Kentucky Law Survey: Workmen's Compensation

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Workmen's Compensation

BY CHARLES S. CASSIS*

INTRODUCTION

The guests at Justice Lukowsky’s party left a body behind. Apache Coal Co. v. Fuller,1 thought most Kentucky legislators and lobbyists at the 1976 Extraordinary Session, lay dead in the Capitol. But the ghost of Apache, smoldering and clanking and whispering of “lost wages,” haunted the opinions of the Kentucky Supreme Court and the newly created court of appeals in 1977.

This article will examine the process of judicial decision-making in last year’s workmen’s compensation cases. The venture is timely because the Apache affair shows that the General Assembly is not entirely satisfied with judicial implementation of the workmen’s compensation law. Our courts must frequently resolve difficult coverage questions without adequate legislative direction or generally accepted theories of the purposes of public protection. However, insistence on principled decision-making is essential if we are to develop fair, affordable concepts and goals for workmen’s compensation.

I. THE LEGACY OF APACHE

In the 1976 case of Apache Coal Co. v. Fuller,3 the question was whether Kentucky Revised Statutes (KRS) § 342.740(1)4

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1 541 S.W.2d 933 (Ky. 1976). Justice Lukowsky’s invitation was explicit: “We remind those who may be dissatisfied with this result that the entire concept of workmen’s compensation is a creature of statute . . . . Cries for modification should be addressed to the legislature.” Id. at 935.

2 I feel confident in departing from the usual survey format only because my predecessor’s comprehensive and trenchant analysis needs little updating. See, e.g., Patterson, Kentucky Law Survey—Workmen’s Compensation, 65 Ky. L.J. 411 (1976); Patterson, Kentucky Law Survey—Workmen’s Compensation, 64 Ky. L.J. 307 (1975). Several recent developments are, however, discussed at notes 20, 36, and 63 infra.

3 541 S.W.2d 933 (Ky. 1976).

4 KY. REV. STAT. § 342.740(1)(1977) [hereinafter cited as KRS] provides: “The minimum weekly income benefits for disability shall not be less than 20 percent . . .
always entitles a partially disabled employee to the minimum compensation of 20% of the average weekly wage of the state. The Supreme Court held that minimum benefits must be paid, even though the employee there suffered no decrease in employment prospects or current earnings.\(^5\) *Apache* not only stunned the business community, but was significant enough to warrant inclusion in the Governor's call for a special legislative session.\(^6\) Within days of the denial of rehearing, the General Assembly gutted *Apache* by providing that "*there shall be no minimum weekly income benefit for permanent partial disability*."\(^7\)

In the course of his *Apache* opinion, Justice Lukowsky stopped to comment on two statutory provisions not involved in the case. As part of the statutory definition of disability, KRS § 342.620(9) provides that "[a] person who has lost wages by reason of his disability . . . is entitled to compensation . . . in an amount equal to the wages lost, so long as this amount does not exceed the applicable maximum compensation." A sentence later, the disability definition continues: "An individual entitled to benefits under permanent partial disability shall be entitled to either his lost wages due to his injury, or body functional disability benefits, whichever is greater." KRS § 342.730(1)(b), the computation section for permanent partial disability, similarly states that "the individual entitled to benefits under permanent partial disability shall be entitled to income benefits based on lost wages or body functional disability benefits, whichever is greater." However, KRS § 342.730(1)(b) also provides that "[i]n all other cases of permanent partial disability . . . income benefits shall be determined according to the percentage of disability." Thus the two sections seem to provide inconsistent methods of measuring income benefits in cases of permanent partial disability: "lost wages" and a percentage of the employee's earnings at the time of the injury.\(^8\)

\(^5\) 541 S.W.2d at 935.
\(^6\) Governor's Proclamation, Ky. HOUSE JOURNAL 1, 2 (1976 Extra. Sess.).
\(^8\) In case of total disability, KRS § 342.730(1)(a) provides for recovery of "66 2/3 and the maximum weekly income benefit shall not exceed 60 percent . . . of the average weekly wage of the state . . . ."
Justice Lukowsky noted that "[t]hese statutes rival the Internal Revenue Code in complexity and contradiction. Their seeming internal inconsistency and inconsistency with each other is hypnotic and soporific." Although he described interpretation of these two statutory provisions as an "unpleasant task," Justice Lukowsky—perhaps intrigued by the prospect of bringing order to chaos—wrote:

Suffice it to say that disability is defined and paid for on the loss of earning capacity theory with a provision for entitlement to compensation based on the actual wage loss theory, whichever provides the higher benefits. . . . It is apparent that what the legislature has done is adopt two theories for the computation of benefits and provide that the employee is entitled to be paid pursuant to the theory which will grant him the greater return.10

These observations were dictum; the issue in Apache was whether KRS § 342.140(1) established a minimum benefit floor supporting all compensation claims. But by the end of 1977, Apache's notion of "lost wages" compensation had prevailed in the court of appeals. If the Supreme Court explicitly approves the lost wages doctrine, it will cause changes in Kentucky's workmen's compensation law that will dwarf those threatened by Apache.

II. "LOST WAGES" IN THE COURT OF APPEALS

The court of appeals first confronted a lost wages claim in Mills v. Parsley. The claimant was totally disabled, had an average weekly wage determined pursuant to KRS § 342.140 of $90, and, since he had two dependents, his income benefit factor under KRS § 342.730(1)(a) was 60%.12 The rule of C. E.

percent of [the employee's] average weekly wage." This percentage limitation also conflicts with the language of the definition section, KRS § 342.620(9)(1977).
1 541 S.W.2d at 933. Justice Lukowsky also noted, "A careful examination of these statutes will quickly establish that a sentence by sentence dissection and attempted reconciliation would serve only to confound confusion in a field replete with inconsistency." Id. at 934.
10 Id. at 934.
12 At the time the Mills employee was injured, KRS § 342.730(1)(a) provided total disability benefits of "55 percent of [the employee's] average weekly wage during such disability, and two and one-half percent of his average weekly wage for each dependent
Pennington Co. v. Winburn\(^\text{13}\) required that his benefits be calculated in the following manner: average weekly wage *times* income benefit factor *times* percentage disability *equals* benefits payable, *reduced*—if necessary—to the maximum benefit payable of 60% of the state average weekly wage as provided by KRS § 342.740(1).\(^\text{14}\) The claimant in *Mills* contended that he was entitled to the maximum benefits of $84 per week because he had lost all his wages by reason of 100% disability. The Workmen's Compensation Board denied the lost wages claim and set benefits under the *Pennington* rule at $54 per week.\(^\text{15}\)

On appeal, the court of appeals embraced the lost wages theory, and held that the claimant was entitled to maximum benefits. According to the *Mills* court, the question involved only statutory construction. The court found that the provisions of the disability definition section (KRS § 342.620(9)) and the computation section (KRS § 342.730(1)(a)) were conflicting. The former seemed to allow lost wages compensation while the latter limited compensation to a percentage of the employee's average weekly wage. Where two statutes conflict, *Mills* said, courts must harmonize them and give effect to both where possible.\(^\text{16}\) The court of appeals then concluded:

> In applying the above-mentioned guidelines for statute construction, this Court is of the opinion that two separate methods were intended and provided for by the Legislature and that the claimant is entitled to receive benefits under the method providing the greater return, subject to the maximum set forth in KRS 342.740.\(^\text{17}\)

One week later, the court of appeals extended the lost wages concept to permanent partial cases in *Bartley & Bartley Coal Co. v. Ratliff*.\(^\text{18}\) The claimant's average weekly wage was up to a maximum of three.\(^\text{19}\) See 1976 Ky. Acts ch. 160, § 9(1)(a) (current version at KRS § 342.730(1)(a) (1977)). The present statute eliminates the calculation for dependents and provides a straightforward benefit of two-thirds of the average weekly wage of the employee. See KRS § 342.730(1)(a) (1977).

\(^{13}\) 537 S.W.2d 167 (Ky. 1976).

\(^{14}\) Id. at 168 n.1.


\(^{16}\) Id. (citing General Motors Acceptance Corp. v. Shuey, 47 S.W.2d 968, 970 (Ky. 1932)).

\(^{17}\) Id.

$200; his income benefit factor was 62.5%; and his percentage disability was 60%. Under Pennington’s construction of KRS § 342.730(1)(b), the computation section for permanent partial disability, the claimant would have been entitled to a weekly benefit of $75. The court of appeals again disagreed with the Board’s award:

In [Apache] the Supreme Court of Kentucky held that it is the duty of the Board to compute benefits upon (1) actual wage loss and (2) weekly benefits under the percentage of occupational disability formula set forth in Pennington . . . and to award the greater of the two as benefits, not exceeding the maximum. . . . The wage loss of $200.00 per week [due to 60% disability plus 40% prior active disability] would exceed the $75.00 per week under Pennington . . . so as to make the weekly benefits on the wage loss theory $200.00 per week, reduced to the maximum $84.00 per week.19

The court of appeals reaffirmed the lost wages concept in Transport Motor Express, Inc. v. Finn.20 In that case, the court, relying primarily on Mills, Bartley & Bartley, and Apache,

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19 Id., slip op. at 2-3.

Another significant aspect of Transport Motor Express is that it departed from apportionment principles set forth by the Supreme Court in Young v. Fulkerson, 463 S.W.2d 118 (Ky. 1971). Under Transport Motor Express, the Special Fund is only responsible for the difference between the maximum benefits and the benefits (before any reduction to the statutory maximum) that would be payable by the employer in a case where the Special Fund was not a party. Thus, if an employee has a rather high average weekly wage, the employer may pay considerably more than its proportionate share of the disability award vis-a-vis the Special Fund.

Suppose, for example, that an employee injured in 1978 has an average weekly wage of $300, that he is 80% disabled, and that half of his disability is due to a pre-existing dormant condition aroused into disabling reality by a work-related injury. Under KRS § 342.730(1)(b), his benefits are $300 times 66.67% times 80%, or $160. This exceeds the maximum allowable benefit of $112 per week. Transport Motor Express requires that the employer's responsibility be satisfied off the top, so that the employer will be liable for $300 times 66.67% times 40% (half the disability), or $80. The Special Fund is liable only for the remaining $42 of the maximum benefits. The employer therefore ends up paying over 70% of the actual benefits received by the claimant.

This result twists the statutory scheme of apportionment and is directly contrary to Young v. Fulkerson, 463 S.W.2d 118 (Ky. 1971), which held that the "employer is responsible for the portion of the award ascribable alone to the subsequent injury." Id. at 120. The proper method of determining apportionment should be to determine the award first, reduce it to the maximum benefits if necessary, and then allocate the proportionate liability between the employer and the Special Fund according to their respective responsibilities.
reaffirmed that the amount payable to a disabled worker is to be the greater of (1) lost wages or (2) income benefits under Pennington, subject in either event to the statutory maximum set by KRS § 342.740(1).

III. THE IMPACT OF THE LOST WAGES CASES

The lost wages cases balloon the exposure of employers and insurers. In cases of permanent total disability, the lost wages doctrine results in the following consequences in 1978: (1) benefits payable to employees earning less than $112 per week will be increased by fifty percent; (2) benefits payable to employees earning from $113 to $140 per week will be increased from twenty to fifty percent; (3) benefits payable to employees earning from $141 to $168 will be increased by up to twenty percent; and (4) benefits payable to employees earning more than $168 will be unaffected. The doctrine's effect on permanent partial cases resists easy quantification, but here too the lost wages concept translates into substantially greater liability for employers and insurers. If the decline in lost wages is roughly commensurate with the percentage disability, the increase in benefits payable will correspond to the increases for various wage levels under permanent total disability. If the percentage decrease in earnings is greater than the percentage disability, then in many cases benefits may be increased by more than fifty percent.

Subject to the maximum benefits provision of KRS § 342.740(1), the lost wages doctrine means that in permanent total cases, the employee will receive his entire lost income, rather than two-thirds of his lost income. In permanent partial

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21 These computations can be illustrated as follows. Suppose an employee injured in 1978 earning $100 per week is totally disabled. Under KRS § 342.730(1)(a), his benefits will be $100 X 66.67% = $66.67. But under the court of appeals' lost wages doctrine, his benefits will be $100 per week, an increase of 50%. Similarly, an employee earning $120 per week would be entitled to benefits of $80 per week under KRS § 342.730(1)(a) - $120 X 66.67% = $80. Under the lost wages doctrine, however, he will receive the maximum benefits of $112 per week, an increase of 40%.

22 These computations can be illustrated as follows. Suppose an employee injured in 1978 has an average weekly wage of $200 and is 25% disabled by a work-related accident. Under KRS § 342.730(1)(b) his benefits will be $200 X 66.67% X 25% = $33.33. But his decline in wages, if equal to his percentage disability, will be $50, or $200 X 25%. The increase in exposure under the lost wages doctrine is equal to the difference between $50 and $33.33.
cases, the doctrine means that the employee can recoup any lost income up to the statutory maximum regardless of his degree of disability as determined by the Workmen's Compensation Board. The crucial point is that in all cases where the method of computation makes any difference, the lost wages doctrine will increase the benefits payable to the employee.

IV. THE JURISPRUDENCE OF THE LOST WAGES CASES

A. Realism

These statistics do not preface a jeremiad about insurance rates, economic growth, and industry exodus. However, it is disquieting that none of the lost wages cases mentioned them. It might be suggested that the financial impact of the workmen's compensation statute is the business of the legislature and not the courts. But that contention can claim neither historical nor doctrinal legitimacy. Kentucky courts have been fashioning a common law of workmen's compensation for years—and properly so.

However, the lost wages doctrine can trace its origins no

23 An illustrative case is Davis v. Comer, 532 S.W.2d 12 (Ky. 1975), in which the Court protests that "we did not write this law, and it is neither our responsibility nor our prerogative to shore it up against the tides of inequity. The legislature opened the door, and it is up to the legislature to close it if it so desires." Id. at 14.

21 See, e.g., Young v. Fulkerson, 463 S.W.2d 118 (Ky. 1977), see note 20 supra for a discussion of Young; Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968), see notes 55-64 and accompanying text infra for a discussion of Osborne.

25 The suggestion that a court should not concern itself with whether a literal application of a statute produces inequitable results would seem to make sense only if it is assumed that the legislature intended a manifestly inequitable or unreasonable result. But when there is no evidence of such a legislative purpose, it is ostrich jurisprudence to recognize inequity and yet adopt a construction of a statute that fails to correct it. Cf. Fidelity & Columbia Trust Co. v. Meek, 171 S.W.2d 41, 48 (Ky. 1943) ("[w]e cannot bury our heads in the sand and say that we do not know that it has always been the common practice of prudent business men to invest their funds in such stocks..."").

Statutory language drafted in response to a broad range of problems may often encompass situations quite unlike those types of cases which most concern the draftsmen. However, concern with a major aspect of a problem may lead the legislature to overlook the combined effect of several different statutory provisions. When an apparently unanticipated application of a statute is in the offing, a court should attempt to reconcile the interpretation of the statute in marginal situations with the legislative purpose evidenced by the paradigm cases to which the statute speaks. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1156-57, 1200, 1220-21, 1414-15 (1958).
further than dictum in *Apache*. The Workmen's Compensation Board implemented the doctrine only at the insistence of the court of appeals. Nothing seems to suggest that the General Assembly sought to enforce a new and onerous liability when it amended the statute in 1972. In these circumstances attention to practical policy considerations is mandatory; it blinks reality to describe the task of deciding the lost wages issue as "purely one of statutory construction."

**B. The Plain Meaning Rule**

The decisions in *Apache* and *Mills* proceed as if the "plain meaning" of a statute's literal terms obviated the need for further analysis. But the literal meaning of a statute is no more than the meaning that is most linguistically probable. The literal terms of a statute do not preclude the possibility that the General Assembly employed a particular collocation of words to effect a somewhat different purpose than that which might be inferred from the definitions of an unabridged dictionary. Both *Apache* and *Mills* accepted the term "lost wages" at face value, without appropriate attention to the structure of the statute (the definitions section versus the computation section), to the relevance of other statutory provisions (the compatibility of the lost wages doctrine with the total disability benefits provision of KRS § 342.730(1)(a)), or to the impact of the doctrine on employers. In other decisions, the Kentucky Supreme Court has tempered the literal force of

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26 See Part V(A) *infra* for a discussion of the legislative purpose of the statute.

27 *Apache* moved directly from citing the statute to its dictum on lost wages. 541 S.W.2d 933, 934 (Ky. 1976). *Mills* relied only on its own "close reading" of the definitions section. No. CA-265-MR, slip op. at 3.

28 Literal meaning is the meaning carried by language when it is read in its dictionary sense unaffected by considerations of particular context. Although literal meaning sometimes coincides with . . . true meaning, as where language is read out of context or where its meaning is unaffected by the context in which it is or should be read, more often that context yields a meaning significantly different from its literal meaning. R. Dickerson, *The Interpretation and Application of Statutes* 38 (1975).

29 See note 25 *supra* where the importance of the practical application of statutes is discussed.

30 See notes 38, 40 *infra* and accompanying text for discussion of this distinction.

31 See note 68 *infra* and accompanying text where this compatibility is discussed.

32 See Part III *supra* for a discussion of this impact.
statutory language in order to avoid unreasonable results.\textsuperscript{33}

The plain meaning approach to statutory construction begs the question. In every case the issue is which meaning is "plain." To say that one possible interpretation is "plain" and that another possible interpretation is "not plain" obscures the decision-making process. A court which interprets the terms of a statute "literally," without inquiring whether that literal meaning is consistent with the history and purpose of a statute, may thwart rather than implement the legislature's intent.

\section*{C. Stare Decisis}

The lost wages cases adhered to the principle of stare decisis perhaps too readily. Both \textit{Bartley & Bartley} and \textit{Transport Motor Express}, for example, transmuted dictum

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\begin{itemize}
\item For examples of perceptive and necessary exercises of lawmaking power, see Reed v. Reed, 457 S.W.2d 4 (Ky. 1970) and Colley v. Colley, 460 S.W.2d 821 (Ky. 1970), in which the Court left no doubt that the Kentucky common law of divorce as declared by the Court would govern awards of alimony and restoration of property, rather than the statutes pertaining to those subjects. Similarly, in Fidelity & Columbia Trust Co. v. Meek, 171 S.W.2d 41 (Ky. 1943), the question was whether the enactment of a statute allowing a trustee to invest in "interest bearing securities" permitted investment in dividend-paying stocks. The problem was made difficult because the previous version of the statute had specifically authorized investment in dividend-paying stocks. Noting that it "would be unreasonable to say that the legislature had any intention of making such investments unlawful," the Court said:

"The intent of the lawmakers is the soul of the statute and the search for this intent we have held to be the guiding star of the court. It must prevail over the literal sense and the precise letter of the language of the statute."

So it has always been a recognized power of the courts in the construction of a statute to delete or interpolate words to prevent an absurd consequence or to resolve an ambiguity in order to carry into effect the spirit, purpose and intent of the lawmakers.

\textit{Id.} at 48 (quoting Bridgeman v. City of Derby, 132 A. 25, 27 (Conn. 1926)).

The United States Supreme Court has been no less flexible. In Price v. Johnston, 334 U.S. 266 (1948), the Court held that although the literal terms of 28 U.S.C. § 394 guarantee all litigants an "otherwise unqualified right" to pro se appellate argument, that right can "be circumscribed as to prisoners [seeking habeas corpus] where reasonable necessity so dictates." 334 U.S. at 285-86. And in Standard Oil Co. v. United States, 221 U.S. 1 (1911), the Court announced the famous "rule of reason" antitrust analysis and specifically noted that § 1 of the Sherman Act does not embrace "every contract . . . in restraint of trade . . ., but simply imposes the plain duty of applying its prohibitions to every case within its literal language." 221 U.S. at 63. See 221 U.S. at 63-70. \textit{See also} United States v. American Trucking Ass'n, 310 U.S. 534, 543-44 (1940) ("even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words'").
\end{itemize}
from \textit{Apache} into a mandate for the lost wages doctrine.\textsuperscript{34} But the fact that a single prior opinion exists should be insufficient to invoke stare decisis. One rogue opinion may deprive the law of the accumulated expertise that stare decisis safeguards.

In \textit{Transport Motor Express} the court sat \textit{en banc}—the classic occasion for reevaluation of decisions by separate panels. The majority opinion solidified the lost wages doctrine by citing \textit{Apache} and the still-warm panel decisions in \textit{Mills} and \textit{Bartley \& Bartley}.\textsuperscript{35} This rigid application of stare decisis does not comport with the purpose of the principle of stare decisis:

\begin{quote}
\textit{Stare decisis} embodies an important social policy. It represents an element of continuity in the law, and is also rooted in the psychologic need to satisfy reasonable expectations. But \textit{stare decisis} is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.\textsuperscript{36}
\end{quote}

\textsuperscript{34} The court in \textit{Bartley} said under \textit{Apache} it is the duty of the Board to compute benefits upon either (1) actual wage loss or (2) weekly benefits under the percentage of occupational disability formula set forth in \textit{Pennington}. No. CA-129-MR, slip op. at 2. \textit{Transport Motor Express} merely cited \textit{Apache} without further ado. No. CA-1087-MR, slip op. at 4.

\textsuperscript{35} No. CA-1087-MR, slip op. at 4. The court of appeals also cited \textit{Liberty Engineering \& Mfg. Co. v. Granger}, 548 S.W.2d 845 (Ky. App. 1977), a case which involved an employee who had suffered an injury of appreciable proportions but who returned to work at an increase in pay. \textit{Liberty Engineering} certainly does not support the lost wages doctrine developed in \textit{Apache}, \textit{Mills}, and \textit{Bartley}. Indeed, it is fully in accord with the alternative theory of lost wages advanced later in this article. See Part V and note 67 infra.


Difficulty with \textit{stare decisis} also cropped up in decisions concerning survival of benefits. KRS \$ 342.730(4) provides that when an employee entitled to disability benefits "dies from causes other than the injury before the expiration of the compensable period specified," his remaining benefits shall be paid to certain survivors. In \textit{Yocom v. Chapman}, 542 S.W.2d 510 (Ky. 1976), the Supreme Court held that this section permitted a widow, whose husband had been awarded benefits for occupational disease for 425 weeks, to collect the remainder of his benefits when he died from causes unrelated to the disease before the 425 weeks were up. This result was entirely correct, since the 425 weeks was the "compensable period specified." \textit{Id.} at 511.

In \textit{Wagoner v. King}, No. 75-988 (Ky. Oct. 15, 1976) (mem. per curiam), however, the Supreme Court extended survival of benefits to a case in which the employee suffered a work-related injury and subsequently died from causes unrelated to the injury. The employee, who was totally disabled, had been awarded benefits pursuant to KRS \$ 342.730(1)(a), which sets no time limit on benefits, but provides instead that benefits will be paid "during such disability." That disability, of course, ended when
Judge Park's perceptive dissent correctly challenged the court to explain its prior holdings.  

D. Maxims of Construction

The decision in Mills v. Parsley stands as the most defensible of the lost wages cases. There the court of appeals did not purport to rely on Apache and could not rely on its own prior decisions. Confronted with a perceived conflict between KRS § 342.620(9) and KRS § 342.730(1)(a), the court declared its duty to be to "harmonize them and give them such construction as will give effect to each if possible."  

It is not clear that Mills "harmonized" the definitions section of the workmen's compensation law with the computation section. The court of appeals could have reconciled the two sections by construing the "lost wages" of the definitions section to mean a method of determining whether and to what extent an individual is disabled. "Body functional disability benefits," as used in the final sentence of KRS § 342.620(9), would then mean benefits allowable for occupational disability when an employee's work life is shortened by a compensable injury that causes no present decrease in wages.

This construction of the statute produces "harmony" because the definitions section would be read as describing the conditions under which a person may be considered "disabled," while the computation section is read as prescribing...
ing the method of figuring the amount of benefits payable. By contrast, Mills produced no harmony; it made the two orchestras play in different rooms, and gave the employee tickets to both performances.

One point of view is that maxims of construction "are useful only as facades, which for an occasional judge may add lustre to an argument persuasive for other reasons."40 Mills, however, failed to adduce any reason other than the principle of statutory harmony for its result, a critical omission considering the influential role Mills played in subsequent decisions. Not only did Mills neglect to explore fully the potential of its chosen maxim, it also ignored at least three other equally applicable maxims of construction that would have led to a different result.

One such maxim surfaced in Yocom v. Reid,41 a compensation case decided on the authority of "an unbroken line of cases holding that as a matter of statutory construction, the specific provisions of a statute take precedence over the general."42 Mills could have held that the specific provisions of the computation section should prevail over the general entitlement language of the definitions section. A second principle of construction would also have generated a different result. An agency's construction of the statute it administers should be respected by a reviewing court;43 Mills could have accepted the Board's conclusion that lost wages were not meant as a measure of compensation. Finally, Mills could have ruled that the computation section prevailed on the theory that "[w]here there is an irreconcilable conflict between different parts of the same act, the last in order of position must control."44

42 Id., slip op. at 5. (citing Kentucky Trust Co. v. Department of Revenue, 421 S.W.2d 854, 856 (Ky. 1967)).
43 See, e.g., Udall v. Tallman, 380 U.S. 1, 16 (1965).
44 See, e.g., Gish v. Shaver, 131 S.W. 515, 516 (Ky. 1910).
V. AN ALTERNATIVE READING OF THE LOST WAGES LANGUAGE

The lost wages cases, swarming with amici curiae are bound to come buzzing into the Supreme Court next year. Citing Apache, the claimants will belittle the dispute as a case of second impression. The insurance companies and employers will parade the usual horribles that follow increased labor costs. And the Supreme Court will confront the most difficult of judicial tasks—the application of a statute in circumstances apparently not anticipated by the legislature.

A. The Genesis of the Lost Wages Dispute

Prior to the 1972 amendments to the workmen’s compensation law, a claim for compensation in the full amount of lost wages would have been considered frivolous. Prior to 1972, Kentucky law expressly limited compensation for total, temporary or partial disability to a percentage of either the employee’s weekly wages or the state’s average weekly wage. An argument that the General Assembly meant to offer an employee the greater of lost wages or percentage benefits must be predicated on the 1972 amendments, in which the lost wages language first appeared.

When the General Assembly amended the statute, it probably had no inkling that its action made lost wages compensation (as that term is used in Mills) a practical possibility. At the time, every state paid compensation equal to a percentage of an employee’s former wages, a practice that has remained unchanged. Kentucky itself paid compensation in amounts no greater than two-thirds of the employee’s pre-disability weekly

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4 KRS §§ 342.095-.110, reprinted in Legislative Research Commission, Kentucky Workmen’s Compensation Law Annotated 44-52 (1970) (repealed 1972 Ky. Acts ch. 78, § 36). KRS § 342.095(2) limited compensation for total disability to “fifty-five percent of eighty-five percent of the average weekly wage of the state.” A ceiling of “fifty percent of eighty-five percent of the average weekly wage of the state” was placed on compensation for temporary partial disability under KRS § 342.100(2). KRS § 342.110(3) provided benefits for permanent partial disability equal to “sixty-six and two-thirds percent of the average weekly earnings of the employee, subject to the limitations [of the maximum benefits], multiplied by the percentage of disability.”

4 1972 Ky. Acts. ch. 78, §§ 2(9), 14(1)(b) (codified in KRS §§ 342.620(a), 730(1)(b) (1977)).

wages. Given this history, it is hardly unfair to conclude that the Mills version of lost wages compensation is an application of the statutory language that was never anticipated by the legislature.

This conclusion is buttressed by the fact that the General Assembly expended considerable effort in the 1972 amendment of provisions governing payments for permanent total disability, now codified, except for the higher percentage limitation, as KRS § 342.730(1)(a). Yet in a lost wages world, KRS § 342.730(1)(a) is a statutory derelict; a totally disabled employee will never choose benefits under KRS § 342.730(1)(a) when he can claim lost wages under Mills.

Moreover, until required by the court of appeals to award lost wages compensation, the Workmen’s Compensation Board continued to limit benefits to a statutory percentage of former wages as prescribed by KRS § 342.730(1)(a) and (1)(b). If lost wages compensation were contemplated by the General Assembly, we surely would have had some contemporaneous discussion of the radical departure from prior state policy and national practice, some legislative reluctance to waste time on a meaningless total disability benefits section, some objection to the staggering new liability imposed, or some action by the Board between 1972 and 1977 signifying its understanding that the rules had been changed. We had none.

B. Lost Wages as a Multiplier

A statute ought to be presumed to be the work of reasonable men pursuing reasonable purposes. The question thus immediately presents itself: If the General Assembly in 1972 did not mean to allow compensation in the full amount of lost wages, what reasonable purpose or policy explains the existence of the lost wages language in KRS § 342.620(9) and KRS...
§ 342.730(1)(b)? The answer is that "lost wages" was meant to preserve the pre-1972 policy of awarding benefits based on the greater of (1) percentage disability determined primarily by comparing pre-injury to post-injury earnings; or (2) in those cases in which the injury causes no present decrease in wages, a percentage disability calculated to reflect the reduction in the employee's future earning capacity traceable to the expected effects of a current injury. That is, "lost wages" was meant by the legislature to be no more than a method of determining the degree of disability.

The 1976 Supreme Court case of Blankenship v. B & B Coal Co. adumbrates this approach to the lost wages language of the statute. There the claimant sustained an occupational disability set at 80% by the Workmen's Compensation Board. The Supreme Court said: "[Blankenship] is to receive his actual lost wages or his future occupational impairment, whichever is greater." Yet in calculating the claimant's "lost wages," the Supreme Court did not simply subtract post-injury earnings from pre-injury earnings and order an award in that amount. Instead, the Court looked to the difference in earnings in order to establish the percentage of disability and treated "lost wages" as merely another factor to be plugged into the disability benefits formula of KRS § 342.730.

Blankenship does not require that lost wages be treated as a percentage multiplier—any more than Apache requires full payment of pre-disability earnings. Both cases actually focused on other issues, and their abbreviated treatment of the lost wages issue can hardly be regarded as dispositive. Nevertheless, Blankenship is important, if only because it shows that Apache was not the Supreme Court's last or unequivocal pronouncement on the lost wages controversy.

C. Lost Wages Reprise

The presence of the lost wages language in the workmen's compensation statute is fully explained by reference to the landmark case of Osborne v. Johnson. Osborne is no stranger
to practitioners in the field. Prior to the 1972 amendments, *Osborne* was at least as important as the statute in determining the law of workmen’s compensation. This was because *Osborne* distilled from a large number of prior cases a comprehensive set of rules to be followed by the Board and the courts in determining the level of benefits to be paid an injured worker. It was from *Osborne* that the legislature took the lost wages language that now appears in KRS § 342.620(9) and KRS § 342.730(1)(b).

The *Osborne* Court began with the proposition that "disability," as used in the workmen’s compensation law, means *occupational* disability as distinguished from functional disability (mere bodily impairment).⁵⁶ Thus, although the claimant in *Osborne* suffered a bodily impairment of functional disability of only 15%, the nature of the disability coupled with the availability of employment in the local market rendered him unemployable and therefore eligible for total disability benefits. This redefined focus on occupational disability led the Court to the conclusion that "all that need be determined in a compensation case, as concerns disability, is: To what extent has the injured workman’s earning capacity been impaired?"⁵⁷

*Osborne* then established two rules for the determination of the percentage disability. The Court first considered the case in which the workman is unable to return to his former job or to obtain employment at a wage rate equal to that of his former job:

If the Board finds that the workman is so physically impaired that he is not capable of performing any kind of work of regular employment, or if the Board finds that regular employment in the kind of work the man can perform is not available on the local labor market, the man will be considered to be *totally* disabled. Otherwise he will be considered to be only *partially* disabled. And the *percentage* of his partial disability will be determined by the ratio of the prevailing

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⁵⁶ *Id.* at 802.
⁵⁷ *Id.* at 803. *Osborne* was also significant in that it led a departure from the rule that disability would be determined with reference to a workman’s usual employment. After *Osborne*, disability was determined according to an employee’s earning capacity at any job available in the local market area. See Couliette v. International Harvester Co., 545 S.W.2d 936 (Ky. 1976).
wage rates in the kind of employment available to him, to the wage rates earnable by him before being injured.\textsuperscript{58}

The Court then approved a second method for determining the percentage disability in those cases where an employee suffers a rather substantial injury yet is able to return to his former job or to work at alternative employment that pays as well as his former job. It might be argued that, in such a case, the workman had suffered no disability. However, the Court noted, "to adopt such a proposition would be to treat earning capacity as being static and perfectly measurable . . . and to ignore the attrition from the mere passing of the years."\textsuperscript{59} Instead the Court held:

While a workman who has sustained a permanent bodily injury of appreciable proportions may suffer no reduction of immediate earning capacity, it is likely that his ultimate earning capacity will be reduced either by a shortening of his work life or a reduction of employment opportunities through a combination of age and physical impairment. Accordingly, it is our opinion that in those instances in which the workman has sustained no loss of immediate earning capacity but has incurred a permanent injury of appreciable proportions, the Workmen's Compensation Board, under [the permanent partial disability benefits statute], can and should make an allowance for some degree of permanent partial disability on the basis of the probability of future impairment of earning capacity as indicated by the nature of the injury, the age of the workman, and other relevant factors.\textsuperscript{60}

When the lost wages language of the 1972 amendments is read in light of the Osborne decision, the General Assembly's purpose seems transparent. As used in KRS § 342.620(9) and KRS § 342.730(1)(b), the term "lost wages" refers to a method of determining percentage disability by comparing "the ratio of the prevailing wage rates in the kind of employment available to [the employee], to the wage rates earnable by him before being injured."\textsuperscript{61} But when an employee suffers an appreciable injury without an immediate decrease in earnings, he

\textsuperscript{58} 432 S.W.2d at 803 (emphasis in original).
\textsuperscript{59} Id. at 804.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 803.
may be awarded "body functional disability benefits," i.e., benefits on account of a physical impairment that decreases earning capacity "because his injury may reduce his ability to do some kind of gainful work in the future." Both methods of determining the percentage disability, of course, derive from the central concept of occupational disability as opposed to functional impairment. As explained by the Osborne Court:

The degree of disability depends on impairment of earning capacity, which in turn is presumptively determined by comparing pre-injury earnings with post-injury earning ability; the presumption may, however, be rebutted by showing that post-injury earnings do not accurately reflect claimant's true earning power.

The relationship between lost wages and Osborne was made clear by the Supreme Court in Volk v. Restaurant Concessionaires, Inc., which has curiously escaped comment in all the lost wages cases. In Volk, the claimant had been awarded benefits by the Board based on a finding of 10% permanent partial disability. The claimant contended that she was entitled to benefits in the full amount of lost wages, but the Supreme Court rejected the contention in no uncertain terms:

Mrs. Volk's counsel argues that since, during the 10-week period Mrs. Volk worked after the accident, she earned 21.4 percent less in wages and tips than she earned in a comparable period before the accident, a reduction of at least that percentage in her "earning capacity," within the meaning of Osborne v. Johnson . . ., has been conclusively established, and that since she subsequently has earned nothing at all she has established a complete loss of her earning capacity. The argument is not valid, because it rests on the erroneous premise that actual loss of earnings is the equivalent of loss of

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63 The concept of occupational disability was itself expanded in Haycraft v. Corhart Refractories Co., 544 S.W.2d 222 (Ky. 1976). There, the Court held that the definition of "injury" in KRS 342.620(1) includes the situation where "the nature and duration of the work probably aggravated a degenerative disc condition to the degree that it culminated in an active physical impairment sooner than would have been the case had the work been less strenuous," even though the condition was neither precipitated nor aroused by any specific work-related incident. Id. at 225-28.
64 432 S.W.2d at 802 (quoting 2 A. Larson, The Law of Workmen's Compensation § 57.00 (1976)) (emphasis added).
65 476 S.W.2d 195 (Ky. 1972).
earning capacity. . . . An actual loss of wages may be evidence on the question of what would be the earning capacity of a person who has the physical disability claimed by the worker in question, but it is not proof that such physical disability does in fact exist.88

D. Statutory Mysteries

The theory of lost wages just advanced solves a number of statutory mysteries that confound the Mills lost wages doctrine. The first problem appeared in Mills itself. In that case, the claimant was totally disabled. The difficulty with a lost wages award when the claimant is totally disabled is that, while the permanent partial benefits provision of KRS § 342.730(1)(b) mentions lost wages, the immediately preceding subsection—which governs benefits for total disability—contains no reference to lost wages. Any entitlement to lost wages compensation in a total disability case must be derived from the definitions section. But the simultaneous absence and presence of lost wages language in the first two subsections of KRS § 342.730(1) amount to rather strong evidence that the legislature did not intend to pay lost wages benefits—whatever they are—in cases of total disability. And it proves too much to contend that the definitions section makes mention of lost wages in KRS § 342.730(1)(a) unnecessary. If that were so, the General Assembly’s use of the term in KRS § 342.730(1)(b) was redundant.

The alternative view of lost wages advanced here creates no such anomaly. If lost wages is read to be a method of determining the degree of disability, then it would not have been useless for the General Assembly to employ the term in KRS § 342.730(1)(b) while omitting it from KRS § 342.730(1)(a). The

88 Id. at 196-97.
89 This reading of the statute’s lost wages language is supported by the court of appeals’ decision last year in Liberty Engineering & Mfg Co. v. Granger, 548 S.W.2d 845 (Ky. App. 1977), when the court noted that “[u]nder Osborne v. Johnson . . . loss of earnings was established as the measure of occupational disability.” Id. at 846. It is also implicitly adopted in C. E. Pennington Co. v. Winburn, 537 S.W.2d 167 (Ky. 1976). There, the claimant’s pre-injury earnings were $314 per week; his post injury earnings were $160 per week. Under the Mills lost wages theory, he should have been entitled to the then maximum benefits of $81 per week. But the Supreme Court approved benefits of $39.25 per week by using the percentage method of the computations section.
reason is that a totally disabled person, as defined by the Osborne decision, is one "so physically impaired that he is not capable of performing any kind of work" or one whose disabilities are such that "the kind of work the man can perform is not available on the local labor market." In such a case, of course, he will have lost 100% of his wages, and there is no need to compare the ratio of pre-injury to post-injury earnings to determine the degree of disability.

In a permanent partial case, however, it is necessary to compare earnings to determine the degree of disability when there is a current decrease in take-home pay. And if there is no current decrease, then the alternative of computing benefits based on the lifetime earning capacity of an individual who has suffered an injury "of appreciable proportions" becomes appropriate. But in either total or partial disability cases, the lost wages ratio only determines the degree of disability; the amount of benefits is determined according to the percentage formulae of the computations section.

The second difficulty that plagues the current lost wages doctrine is its inconsistency with the statutory policy of rehabilitation. Although Kentucky formerly made participation in rehabilitation programs voluntary and rewarded participation as an incentive, the state now requires participation and penalizes non-participation by slashing benefits of the recalcitrant employee by 50%.

The message from the General Assembly is clear. An employee is to be rehabilitated if possible, whether he likes it or not, rather than given the option of continuing to receive benefits. The Mills lost wages doctrine, however, undercut this policy of rehabilitation. Because compensation benefits are nontaxable, an employee is better off collecting his lost wages than he is returning to his former job if his wages would be below the maximum compensation allowed under KRS § 342.740(1). The lost wages doctrine undermines this work ethic.

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68 Osborne v. Johnson, 432 S.W.2d 800, 803 (Ky. 1968).
69 "One (1) of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment." KRS § 342.710(1) (1977).
71 See KRS § 342.710(3)-(5)(1977).
72 See I.R.C. § 104(a)(1).
by making it more rewarding to remain disabled than to be fully rehabilitated.

CONCLUSION

The proper approach to the lost wages dispute is not an unswerving application of the literal terms of the statute. Rather, attention to the documented history of the workmen's compensation statute, to the common law of workmen's compensation that channeled the legislature's language, to the purposes of the workmen's compensation law, and to the structure of the statute itself should be the aim of judicial craftsmanship. A decision-making process that is informed by those considerations leads inevitably to the conclusion that "lost wages" as used by the General Assembly is merely a means of determining the degree of disability and not the amount of benefits to which a claimant may be entitled.