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Kentucky Law Survey: Workmen's Compensation

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Workmen's Compensation

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In 1976, the Kentucky Supreme Court and practicing Bar found themselves still reeling from their efforts to interpret and apply the workmen's compensation legislation adopted by the 1972 General Assembly. No other area of Kentucky law has been so "worked carefully upon, beat soundly, thwacked repeatedly, drubbed, and assailed verbally."[1] This article will survey recent Kentucky cases which expose the infirmities of the Kentucky workmen's compensation system, infirmities which, for the most part, will respond to a poultice that only the General Assembly can apply.

I. Computation of Benefits

C.E. Pennington Co. v. Winburn[2] and *Apache Coal Co. v. Fuller*[3] were the two most important workmen's compensation cases decided by the Kentucky Supreme Court during the past survey year. The two cases interpret the Kentucky statutes which regulate computation of compensation benefits,[4] and both are cases of first impression.

The Workmen's Compensation Board awarded the employee in *Pennington* $39.25 per week for life for a 20 percent permanent partial disability, and the Fayette Circuit Court affirmed. The employer appealed, arguing, *inter alia*, that the Board had incorrectly calculated the benefits to be awarded under the applicable statutes—Kentucky Revised Statutes §§ 342.730 and .740 [hereinafter cited as KRS].

KRS § 342.730(1)(b) provides in part that in cases of permanent partial disability:

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[1] Kotsiris v. Ling, 451 S.W.2d 411, 412 (Ky. 1970).

[2] 537 S.W.2d 167 (Ky. 1976).

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

[4] The Kentucky statutes which regulate computation of benefits are: Ky. Rev. Stat. § 342.730, .740, and .610 [hereinafter cited as KRS].

[5] Sixty percent of the average weekly wage of the state is $81. *See* C.E. Pennington Co. v. Winburn, 537 S.W.2d 167, 168 (Ky. 1976).

> The compensation paid therefor shall be 55 percent of the average weekly earnings of the employe . . . and two and one-half per cent . . . for each dependent up to a maximum of three, *subject to the limitations contained in KRS 342.740*, multiplied by the percentage of disability . . . [emphasis added].

The employee had average weekly earnings at the time of his injury of $314. KRS § 342.740(1), to which KRS § 342.730(1)(b) makes reference, provides in part that:

> The minimum weekly income benefits for disability shall not be less than 20 percent . . . and the *maximum weekly income benefit shall not exceed 60 per cent . . . of the average weekly wage of the state as defined herein* [$81].[5]

Both the employer and the employee in *Pennington* agreed that the first step in calculating the employee's benefits under KRS § 342.730(1)(b) was to multiply the employee's weekly wage, $314, by 62.5 percent (55 percent plus 2.5 percent for each of his three dependents), which would equal $196.25. However, they disagreed as to the next step in calculating benefits. KRS § 342.730 directs that the weekly wage be multiplied by 62.5 percent, "subject to the limitations contained in KRS § 342.740 multiplied by the percentage of disability." The employer contended that KRS § 342.730 dictated that the $196.25 figure (62.5 percent x $314) be reduced to $81, since, on the basis of the statutory language, $196.25 was "subject to" the $81 limitation of KRS § 342.740. Thus, the issue was whether $196.25 or $81 should be multiplied by 20 percent (the employee's percentage of disability). Twenty percent of $81 yields $16.20 and twenty percent of $196.25 yields $39.25—a substantial difference when spread over a lifetime.[6]

In all cases of permanent partial disability, under the employer's construction of KRS § 342.730, an employee's weekly wage should be multiplied by 55 percent, plus 2.5 percent for each dependent (up to a maximum of three), and that figure, if more than $81, should be reduced to $81, and then multiplied

[6] Pennington was 39 years old and had a life expectancy of 28.9 years (1,502.8 weeks), according to the *American Experience Table of Mortality*. Weekly benefits of $39.25 amount to $25.05 more per week than weekly benefits of $16.20—a difference of almost $35,000 in additional benefits during Pennington's life expectancy.

by the percentage of disability. Under the employee's construction of KRS § 342.730, the weekly wage should first be multiplied by 55 percent plus 2.5 percent for each dependent (up to a maximum of three), then that figure should be multiplied by the percentage of disability, and then *that* figure should be reduced to $81, pursuant to KRS § 342.740, if it exceeds $81. The Kentucky Supreme Court, in a majority opinion by Justice Jones, agreed with the employee's construction of KRS § 342.740, stating:

> Pennington and its insurance carrier argue that the sum of $81.00 must be multiplied by the percentage of disability (20%) which would award Winburn the sum of $16.20, and that the board erred in not so doing. This Court is of the opinion that KRS 342.740 imposes no such limitation. Since the award of $32.25 per week to Winburn is under the maximum of $81.00 per week, the board's award was proper.[7]

Thus, the Court concluded that the $81 limitation of KRS § 342.740 was applicable only after all other calculations indicated in the statute yielded a figure in excess of $81. This approach would almost certainly be the correct one if the General Assembly had placed the "subject to" language of KRS § 342.730 at the end of the sentence. However, because the "subject to" language appears in the sentence after "compensation shall be 55 per cent of the average weekly earnings" and before "multiplied by the percentage of disability," the majority opinion's construction of KRS § 342.730 appears to be, in effect, a rewriting of the statute.

Justice Palmore in a dissenting opinion[8] with which Chief Justice Reed concurred, said that:

> Assuming that the drafter of the statute had some degree of proficiency in the use of the English language and had a conscious reason for this placement of the "subject to" phrase, it can only mean that the $81.00 limitation of KRS 342.740 applies to the percentage-of-wage figure, and not to the fraction of that figure represented by percentage of disability. I am therefore convinced that the majority opinion does not comport with the statute, for which reason I dissent.[9]

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[7] 537 S.W.2d 167, 168 (Ky. 1976).

[8] *Id.* at 168-69.

[9] *Id.* at 168.

While the majority of the Court in *Pennington* was doing its best to clarify that which defies clarification,[10] its construction of KRS §§ 342.730 and.740 will result in marked inequities. Consider, for example, two employees, both of whom have three dependents and an average weekly wage of $314. Assume that both employees receive work-related injuries which result in a 100 percent disability to one and a 41.3 percent disability to the other. Under the computation formula prescribed by *Pennington*, the totally disabled employee would receive the maximum benefit of $81 per week;[11] however, the employee with only a 41.3 percent disability would also receive an $81 weekly benefit.[12] If the $81 limitation of KRS § 342.740 were applied to the percentage-of-weekly-wage figure, the employee with the 41.3 percent disability would receive $33.45 in weekly benefits.[13]

In *Apache Coal Co. v. Fuller*,[14] the Court applied the formula it had developed in *Pennington* and further construed KRS § 342.740 in relation to KRS § 342.730. The Court held, in effect, that any employee with a work-related permanent partial disability is entitled, regardless of the percentage of his disability, to a minimum of $27 in weekly compensation benefits.

The employee in *Apache* had an average weekly wage of $170, and supported two dependents. The Board found that he had an occupational disability of 20 percent, and following the computation formula in *Pennington*, awarded him $20.40 per week.[15] The employee appealed to the circuit court, arguing that under KRS § 342.740, he was entitled to a minimum of

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[10] Justice Lukowsky said of these statutes, in Apache Coal Co. v. Fuller, 541 S.W.2d 933 (Ky. 1976):

> These statutes rival the Internal Revenue Code in complexity and contradiction.
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> . . . .
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> 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 already replete with inconsistency.

[11] $314 x 62.5 percent = $196.25, subject to the $81 limitation.

[12] $314 x 62.5 percent x 41.3 percent = $81.05, subject to the $81 limitation.

[13] $314 x 62.5 percent = $196.25, subject to the $81 limitation; $81 x 41.3 percent = $33.45.

[14] 541 S.W.2d 933 (Ky. 1976).

[15] $170 x 60 percent = $102 x 20 percent = $20.40.

"20 percent . . . of the average weekly wage of the state"[16] or $27. The circuit court agreed, and the Supreme Court affirmed, stating that:

> In *C.E. Pennington Co., Inc. v. Winburn* . . . we held that the maximum limitation applied to income benefits to be paid for partial disability not to the product of average weekly earnings multiplied by fifty-five to sixty-two and one half percent as the number of dependents might require. Following this rationale to its logical conclusion, we are of the opinion that the minimum limitation applies to income benefits to be paid for partial disability and not only to cases of total disability . . . .[17]

Apache, when applied by the Board, will result in inequities similar to those discussed above in connection with *Pennington*. Consider, for example, two employees, each of whom has two dependents and an average weekly wage of $170, as did the employee in *Apache*. Assume that both employees receive work-related injuries, and that one suffers a 25.5 percent disability while the other incurs a 1 percent disability. By computing their benefits under KRS §§ 342.730 and .740 as directed by the Court in *Apache*, both employees would receive $27 in weekly benefits.[18]

The impact of *Apache* is staggering. The employee in the above hypothetical with the 1 percent disability would be entitled to benefits of $1.02 per week under KRS § 342.730. With a life expectancy of 2194.4 weeks, he would receive $2,238.29 in lifetime benefits. However, when the $27 weekly minimum of KRS § 342.740 is applied to the partial permanent disability benefits of KRS § 342.730, the employee's lifetime benefits rise dramatically to $59,248.80. It hardly needs to be said that a statutory scheme is outrageous at best which permits an employee to receive as much as $60,000 for a 1 percent disability.

While the Court could have easily avoided the result it achieved in *Pennington* merely by giving § 342.730 a common sense construction, its construction of KRS § 342.740 in

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[16] KRS § 342.740(1).

[17] *Apache Coal Co. v. Fuller*, 541 S.W.2d 933, 935 (Ky. 1976).

[18] $170 x 60 percent = 102 x 25.5 percent = $26.01, which must be increased to $27, and $170 x 60 percent = $102 x 1 percent = $1.02, which must be increased to $27.

Apache was probably mandated by the express language of the statute. In the final analysis, however, the Court can hardly be faulted for the decision it reached in either case, since, even the Court has said:

> These statutes rival the Internal Revenue Code in complexity and contradiction. Their seeming internal inconsistency and inconsistency with each other is hypnotic and soporific.
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> . . . .
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> 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 already replete with inconsistency.[19]

Pennington and *Apache* precipitated dramatic rises in workmen's compensation insurance costs which, in turn, caused a public outcry by employers and their insurers. The Kentucky General Assembly addressed the problem by convening in special session in the fall of 1976 and, in effect, statutorily overruling *Apache*. It amended KRS § 342.730(1)(b) by adding the following language: "[N]otwithstanding any section of KRS Chapter 342 to the contrary, there shall be no minimum weekly income benefit for permanent partial disability." The amendment became effective on January 1, 1977. While *Apache* will not apply to work-related injuries or exposures after that date, it will continue to have a considerable impact on all claims for injuries or exposures arising between January 1, 1973 and December 31, 1976, which have not been finally adjudicated.

II. INDEPENDENT CONTRACTOR DEFENSE

In *Fields v. Twin City Drive-In*,[20] the Court ended speculation that independent contractors are "employees," within the meaning of the Kentucky Workmen's Compensation Act.[21] It

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[19] Apache Coal Co. v. Fuller, 541 S.W.2d 933, 934 (Ky. 1976).

[20] 534 S.W.2d 457 (Ky. 1976).

[21] The applicable provisions of KRS § 342.640 are as follows:

> The following shall constitute employees subject to the provisions of this chapter except as exempted under KRS 342.650:
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> (1) Every person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employes

held that they are not. The Court acknowledged that the Act contemplates that employment relationships arise out of express or implied contracts, but it said that: "It does not necessarily follow, however, that all persons working under a contract are employees as contemplated by the Workmen's Compensation Act."[22]

In *Elkhorn-Hazard Coal Land Corp. v. Taylor*,[23] the Court likened a lessor of mineral rights to an "owner" and a lessee to an independent contractor, and held that the lessor was not liable to an employee of the lessee for workmen's compensation benefits.[24] Elkhorn-Hazard had leased certain coal lands to M & A Coal Company and retained a royalty interest. Taylor, an employee of M & A, sought total disability benefits for pneumoconiosis. Since M & A was uninsured, Taylor also named the Uninsured Employers Fund and the Special Fund as defendants. An enterprising attorney for the Uninsured Employers Fund moved that the Fund be dismissed and that Elkhorn-Hazard be made a party defendant. The Uninsured Employers Fund's theory was that Elkhorn-Hazard was to be deemed a contractor pursuant to KRS § 342.610(2), which provides that a contractor who subcontracts all or a part of a contract shall be liable for the payment of compensation benefits to employees of the subcontractor.[25] Thus, the issue was whether the

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whether paid by the employer or employe, if employed with the knowledge, actual or constructive, of the employer.

[22] 534 S.W.2d 457, 458 (Ky. 1976). The Court further said: "The phrase 'contract of hire' does not add some magic quality to the basic concept of the Act. A sow's ear is a sow's ear, regardless of what it is called." *Id.* at 459. For an earlier discussion of "contracts of hire" *see* Duke v. Brown Hotel Co., 481 S.W.2d 289 (Ky. 1972). The "independent contractor" defense provided by *Fields* is, needless to say, important to attorneys who do workmen's compensation defense work.

[23] 539 S.W.2d 101 (Ky. 1976).

[24] It should be noted that the employee was not without ultimate relief, since he had a right to claim compensation benefits against the Uninsured Employers Fund.

[25] The exact language of KRS § 342.610(2) is as follows:

> A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employes of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. *A person who contracts with another (a) to have work performed consisting of the removal, excavation or drilling of soil, rock or mineral, or the cutting or*

lease executed by Elkhorn-Hazard to M & A Coal Company constituted a "contract," within the meaning of KRS § 342.610(2), to have work performed by M & A for Elkhorn-Hazard. The Court held, no doubt much to the relief of owners of Kentucky mineral interests, that a lessor under such circumstances is not a "contractor" who is liable to a lessee's (subcontractor's) employees for compensation benefits.[26]

III. WORK RELATED CHANGE IN THE HUMAN ORGANISM

Under the previous Workmen's Compensation Act,[27] in order to establish eligibility for benefits, an employee was required to prove that he had sustained a traumatic, personal, *injury* by *accident* which arose out of and in the course of his employment.[28] Under present law, an employee need only prove that he has sustained a "work related harmful change in the human organism . . . ."[29] While the definitional differences between the former and present statutes regarding what is compensable may be subtle, the current Act does bring within the realm of compensability many claims which formerly would have been dismissed.[30]

In *Yocom v. Pierce*[31] the Court was asked to decide whether, in the absence of an injury or accident, an employee's

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removal of timber from land, or (b) to have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation or profession of such person, shall for the purposes of this section be deemed a contractor, and such other person a subcontractor. This subsection shall not apply to the owner or lessee of land principally used for agriculture (emphasis added).

[26] The Court stated:

If this were a sale of coal in place to M & A Coal Company we do not think it could be contended successfully that the seller has an obligation to provide workmen's compensation coverage for the employees of the purchaser engaged in the mining of coal. Although this lease cannot technically be construed to be a sale of the coal deposit in place, the ownership of that part of the coal deposit actually separated from the surface and mined was transferred from the lessor to the lessee. This fact strengthens the conclusion that M & A Coal Company was not performing work for Elkhorn-Hazard under the lease.

Elkhorn-Hazard Coal Land Corp. v. Taylor, 539 S.W.2d 101, 104 (Ky. 1976).

[27] KY. ACTS ch. 77, § 2 (1952), *repealed by* KY. ACTS ch. 78, § 36 (1972).

[28] *Id.*

[29] KRS § 342.620(1).

[30] *See infra* note 33.

[31] 534 S.W.2d 796 (Ky. 1976).

nervous breakdown was a "work related harmful change in the human organism. . . ."[32] The claimant was an employee of a clothing manufacturer whose job required considerable concentration in matching different colors of thread with the threads in garments being manufactured. She claimed that the pressures of her job ultimately caused her nervous breakdown. The employer argued that compensation benefits should be denied in the absence of physical trauma. The Court disagreed and interpreted the present definition of compensable claims as reflecting an intent by the General Assembly to broaden the scope of compensability. The Court, therefore, affirmed an award to the employee.[33]

Although the level and kind of proof required to show an "accident" had become less stringent even prior to the present Act,[34] the Court has now made it clear that no accident or traumatic injury need be proven to establish the compensability of a claim. Of course, one must still establish through expert medical evidence that an employee's condition is work related,[35] except in heart attack cases.[36] The Court has held that in heart attack cases, the Workmen's Compensation Board may view the "totality of circumstances"[37] and make a finding as to whether the employee's heart attack was related to a "work-connected event,"[38] even in the absence of medical evidence.

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[32] KRS § 342.620(1).

[33] Under Kentucky law prior to 1972, a claim for compensation due to traumatic neurosis or other psychological disturbances was only honored upon a showing that the condition had arisen out of a traumatic injury to the employee. *See* Mays v. Potter & Brumfield, Inc., 427 S.W.2d 567 (Ky. 1968); E.I. DuPont De Nemours & Co. v. Whitson, 399 S.W.2d 734 (Ky. 1966).

[34] *See* Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969), in which the Court stated:

> Accidental result is enough to constitute an accidental injury.
>
> In short, a fortuitous unexpected injury to the workman, traceable to the performance of his work, is sufficient to provide the accidental quality demanded by our compensation statute.

[35] Medical evidence may not be required where it is within the realm of common knowledge that an accident suffered will cause a particular injury, *i.e.*, that a severe blow to the head will cause headaches, and that severe shock will produce nervousness. *See* Tatham v. Palmer, 439 S.W.2d 938 (Ky. 1969).

[36] *See* Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969).

[37] Moore v. Square D Co., 518 S.W.2d 781, 783 (Ky. 1975). For a discussion of *Moore, see* Patterson, *Kentucky Law Survey—Workmen's Compensation*, 64 KY. L.J. 307, 313-17 (1975).

[38] Moore v. Square D Co., 518 S.W.2d 781, 784 (Ky. 1975).

IV. SPECIAL FUND

The Court also decided in *Yocom v. Pierce*[39] that a claimant's preexisting "personality makeup or structure" could be a dormant disabling "disease *or* condition," within the meaning of KRS § 342.120, which would make the Special Fund liable in the event of the preexisting condition's arousal. Prior to the 1972 amendments to the Workmen's Compensation Act, liability had been imposed upon the Special Fund only in those cases involving the arousal of a preexisting "dormant nondisabling disease condition."[40] KRS § 342.120(1)(b) now makes the Special Fund liable in the event of an arousal of a preexisting "dormant disease *or* condition." The Court had held, prior to the adoption of the present Act, that a person's low emotional threshold and his preexisting personality makeup were not "disease conditions."[41] In *Yocom v. Pierce* the Court held that "there is no room for doubt that the statute now refers to a condition separate and apart from a disease."[42] Thus, an employee's preexisting personality makeup can now be a *condition* for which the Special Fund will be liable in the event of an arousal of the condition by a subsequent work-related event.

V. UNINSURED EMPLOYERS FUND

Questions continue to arise as to the proper procedures for an employee to follow in establishing that he is entitled to be paid benefits by the Uninsured Employers Fund.[43] In *Yocom v. Campbell*,[44] an employee was found to be permanently and totally disabled, and his award was apportioned 75 percent against the Special Fund and 25 percent against the employer. The order provided that all sums were to be paid by the Special

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[39] 534 S.W.2d 796 (Ky. 1976).

[40] For a discussion of the significance of the insertion of the word "or" between "disease" and "condition," *see* Yocom v. Gibbs, 525 S.W.2d 744 (Ky. 1975) and Patterson, *supra* note 37, at 311.

[41] *See* Yocom v. Tri-County Sanitation Service, Inc., 522 S.W.2d 850 (Ky. 1975); Yocom v. Fleming, 492 S.W.2d 194 (Ky. 1973); Merritt Clothing Co. v. Jewell, 459 S.W.2d 88 (Ky. 1970).

[42] 534 S.W.2d at 799.

[43] For a previous discussion of this matter *see* Patterson, *supra* note 37, at 309.

[44] 536 S.W.2d 470 (Ky. 1976).

Fund, subject to reimbursement by the employer. The Uninsured Employers Fund was made a party to the proceedings since the employer was uninsured and had not qualified as a self-insured. The Special Fund sought an order of reimbursement from the Uninsured Employers Fund prior to making any payments to the employee, in order to avoid the necessity of obtaining reimbursement from the employer through civil litigation. The Board and the lower court refused such an order, and the Kentucky Supreme Court affirmed, likening the Uninsured Employers Fund to a surety which has no duty to pay until the principal either fails to pay or is adjudicated unable to pay.[45] The Court held that until the Special Fund has made a payment to the employee on behalf of the employer and unsuccessfully sought reimbursement from the employer, the question of its rights against the Uninsured Employers Fund remains academic. Thus, the Court held that the issues were not properly joined. It noted further that the Board is not required to give advisory opinions based on hypothetical fact situations, and that there is no provision for an "administrative declaratory judgment" action.[46] If the order of the Board had not required the Special Fund to pay the sums assessed against the employer, subject to reimbursement, the employee could have recovered from the Uninsured Employers Fund only after he had reduced his award against the employer to judgment and found no property upon which to execute. The Court has wisely placed this burden upon the Special Fund instead of upon employees who are often in need of immediate benefits.

Other cases involving the Uninsured Employers Fund were *Davis v. Baker*[47] and *Davis v. Comer*.[48] Both cases involve the time at which the Uninsured Employers Fund can or should be made a party to the proceedings. In *Baker*, the Uninsured Employers Fund was not made a party until after the case had been submitted and briefed. The Fund moved to dismiss, claiming that it had been prejudiced by the delay in joining it, and that the Board lacked jurisdiction. The Board dismissed

[45] *Id.* at 471. The Court cited KRS § 342.760 and Davis v. Turner, 519 S.W.2d 820 (Ky. 1975) in support of this proposition.

[46] Yocom v. Campbell, 536 S.W.2d 470, 472 (Ky. 1976).

[47] 530 S.W.2d 370 (Ky. 1975).

[48] 532 S.W.2d 12 (Ky. 1975).

the employee's claim on the merits, but did not rule on the jurisdictional question raised by the Fund. The circuit court held on appeal that the Board had erred in dismissing the claim, and the matter was remanded to the Board with directions to enter a new opinion and order. The Uninsured Employers Fund appealed to the Kentucky Supreme Court, raising the issue of whether the Fund had standing to prosecute an appeal. In holding that it did the Court observed that the judgment remanding the case was an appealable judgment, and that the Fund had a "real and direct"[49] interest in the controversy since the Fund was a beneficiary of the Board's earlier order dismissing the claim, and, since the claimant had made the Fund a defendant before the Board.

In the *Comer* decision the claimant did not move the name the Uninsured Employers Fund as a party defendant until several months after the award had been entered. The Board denied the motion, and the claimant filed an action in circuit court against all of the parties, including the Uninsured Employers Fund, demanding that the Fund be required to pay the judgment. The lower court granted the claimant's petition and the Fund appealed. The Kentucky Supreme Court noted that the circuit court action was in the nature of an original proceeding to enforce an award. The employer had failed to pay the award, a writ of execution had been issued and returned *nulla bona*, and judgment was then entered against the Uninsured Employers Fund. In distinguishing an earlier case, *Travelers Insurance Co. v. Cole*,[50] the Court cited the difference between an original action in the circuit court under KRS § 342.285 and an *ex parte* proceeding under KRS § 342.305. In the former, it held that although the Fund may be made a party to the Board's proceedings, there was no statutory basis for a requirement that it must be made a party. Again, the Court pointed out that the Fund's liability does not arise until there has been a default in the payment of compensation due under the award.

Unfortunately, nothing in the statutes suggests when the Fund should be joined in compensation proceedings. The most plausible explanation given by the Court is that the "Legisla-

[49] Baker v. Davis, 530 S.W.2d 370, 373 (Ky. 1975).

[50] 336 S.W.2d 583 (Ky. 1960).

ture never thought of it."[51] To prevent such cases in the future, the Court suggested that the Board on its own initiative ought to make the Uninsured Employers Fund a party, when it discovers that the employer is not insured, so as to allow the Fund to defend against unmeritorious claims.

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[51] 532 S.W.2d at 14. The Court also said:

> We are fully aware that in the shark-infested waters of workmen's compensation litigation there may be fraud and collusion between claimants and noncovered or otherwise judgment-proof employers. However, 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.