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Kentucky Law Survey: Workmen's Compensation

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Workmen’s Compensation
By W. R. Patterson, Jr.*

INTRODUCTION

This survey of appellate decisions should be prefaced with a caveat. Many of the Kentucky Court of Appeals’ opinions during the 1974-75 term are irrelevant to the present or future practice of workmen’s compensation because the statutes under which they were decided were radically revised in 1972. While the “new” Act provides a cornucopia of benefits, it also poses numerous questions which will require judicial interpretation. Although there is ample fuel for future appellate controversy, only a few of these important problems have reached the attention of our highest Court. Only those cases during the preceding term which seem to indicate trends for the future will be given consideration in this review.²

I. EFFECTIVE DATE OF THE NEW ACT

A continuing source of confusion for practitioners has been a clause in the 1972 revision of the Workmen’s Compensation Act which states: “This Act shall be effective on January 1, 1973; and effective for all claims filed on or after January 1, 1973 . . . .”³ A literal reading of this section indicates that the new Act is applicable to a claim filed after January 1, 1973, even if the injury that occasioned the claim occurred prior to that date. The Court of Appeals was faced with precisely this question in the companion cases Vater v. Newport Board of Education and Early v. City of Newport.⁴ In both cases the employees were injured during 1972, at which time neither they

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² To those who regularly practice in this area it goes without saying that the most interesting developments during the past year have occurred at the administrative, rather than the appellate level. Such developments include: increasing use of “wage loss factor” to determine impairment of future earning capacity; a reluctance to apply maximum limitations on compensation rates before multiplying by the occupational disability factor; and, requests for all medical reports before approving settlements.


⁴ 511 S.W.2d 670 (Ky. 1974). The two cases were consolidated on appeal.
nor their employers were bound by the then-existing Workmen's Compensation Act, and both filed claims in 1973 under the revised Act which mandated coverage of their employers. The Court upheld dismissal of the claims citing two earlier cases, in one of which, *Maggard v. International Harvester Co.*,\(^5\) it had said:

> [T]he law in effect on the date of the injury or the date of the last exposure, as the case may be, is the law that fixes the rights of the claimant, and the filing date of the claim has no bearing upon the award other than whether there has been a compliance with the statute of limitations.\(^6\)

Although this holding flies in the face of the explicit wording of the statute, to have held otherwise would have created havoc for employers and their insurers. The General Assembly could not have intended to increase the liability of employers, as it did by the revised Act's expanded employee benefits, without notice or adequate time to provide for the increased benefits.

If the law in effect on the date of the injury fixes the rights of the claimants, it would seem to follow that the old Act's 1-year statute of limitations, as well as its limited benefits, is applicable to any injury or exposure occurring prior to January 1, 1973, regardless of when the claim is actually filed. However, an earlier case, *Kiser v. Bartley Mining Co.*,\(^7\) held that a statutory amendment extending the limitations period was applicable to claims which arose before the amendment, but which were not yet barred by the previous limitation when the amendment became effective. Thus, under *Kiser*, an employee injured prior to January 1, 1973, whose claim under the old Act was still viable on the effective date of the new Act, could avail himself of the 2-year statute of limitations provided by the 1972 revision. The apparent inconsistency between the *Kiser* deci-

\(^5\) 508 S.W.2d 777 (Ky. 1974). The other case cited was *Thomas v. Crummies Creek Coal Co.*, 179 S.W.2d 882 (Ky. 1944), in which the Court said: "The rights of the parties in respect to compensation for injuries became fixed and vested on the date of the injury." *Id.* at 883. In *Vater* the Court professed to rest its dismissal of the claims on a "constitutional interpretation" made in *Maggard* and *Thomas*, 511 S.W.2d at 671, but the relevancy of any constitutional claim is unclear, since the facts in *Vater* are undeveloped.

\(^6\) 508 S.W.2d at 783.

\(^7\) 397 S.W.2d 56 (Ky. 1965).
sion and the Court’s ruling in Maggard, as adopted in the Vater and Early cases, is difficult to reconcile. One is compelled to agree with the view expressed by Justice Stewart, dissenting in Kiser, that because the amount of compensation is fixed as of the date of the injury, the time for filing a claim should be fixed as of the same date.\(^8\)

Since over 3 years have elapsed since January 1, 1973, the effective date issue might appear academic. However, it should be noted that Kentucky Revised Statutes § 342.185 [hereinafter cited as KRS], as originally amended in 1972, provided that if payments of compensation had been made voluntarily, a claim could be filed within 2 years after the suspension of such payments. In 1974 this section was further amended to provide that a claim must be filed within 2 years following the date of an accident, or death, or within 1 year following the suspension of such voluntary payments of compensation, “whichever is later.”\(^9\) Therefore, the 1- or 2-year statute of limitations question may still be of practical importance in those cases involving accidents or exposures prior to January 1, 1973, where voluntary payments have been made.

II. UNINSURED EMPLOYER’S FUND

In Davis v. Turner,\(^10\) the Court undertook to harmonize certain statutory inconsistencies concerning the Uninsured Employer’s Fund created by the 1972 amendments to the Workmen’s Compensation Act.\(^11\) At the time Turner was injured in May of 1973, his employer had neither identified himself as an employer subject to the workmen’s compensation law, nor complied with KRS § 342.340(1), which requires employers to provide insurance or security against their liability for workmen’s compensation. The Board awarded Turner compensation for total permanent disability against the Uninsured Employer’s Fund and gave the Fund subrogation rights against

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\(^8\) Id. at 58.
\(^10\) 519 S.W.2d 820 (Ky. 1975).
\(^11\) The Uninsured Employer’s Fund was created to provide benefits to employees “when there has been default in the payment of compensation due to the failure of an employer to secure payment of compensation as provided by this chapter.” Ky. Rev. Stat. § 342.760 [hereinafter cited as KRS].
the employer. On appeal, the Fund claimed that the 1972 amendments to the Workmen's Compensation Act had not eliminated the voluntary aspects of the old Act. Relying on KRS §§ 342.390, 342.395, and 342.340(2), sections retained from the old Act which refer to various aspects of the employer's election to operate under and his acceptance of the Act, the Fund argued that Turner's employer was not required to comply with the Act, since he had not elected to operate under it.

The Court struggled to rationalize these provisions with the following unambiguous language contained in the 1972 Act:

The following shall constitute employers mandatorily subject to, and required to comply with, the provisions of this chapter:

(1) Any person, other than one engaged solely in agriculture, that has in this state one or more employees subject to this chapter.12

The Court resolved the conflict by attributing the General Assembly's failure to delete the old sections which refer to "election" or "acceptance" to no more "than the reluctance of the drafters of the 1972 Act to amend the entire section just to eliminate a few words that were becoming surplusage."13 Thus, the Court concluded that the employer's obligation to provide insurance or security is mandatory, not elective.

The Court further held that the employer's liability was not limited to the Fund's subrogation claim; rather, he also had a direct liability to the employee. The Fund's liability arises only in the event of an employer's default in the payment of compensation due the employee under the award. Therefore, before an employee can recover against the Uninsured Employer's Fund, he apparently must sue in circuit court to enforce the award and obtain judgment against the employer, execute upon the judgment, and if returned "no property found," then apply to the Board for an order directing the Fund to make the payments. The imposition of such a burden on an injured employee seems inconsistent with the language of KRS § 342.760(4), which imposes liability on the Fund "when there

12 KRS § 342.630 (1972).

13 519 S.W.2d at 822.
has been a default in the payment of compensation due to the failure of an employer to secure payment of compensation as provided by this chapter. It would be more equitable to allow an employee to recover from the Fund upon proof that the employer had not provided insurance or security, as required by KRS § 342.340, than to require him to proceed against his employer by a lawsuit.

III. Special Fund

The most significant case from the past court term involving a claim against the Special Fund is Yocom v. Gibbs. In Gibbs the Court interpreted the amended language of KRS § 342.120(1)(b), which states that the Special Fund shall be liable for compensating the arousal of a preexisting "dormant disease or condition" into disabling reality by a subsequent injury. Prior to the 1972 amendment, this section had imposed liability on the Special Fund only in those cases involving the arousal of a preexisting "dormant non-disabling disease condition." The subtle insertion of the word "or" between "disease" and "condition" is of tremendous significance, as exemplified by Gibbs, in which the Court was asked to determine whether a preexisting spondylolisthesis fell within the definition of "disease or condition," thus rendering the Special Fund liable for its subsequent arousal. Under the old Act, the Court of Appeals had excluded spondylolisthesis and numerous other congenital, psychological, and aging process conditions from the "disease condition" category.

In the face of the Special Fund's argument that an adverse

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11 KRS § 342.305 (1972).
15 525 S.W.2d 744 (Ky. 1975).
16 Emphasis supplied.
17 See, e.g., Yocom v. Tri-County Sanitation Serv., 522 S.W.2d 850 (Ky. 1975) (low emotional threshold); Yocom v. Fleming, 492 S.W.2d 194 (Ky. 1973) (hysterical neurosis); Young v. Combs, 487 S.W.2d 906 (Ky. 1972) (degenerative disc disease); Young v. Wright, 474 S.W.2d 76 (Ky. 1971) (congenital spina bifida); Giles Indus., Inc. v. Neal, 471 S.W.2d 5 (Ky. 1972) (preexisting spondylolisthesis); Central Uniform Rentals v. Richburg, 468 S.W.2d 268 (Ky. 1971) (obesity and hypertopic arthritis); Young v. Pugh, 463 S.W.2d 928 (Ky. 1971) (active diabetes); Merit Clothing Co. v. Jewell, 459 S.W.2d 88 (Ky. 1970) (preexisting personality structure); Young v. Polly, 458 S.W.2d 780 (Ky. 1970) (embryonic malformation causing deformity); Ashland Crafts, Inc. v. Young, 451 S.W.2d 607 (Ky. 1970) (sensitivity to cotton fibers).
ruling would probably bankrupt the Fund, the Court specifically held that spondylolisthesis qualifies as a "disease or condition" when aroused into disabling reality by a subsequent compensable injury, and that the Special Fund must bear part of the compensation burden. The Court made it quite clear that its construction of the unqualified word "condition" is limited to the facts of the Gibbs case and is no barometer of any future willingness to find other preexisting problems to be "conditions." However, if spondylolisthesis is a "condition," then it appears that congential defects, degenerative disc disease, osteoarthritis, and other similar problems would likewise be considered "conditions." Whether obesity, one's preexisting personality structure, or other less pathological problems will be found to be "conditions" under the Act is more questionable.

A rather important procedural question involving the Special Fund was decided by the Court in Yocom v. Jordan Auto Parts Co. In Jordan, the employee and the employer decided to settle, but the Special Fund refused to participate in the settlement. The agreement reached between the employee and the employer was submitted to the Board, approved, and became an award of the Board. The employer then filed an "Application for Adjustment of Claim" against the Special Fund seeking to recover all sums which it had paid to the employee on the ground that the employee's disability had resulted from the arousal of a preexisting latent disease condition. The Board sustained the Special Fund's motion to dismiss and the Court of Appeals affirmed. The Court held that an employer may not settle a claim with an employee and then, by an independent proceeding, seek to recover its payment from the Special Fund. If the Special Fund refuses to voluntarily contribute to the settlement of a claim, the employer or the employee must file an application pursuant to KRS § 342.370 for a full adjudication of all the issues in controversy, including the potential liability of the Fund.

18 525 S.W.2d at 746.
19 Id.
20 521 S.W.2d 519 (Ky. 1975).
21 The Board's approval was pursuant to KRS § 342.265 (1960).
22 521 S.W.2d at 521.
Such a requirement may serve to impede the settlement process and increase the volume of litigation before the Board. It is the writer's experience that the Special Fund will seldom, if ever, voluntarily contribute toward a settlement. Employers often believe that an employee is entitled to compensation benefits, but are rarely willing to bear the entire brunt of the award. They should be able to settle with an employee, pay the entire award and seek an apportionment from the Special Fund, thereby permitting employees to receive benefits without waiting for a resolution of the dispute between the employer and the Special Fund.

IV. CAUSATION—HEART ATTACKS

The most significant workmen's compensation decision handed down during the past term was Moore v. Square D Co., in which the Court of Appeals apparently dispensed with the necessity of proving by expert medical testimony that heart attacks are probably work-related. Square D represents an abrupt departure from the long-standing rule in this jurisdiction that causation must be proved by expert testimony, when it is a matter outside the realm of common knowledge. It appears to now be the rule in Kentucky that in heart attack cases fact finders may form their judgments about causation on the basis of the "totality of the circumstances," even though there is no medical evidence of the probability of work-causation.

Moore, who had a history of heart problems, suffered a myocardial infarction while on the job as an assembly line worker. A Board-appointed physician testified that Moore's heart attack was "merely coincidental" to his work, and another doctor would only state that Moore's work activities "could have been" a cause of the heart attack. Neither was

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23 518 S.W.2d 781 (Ky. 1975).
24 Expert opinion is required when "the factual situation is so far out of the practical experience of jurors that they are likely to be incapable of forming a correct judgment without expert assistance." O'Conner & Raque Co. v. Bill, 474 S.W.2d 344, 347 (Ky. 1971). "However, the conclusion reached in this case does not mean we are departing from the rule requiring medical evidence to show causation when the claimed internal or external injuries allegedly resulting from the accident are not within the realm of common knowledge." Tatham v. Palmer, 439 S.W.2d 938, 939 (Ky. 1969).
25 518 S.W.2d at 783.
26 Id.
willing to say that the heart attack was probably caused by a work-connected event.

The Board found that the heart attack had arisen out of Moore's employment, in the sense that his work was a causative factor, and awarded him permanent disability. The circuit court reversed, partly on the strength of *Kelly Contracting Co. v. Robinson*, in which the Court of Appeals had clearly held that expert testimony that a heart occlusion "could have" been work-related was mere conjecture, and that medical testimony of a probable work-related cause was a prerequisite to recovery of workmen's compensation benefits.

The Court of Appeals reversed the circuit court, basing its opinion on an extension of the principles it had enunciated in *Hudson v. Owens*, which it said had implicitly overruled *Kelly Contracting Co.*, although *Hudson* had not mentioned *Kelly* by name. In *Hudson*, the Court affirmed the Board's finding that the claimant's death was not work-related, despite medical testimony that the stress and strain of work was a cause of his death. Thus, in *Hudson v. Owens* the Board was permitted to find from the "totality of the circumstances" that a heart attack was not work-related, even though there was medical testimony that it probably was. In *Square D* the Court said:

"The question here is whether the proposition stated in *Hudson v. Owens*, that medical evidence is not to be exclusively determinative but that the board shall make the factual determination, from the totality of the circumstances, of whether there was a work-connected event, means what it appears to say—that medical testimony is not exclusively

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27 377 S.W.2d 892 (Ky. 1964). The trial court also relied on Markwell & Hartz, Inc. v. Pigman, 473 S.W.2d 842 (Ky. 1971), in which the Court of Appeals reversed an award in favor of an employee for the loss of hearing, allegedly caused by his operation of a jackhammer, because a medical expert would only state that the disability "could have resulted" from exposure to the noise.

28 439 S.W.2d 565 (Ky. 1969).

29 The Court said in *Moore v. Square D Co.*:

As concerns *Kelly Contracting Company v. Robinson*, the line of cases of which the case is representative was overruled, on the point here in issue, by *Hudson v. Owens*. *Kelly* clearly was embraced in the overruled group, though not mentioned by name.

518 S.W.2d at 783.

30 439 S.W.2d at 569-70.
determinative either that there was a work-connected event or was not such an event. We think it does.\textsuperscript{31}

\textit{Hudson} and \textit{Square D} are two sides of the same coin. \textit{Hudson} permits the Board to find that a heart attack was not work-related despite medical testimony that it probably was, while \textit{Square D} permits the Board to find that a heart attack was work-related in the absence of medical testimony that it probably was. Although the \textit{Square D} holding is an extension of \textit{Hudson}, it was not an extension made out of logical necessity, as the Court seems to imply. Given that a trier-of-fact was permitted in \textit{Hudson} to reject an expert's testimony, it does not necessarily follow that the Board can decide that a heart attack was work-related, in the absence of expert medical testimony to that effect. In other words, the Court could have decided \textit{Square D} differently; it was not bound by \textit{Hudson} to decide \textit{Square D} as it did.

\textit{Hudson v. Owens} was merely a case in which the Workmen's Compensation Board, as factfinder, chose to reject the evidence of the medical expert who testified that there was a causal relationship between the heart attack and the employee's work. \textit{Hudson} did not expressly or implicitly dispense with the necessity of expert medical testimony to establish causation. In fact, in 1972 \textit{Hudson} was cited by the Court in \textit{Parker Seal Co. v. Russell}\textsuperscript{32} for the proposition that "[a] possibility of causal connection is not enough to support a finding of such causation as a fact."\textsuperscript{33}

This author is of the opinion that \textit{Moore v. Square D Co.} represents neither a reasonable nor a practical approach to the problems facing the Court in heart attack cases. Such cases often involve persons who are permanently and totally disabled, and under our present Workmen's Compensation Act they can involve awards in excess of $150,000.\textsuperscript{34} They are important cases with serious consequences to both sides. Instead of permitting lay persons to speculate about complicated medical

\begin{footnotes}
\item[31] 518 S.W.2d at 783.
\item[32] 487 S.W.2d 280 (Ky. 1972).
\item[33] Id. at 282.
\item[34] A 25-year-old man totally disabled in 1975 would draw $164,584.56 over his anticipated life expectancy of 38.81 years, based upon the mortality and compensation-benefit tables currently used by the Workmen's Compensation Board.
\end{footnotes}
questions without the assistance of expert medical testimony, it would seem more appropriate to maintain a consistent position throughout all fields of personal injury litigation. Expert medical testimony should be required in those cases which involve matters beyond the realm of common lay experience.

The Court said in *Square D* that “heart attack cases fall into a special class of their own, to which historically and necessarily, special rules have been applied.” However, it did not define this “special class,” nor did it tell us where historically, or why necessarily, special rules have been applied. Surprisingly, an article by Professor Larson, cited as authority for this statement, seems to support a contrary position.

If in fact “heart attack cases fall into a special class of their own,” is not the Court usurping a legislative function in making such a distinction? The Court seemed to recognize this in *Hudson v. Owens* when it said that “there is no statutory basis for treating preexisting heart disease in a different category from any other form of preexisting disease.” The General Assembly has clearly not differentiated heart attacks from any other “harmful change in the human organism.” If it had intended to treat heart attacks specially, it would have created special provisions as it has for claims involving pneumoconiosis, loss of hearing, and scheduled benefits for loss of body members.

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23 See note 23, *supra*, and accompanying text.
24 518 S.W.2d at 784.

The beginning point in any attempt to articulate a sound working rule for the heart cases is the recognition of the fact that, while limits must be put on heart liability, the essence of the problem is causation. The fact that an increasing number of jurisdictions accept this beginning point is a step in the right direction, but there is one additional preliminary step which is indispensable to an orderly analysis and that is to recognize that the causation question has two distinct parts: the legal and medical. The law must define what kind of exertion satisfies the test of “arising out of the employment”; then the doctors must say whether the exertion which has been held legally sufficient to support compensation has in fact caused the heart attack.

26 518 S.W.2d at 784.
27 439 S.W.2d 565, 568 (Ky. 1969).
28 See KRS § 342.620(1), which defines the term “injury.”
29 KRS §§ 342.316, .730.
The most disturbing aspect of *Square D* is not the Court's holding. Admittedly, the question of medical causation in heart attack cases is a subject about which the most knowledgeable experts disagree. Most unsettling to practitioners is the apparent demise of stare decisis as a viable working principle in workmen's compensation cases. The Court's willingness in *Hudson v. Owens* to overrule a decision handed down only two years before,\(^4\) plus its statement in *Square D* that *Hudson* had "clearly" overruled *Kelly Contracting Co. v. Robinson* "though not mentioned by name,\(^2\)" and the citation of *Kelly Contracting Co.* with approval in no less than five decisions after it was said to have been overruled,\(^4\) indicate the confusion that is necessarily felt by the practicing bar.

V. Lump Sum Settlements of Medical Treatment Benefits

In *Simpson County Lumber Co. v. Brown*,\(^5\) the Court of Appeals, in a case of first impression, upheld an agreement for the payment of lump sum medical treatment benefits. The employer and the employee entered into a final settlement agreement, subject to the approval of the Board, whereby the employee was to receive $50,000 in a lump sum and a $10,000 insurance policy to cover medical expenses. The Board approved the $50,000 payment, but refused to approve the medical expense settlement. The circuit court affirmed the Board's decision, but was reversed by the Court of Appeals, which stated: "We are of the opinion that in compensation cases medical expense is a proper subject of a compensation settlement and the settlement should be approved unless it is manifestly unfair to the employee."\(^6\)

\(^4\) See *Trailer Convoys, Inc. v. Holsclaw*, 419 S.W.2d 563 (Ky. 1967) which was the most recent case in a group of cases overruled or modified to the extent that they were inconsistent with *Hudson*.

\(^5\) 518 S.W.2d 781, 783 (Ky. 1975). See note 28 supra.

\(^6\) See *Markwell & Hartz, Inc. v. Figman*, 473 S.W.2d 842 (Ky. 1971); *Witt v. Greer Bros. & Young, Inc.*, 465 S.W.2d 286 (Ky. 1971); *Purchase Area Economic Opportunity Council, Inc. v. Workmen's Compensation Bd.*, 459 S.W.2d 604 (Ky. 1970); *Tatham v. Palmer*, 439 S.W.2d 938 (Ky. 1969); *Inland Steel Co. v. Johnson*, 439 S.W.2d 562 (Ky. 1969). Particular attention is directed to the opinions in *Witt v. Greer Bros. & Young, Inc.* and *Markwell & Hartz, Inc. v. Figman* in which both *Kelly Contracting Co.* and *Hudson* are discussed.

\(^4\) 520 S.W.2d 312 (Ky. 1975).

\(^6\) Id. at 313.
Simpson relieves the dilemma in which many employers and their insurance carriers have found themselves when desiring to enter into a final lump sum settlement agreement with an employee. While there generally have been no problems in obtaining Board approval of a lump sum settlement of compensation benefits, settlements of medical treatment benefits have lacked finality because of the possibility of future claims for additional medical expenses.

Although the Court held that such settlements “should be approved unless . . . manifestly unfair to the employee,” it is the writer’s experience that the Board will carefully and deliberately scrutinize each of these settlements to ascertain that the interests of the employee are being adequately protected. Although this is as it should be, the Board’s reluctance to approve such settlements will obviously meet with the disapproval of both sides, who desire to settle their differences without further litigation. The language of the opinion appears to make it mandatory upon the Board to approve such settlements, except where “manifestly unfair” to the employee. A determination of the criteria for a finding of “manifest unfairness” will have to await future appeals.

VI. Procedure and Appeal

In Yocom v. Payne, the Court was asked to determine whether petitions for reconsideration filed by two defendants pursuant to KRS § 342.281 extended the time allowed for a third defendant to appeal to the circuit court. The case actually involved separate claims against two defendants, Parish Avenue and Baird, which were consolidated at the Board level. Awards were made for 25 percent permanent partial disability against both defendants, and an award of 50 percent disability was made against the Special Fund, because the case involved the arousal of a preexisting, dormant, nondisabling disease condition. The award was entered on September 20, 1971, and within the 14-day limit prescribed by KRS § 342.281, petitions for reconsideration were filed by Parish Avenue and Baird.

47 Id.
48 512 S.W.2d 517 (Ky. 1974).
None was filed by the Special Fund. On October 4, 1971, the Board overruled the petition filed by Parish Avenue, and on November 8, 1971, it overruled Baird's petition. KRS § 342.285 provides that an appeal to the circuit court must be taken within 20 days of the entry of a final award or order of the Board. Therefore, on October 14, 1971, Parish Avenue filed its appeal in the circuit court. Baird appealed on November 22, 1971, and the Special Fund filed its appeal on November 26, 1971.

The circuit court determined that the Special Fund's appeal was not timely filed. In reversing, the Court of Appeals held that the Special Fund was under no obligation to file a petition for reconsideration. When Baird and Parish Avenue filed their petitions for reconsideration, the finality of the award was destroyed; the entire case was held in abeyance as to all parties until the last of the two petitions had been overruled. That the Board entered separate orders at different times on the two petitions did not affect the Fund's appeal deadline. The Court noted:

When the last petition was overruled, the award again became final and the time for appeal to the circuit court as provided in KRS § 342.285 again commenced. To hold otherwise would be to set a series of procedural traps and to invite premature appeals to the circuit courts.49

The Court's decision was obviously justified. To have forced the Special Fund to file by October 10, which would have been 20 days after the original award, would have meant that the Fund would have had to appeal nearly a month before the Board ruled on Baird's petition for reconsideration. The Fund could hardly have filed an intelligent appeal before it knew the contents of the Board's final ruling.

Justice Jones filed a dissenting opinion50 in the Payne case which may cause some confusion among the practicing bar. Although he thought the Fund's appeal was not timely filed, he apparently would have allowed it a 34-day period to file an appeal with the circuit court, instead of the 20-day period men-

49 Id. at 518-19.
50 Id. at 519.
tioned by KRS § 342.285. Thus, the Fund would have had through October 24, instead of October 10, to file an appeal. His theory is that an award of the Board is not final until the 14-day period for filing a petition for reconsideration has elapsed, and that an appeal can only be taken from a final award. Thus, under Justice Jones’ approach, the 20-day appeal period begins running at the end of the 14 days which are allowed for a petition for reconsideration.

Although his analysis is reasonable and persuasive, it does not seem to comport with the wording of KRS § 342.285(1) which provides in part:

An award or order of the board as provided in KRS 342.275, if petition for reconsideration is not filed as provided for in KRS 342.281, shall be conclusive and binding as to all questions of fact, but either party may within twenty (20) days after the rendition of such final award or order of the board, by petition appeal to the circuit court . . . .

After 14 days an award of the Board becomes “conclusive.” However, the statutory language indicates that the finality achieved after 14 days relates back to the rendition of the award. The 20-day appeal period runs from the “rendition” of the final award. By “rendition” the statute must refer to the date of the original award, since the Board takes no additional affirmative acts, within the meaning of “rendition,” if no petition for reconsideration is filed. Until this matter is clarified by the Court of Appeals, practitioners would be wise to take the safer course and file all appeals within 20 days after an original award is rendered, in the absence of a petition for reconsideration.

Justice Jones said:

I am of the opinion that the appeal by the Special Fund was not timely filed. KRS § 342.285(1) states that a party shall have twenty days from the rendition of a final award in which to take an appeal to a circuit court. In the Parish Avenue proceeding in which the Special Fund was a defendant the opinion and award of the Board was entered on September 20, 1971, and absent a petition for rehearing by the Special Fund became final as to the Special Fund on October 4, 1971. KRS 342.281. The Special Fund had only twenty days from that date within which to take an appeal. I am further of the opinion that the appeal filed by the Special Fund in the Baird proceeding was not timely filed within the time permitted by the statute.

Id. at 519.
In another opinion, *Carnahan v. Yocom*, the Court discussed the necessity of filing a responsive answer to a petition for review in the circuit court. An employee failed to file a responsive pleading and the Special Fund was granted a default judgment. On appeal, the Court of Appeals held that a respondent named in a petition for review, upon appeal from an order of the Workmen's Compensation Board, must file an answer within the 15-day period prescribed by KRS § 342.285(2).

It is not clear whether the requirement that an answer be filed is also applicable to the Workmen's Compensation Board. KRS § 342.285 provides in part that the "Board shall be named respondent" in any appeal, and the Court has previously held that the Board is not merely a nominal party. By implication, one is led to believe that the Board should be required to file an answer; however, this has not been the general practice. Apparently, the Board would be required to answer allegations of fraud or misconduct by officials who administer the Act, and it might be required to answer in those cases in which an appeal is from a decision of the Board which refuses to approve an agreed settlement between the parties.

**VII. REOPENING OF AWARDS**

During the past term the Court of Appeals took a hard line concerning the grounds upon which an award can be reopened under KRS § 342.125. In *Yocom v. Meade*, an employee sought to reopen an earlier award in which he had been granted a 25% permanent partial disability, based upon evidence of a traumatic injury to his back and a preexisting psychoneurosis. The Workmen's Compensation Board reopened the case and awarded permanent total disability, and the circuit court affirmed. The Court of Appeals reversed, noting that there was evidence in the record that the employee had been totally disabled by the psychoneurosis prior to his traumatic injury. It said that if the disability existed at the time of the original award, it could not now constitute a change in condition which would

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52 526 S.W.2d 301 (Ky. 1975).
54 514 S.W.2d 687 (Ky. 1974).
support a motion to reopen, even if there had been no evidence of it before the Board.

In *Royal Crown Bottling Co. v. Jones*, a motion to reopen was denied on the basis that the employee knew of the condition about which he was presently complaining prior to the time he executed an agreement for the settlement of his earlier claim. The Court held that although the employee had "frittered away a valid claim for total disability when he settled for lump sum benefits," he was "bound by the agreement."

In a later opinion, *Central City v. Anderson*, the Court reversed an award of the Workmen’s Compensation Board granted on a motion to reopen, observing: "There is not so much as an ectoplasmic vapor of evidence to indicate that the appellee, Anderson, is any more of a dreg on the employment market now than he was at the time of the settlement."

These cases seem to indicate a trend by the Court toward rejecting motions to reopen, unless the conditions existing at the time of the filing of the motion are considerably different from those at the time of the earlier settlement or award. It should be noted that in 1972 the General Assembly added "newly discovered evidence" as a ground upon which a motion to reopen could be sought under KRS § 342.125. Previously, the only grounds had been change of conditions, mistake or fraud. To date, no appellate decision has defined "newly discovered evidence." However, the above cases seem to indicate that this new ground will afford little, if any, additional relief.

**VIII. Occupational Disease**

*Chapman v. Eastern Coal Corp.* and *Fugate v. United States Steel Corp.* are two occupational disease cases from the past Court term which point out certain statutory inequities created by the 1972 amendments to Kentucky’s Workmen’s Compensation Act. The 1972 amendments substantially increased the amount and duration of benefits payable to work-

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55 No. 74-829 (Ky., Jan 31, 1975)(memorandum opinion per curiam).
56 Id. at 3.
57 521 S.W.2d 246 (Ky. 1975).
58 Id. at 247.
59 519 S.W.2d 390 (Ky. 1975).
60 528 S.W.2d 691 (Ky. 1975).
men's compensation claimants. However, chapter 78, § 37 of the amendments specifically provides that the increased benefits are inapplicable to "those claims where benefits are awarded under the federal law." At present, benefits are awarded under federal law to black lung claimants pursuant to the Federal Coal Mine Health and Safety Act of 1969. Consequently, the increased benefits provided by the 1972 amendments are not payable to black lung claimants.

The purpose of the federal act was to provide benefits to black lung claimants in states which paid compensation below federal standards. Kentucky claimants will continue to be eligible for federal awards until the United States Secretary of Labor lists Kentucky as providing "adequate coverage for pneumoconiosis" or until 1981, whichever is earlier.

Ironically, the 1972 amendments provide substantially greater state black lung benefits than are awarded under federal law, yet under Kentucky Acts, chapter 78, § 37, the increased state benefits are not payable until the federal awards are no longer available. Even more ironic, benefits under the federal awards, which were originally payable by the federal government, have been paid by employers since January 1, 1974. Therefore, if the rationale of § 37 was originally to take advantage of federal funds, that rationale is no longer viable.

In both Chapman and Fugate, black lung claimants were forced to accept substantially smaller awards than they would otherwise have been entitled to under the 1972 Kentucky amendments merely because they were also covered by federal law. Even though they were subject to federal law, any award,

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62 Id. Section 37 provides more fully that:
   . . . in the event federal law specifies that claims covered by provisions of this Act shall be filed with a federal agency such claims shall continue to be filed as required by the federal law until repeal or expiration of the federal law requiring same; then, in that event, the increase in benefits provided herein shall not apply to those claims where benefits are awarded under the federal law. The benefits under the present law KRS Chapter 342 shall apply to those claims.
64 519 S.W.2d at 392.
66 519 S.W.2d at 392.
whether state or federal, was payable by their employers. This result is both inequitable and illogical, and the General Assembly should seriously consider revising § 37.