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Kentucky Law Survey: Workers' Compensation

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WORKERS' COMPENSATION*

BY DANNY J. BASIL

INTRODUCTION

During the past year Kentucky's Workers' Compensation program has undergone substantial legislative and judicial changes. A number of those changes are examined below, with greater emphasis being placed on the legislative changes. Although this survey is not exhaustive, an effort has been made to examine developments the author believes will prove most relevant to practitioners.

I. LEGISLATIVE CHANGES

One of the major projects undertaken by the 1980 Kentucky General Assembly was an extensive revision of the Workers' Compensation Act.1 The legislative changes that resulted became effective on July 15, 1980.2 The high cost of workers' compensation insurance premiums appears to have been the primary impetus for the revision,3 with the new legislation requiring a twenty-seven percent reduction in premium rates.4 Similarly, many other changes in the Act are directed at reducing the operating cost of the program by reducing benefits5 and requiring more restrictive application of the

* In recent legislation the reviser of statutes was directed to change the words "workmen's compensation" to "workers' compensation" wherever they appear in the Kentucky Revised Statutes. 1980 Ky. Acts, ch. 104, § 22.
1 INFORMATIONAL BULL. NO. 131, LEGIS. RESEARCH COMM'N 129 (August 1979).
3 INFORMATIONAL BULL. NO. 131, LEGIS. RESEARCH COMM'N 131 (August 1979).
4 1980 Ky. Acts, ch. 104, § 18. The reduced rates are to remain in effect for at least one year. The Commissioner of Insurance was given authority to call for a public hearing to determine an appropriate rate level in the event that an intervening statutory change should cause the reduced "rates to be inadequate as defined under Chapter 304 of the Kentucky Revised Statutes." 1980 Ky. Acts, ch. 104, § 18.
5 One major benefit reduction is the newly imposed limit of 425 weeks that was placed on benefits for permanent partial disability. KY. REV. STAT. § 342.730(1)(b) (Supp. 1980) [hereinafter cited as KRS]. Prior to this change, certain permanent partial disabilities benefits continued for the duration of the disability. The elimination of the Pennington Doctrine (see notes 26-33 infra and accompanying text for a thorough discussion) will also lead to major benefit reductions. Id.
To the extent that legislative intent is relevant, this goal of reducing expenses should be considered in interpreting the revised statutes.

A. Liberal vs. Strict Construction

Kentucky Revised Statutes (KRS) section 342.004\(^7\) was repealed by the 1980 General Assembly. The repeal of this section, which required that the Act be liberally construed, would appear to be an alarming change. KRS section 342.004 provided, in part, that "[t]his chapter shall be liberally construed on questions of law, as distinguished from evidence, and the rule of law requiring strict construction of statutes in abrogation of the common law shall not apply to the chapter." This provision had been frequently cited by the Workers' Compensation Board and the courts\(^9\) and was often used to resolve doubts in favor of claimants.\(^{10}\)

\(^6\) It would appear that the repeal of KRS § 342.004, which had required a "liberal construction" of the Act, might lead to more restrictive interpretations. 1980 Ky. Acts, ch. 104, § 24. Furthermore, "injury," as defined in KRS § 342.620(1) (1980), must now "arise out of and in the course of employment," as well as be "work related." 1980 Ky. Acts, ch. 104, § 24. Each of these revisions would seem to indicate a trend toward requiring more restrictive applications of the Act. As will be seen, however, this trend is perhaps more illusory than real.

\(^7\) KRS § 342.004 (1972) (repealed).

\(^8\) Id. The language quoted comprised the entire section as originally passed. 1950 Ky. Acts, ch. 187, § 7. In 1972 a second sentence was added which stated: "In any proceeding for the enforcement of a claim under the law for pneumoconiosis or silicosis it is presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the law." 1972 Ky. Acts, ch. 78, § 20.


\(^{10}\) See note 8 supra and accompanying text, which set out the language of the statute. Note the presumption of validity as to certain claims.
The repeal of KRS section 342.004 seemingly would indicate that the 1980 General Assembly intended to apply prospectively principles of strict construction to the Act. This conclusion is bolstered by the Legislature's previously acknowledged concern with high premium rates and its desire to lower them. In spite of this "apparent" or "intended" effect, however, the Act must continue to be liberally construed for at least two reasons. First, KRS section 446.080(1), enacted in 1892, requires that all Kentucky statutes be liberally construed. Had the General Assembly intended to authorize strict construction of the Workers' Compensation Act, it would have been necessary to exempt the Act (or specific portions of it) from the coverage of KRS section 446.080. Second, KRS section 342.004, as originally passed in 1950, served neither to broaden employees' rights nor to increase their chances of success on the merits. The repeal of that section, therefore, should neither limit employees' rights nor decrease their chances of success on the merits. A brief examination of the history of the provision explains this point.

When the original act was passed in 1916, it contained a provision similar to KRS section 342.004, requiring liberal construction of the Act. That provision was repealed in

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11 See note 3 supra and accompanying text for a discussion of the Legislature's concern with high premium rates.
12 KRS § 446.080(1) (1975) became a part of the statutory scheme through the enactment of 1892 Ky. Acts, ch. 107, § 15.
13 KRS § 446.080(1) (1975) states: "All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislation, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to statutes of this state."
14 The position of the Kentucky courts on implying an exception to a statute is stated in Hawley Coal Co. v. Bruce, 67 S.W.2d 703 (Ky. 1934). "Where the Legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is not the province of a court to introduce an exception by construction." Id. at 705.
16 Segal, An Historical Analysis of the Kentucky Workmen's Compensation Law, 47 Ky. L.J. 281 (1959).
18 "Act to be liberally construed. The rule of law requiring strict construction of statutes in derogation of the common law shall not be applicable to the provisions of this Act." Carroll's Kentucky Statutes § 4987 (1916).
because it was deemed an unnecessary duplication of KRS section 446.080.\textsuperscript{19} In spite of this repeal, liberal construction of the Act continued.\textsuperscript{20} Furthermore, in 1948 the state Supreme Court decided \textit{Yocum Creek Coal Co. v. Jones}\textsuperscript{21} and explicitly extended the "liberal construction" rule to matters of evidence.\textsuperscript{22} In its next session the Kentucky General Assembly passed KRS section 342.004 to negate the holding in \textit{Yocum Creek}. Thus, the important language of KRS section 342.004 was "as distinguished from evidence." The section was intended to prevent liberal construction on matters of evidence, not to extend such a construction to matters of law.\textsuperscript{23} The requirement for liberal construction of matters of law already existed.

Due, therefore, to the presence of KRS section 446.080 and to the fact that the Act was liberally construed as to matters to law even prior to the passage of KRS section 342.004, the repeal of KRS section 342.004 will not mandate that a policy of strict construction be followed. Furthermore, it is conceivable that the purpose of the repeal was to remove the limitation on \textit{Yocum Creek} that had been imposed by the passage of KRS section 342.004. Acceptance of this reasoning would again permit liberal construction as to evidentiary matters. This is not to suggest that the Legislature \textit{clearly in-}

\textsuperscript{19} 1940 Ky. Acts, ch. 191, § 1.
\textsuperscript{20} Coomes v. Robertson Lumber Co., 427 S.W.2d 809, 811 (Ky. 1968).
\textsuperscript{21} See \textit{Hinkel v. Allen-Codell Co.}, 182 S.W.2d 20 (Ky. 1944); Pond Creek Collieries Co. v. La Santos, 212 S.W.2d 530 (Ky. 1948). In \textit{Hinkel} the Court stated:

\begin{quote}
It should also be remembered that compensation statutes are to be liberally construed to accomplish the purpose of their enactment which is nothing less than a direction to courts that if there is any doubt as to a servant's right to receive compensation under the terms of the statute such doubt should be resolved in his favor.
\end{quote}

182 S.W.2d at 24. In \textit{Pond Creek} the Court held: "The compensation law should be liberally construed to carry out its "humane and beneficent purposes in favor of injured employees." 212 S.W.2d at 530. \textit{See also} Lexington Mining Co. v. Richardson, 150 S.W.2d 889, 890 (Ky. 1941).
\textsuperscript{22} 214 S.W.2d 410 (Ky. 1948).
\textsuperscript{23} "In view of the policy of broad and liberal construction of the Workmen's Compensation Law, it devolves upon the Workmen's Compensation Board to construe evidence liberally in favor of claimants in compensation cases." \textit{Id.} at 412 (emphasis added).
\textsuperscript{24} \textit{See note 21 supra} for cases demonstrating that the Act was already being liberally construed as to matters of law.
tended to reapply liberal construction principles to matters of evidence. One might argue, however, that this is the only logical conclusion that may be reached in light of the reason for KRS section 342.004's original enactment and in view of the fact that the Legislature did not exempt the Act from KRS section 446.080. Yet the legislators' intent to reduce costs weighs against this argument.

B. Computation of Benefits

The computation of benefits has been significantly changed by amendments to KRS sections 342.730 and 342.740. The major changes, and their effects, are outlined below.

1. The Elimination of the Pennington Doctrine

Benefits for permanent partial disability have traditionally been calculated by multiplying the percentage of disability times a statutory percentage of the claimant's average weekly wage. This award, however, is subject to a statutory maximum. The maximum award is simply a percentage of the statewide average weekly wage.

The Pennington doctrine deals with the application of the statutory maximum and can best be explored by examining hypothetically the facts of Pennington v. Winburn, the case from which it is derived. Assume that the statewide average weekly wage is $135.01. To establish the statutory maximum, this figure, prior to the 1980 amendments, was multiplied by the percentage provided in KRS section 342.740(1), which was 60% at the time Pennington was decided. This

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This doctrine derives its name from the case of C. E. Pennington Co. v. Winburn, 537 S.W.2d 167 (Ky. 1976).


KRS § 342.740(1) (1972). The statutory maximum is now contained in KRS § 342.730(1) (Supp. 1980). The relevance of this change is discussed in the text.

537 S.W.2d 167 (Ky. 1976).
formula yields a figure of $81 (.60 \times 135.01 = 81) as the maximum award. Next, assume that the claimant’s average weekly wage is $314 and that the statutory percentage by which it is to be multiplied is 62\%\%\ %. This was the percentage provided in KRS section 342.730(1)(b) at the time Pennington was decided. This equation yields a figure of $196.25 (.625 \times 314 = 196.25).

Prior to the case of Pennington v. Winburn, the award was computed by applying the statutory maximum at this point in the computation, i.e., before multiplying by the percentage of disability, which is the last step in the computation. Assuming that the percentage of disability is 20\%, the lesser of $81 or $196.25 would be multiplied by 20\% to compute the proper award. Thus, the pre-Pennington award would be $16.20 per week (20 \times 81 = 16.20). The Pennington doctrine led to a different result by applying the statutory maximum ($81) only after the figure derived from KRS section 342.730(1) ($196.25) was multiplied by the percentage of disability. This approach would award a claimant the lesser of $81 or $39.25 per week ($196.25 \times .20 = 39.25). The essential difference in the two methods of computation is that the Pennington approach injects the statutory maximum one step later in the computation.

The 1980 General Assembly removed the “maximum” language of KRS section 342.740(1)\textsuperscript{31} and, for permanent partial disability, placed it in KRS section 342.730(1)(b).\textsuperscript{32} To determine permanent partial disability benefits for injuries occurring after July 15, 1980, one must multiply the lesser of 66\%-\% of the claimant’s average weekly wage or 75\% of the statewide average weekly wage times the percentage of disability.\textsuperscript{33} The “order” of computation is thus fixed by statute, and the Pennington doctrine has been eliminated.

\textsuperscript{33} Note that the “maximum” was increased from 60\% of the statewide average weekly wage to 75\% of the state average weekly wage. Furthermore, the pre-Pennington method of computation is now statutorily directed by this provision. KRS § 342.730(1)(b) (Supp. 1980).
2. Variations in Partial and Total Disability

Prior to the 1980 changes, benefits for permanent partial disability were calculated in the same manner as were benefits for permanent total disability. This is no longer true.

KRS section 342.730(1)(a) as amended designates total disability benefits as the lesser of 66\(\frac{2}{3}\)% of the employee's average weekly wage or 100% of the statewide average weekly wage.\(^{34}\) A minimum benefit of 20% of the state average weekly wage is required for total disability,\(^{35}\) and total disability benefits continue as long as the disability continues.\(^{36}\) As mentioned earlier, the statutory maximum for permanent partial disability is based on 75% of the statewide average weekly wage.\(^{37}\) Prior to revision of the Act, certain permanent partial disability benefits continued for the duration of the disability. Under the revised statute, permanent partial disability benefits will be limited to a maximum of 425 weeks.\(^{38}\)

3. Determining Disability

Previously, an employee's percentage of disability was determined from a schedule of losses contained in KRS section 342.730(1)(c). This schedule of losses, sometimes referred to as the "price tag" statute, was eliminated.\(^{39}\) A claimant's percentage of disability for injuries sustained under the revised Act is to be determined either by Guides to the Evaluation of Permanent Impairment\(^{40}\) or by the percentage of disability provided by KRS section 342.620(11),\(^{41}\) whichever is greater.\(^{42}\)

\(^{34}\) KRS § 342.730(1)(a) (Supp. 1980).
\(^{35}\) Id.
\(^{36}\) Id.
\(^{37}\) KRS § 342.730(1)(b) (Supp. 1980).
\(^{38}\) Id.
\(^{39}\) KRS § 342.730(1)(c) (1972). This section was amended by 1980 Ky. Acts, ch. 104, § 15(1)(b).
\(^{40}\) The 1977 edition of this American Medical Association publication is to be used. Copies can be obtained by writing to: Dept. OP-298, AMA, P.O. Box 821, Monroe, Wisconsin 53566.
\(^{41}\) KRS § 342.620(11) (Supp. 1980) is a definitional statute. It describes "disability" as:
[a] decrease of wage earning capacity due to injury or loss of ability to compete to obtain the kind of work the employee is customarily able to do, in the area where he lives taking into consideration his age, occupation, educa-
4. **Apportionment**

KRS section 342.120(5), which relates to the apportionment among the employer, the Special Fund, and the employee of responsibility for a compensable injury, was also amended.\(^4\) Apportionment is necessary in cases where a claimant with a pre-existing disability or disease suffers a compensable injury or occupational disease. It is also necessary in cases where the claimant is found to have a dormant, non-disabling disease or condition that is aroused by a subsequent compensable injury. Responsibility is apportioned among the parties in the following manner: 1) the employer is liable for the portion of the injury attributable to a disability incurred in the course of employment;\(^2\) 2) the Special Fund, established by KRS section 342.122,\(^5\) is liable for the portion attributable to a pre-existing dormant condition;\(^6\) and 3) the employee bears responsibility for any portion attributable to a prior disabling disease or injury.\(^7\) The changes made by the 1980 General Assembly in this provision essentially codify the law as espoused in *Transport Motor Express v. Finn*\(^8\) and more recently in *River Coal Co. v. Mullins*.\(^9\) The statute as revised makes clear that the employee's benefits are to be determined first and then apportioned, based upon each party's determined share of liability. This revision eliminates any confusion that may have existed as to the priority of liabilities in cases where the statutory maximum was in effect.\(^10\)

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\(^1^\) Id.

\(^2\) KRS § 342.730(1)(b) (Supp. 1980).

\(^3\) KRS § 342.120(5) (Supp. 1980).

\(^4\) KRS § 342.120(3) (Supp. 1980).

\(^5\) KRS § 342.122 (Supp. 1980).

\(^6\) KRS § 342.120(4) (Supp. 1980).

\(^7\) KRS § 342.120(5) (Supp. 1980).

\(^8\) 574 S.W.2d 277 (Ky. 1978).

\(^9\) 694 S.W.2d 875 (Ky. 1979).

\(^10\) Prior to this change an argument was made that the employer's liability must be met before that of other parties. The following hypothetical is offered to show how such a finding could affect apportionment:

Suppose the employer and the Special Fund are each 50% liable for the injury; that 66\%\% of the employee's average weekly wage is $200; and that
C. *KRS Section 342.620(1): The Definition of Injury*

Prior to the 1980 revision of the Act, "injury" was defined as "any work related harmful change in the human organism." In order for a "work related harmful change" to be classified as an injury after July 15, 1980, it must "arise out of and in the course of employment." The effect of this definitional amendment poses one of the most perplexing problems raised by the 1980 revisions.

The phrase "arising out of and in the course of employment" is by no means new to Kentucky workers' compensation law. A revision of the Act in 1972 appended this phrase to the definition of "occupational disease," and this phrase remains a part of the definition of "occupational disease" contained in KRS section 342.620(2). Guidelines for determining whether an "occupational disease" arose "out of and in the course of employment" are now provided in KRS section 342.620(3). These guidelines, however, refer only to "occupa-

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the maximum award is $150. Under the "priority" argument the employer would be liable for 50% of the $200, or $100, and the Special Fund would only have to provide the balance between the employer's liability and the maximum award, or $50. Under the revised statute the employer is liable for 50% of the benefits the employee is to receive, in this case $75 per week. The Special Fund must also pay $75 per week.

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51 KRS § 342.620(1) (1972). This section was amended by 1980 Ky. Acts, ch. 104, § 13(1).


54 KRS § 342.620(2) (Supp. 1980).

55 An occupational disease as defined in this section shall be deemed to arise out of employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work was performed and the occupational disease, and which can be seen to have followed as a natural incident to 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. The occupational disease shall be incidental to the character of the business and not independent of the relationship of employer and employee. An occasional occupational disease need not have been foreseen or expected but, after its contraction, it must appear to be related to a risk connected with the employment and to have flowed from that source as a rational consequence.

KRS § 342.630(3) (Supp. 1980).
tional disease” and not to “injury.” The negative implication, therefore, is that the identical phrase has a somewhat different meaning when applied to “injury.” The precise meaning of “arising out of and in the course of employment” as it relates to “injury” is quite unclear; furthermore, there are few clues as to how “arising out of and in the course of employment” is intended to mesh with the previously existing “work related” requirement of KRS section 342.620(1). Insight into this question, however, can perhaps be gained through an examination of the legislative and judicial history regarding the phrase “arising out of and in the course of employment.”

1. Legislative and Judicial History

Initially, it should be noted that “arising out of and in the course of employment” was a requirement for benefits under the Act when originally passed in 1916. Less than two years later, the Workers’ Compensation Board decided Phil Hollenbach Co. v. Hollenbach, in which it was held that an employee’s death arose out of and in the course of employment when he was electrocuted while washing up in a company washroom after work. This decision received court affirmation and was the first workers’ compensation case to be appealed in Kentucky. On appeal, the Court examined case law from other jurisdictions and determined that the words “arise out of” relate to the cause or source of the injury and that the words “in the course of” have reference to the time, place and circumstances of the injury. The Court, therefore, found that these terms were not synonymous and said that recovery must

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56 1916 Ky. Acts, ch. 33, § 3. The statute stated: “Whereas at the time of the injury, both employer and employe have elected to furnish or accept compensation under the provisions of this act for a personal injury received by an employe by accident and arising out of and in the course of his employment.” This section was codified as Carroll's Kentucky Statutes § 4882 (1916).

57 The Kentucky Court's review of this decision appears at 204 S.W. 152 (Ky. 1918).

58 There was some question as to whether or not a prank may have been involved. An uninsulated wire had been connected to a light socket and possibly attached to the sink. Id. at 154.

59 Id. at 153.

60 Id. at 159-60.
be denied if either is not satisfied. The Court, however, found that both terms were satisfied and upheld the award.

The phrase “arising out of and in the course of employment” ultimately appeared in two sections of the Act, KRS sections 342.005 and 342.015. Both sections were repealed by revisions to the Act in 1972. At the same time, as has been previously noted, the phrase was added to the definition of “occupational disease,” while “injury” was defined as a “work related harmful change in the human organism.” These definitions remained in force until 1980. During the period from 1972 to 1980 the judiciary had an opportunity to examine the impact of the 1972 revision and to discuss the relationship between the phrases “work related” and “arising out of and in the course of employment.” In Seventh Street Road Warehouse v. Stillwell, the Court said:

61 Id. Hollenbach has been frequently cited for this principle. See People's Service Stations, Inc. v. Purvis, 379 S.W.2d 222, 223 (Ky. 1964); Wilke v. Univ. of Louisville, 327 S.W.2d 739, 740 (Ky. 1959); King v. Lexington Herald-Leader Co., 313 S.W.2d 423, 425 (Ky. 1958); Stapleton v. Fork Junction Coal Co., 247 S.W.2d 372, 373 (Ky. 1952); Louisville & Jefferson County Air Bd. v. Riddle, 190 S.W.2d 1009, 1010 (Ky. 1945).

62 204 S.W. at 162.

63 KRS § 342.005 (1956) was a codification of 1956 Ky. Acts, ch. 77, § 1 and dealt with the applicability of the Act to various categories of employers and employees. This statute was repealed by 1972 Ky. Acts, ch. 78, § 36.

64 1956 Ky. Acts, ch. 77, § 2, which was codified as KRS § 342.015(1) (1956), appeared as follows:

Where at the time of the injury both employer and employee have elected to furnish or accept compensation under the provisions of this Act for a traumatic personal injury, received by an employee by accident and arising out of and in the course of his employment, or for death resulting from such injury, within two years thereafter, or for disability or death resulting from occupational disease as defined in this Act, the employer shall be liable to provide and pay compensation under the provisions of this Act and shall, except as provided in subsection (2) of this section and in KRS 342.170, be released from all other liability.

Id. (emphasis added). This section was repealed by 1972 Ky. Acts, ch. 78, § 36.

65 Id. at § 2(1).

66 Prior to its decision in Seventh Street Road Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976), the Kentucky Supreme Court decided two "injury" cases that provided little guidance on the revision's meaning. See Haycraft v. Corhart Refractories Co., 544 S.W.2d 222 (Ky. 1976); Yocom v. Pierce, 534 S.W.2d 796 (Ky. 1976).

67 550 S.W.2d 469 (Ky. 1976).
It should be noted that the 1972 amendments to the Workmen’s Compensation Act repealed KRS section 342.005 which stated that to be compensable an injury must be traumatic, sustained by accident and arise out of and in the course of employment. Acts of 1972, Chapter 78, sec. 20. Its successors, KRS 342.620(1) and 342.610(1) merely state that a compensable injury is any work related harmful change in the human organism. The purpose of this change in the law was to expand workmen’s compensation coverage to non-traumatic injuries. It is the injury element and not the employment element of a workmen’s compensation claim that the legislature meant to expand. “Work related” and “arising out of and in the course of employment” are synonymous terms.69

As Justice Lukowsky pointed out in Stillwell, there are two elements to a workers’ compensation claim: an “injury” element and an “employment” element.70 In the years 1972 to 1980, when the phrase “arising out of and in the course of employment” was missing from the definition of “injury” in KRS section 342.620(1), the phrase “work related” thus was interpreted by the courts to be synonymous with the “arising out of” phrase and was applied to the “employment element.”71 Justice Lukowsky’s interpretation of the 1972 revision as an expansion of the “injury element” to “non-traumatic” injuries72 has been followed by the Kentucky Court of Appeals on at least two occasions since Stillwell.73

Now that both phrases appear concurrently in KRS section 342.620(1), interpreting them as synonymous renders one of the phrases superfluous. Yet, the 1980 amendment certainly was not intended to narrow the “injury” element of the definition. Had this been the legislative intent, a “traumatic” or “accidental” injury would likely have been required. While the impact of the 1980 amendment is less than clear, it is suggested that the change may have been intended to allay the

69 Id. at 470 (citations omitted).
70 Id.
71 Id.
72 Id.
73 Dealer’s Transp. Co. v. Thompson, 593 S.W.2d at 84; Armco Steel Corp. v. Lyons, 561 S.W.2d 676 (Ky. Ct. App. 1978).
confusion following the 1972 revision and is therefore nothing more than a reinforcement of Stillwell.

D. Limitation of Actions

1. Repeal of KRS Section 342.186: Notifying Employee of Statute of Limitations

KRS section 342.186 required an employer to notify an employee who was injured or ill of the statute of limitations applicable to the injury or illness at least thirty days prior to the expiration date. That provision, which became effective June 21, 1974, was repealed effective July 15, 1980. The repeal of this statute is a significant change in the Workers' Compensation Act. An examination, however, of the two published opinions rendered under the statute reveals a potential for its application notwithstanding its repeal.

In Lanier v. Commonwealth Fish and Wildlife Division, the court of appeals held that "failure to comply with the notice provision of KRS 342.186 bans [sic] the employer from raising the defense of statute of limitations . . . In the event the notice is given late, the statute of limitations will not expire until 30 days after notice is given." Shortly before the Lanier decision, the court of appeals decided Peach v. 21 Brands Distillery, in which the claimant Peach had suffered a heart attack in June 1973, prior to the enactment of KRS section 342.186. The statute became effective in June 1974, before the statute of limitations had run on Peach's injury. When Peach filed his claim in July 1976, however, the two year statute of limitations had run. Peach asserted coverage of KRS section 342.186, arguing that his claim should not be

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74 "An employer shall notify any employee who has received an injury or illness of the statute of limitations applicable to the injury or illness, not later than thirty days prior to the expiration date." KRS § 342.186 (1974), repealed by 1980 Ky. Acts, ch. 104, § 24.
77 605 S.W.2d 18 (Ky. Ct. App. 1979).
78 Id. at 19.
80 Id. at 236.
barred by the statute of limitations since he had not received notice. Although Peach’s employer admitted that no notice had been given, the court, applying the rule of construction against retroactive application of statutes in the absence of legislative intent to the contrary, denied relief. Following the general rule that “the statute in effect on the date of the injury is controlling,” the court in Peach refused to apply KRS section 342.186 to those claims that had arisen prior to its effective date.

Lanier and Peach suggest that KRS section 342.186 will apply to claims that arose between June 21, 1974 and July 15, 1980, in spite of the statute’s repeal. Thus, if an employer had notice of a claim arising during that period and failed to give the employee timely notice of the statute of limitations, the employee will have thirty days from the time he actually received notice in which to file a claim, regardless of the running of the statute of limitations.

2. Application for Adjustment of a Claim Upon Termination of Voluntary Benefits

Changes to KRS section 342.185 appear to have created a conflict with KRS section 342.270(1). KRS section 342.270(1), which prescribes the time allowed for filing an application for adjustment of a claim following the cessation of voluntary payments, was amended in 1974 to increase the time permitted from one to two years. As part of the 1980 amendments to the Act, KRS section 342.185 was amended to also apply to “adjustments of claims.” Prior to the 1980 amendment, that statute dealt with “notice of accident” to the employer and to the filing of a claim for benefits and did have a provision for tolling the statute of limitations during voluntary payments. KRS section 342.185 now requires that an application for adjustment of a claim be filed within one year following the suspension of voluntary payments or within two years of the acci-

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81 Id.
82 Id. at 237.
dent, whichever is later. Because KRS section 342.270(1) has a two year limitation and because KRS section 342.185 now potentially contains a one year limitation, a conflict arises involving possible dual application of these statutes to a given situation.

Kentucky case law holds that contradictory statutory provisions are reconciled in favor of the more recent enactment:

"If the two statutes are repugnant to each other, the later statute must prevail, as it is the latest expression of the legislative will."

In Shultz v. Ohio County, however, the Court also recognized:

It is an elementary rule of construction that the repeal of an existing law by implication is not favored by the courts, and a legislative enactment will never be interpreted as inferentially repealing a prior statute or part thereof unless the repugnancy is so clear as to admit of no other reasonable construction. This universal rule means that the courts will construe the acts if possible so that both shall be operative and effective if that can be done without contradiction or absurdity. If any part of the existing law can be reconciled or harmonized with the provisions of the new act, it will not be deemed as having been repealed.

Applying the foregoing rationale, the changes in KRS section 342.185 would implicitly repeal the conflicting portions of KRS section 342.270(1). It should be carefully noted, however, that the changes in section 342.185 affect only the specific segment of section 342.270 dealing with adjustment of a claim after the cessation of voluntary benefits. Though it is not likely that practitioners will often encounter this conflict, the problem is significant for those who might fail to realize that the statute of limitations has been shortened. Failure to make a timely application would result in loss of the opportunity to have the claim adjusted.

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85 KRS § 342.185 (Supp. 1980).
86 Head v. Commonwealth, 177 S.W. 731 (Ky. 1915).
87 Id. at 733.
88 11 S.W.2d 702 (Ky. 1928).
89 Id. at 704.
E. KRS Section 342.075: Determining Dependents of a Deceased Employee

KRS section 342.075 sets out the criteria that must be considered in determining who qualifies as a dependent of a deceased employee. Subsection (1)(a) presumes dependency of a surviving spouse under certain conditions, and that presumption, where it applies, has been consistently regarded as conclusive upon the courts and the Workers' Compensation Board. The court held as early as 1946 that "the conclusive presumption of being 'wholly' dependent cannot be defeated or otherwise contradicted by extraneous testimony in all cases where the dependent met the provisions of the section of the statute." Thus, in practice, if a spouse meets the requirements for the presumption, he or she is entitled to benefits even though not actually dependent upon the employee at all.

Dependents of a deceased employee must qualify under the following provision:

(1) The following persons shall be presumed to be wholly dependent upon a deceased employee:
   (a) A surviving spouse upon a decedent whom the surviving spouse had not voluntarily abandoned at the time of the accident, or who having been abandoned by the decedent 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 or such husband by his wife;
   (b) A child or children under the age of sixteen (16) years, or over sixteen (16) 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.

(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 and is actually dependent.


90 Dependents of a deceased employee must qualify under the following provision:

92 Id. at 220. See also Reynolds Metal Co. v. Glass, 195 S.W.2d 280 (Ky. 1946).
93 See Ritchie v. Katy Coal Co., 231 S.W.2d 57 (Ky. 1950) (abandoned wife con-
The 1980 revision of the Act, however, added to subsection (3) of KRS section 342.075 the requirement that any person not living in the household of the employee at the time of the accident be "actually dependent" upon the employee.\(^4\) It appears that the amendment converts the conclusive presumption of subsection (1)(a) into a rebuttable presumption of dependency when the surviving spouse is not living in the household of the employee at the time of the accident.\(^5\) An employer, therefore, could avoid liability for benefits by raising the defense of "no dependency" and by proving that the surviving spouse did not reside with and was not "actually dependent" upon the deceased employee at the time of the accident. The amendment to KRS section 342.075, however, should not affect the conclusive presumption of dependency in cases where the surviving spouse was residing with the employee at the time of the accident.\(^6\)

Problems may arise concerning the meaning of the phrase "actually dependent" in cases where a surviving spouse not living in the claimant's household earned some income but remained "actually dependent" upon the deceased employee. Arguably, if the Legislature had intended to require the surviving spouse in such a situation to be "wholly dependent," that phrase would have been the one added to subsection (3) of KRS section 342.075. Thus, construing subsection (3) as actually worded with the presumption of subsection (1)(a) that


\(^{5}\) Note, however, that for the surviving spouse to be entitled to even a rebuttable presumption, he or she must not have voluntarily abandoned the employee. KRS § 342.075(1)(a) (Supp. 1980). See Davis v. Mitchell, 98 S.W.2d 474 (Ky. 1936) (separation was voluntary on part of both spouses; wife was therefore determined not to be a dependent).

\(^{6}\) Furthermore, Yocom v. Hylton, 557 S.W.2d 219 (Ky. Ct. App. 1977), should remain controlling in cases where the spouse was residing with the deceased claimant. Yocom held that the "wholly dependent" presumption could not be defeated even though the surviving spouse was employed at the claimant's death. See also Purex Corp./Ferry-Morse Seed Co. v. Bryant, 590 S.W.2d 334 (Ky. Ct. App. 1979), in which the court applied the presumption of KRS § 342.075(1)(a) to a claim for permanent partial disability under KRS § 342.730(1)(b) (1976). Although the claimant's wife worked full time, she was conclusively presumed to be wholly dependent upon her husband.
a qualified surviving spouse is "wholly dependent" suggests that a spouse who passes the subsection (3) threshold requirement of "actually dependent" also qualifies for the subsection (1)(a) presumption of "wholly dependent." In practice, the subsection (3) threshold will involve application to a narrow group of cases wherein the surviving spouse was not residing with the deceased employee at the time of the accident but had neither voluntarily abandoned nor acted in a manner to justify being abandoned by the employee prior to the accident.97 Only those select circumstances will trigger the 1980 amendment and will require the surviving spouse to prove actual dependency in order to maintain the presumption of "wholly dependent" against an employer's rebuttal.

F. KRS Section 342.150: Lump Sum Payments

Prior to July 15, 1980, lump sum payments of future benefits could be approved by the Board on application of either party, where it was in the best interest of either party and certain conditions were met. Under KRS section 342.150 as amended,98 such lump sum payments will be approved only when applied for by all parties and only where the Board determines that such payments are in the best interest of all parties. Since the statute provides that a four percent discount rate is to be used in determining present value,99 the amendment will probably reduce the frequency of lump sum payments. This conclusion is inescapable when one considers that the current prime interest rate fluctuates between fifteen and twenty percent. It is difficult to envision a lump sum settlement discounted at four percent that would be in the "best interest" of an insurer. Therefore, except in situations involving small awards having a disproportionately high administrative cost, insurers will be unlikely to favor lump sum payments.

97 See KRS § 342.075(1)(a) (Supp. 1980) & KRS § 342.075(3).
98 KRS § 342.150 (Supp. 1980).
99 Id.
II. Case Law Changes

A. Holding the Claim in Abeyance During Voluntary Payments

KRS section 342.270(5) requires the Board to hold an employee's claim in abeyance while the injured employee is receiving voluntary payments of the maximum benefits payable under the Act, unless the employee's claim would thereby be prejudiced. In Chapman v. Payne and Hager, Inc., the provisions of KRS section 342.270(5) were determined to be mandatory. The court of appeals held that unless there were a showing of prejudice to the employee's claim, the Board had no discretion in the matter and was required to hold the claim in abeyance. Although both the statutory language and the Chapman opinion seem to leave little room for doubt on this point, in McLeod Distributing Co. v. Campbell the court of appeals declined to apply Chapman.

The requirements of the statute seemed to be met in McLeod. Campbell, the employee, was receiving voluntary payments at the maximum rate, and there was apparently no showing that his claim would be prejudiced by delay in application for adjustment. The court distinguished Chapman, however, on the ground that there was no indication that the employee in Chapman was claiming unpaid benefits, while Campbell was due thirty-seven weeks of benefits at the time voluntary payments were commenced. By refusing to apply Chapman to situations where the employee is due past benefits, the court rejected an interpretation of KRS section

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100 An application for adjustment of claim shall be held in abeyance by the board during any period voluntary payments of compensation are being made under any benefit sections of this chapter to the maximum which the employee's wages shall entitle him, unless it shall be shown that the prosecution of the employee's claim would be prejudiced by delay.


102 570 S.W.2d 167 (Ky. Ct. App. 1978).

103 Id. at 168.

104 Id. The court noted, however: "Appellee's case is not merely prejudiced, it is completely stopped which appears to be for no other reason than delay itself." Id. at 103.

105 Id.
342.075(5) that would encourage a responsible party to “fore-
stall any payment of past due monies by undertaking present 
payment of the maximum benefits payable.”

B. Aggravation or Continuation of Injury Resulting from 
Failure to Follow Medical Advice

KRS section 342.035(2) states in part: “No compensation 
shall be payable for the death or disability of any employee if 
his death is caused, or if and insofar as his disability is aggra-
vated, caused or continued, by an unreasonable failure to sub-
mit to or follow any competent surgical treatment or medical 
aid or advice.” In Elmendorf Farms v. Goins, where the 
employee suffered a fractured wrist, medical complications de-
veloped from the employee’s failure to perform prescribed ex-
ercises, and his hand degenerated into a condition of virtual 
uselessness. The Workers’ Compensation Board found that 
Goins had a twenty percent functional disability that trans-
lated into a fifteen percent occupational disability. The 
Board noted in its opinion that it would have rated his occu-
pational disability at thirty percent had it not “carved away” 
fifteen percent, presumably under KRS section 342.035. 
Although it acknowledged some confusion in the Board’s opin-
ion, the court of appeals determined that the Board had 
reached a reasonable result. The court found that “the record 
[could] easily support either the finding that only half of 
Goins’ failure to exercise was unreasonable or that any failure 
resulted in only half of his present disability.” Either result 
was held to be within the Board’s province as fact finder.

The second portion of the Elmendorf opinion dealt with a 
conflict between the mandatory language of KRS section

106 Id.
107 KRS § 342.035(2) (1974).
108 593 S.W.2d 81 (Ky. Ct. App. 1979), disc. rev. denied, 594 S.W.2d 273 (Ky. 
1980).
109 Id. at 82.
110 Id.
111 Id. at 83.
112 Id.
113 Id.
342.035(2) and the interpretation of KRS section 342.740(1)\textsuperscript{114} espoused by the Kentucky Supreme Court in \textit{Apache Coal Co. v. Fuller}.

The Board in \textit{Elmendorf} first reduced the award by applying KRS section 342.035(2) and then applied the statutory minimum provided in section 342.740(1). This was the \textit{Apache} approach. The net result was that the final award remained as if no reduction had occurred under section 342.035(2), because the statutory minimum exceeded the reduced and original awards. Recognizing that this application of \textit{Apache} would render KRS section 342.035 a nullity,\textsuperscript{115} the court resolved the conflict in the following manner:

The award should be initially computed as if failure to follow medical advice were not a factor. Once the correct figure is reached it should, following \textit{Apache}, be raised, if necessary, to the statutory minimum. The figure should then be proportionately reduced according to the degree to which the Board has found that the disability was caused, prolonged, or aggravated by the conditions set out in KRS section 342.035(2).\textsuperscript{117}

The importance of this facet of \textit{Elmendorf}, however, has been greatly diminished by new legislation for cases of permanent partial disability. There is no minimum level of benefits for \textit{permanent partial disability} for claims arising after January

\textsuperscript{114} KRS § 342.740(1) (1974) provided a statutory minimum for permanent partial disability benefits until 1977. The only statutory minimum now appearing in the Act is contained in KRS § 342.730(1)(a) (Supp. 1980) and applies only to total disability.

\textsuperscript{115} 541 S.W.2d 933 (Ky. 1976).

\textsuperscript{116} The \textit{Elmendorf} opinion indicates that KRS § 342.140(1) (rather than KRS § 342.740(1) as indicated in this survey) is the relevant section. However, this may be a typographical error. While KRS 342.140(1) was mentioned in the \textit{Apache} decision, the opinion primarily dealt with applying the statutory minimum of KRS § 342.740(1) to claims for permanent partial disability.

\textsuperscript{117} 593 S.W.2d at 83. This passage from the opinion and the problem discussed therein can perhaps best be illustrated by examining the facts presented in \textit{Elmendorf}. Goins, the claimant, was determined to be 30\% disabled, half of which was attributed to his own neglect under KRS § 342.035. The award that resulted was $11.13 per week. The statutory minimum was $32 (20\% of the statewide average weekly wage). \textit{Apache}, as applied to these facts, would require an award of $32 per week. \textit{Elmendorf} recognized that this approach nullified KRS § 342.035 and reduced the statutory minimum ($32) by 50\% (the portion of the injury attributed to Goins under section 342.035). The proper award under this approach is $16.
The Elmendorf technique would be used, however, in applying the statutory minimum of KRS section 342.730(1)(a) to an appropriate case of total disability if the employee had, to his detriment, failed to follow medical advice.

C. Benefits Payable to Dependents Although Claimant Died from Other Causes Before Approval of Claim

A problem may arise when an employee suffers an injury that is compensable under the Act but dies from unrelated causes before his claim is filed or approved. KRS section 342.730(3) addresses this issue as follows:

When an employee, who has sustained disability compensable under this section, and who has filed, or could have timely filed, a valid claim in his lifetime, dies from causes other than the injury before the expiration of the compensable period specified, the income benefits specified and unpaid at the individual's death, whether or not accrued or due at his death, shall be paid, under an award made before or after such death, for the period specified in this section, to and for the benefit of the persons within the classes at the time of death and in the proportions and upon the conditions specified in this section.\footnote{Id. (emphasis added).}

The problem courts have experienced in dealing with continuation of benefits to dependents arises out of the fact that total disability benefits (and permanent partial disability benefits prior to the 1980 revision) are limited to the period of disability. The Kentucky Court of Appeals has interpreted this provision as requiring a cessation of benefits at death. This principle was stated in Silvers v. Marley Company\footnote{566 S.W.2d 767 (Ky. Ct. App.), disc. rev. denied, 585 S.W.2d 397 (Ky. 1978).} as recently as 1978: "If compensation is to be paid to dependents under KRS 342.730(4) 'for the period specified in this section' and that time is 'during such disability' and the disability

\footnote{1976 Ky. Acts (Ex. Sess.), ch. 26, § 1(b). Mr. Goins' claim arose January 20, 1976. 593 S.W.2d at 83.}

\footnote{KRS § 342.730(3) (Supp. 1980).}

\footnote{1976 Ky. Acts (Ex. Sess.), ch. 26, § 1(b). Mr. Goins' claim arose January 20, 1976. 593 S.W.2d at 83.}
ceases with death, then so also do the benefits." The widow of the deceased claimant in Silvers was unsuccessful in convincing the court that the Board’s award based upon the life expectancy of the claimant should be upheld.

In the course of its opinion in Silvers, the court distinguished an earlier decision by the Kentucky Supreme Court in Yocum v. Chapman. The Court in Yocum affirmed the Board’s award of disability benefits to the deceased claimant’s widow, where the Board had limited the award to 425 weeks. The Silvers court seized upon this limitation to distinguish Yocum by stating:

There has been a great deal of time devoted to discussions in the briefs by both parties of Yocum v. Commonwealth, Ky., 542 S.W.2d 510 (1976) but that opinion is of little aid in resolving the specific question of legislative intent, for in that appeal there was a definite period of disability involved while in this case, we are requested to provide a period of disability.

Amburgey v. Daniel Construction Co., Inc. appears to have resolved the Yocum-Silvers disagreement by extending Yocum and overruling Silvers. The Court upheld an award to the widow of the claimant in Amburgey for benefits that were to continue “during [the] widowhood and/or dependency [of Amburgey’s dependents] or the passage of 27.45 years, the latter being the life expectancy of the decedent, whichever first occurs.” The Court pointed out that “[t]he Legislature would not have used the phrase ‘whether or not accrued or due at his death’ in KRS 342.730(4) if they had not anticipated payments beyond the death of the claimant.”

One should note, however, that Amburgey’s claim was for permanent partial disability. Under the 1980 revisions, those payments are limited to 425 weeks. Payments to the widow

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122 Id. at 768.
123 542 S.W.2d 510 (Ky. 1976).
124 566 S.W.2d at 769.
125 592 S.W.2d 141 (Ky. 1979).
126 Id. at 141-42.
127 Id. at 142.
128 KRS § 342.730(1)(b) (Supp. 1980).
after the claimant’s death would also be so limited.\textsuperscript{129} Cases involving total disability benefits, however, continue to be controlled by \textit{Amburgey}.

\textsuperscript{129} Payments to the widow or other dependent will only continue “for the period specified in this section” and thus must cease after 425 weeks if the payments are for a permanent partial disability. KRS § 342.730(3) (Supp. 1980).