shall order the payment of same directly to the attorney, commuting sufficient of the final payments of compensation payable under the award to a lump sum for that purpose.

The provision for attorneys' fees of 15% of the first $1,000.00 or fraction thereof recovered and 10% thereafter, with the discretion of the Board to deny or reduce attorneys' fees, remained unchanged from the original enactment of 1916 as repealed and re-enacted by the 1926 Assembly, until 1952.[185] In 1952 the section was changed to provide that the attorney representing claimants under this Act "shall receive as his fee, a sum up to 25% of the award to his client, one-half of which shall be paid out of the award and one-half to be paid by the employer," with the Board still having the discretion to deny or reduce attorneys' fees.

The 1952 amendment was declared unconstitutional[186] on the ground that it was a violation of the due process clause of the federal and state constitutions. Since an unconstitutional law cannot supersede an existing valid law, the previous KRS 342.320 was still valid.[187]

By the 1956 amendment the attorneys' fees were raised to 20% of the amount recovered, with the Board still maintaining discretion to reduce or deny attorneys' fees.

Determination of the amount of attorneys' fees is not a substantive matter, but rather is procedural,[188] and is to be deter-

185 Dosker, Workmen's Compensation in Kentucky 274 (1st ed. 1916).
186 Burns v. Shepherd, 264 S.W. 2d 685 (Ky. 1954).
187 Id., at 688.
188 Rye v. Conkwright, 311 S.W. 2d 796 (Ky. 1958).

mined after a final determination of the claim, with the statute applicable at that time determining the amount of the claim and the reasonableness of the fee.[189]

Charging fees in violation of this section has been ground for suspension from the practice of law until restitution of alleged excessive fee charged or unless a declaratory judgment was obtained adjudging attorney not be indebted to claimant.[190]

If the Board finds in its sound discretion after careful consideration of the facts and circumstances that a fee should be reduced, it may reduce it, even though the contract fee agreed to does not exceed the statutory amount and there is no evidence that the employment was solicited.[191]

* * *

342.325 [4943] *Questions not agreed on determined by board.* All questions arising under this chapter, if not settled by agreement of the parties interested therein, with the approval of the board, shall be determined by the board except as otherwise provided in this chapter.

This section has remained unchanged from the original Act of 1916. It is for the Board to determine whether there was a valid outstanding policy issued by an insurance carrier and covered by claimant's employer at time of claimant's injury.[192]

A Federal district court would not take jurisdiction of a declaratory judgment suit where an insurer under the Act sought a declaration of rights as to its liability, because such a declaration of rights went to the merits of the case, and there existed a legal question which should have been determined by the Workmen's Compensation Board.[193]

* * *

342.330 [4944] *Employer's record of injuries; reports to board; contents of.* (1) Every employer subject to this chapter shall keep a record of all injuries fatal or otherwise, received by his employes in the course of their employment. Within one week after the oc-

[189] Id., at 198.
[190] In re Charles H. Whittle, 288 S.W. 2d 337 (Ky. 1956), where a declaratory judgment was filed but never processed.
[191] Rawlings v. Workmen's Compensation Board, 187 Ky. 308, 218 S.W. 32 (1920), but see Vanderpool v. Goosecreek Mining Co., 170 S.W. 2d 32 (Ky. 1943).
[192] Lawrence Coal Co. v. Boggs, 309 Ky. 646, 218 S.W. 2d 670 (1949).
[193] Coal Operators Casualty Co. v. Abshire, 111 F. Supp. 24 (E.D. Ky. 1953).

currence and knowledge, as provided in KRS 342.185 to 342.200, of an injury to an employe causing his absence from work for more than one day, a report thereof shall be made in writing and mailed to the board on blanks procured from the board for the purpose.

(2) Upon the termination of the disability of the injured employe, or if the disability extends beyond a period of sixty days, then also at the expiration of such period the employer shall make a supplementary report to the board on blanks procured from the board for the purpose.

(3) The report shall contain the name, nature and location of the business of the employer and name, age, sex, wages and occupation of the injured employe, and shall state the date and hour of the accident causing the injury, the nature and cause of the injury, and any other information required by the board.

This section has remained unchanged from the original Act of 1916.

The penalty for violation of this section is a fine of not more than $25.00 for each offense.[194] However, failure of the employer to report the accident does not estop him from relying on other provisions of the Act,[195] including one year limitation period.[196]

* * *

342.335 [4945] *No person to misrepresent or defraud; present false claim.* No person shall knowingly file, or permit to be filed any false or fraudulent claim on his behalf to compensation or other benefits under this chapter, or by fraud, deceit or misrepresentation procure or cause to be made or receive any payments of compensation or other benefits under this chapter to which the recipient is not lawfully entitled, or conspire with, aid or abet another so to do. No person shall by deceit or misrepresentation or with intent to defraud cause or procure or conspire with, aid or abet another in so causing or procuring any person entitled to compensation or other benefits under this chapter to omit to claim title thereto or to accept the payment of a less sum than that to which he may be lawfully entitled to thereunder.

This section has remained unchanged from the 1916 Act except the original Act declared such violation to be a misde-

[194] KRS 342.990(1).
[195] Langhorne & Langhorne v. Newsome, 285 Ky. 519, 148 S.W. 2d 684 (1941).
[196] Fiorella v. Clark, 298 Ky. 817, 184 S.W. 2d 208 (1944).

meanor. Subsequently the words "shall be guilty of a misdemeanor" were eliminated, although the penalties for violations as set out in the original Act have remained unchanged.[197]

* * *

342.340 [4946] *Employer to insure or provide security against liability to workers.* (1) Every employer under this chapter shall either insure and keep insured his liability for compensation hereunder in some corporation, association or organization authorized to transact the business of workmen's compensation insurance in this state or shall furnish to the board satisfactory proof of his financial ability to pay directly the compensation in the amount and manner and when due as provided for in this chapter. In the latter case the board shall require the deposit of an acceptable security, indemnity or bond to secure to such an extent as the board directs the payment of compensation liabilities as they are incurred.

(2) Every employer accepting this chapter shall at the time of such acceptance file with the board in substantially the form prescribed by it, and annually thereafter, or as often as may be necessary, evidence of his compliance with the provisions of this section and all others relating thereto. Until these provisions are complied with the employer shall, from the date of his acceptance of the chapter, be liable to an employe either for compensation under this chapter or at law in the same manner as if the employer had refused to accept this chapter. Claim of compensation in such cases shall be considered a waiver of the right to proceed at law and the institution of an action at law shall be considered a waiver of all claim to compensation.

This section has remained unchanged from the original Act of 1916. Where coverage of an employer's policy was limited to business of servicing and selling automobiles, even though that class of risk included garage helpers, the policy did not cover liability for employee's death while said employee was operating a taxicab also owned by the employer.[198] Where an employer is operating one business and the employee was only temporarily outside his accustomed work recovery may be had.[199]

[197] KRS 342.990(2).

[198] Old Republic Inc. Co. v. Begley, 314 S.W. 2d 552 (Ky. 1958); also see KRS 342.375; Aetna v. City of Henderson, 14 S.W. 2d 211 (Ky. 1929); City of Henderson v. Royal Indemnity Co., 227 Ky. 746, 14 S.W. 2d 213 (1929); Kelly v. Nussbaum, 218 Ky. 330, 291 S.W. 2d 754 (1927). Also see comment on the Begley case, supra, 47 Ky. L. J. 267 (1959).

[199] Nugent Sand Co. v. Harshegimer, 254 Ky. 38, 71 S.W. 2d 647 (1934).

342.345 [4947] *Certificate of self-insurance; revocation; new certificate; independent insurance of risk;* (1) Whenever an employer has complied with the provisions of KRS 342.340 relating to self-insurance, the board shall issue to such employer a certificate which shall remain in force for a period fixed by the board. But the board may, upon at least sixty days' notice and a hearing to the employer, revoke the certificate upon satisfactory evidence for such revocation having been presented. The board may thereafter, upon petition of the employer and a hearing, grant a new certificate, but the employer shall not, as a matter of right, be entitled to a hearing for this purpose sooner than six months after a previous revocation of his certificate.

342.350 [4948] *Mutual or interinsurance against compensation claims; board may require reinsurance.* (1) In order to comply with KRS 342.340 groups of employers may form, either among themselves or with employers in other states, mutual insurance associations or reciprocal or interinsurance exchanges subject to the insurance laws of this state and such reasonable conditions and restrictions not inconsistent therewith as may be fixed by the board. Membership in such mutual insurance associations or reciprocal or interinsurance exchanges so approved, together with evidence of the payment of premiums due, shall be evidence of compliance with KRS 342.340.

(2) The board may, except as provided in subsection (3), require any mutual insurance association or reciprocal or interinsurance exchange to purchase an annuity or to effect reinsurance with a company authorized to transact insurance in this state or to make such deposit with a bank or trust company of this state as shall in either case be approved by the board for the purpose of fully securing the payment of all deferred installments upon any claim for compensation.

(3) Any mutual insurance association or reciprocal or interinsurance exchange possessing a surplus of at least one hundred thousand dollars and not less in amount than the capital required of a domestic stock insurance company transacting the same kind of insurance, shall not be required to purchase an annuity or effect reinsurance with a company authorized to transact insurance in this state or to make such a deposit with a bank or trust company of this state for the purpose of fully securing the payment of all deferred installments upon any claim for compensation.

Sections 342.345-342.380 concern certificates of self-insurers and other matters pertaining to insurance and coverage and types

of policies. Since this article primarily concerns sections of the Act directly covering compensable injuries, a full discussion of the provisions in these sections will be reserved for a subsequent article.

* * *

342.390 [4956] *Employer's notice of election to operate under this chapter; evidence of election.* (1) Election to operate under this chapter shall be effected by the employer by filing with the board the following notice:

"(Name of employer) elects to operate under the Workmen's Compensation Law (KRS Chapter 342). This election is effective as of the day of . . . and covering (here insert name of industry, business or operation on which election is made.)"

(2) In addition to the name of each industry, business or operation as to which such election is filed there shall also be stated in the notice with reference thereto:

(a) Its location and address of chief office;

(b) Average number of employes during preceding twelve months;

(c) Kind of business being conducted; and

(d) Method of securing payments of compensation to employes that the employer elects to adopt.

(3)The notice shall be in writing signed by the employer, if an individual, by any partner, if a partnership; or by the chief officer or agent within this state, if a corporation.

(4) The notice or a copy thereof certified by an authorized representative of the board may be used as evidence in any action by or against the employer in any court of this state of the facts therein shown and that the employer has elected to operate under this chapter.

342.395 [4957] *Employe deemed to have accepted provisions of chapter unless contrary notice given to employer; withdrawal of election to reject chapter.* In the event an employer elects to operate under this chapter, then every employe of such employer, as a part of his contract of hiring or who may be employed at the time of the acceptance of the provisions of this chapter by such employer, shall be deemed to have accepted all the provisions of this chapter and shall be bound thereby unless he shall have filed, prior to the injury or incurrence of occupational disease, written notice to the contrary with the employer; and such acceptance shall include all of the provisions of this chapter with respect to traumatic personal injury, silicosis and any other occupational disease.

Until such notice to the contrary is so given to the employer,

the measure of liability of such employer shall be determined according to the compensation provisions of this chapter.[199a] Any such employe, may, without prejudice to any existing right or claim, withdraw his election to reject this chapter by filing with the employer a written notice of withdrawal, stated the date when the withdrawal is to become effective. Following the filing of such notice, the status of the party withdrawing shall become the same as if the former election to reject this chapter had not been made, except that withdrawal shall not be effective as to any injury sustained or disease incurred less than one week after the notice is filed.

These sections are considered together because the problems presented are interwoven.

Except for minor grammatical changes KRS 342.390 has remained as written in the original Act. KRS 342.395 remained unchanged from the original Act until 1948 when the words "for less than one year" were deleted. By the amendment of 1952[200] the requirement that the employee sign the compensation book was eliminated. Much of the case law prior to the 1952 amendment concerned issues of fact as to whether or not the compensation record had been signed.[201]

It has been held that where an employer had bound himself by a collective bargaining agreement to comply with the provisions of the workmen's compensation and occupational disease laws, an employee was covered even though he had not accepted the provisions of KRS 342.005(2) [case arose under Act prior to 1956 amendment].[202]

By the 1956 amendment language was added to this section to conform it with the new Occupational Disease provisions. However, there was an additional significant change, namely, that the employer's acceptance of the Act included all of the provisions with respect to traumatic personal injury, silicosis and any other occupational disease, which, of course, eliminates a joint voluntary acceptance as previously required for silicosis under KRS 342.005(2) prior to its enactment in 1956. The joint-vol-

[199a] Mahan v. Litton, 321 S.W. 2d 243 (Ky. 1959); Commonwealth of Kentucky v. Meyers, 307 S.W. 2d 179 (Ky. 1957).

[200] Held constitutional in Wells v. Jefferson County, 255 S.W. 2d 462 (Ky. 1953).

[201] For typical cases of this type see McNeese Construction Co. v. Harris, 273 S.W. 2d 355 (Ky. 1954); Garmeada Coal Co. v. Marsee, 300 Ky. 414, 189 S.W. 2d 399 (1945).

[202] Dick v. International Harvester Co., 310 S.W. 2d 514 (Ky. 1958).

untary-acceptance requirement still applies to employers and employees excepted from the Act and employers with less than three employees.[203]

The burden of proof is upon the employee to show that he was under the Act unless sufficient facts raise a presumption of coverage that shifts the burden to the employer.[204]

As previously stated in our discussion of the constitutionality of the Act, the Workmen's Compensation Act is voluntary as far as the employer is concerned.[205]

* * *

342.400 [4958] *Notice of employe's rejection to be preserved.* (1) All notices of rejection of the provisions of this chapter by employes shall, when executed, be preserved by the employer during the continuation of the employment of those employes whose names are subscribed thereto.

(2) No person shall with fraudulent intent, willfully destroy, convert or secrete any such notice, or willfully deprive the owner or his agent thereof, or erase or obliterate any part thereof.

This section of the original Act remained relatively unchanged until the amendment of 1954. It seems the Legislature in eliminating the requirement of signing of the register by the 1952 amendment neglected to amend this section. This oversight was corrected in 1954 with the changing of the words "all notice of election" to "all notices of rejection." The penalty for violation of this section has remained unchanged since the original Act.[206] The case law previously arising under the necessity of keeping the written election is, of course, equally applicable to keeping a notice of rejection.[207]

* * *

342.405 [4959] *Withdrawal from election to operate or rejection of chapter; filing; effect; posted notice.* At any time after electing to operate under this chapter, an employer may withdraw such election by filing written notice with the board stating the date when such withdrawal is effective, and the industry, business or operation

[203] KRS 342.005(2).

[204] Walker v. Lebanon Stone Co., 312 Ky. 624, 229 S.W. 2d 163 (1950); also see Dick v. International Harvester Co., 310 S.W. 2d 514 (Ky. 1958).

[205] Greene v. Caldwell, 186 S.W. 648 (Ky. 1916); Griffin v. Cornett-Lewis Coal Co., 280 Ky. 116, 132 S.W. 2d 781 (1939).

[206] KRS 342.990(3).

[207] Blue Diamond Coal Co. v. Sizemore, 254 Ky. 102, 71 S.W. 2d 11 (1934); McCune v. Wm. B. Pell & Bros., 192 Ky. 22, 232 S.W. 43 (1921).

covered thereby, and by personal written notice to the employe, or posting in conspicuous places about such place of business not less than one week next preceding the date on which the withdrawal is to become effective copies of the notice. An employe who has rejected the provisions of this chapter may withdraw his rejection by filing with the employer a written notice of withdrawal, stating the date when the withdrawal is to become effective. Following the filing or giving of such notices, the status of the party withdrawing shall become the same as if his former election or rejection had not been made, except that withdrawal of election by employer shall not be effective as to any injury sustained less than one week after the notice is filed. An employer, while operating under this chapter, shall at all times keep posted in conspicuous places about his place of business notices to that effect, in the form prescribed by the board.

This section of the original Act remained relatively unchanged until the amendment of 1954 (as with KRS 342.400). It seems the Legislature when it eliminated the requirement of signing the register by the 1952 amendment neglected to amend this section. This oversight was corrected in 1954 with the changing of the words "elected" to "rejected" in their appropriate places in this section.

Where a claim at law is grounded upon the failure of the defendant employer to comply with the provisions of this section, the plaintiff has to expressly allege such failure in his petition.[208]

For a thorough discussion of the practical operation of this section see *Harvey Coal Corp. v. Morris,* 314 Ky. 71, 237 S.W. 2d 70 (1951).

* * *

342.410 [4960] *Employer who fails to elect denied certain defenses at law.* Every employer affected by this chapter who does not elect to operate under this chapter shall not, in any suit at law by an employe or his representative to recover damages for personal injury or death by accident arising out of and in the course of his employment, be permitted to defend any such suit at law upon any or all of the following grounds:

(1) That the employe was guilty of contributory negligence.

(2) That the injury was caused by the negligence of a fellow servant of the injured employe.

(3) That the employe has assumed the risk of injury.

[208] Wilson v. Williams Coal Co., 307 Ky. 842, 212 S.W. 2d 318 (1948).

This section has remained unchanged since the original Act. Even though the employer cannot rely upon the defenses of assumed risk and contributory negligence (and fellow servant doctrine) when he has not elected to operate under the provisions of the Act, it is still incumbent upon the employee to prove that actionable negligence on the part of the employer was the proximate cause of the injury.[209]

In a common law action by an employee to recover for injuries against an employer not operating under the Act, it was error to instruct the jury (although not prejudicial in this case for other reasons) that the employee had a duty to exercise ordinary care for his own safety, since contributory negligence is not available as a defense.[210]

* * *

342.415 [4961] *Employe who rejects provisions of chapter is subject to common law defenses.* Every employe affected by this chapter who rejects the provisions herein, and his representative in case of death, shall, in any suit at law against an employer electing to operate under this chapter to recover damage for personal injury or death by accident arising out of and in the course of his employment, proceed at law as if this chapter did not exist, and the employer may avail himself of the defenses of contributory negligence, negligence of a fellow servant and assumption of risk as such defenses exist at common law.[211]

This section remained unchanged from the original Act until the amendment of 1954. It seems the Legislature when it eliminated the requirement of signing the register by the 1952 amendment neglected to amend this section. This oversight was corrected in 1954 with the changing of the words "elected" to "rejected" in their appropriate places in this section.

* * *

342.420 [4962] *Employe not to pay premium for compensation.* No agreement by any employe to pay any portion of the insurance premium paid by his employer shall be valid. No employer shall

[209] Engle Coal Co. v. Drake, 311 S.W. 2d 563 (Ky. 1958) and cases cited therein; also see Burk Hollow Coal Co. v. Bills, 300 Ky. 735, 190 S.W. 2d 338 (1945); Harlan Central Coal Co. v. Gimmo's Adm'r., 296 Ky. 828, 178 S.W. 2d 217 (1944).

[210] Croley v. Huddleston, 301 Ky. 580, 192 S.W. 2d 717 (1946).

[211] Consolidated Realty Company v. Jones, 219 Ky. 647, 294 S.W. 172 (1927).

deduct any portion of such premium from the wages or salary of any employe entitled to the benefits of this chapter.

This section has remained unchanged from the original Act of 1916, as has the penalty for violation of the section.[212]

* * *

342.425 [4963] *Attorneys required to represent board.* Upon the request of the board, the Attorney-General, or, under his direction, the Commonwealth's attorney or county attorney of any county, shall institute and prosecute the necessary actions or proceedings for the enforcement of any of the provisions of this chapter arising within his jurisdiction, and shall defend in like manner all actions or proceedings brought against the board or the members thereof in their official capacity.

This section has remained unchanged from the original Act of 1916.

* * *

342.430 [4964] *Blank forms to be furnished by board.* The board shall prepare and furnish, free of charge, blank forms of all notices, claims, reports, proofs and other blank forms and literature which it considers proper and requisite to the efficient administration of this chapter. It may authorize the publication and distribution of such blanks by employers and their insurers in manner and form provided by it, and shall make rules for their distribution so that they may be readily available.[213]

This section has remained substantially unchanged since the 1916 Act.

* * *

342.435 [4965] *Board's annual report.* Annually on or before the 15th day of December the board shall make a report to the Governor for the preceding fiscal year, which shall include a statement of the number of awards made and of claims rejected by it, a general statement of the causes of accident leading to the injuries for which awards were made or rejected claims based, and a detailed statement of the disbursements from and unpaid expenses chargeable against the maintenance fund and its condition, together with any other information which the board deems proper to call to the attention of the Governor, including any recommendations it may have

[212] KRS 342.990(4).

[213] All forms are available by writing directly to the Board at Frankfort, Kentucky.

to make, and it shall be the duty of the board to publish and distribute among employers and employes such general information as to the business transacted by the department as may be useful and necessary. The annual report shall not exceed ten thousand copies. All printing of the department shall be done by the contractor or contractors for public printing, subject to such provisions of the general laws governing public printing as may be applicable thereto.

This section remained substantially unchanged until 1944 when the number of copies of the annual report was raised from 500 to 10,000 and a provision concerning the abuse of the right to publish information was deleted.

* * *

342.440 [4968] *Fund for administration.* For the purpose of paying the salaries and necessary expenses of the board and its assistants and employes in administering and carrying out this chapter an administrative fund shall be created and maintained in the manner provided in KRS 342.450 to 342.485.

The general principle for the maintenance of the Fund for administration has remained generally the same as provided in the 1916 Act. There has, of course, been changes in the amounts of monies involved and the amount of tax.

KRS 342.445-KRS 342.475 relate to the subject matter of insurance, which as indicated supra, is not directly germaine to the discussion here.

KRS 342.480-342.490 pertain to the maintenance fund, surplus and appropriations and limitations of expenses or indebtedness to be incurred by the Board, none of which is within the scope of this discussion. KRS 342.495-342.545 deal with the Kentcuky Employes' Insurance Association and are not germaine to the discussion.

* * *

342.990 [4944; 4945; 4958; 4962; 4968-5] *Penalties.* (1) Any employer subject to this chapter who refuses or willfully neglects to make the report required by KRS 342.330 shall be fined not more than twenty-five dollars for each offense.

(2)Any person who violates KRS 342.335 shall be fined not less than fifty dollars nor more than five hundred dollars or imprisoned for not less than ten nor more than ninety days.

(3) Any person who violates subsection (2) of KRS 342.400 shall be fined not less than fifty dollars nor more than two hundred dol-

lars or imprisoned for not less than ten nor more than ninety days.

(4) Any employer who violates KRS 342.420 shall be fined not more than one hundred dollars for each offense.

(5) Any person who violates any of the provisions of KRS 342.445 to 342.475 shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned for not less than ten nor more than ninety days, or both.

(8) Any employer who shall willfully violate any provision of KRS 342.016 or 342.017 shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than five hundred dollars, and each day's operation in violation of KRS 342.016 or 342.017 shall constitute a separate offense, and such employer shall be enjoined from continuing such violations at the suit of the Attorney-General in an action instituted by him in the Franklin Circuit Court, on which jurisdiction to try such action is hereby conferred.

The penalties provided for in the original Act were listed in the respective sections to which the penalty was applicable. Sometime prior to 1944 these penalties were set out in what is now the present KRS 342.990.

By amendment in 1946 penalties for violations of subsections (2) and (3) of KRS 342.005, subsection (1) of KRS 342.340, and KRS 342.007 were provided. However, since it was held[214] that these sections were impliedly repealed by a later amendment, the penalties set out in subsections (6) and (7) of this section were also repealed.

Subsection (8) of this section was also enacted in 1946 and still is in effect.

Conclusion

Even with the numerous amendments heretofore set out, it is submitted that the reader will agree that the overall approach to compensation recovery in Kentucky has remained unchanged from the original Act. This accomplishment inures to the credit of the Commission who formulated the original Act.[215]

[214] Sumpter v. Burchett, 304 Ky. 858, 202 S.W. 2d 735 (1947).

[215] A movement originated in the Attorney General's Department for the purpose of forming a non-partisan investigating commission including representatives of employers and employees for the purpose of creating some type of Act which would be mutually acceptable to each group. The following persons were appointed by their respective organizations as members of the commission: By the Kentucky State Federation of Labor, H. J. Allington, Otto Wolff, John Schneider and Peter Campbell; by the Kentucky Manufacturers' and Shippers'

Most of the amendments to the Act have been by agreement between the representatives of employer groups and representatives of labor groups. Without an "agreed bill" chances for passage of proposed amendments have been extremely limited.[216]

What future course the Act will take is without the purview of this article. However, a general observation of the trend in workmen's compensation laws in other states indicates that the greatest void now existing in the Kentucky Act lies in the field of rehabilitation. Although the General Assembly enacted the Industrial Rehabilitation Act in 1922,[217] the Act was subsequently repealed in 1940.

APPENDIX I

RULES OF PRACTICE AND PROCEDURE IN TRIAL OF COMPENSATION CASES ADOPTED BY WORKMEN'S COMPENSATION BOARD, STATE OF KENTUCKY, PURSUANT TO KRS 342.260, EFFECTIVE AS REGULATIONS UNDER CHAPTER 13 OF THE KENTUCKY REVISED STATUTES ON OCTOBER 15, 1956 AND KNOWN AS WCB-1 THROUGH WCB-25, EXCEPT THAT WCB-23 WAS EFFECTIVE APRIL 3, 1957; WCB-18 WAS AMENDED EFFECTIVE OCTOBER 5, 1957, AND WCB-24 DOES NOT PERTAIN TO TRIALS AND WAS EFFECTIVE OCTOBER 23, 1957.

RULES OF PROCEDURE INDEX

Assn., Philip S. Tuley, Alfred Struck and W. Pratt Dale; by the Kentucky Mine Owners' Association, Kenneth U. Meguire and Charles W. Taylor; by the Attorney General, Robert T. Caldwell. The Committee was assisted by Nicholas H. Dosker of Louisville, the author of the First Edition of the excellent treatise so frequently referred to in this discussion. See Dosker, Workmen's Compensation Law of Kentucky 730-53 (1916).

[216] No agreed bill was forthcoming in 1958 and no amendments were enacted into the Act during the 1958 session of the Assembly.

[217] Dosker, Workmen's Compensation Law of Kentucky 784-85 (1916). 784.

1. *Original Application—Subsequent Pleadings*

a. All applications, pleadings, motions, special answers and papers must be printed or typewritten in the form prescribed by the Board.

b. The original application, or petition, shall be filed in triplicate.

c. All pleadings and papers filed subsequent to the original application or petition shall certify that a copy was sent to all parties of record; anly the original thereof shall be filed with the Board.

2. *Plaintiffs*

a. All persons should be joined as plaintiffs in whom any right to any relief, arising out of the same transaction, is alleged to exist.

b. If any such person, should refuse to join as plaintiff, he should then be joined as a defendant, and the fact of his refusal to join as a plaintiff should be stated in the application, petition or complaint.

c. The parties to any original proceedings before the Board shall be designated as the plaintiff and the defendant. Party filing the application, petition or complaint in such proceedings shall be designated as the plaintiff and the adverse party as the defendant.

3. *Defendants*

All persons should be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, and the Board at any time, upon a proper showing, or of its own motion, may order that any additional party be joined, when it deems the presence of such party necessary.

4. *Answer—Special—When Necessary*

a. The Defendant may file an answer to or denial of the application of the Plaintiff at least five days before the date set for the hearing, but no such answer is required, and, if none is filed, the allegations contained in the appllication will be deemed to be denied.

b. If the defendant relies upon an affirmative special defense, he shall set forth such defense in a special answer to be filed at least five days before the date set for hearing or within five days after such defense is discovered or could have been discovered in the exercise of due diligence. If, in the exercise of due diligence, such defense could not have been discovered until introduction of proof, such plea must be filed to conform to the proof within five days thereafter.

5. *Place of Hearings*

Hearings of compensation claims shall be assigned in the county where the accident or exposure occurred and can only be heard in another county by agreement of the parties and authorization of the Board.

6. *Continuances*

The policy of the Board will be to determine all questions brought before it as speedily as possible, but the continuances of hearings and extensions of time for good cause, properly shown, may be granted upon the request of either party. Upon proper motion and notice the Executive Secretary is authorized to enter orders granting continuances up to fifteen days without approval of the Board.

7. *Appearance—Exception*

a. The parties to any proceedings before the Board may appear either in person or by an attorney.

b. Upon application, the Secretary will furnish to either party the necessary blank forms for the prosecution or defense of any cause before the Board.

c. An exception will always be given and entered of record in favor of the party against whom a ruling is made, unless such party has defaulted.

8. *Stipulation of Facts*

a. The parties to any proceeding before the Board may stipulate the facts in writing, and thereupon the Board will make its order or award. Where all the material facts set out in the application for hearing are admitted to be true by defendant, it may be so stipulated.

b. To the end that proceedings may be disposed of expeditiously and with the least possible expense to the parties and the

Commonwealth, representatives of the Board shall encourage the parties to thus stipulate the facts whenever it can be done.

9. *Evidence—How Introduced—Depositions*

At all hearings evidence may be introduced by oral testimony or by depositions as set forth herein.

10. *Hearings*

a. Every hearing upon a claim, held before the Board or one of its representatives, shall be conducted in a summary manner. Opportunity will be given to the parties at issue to introduce witnesses and to present either in person or by counsel, the points at issue. Such rearings shall be conducted in such manner as to ascertain the substantial rights of the parties and to determine fairly and expeditiously the controversy.

b. Claims shall stand for hearing before a Referee, a Member of the Board or the Executive Secretary twenty days after an application for adjustment is filed and at which hearing the Plaintiff shall complete proof as far as possible but shall, upon request, be granted thirty days thereafter in which to conclude proof in chief by depositions, and at which time Plaintiff's taking of proof will stand closed whether so announced or not. The claim shall again be referred for hearing at the expiration of Plaintiff's time upon request of Defendant. If no such request is made prior to expiration of Plaintiff's time Defendant shall have thirty days thereafter to take proof by depositions, at which time defendant's taking of proof shall stand closed, whether so announced or not. Plaintiff shall have five days thereafter to take depositions in rebuttal, and at which time the case will stand submitted for decision. Extensions of time to take proof will not be granted except for good cause shown. At the end of each hearing or taking of depositions, the Referee, when present, shall ask the parties whether there will be any further proof. If both parties announce that all proof has been taken, the time for filing briefs shall then be set by the Referee.

11. *Order of Testimony Introduced*

Plaintiff may be required to complete his testimony in court and so announce before defendant shall be required to introduce testimony.

12. *Depositions and Discovery*

Parties to a compensation claim can take depositions in accordance with the provisions of the Kentucky Rules of Civil Procedure, as amended, being Rules 26 through 37.06, inclusive, except Rules 27,

33 and 36, which are not adopted by the Board and which shall not apply to practice before the Board.

13. *Party's Failure to Appear at Hearing*

a. Where claimant fails to appear at the hearing of his case, and no good cause is cited for his failure to appear, the case may be ordered dismissed for lack of prosecution by the Board, with or without prejudice.

b. Where the defendant fails to appear at the hearing of a case and no good cause is presented for his failure to appear, the Referee shall proceed with the hearing of the case and it shall thereafter be submitted in accordance with these rules.

14. *Cases—When and How Submitted*

Cases shall be submitted on order of Executive Secretary, and he is authorized to so enter said submission on the Board's order book. Notice of submission shall be mailed to all interested parties.

15. *Subsequent Proceedings to be on Original Cause*

All applications or petitions for review or modification of any award or order of the Board shall be styled with the name of the parties, plaintiff and defendant, as in the proceedings in which the award or order was made, shall bear the number of the original proceedings and shall be filed therein.

16. *Full Board Hearing*

a. Upon a motion for full Board review the party filing application for said review shall file a brief in support of his motion within ten days from the filing of his motion whether or not a motion for oral argument has been made. A copy of the brief filed shall be furnished the opposing counsel who shall have twenty days from the date of the notice of motion for review in which to file a brief.

b. Upon the lapsing of the time period for filing briefs, or the receipt of briefs from all parties, whichever is sooner, the case shall stand submitted for full Board review for initial determination.

17. *Briefs on Full Board Review*

Five copies of all briefs to the full Board, if a full Board review is asked, shall be filed with the Board.

18. *Additional Pleadings or Briefs*

After a case has been submitted for full Board review no additional pleadings or briefs shall be filed. After the time for filing briefs has expired no briefs will be accepted by the Board. Any of said

briefs sent to the Board or any member thereof, shall be returned to the sender, unless the Board by order directs otherwise.

19. *Payment of Compensation*

Compensation shall be paid direct to the parties entitled to receive the same and not to their attorneys. This shall not preclude putting the Attorney's name on the compensation checks.

20. *Attorney Fee*

The Board upon motion of an Attorney shall allow a reasonable fee for services rendered in representing the plaintiff and under the Act may order the payment of said allowance paid direct to such Attorney, commuting sufficient of the final payments of compensation payable under the award to a lump sum for that purpose.

21. *Oral Arguments—Statement to Obtain*

The Board may at its discretion allow oral arguments upon motion to full Board, where the Board deems it advisable to do so in all claims involving questions of law, or where question of fact only is involved and the amount of the award is in excess of $3,000.00. An attorney desiring an oral argument shall file a motion with the Board together with a statement showing the legal questions involved, accompanied by a brief, and if an oral argument is granted at least three members of the Board shall hear same at a time and place designated by the Board.

22. *Records Not to be Withdrawn*

No record filed with this department is subject to withdrawal by any person, except on order of the Board.

23. *Depositions—Time for Filing*

No deposition shall be considered, unless, within ten days after submission, it has been filed with the Board; provided, however, that the Board may for good cause shown and upon motion filed within said ten days, grant such extension as it deems fit.

24. *Rules for Self-Insurer Applicants*

(This regulation is several pages in length and is therefore not reproduced here. WCB-24 does not pertain to trial of compensation cases. Employers desiring certificates under the provisions of KRS 342.345 may obtain copies of this regulation from the Board upon request and without charge. Applicants should also note the Board's Explanation of Board Forms found on pages 8-10 of this pamphlet.)

15. *Subsequent Injury Medical Panels—Depositions Of*

A medical panel appointed by the Board under KRS 341.121 cannot be examined by deposition on its report, except by special permission granted by the Board on a proper motion made.

(WCB-25 was filed with the Legislative Research Commission on October 22, 1958, to become effective on November 21, 1958).