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DISABILITY—KENTUCKY STYLE

BY ALVIN B. TRIGG

Two hundred years ago, Alexander Pope plaintively inquired, "Who shall decide when doctors disagree?" One year ago a Kentucky Appellate Judge ruefully expressed similar concern.¹

Since biblical days, when persuasiveness meant not a "jot or title" of doubt, our legislators and jurists have been plagued with legal semantics—with the problem of name tags, guidelines and definitions. A nearly universal conclusion has been understandably reached, viz.—"He who defines least divines best".² Particularly is this true in the nebulous area of personal injuries involving consideration and definition of such terms as pain, traumatic personal injury, disease condition, functional or clinical impairment, and the ultimate determinate—disability.

Recently, this writer had occasion to cross-examine a noted orthopedic surgeon who had discounted the existence of pain in a claimant. When asked to define pain, visibly surprised he hesitated, and then candidly stated, "I am not sure that I can."³

In a kindred area involving definition of a "traumatic personal injury," our Appellate Court noted "that slipper word"—"easier to discard than to define."⁴ In a more recent decision, the Court acknowledged the existing inadequacies in definition of a "disease condition" and produced a thoughtful and incisive review of this terminology.⁵

Even our judicial approach to medical conclusions has been cautious and guarded by such phrases as "reasonable medical certainty," a semantical incongruity (since "reasonable" and "certainty" are mutually exclusive, but even if reconcilable, who does not recognize that in the entire lexicon of medicine there can be no such terminology as "medical certainty"). Confronted

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¹ Adjunct Professor of Law, Wallace, Turner, and Trigg, Lexington, Kentucky, University of Kentucky, LL.B., 1947, Univ. of Virginia. Former member, Kentucky Workmen's Compensation Board.
² Young v. Stacy, 450 S.W.2d 506 (Ky. 1969).
⁴ Grimes v. Goodlett, 345 S.W.2d 47, 51 (Ky. 1961).
⁵ Terry v. Associated Stone Co., 334 S.W.2d 926, 929 (Ky. 1960).
⁶ Young v. City Bus Co., 450 S.W.2d 510 (Ky. 1969).
with the logical and legal imperfections of such definition, many Courts (including ours) have altered this requirement to "reasonable medical probability." Even so, the Court has again become involved in what appears to be hyper-semantics (could have or did have x condition—might result in or would result in x future results.) Unfortunately, as the jurist and attorney recognize, it is not simply an academic exercise in hairsplitting—all too often the choice of such words may mandate decisions, even though the intent or true meaning of the medical expert carries a different connotation, with resulting injustice. Fortunately, many courts have effectively circumvented this problem by simply asking the medical witness for his opinion without qualifying or complicating medical jargon—leaving the Workmen's Compensation Board to give appropriate evaluation to such opinion.  

**The Kentucky Hiatus**

The basic impracticality in formulating a set definition of disability becomes a virtual impossibility in the light of our existing Kentucky Workmen's Compensation law. Within the general compensation framework, we have actually developed three independent categories of claims, to wit: (a) the traumatic personal injury by accident, (b) the occupational disease claim, and (c) the schedule injury. The first two have entirely distinct and autonomous ground rules for filing claims, notice to employer, limitation of actions, procedure, burden of proof and particularly, concept of disability. The third system, involving schedule benefits for specific loss of members, invites entirely different considerations in procedure and recovery and is internally complicated by disabilities which extend beyond the loss of the member to the body as a whole (which may move the claim from this category entirely).

It is of historic interest only to consider how these systems evolved. It is of compelling importance that consideration be given as to how these systems may be restructured to bridge this awkward and unnecessary hiatus between various compensation claims. While this should be the theme for a different article, it

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7 334 S.W.2d 926 (Ky. 1960).
8 Rogers v. Sullivan, 410 S.W.2d 628 (Ky. 1967).
would appear germane to our consideration of "disability" to
digress slightly and consider some positive steps and suggestions
which might be considered in reviving and restructuring this
system:
1. Abolish the statutory distinction which relegates claims
to different categories based on etiology, e.g.—injury or occupa-
tional disease.
2. Delete the schedule injury section in its entirety.
3. In lieu of our cumbersome and archaic phraseology which
provides compensation for disability or death resulting from occup-
utional disease, substitute this simple phrase; compensation bene-
fits shall be paid for work-related disability or death.
And what changes might be wrought. To consider a few:
1. No longer would we be concerned with the archaic and
redundant phrase “traumatic personal injury by accident.” An
entire volume could be devoted to the issues raised by this
innocuous terminology. Fortunately, our Courts have dispelled
much of the confusion in decisions involving the effect of adding
the word traumatic to the personal injury requirements—the
meaning of personal injury and the requirements of an accident.
Nevertheless, old notions die hard (with lawyers and judges) and
many of the issues fostered by this definition continue to recur.
Some are not yet fully resolved. For example, psychic disabilities
and traumatic neurosis from non-impact injuries continue to be
troublesome—also heart attack cases (although enlightened by
the recent and excellent de minimis rule). The deletion of this
cumbersome phraseology would go unmourned by Bench and
Bar.
2. Equally productive of prodigious litigation is the com-
panion phrase “out of and in the course of employment.” These
dual requirements for recovery have bemused and bedeviled
attorneys and jurists since inception of this act. Again, our
Appellate Court has diluted much of the astringency in these
twin requirements to recovery, but so many deserving claimants

9 See Grimes v. Goodlett, 345 S.W.2d 47 (Ky. 1961).
11 Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969).
13 Coomes v. Robertson Lumber Co., 427 S.W.2d 809 (Ky. 1968).
have been impaled on the horns of one of these technical requirements, and so unnecessarily, since both are addressed to this simple but ultimate determination, "was the injury work-related."

3. By abolishing the artificial and tenuous distinction between disability produced by injury and that by disease, no longer must we first decide the etiology before determining which ground rules will apply; and the line of demarcation between disease and injury can be extremely thin. No longer need we worry as to whether disability resulting from a germ entering an open cut of a worker should be classified as a traumatic or occupational disease disability—or whether the inhalation of harmful fumes produced an occupational disease or traumatic injury disability. A common and perplexing example is the disability produced by attrition from continuous performance of work activities (repetitive sanding of gun stocks produced a wrist cyst). Our Court concluded in this case\(^4\) that the resultant disability would be classified as an occupational disease. While the decision is open to question, its true relevance is recognition of the difficulty in classification, and the impropriety in perpetuating this unnecessary and dangerous distinction. It would be unreasonable to saddle claimant with preliminary determination (which the Court may later reverse) as to which category he fits and require that if he guesses wrong, his claim may be dismissed as premature, or barred for limitations. Equally incongruous is the fact that the claimant may be considered totally disabled although continuing work for the same employer, or not disabled at all depending on which category he falls under. By allowing recovery for disabilities which are work-related, the question of the etiology would be irrelevant and of course the inconsistencies and inequities evolved from these separate systems would vanish with them.

4. The schedule injury provision\(^5\) which undertakes to put a price tag on disability produced by loss of members had very little justification in its inception and even less for its preservation. It is inconsistent with fundamental workmen's compensation principles—it is thoroughly unrealistic to prescribe one

\(^4\) Hillerich v. Parker, 267 S.W.2d 746 (Ky. 1954).
recovery for specified injury to all claimants, regardless of the disability produced thereby—it creates tenuous, indefensible variants in awards between the injury which has caused severance of the member and that which rendered it useless (but does not involve loss or amputation)—and it is often difficult to establish whether the injury produced an occupational disability which extended beyond the member loss to the body as a whole in order to get a "change of venue" to another provision of the act. It would appear that neither the claimant, the employer nor common sense would suffer from desegregating member loss disabilities from any other type of disability by deleting this section entirely.

Obviously, the foregoing does not constitute a program—only an approach, but one which conceivably could be implemented to achieve this merger of law and common sense. Clearly, there must be legislative and judicial guidelines in order that such concepts as disability may be properly developed and adjudicated. The meaningful question is—how far should our Courts go in judicially defining disability and establishing a specific test for all Workmen's Compensation claims.

**The Balanced Factor Approach to Disability**

At first blush, one might assume that a general definition of disability would not be difficult to formulate in the occupational sense envisioned by our Workmen's Compensation Act, the essential element being extent of loss of work or earning capacity. A simplistic suggestion would be that if a claimant following injury is unable to perform any substantial work reasonably and regularly available to him, he is totally disabled. If he can perform some but less than all of such available work, he is partially disabled. If he is capable of performing all work activities in the available labor area, which he was equipped to perform prior to injury, he has sustained no disability. In essence, this is the concept of disability as originally envisioned and applied in our Workmen's Compensation law (as well as the predecessor English system).

Understandably, it was enunciated in different legal terminology in our various states, but the common denominator has
been recognition that there are two basic ingredients essential to proper determination of disability. The first of these essential ingredients is that each claimant is an individual and unique, and his disability cannot be gauged on a clinical basis by McBrides' Tables. No single standard can evaluate the nature and extent of his disability because claimants come in all sizes, ages and propensities with varying degrees of education, training, experience and adaptability, as well as all the physical and mental quirks and idiosyncrasies, endowed by their Creator in individual and unequal proportions. Consequently, there could be no single formula, no basic factor which could be applied as a general and controlling determinate of a man's disability. The second essential ingredient is that this unfettered and uncircumscribed determination of disability should be relegated to the fact-finding board or tribunal which would (hopefully) consider all the factors involved in each individual case in concluding the nature and extent of compensable disability.

Obviously, the strength in this concept rested in its viability and a recognition that there is no average man or faceless claimant; and no general formula or conclusion may be considered universally (or even ordinarily) conclusive of disability. Consequently, these fact finding boards and agencies in the various states developed their own criteria for gauging the nature and extent of disability. Among the significant factors, they considered a claimant's age and education, his pre-injury physical and mental condition, his entire work history including training and experience and the pre-injury earnings in such work activities, his post-injury physical capabilities and activities, his subsequent work performance, earnings, and his job availability. These considerations coupled with the best medical opinions as to the nature and extent of impairment (for translation into occupational disability) enabled these boards and commissions to determine post-injury earning capacity, i.e. disability. A consideration of our earlier Kentucky decisions emphasizes their consideration of all these factors rather than exclusive reliance on any one in reaching their ultimate determination of the nature and extent of disability.

16 Medical Tables which translate injuries into standard percentages of clinical bodily impairment.
Although this broad and practical approach appeared to be both equitable and workable, there were suggestions that the Court should define disability with more particularity and lay down some compelling guideline which could be universally applied as the controlling factor in all such disability determinations. Our Court succumbed to this temptation in the _E. & L. Transport_ case\(^{17}\) and laid down two unequivocal guidelines, stating that a claimant would be considered totally disabled, following injury, if:

1. he can no longer perform his prior work activities; and,
2. he is handicapped or impaired in the performance of other work activities (this was virtually meaningless since any claimant incapable of performing his pre-injury activities would necessarily be somewhat restricted or impaired for some other work activities).

This decision attracted some academic murmurs, but it was not until the _Leep_ decision\(^ {18}\) that the impact of this definition was evidenced, probably because the facts of this case pinpointed its seeming inequity, both as a matter of law and of logic. In that case, the claimant, a state patrolman, sustained an injury which incapacitated him for further field duty as a trooper. However, he resumed work at less exacting office duties with the same pay. The Court, applying the _E. & L. Transport_ criteria, stated that Leep was totally disabled because he was unable to perform his precise previous work duties (interestingly, the judge writing this opinion noted his personal misgivings with this rationale). Essentially, the Court thereby adopted the “related occupation test” as the controlling consideration in determination of disability. Although it is obviously of great importance to determine whether a claimant can no longer perform the particular work which he was required to do prior to his injury, few states have considered this to be the persuasive or sole consideration and it has been soundly criticized as unduly restrictive in scope.\(^ {19}\)

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\(^{17}\) _E. & L. Transport Co. v. Hayes_, 341 S.W.2d 240 (Ky. 1960).
\(^{18}\) _Leep v. Kentucky State Police_, 366 S.W.2d 729 (Ky. 1962).
\(^{19}\) _A. Larson, 2 The Laws of Workmen's Compensation_ § 57.3 (Supp. 1970).
view is that the total work history of the claimant should be con-
sidered in determining his post-injury work capacity (along with
other factors), and at least a general classification of work which
he is equipped by education, training and experience should be
established (for example, was he a general laborer or in a more
specialized field). Yet the thrust of this decision was that the
prime consideration was not general classification but considera-
tion must be restricted to his capacity to perform the specific
work activities immediately prior to the injury.

Perhaps the most obvious inadequacy in such an approach
is that it virtually emasculated permanent partial disability
awards. If a claimant could perform less exacting work in his
general work area but not the previous work duties, he was appar-
ently entitled to total disability benefits. Our Appellate Court sub-
sequently undertook to correct this inadequacy by modifying
and extending the E. & L. Transport definition of disability,
noting that the controlling consideration should be ability to
perform the activities required in the general work classification
rather than the specific job at the time of claimant's injury. In
fact, the Court withheld judgment in one instance pending a
specific determination of a claimant's pre-injury general work
classification.

Although a distinct improvement in definition, the essential
weakness of this test remained, viz., work capacity was equated
with work performance. And while work performance is an
important consideration, it is not the entire or necessarily the
persuasive factor in disability. The claimant might be capable
of actually working following injury at unrelated work activities at
the same or greater wages, and without diminution of earning
capacity; and more pointedly the difficulties of ascertaining a gen-
eral work classification (excepting in the case of the general
laborer) are evident.

Nevertheless, the Court continued to operate under the Leep
formula with increasing awareness of its frequent inequity in

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20 Dep't. of Economic Security v. Adams, 450 S.W.2d 819 (Ky. 1970).
21 Parker v. Nehi-Royal Crown Bottling Co., 429 S.W.2d 357 (Ky. 1968);
Joseph v. Blue Diamond Coal Co., 408 S.W.2d 467 (Ky. 1966); Highland Roofing
& Sheet Metal Co. v. Helms, 407 S.W.2d 132 (Ky. 1966).
22 Young v. Stacy, 450 S.W.2d 506 (Ky. 1969).
application until 1968 when a majority of the Court concluded the Leep formula (work performance) for disability should be abandoned and a different test (wage earnings) imposed.23

THE LONG LEEP TO OSBORNE

The factual situation and the issue involved in Osborne v. Johnson24 was a familiar one to the Board and the Courts. The claimant, a coal miner, asserted a claim for permanent total disability from a back injury. The examining physician designated by the Board concluded the claimant had a 10% to 15% permanent partial disability but noted that he should be doing only light work and certainly no heavy lifting, stooping, bending, etc. The Circuit Court sustained claimant's appeal from 15% permanent partial disability award by the Board on the theory that it was his incapacity to perform customary work duties which was controlling, rather than the estimated percentage evaluation of disability; and since the claimant was (by this physician's own admission) incapable of performing the hard, physical labor required by a coal miner, he was totally disabled. The Court noted the facts were indistinguishable from the Deby case,25 which applied the then existing test of work performance (as set out in E. & L. Transport and subsequently extended). Since this was a proper and mandated conclusion under the existing law, the Appellate Court affirmed the decision, but reviewed and revised the law prospectively with new concepts and tests—which we must now consider.

(a) THE NEW ROLE OF THE MEDICAL WITNESS

The Court in Osborne initially approved the concept that disability in Workmen's Compensation Law means occupational disability rather than functional (or clinical) impairment. This traditional concept, in practical operation, simply meant that the doctor's testimony should be addressed to the functional impairment of the individual and the exclusive responsibility remained with the Board to translate such opinions and esti-

23 Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968).
24 Id.
25 Deby Coal Co. v. Caldwell, 383 S.W.2d 905 (Ky. 1964).
mates into a degree of occupational disability. Actually, it is rare to find any physician willing to estimate percentages of impairment or disability, either existent or projected as it is inconsistent with his training and his medical experience. At most he may venture to say “he might do some light work if there is any available,” or “I doubt if he should undertake any work that involves heavy lifting or strain at this time,” or “we would like for him to start out with some occasional work and perhaps in time he can reach substantial work capacity;” but this is as far as most doctors will venture. Every practicing attorney and every reviewing judge is familiar with the essential medical reply as to percentage of disability, viz., “I wouldn’t know his job requirements or how well he could perform them. I can describe his condition as I see it but it is up to you fellows to determine how disabled that makes him for occupational purposes.” Occasionally, some hardy physician would estimate a percentage of disability based upon his capacity to perform his customary work duties, and the Court quite reasonably said that it was admissible for him to give such an opinion if he knew the work activities involved conceding it might be helpful for the Board to have the benefit of such opinion; but the Court did not usurp the Board’s prerogative to consider this in reaching their own determination of the degree of occupational disability from all evidence of record.26

While ostensibly approving this translation concept, the Osborne decision actually rejected the foregoing procedure in presentation of medical opinions as to impairment and percentage of disability, no matter how informed or helpful. Instead, the Osborne decision concluded:

The doctor’s testimony should be addressed to the question of what job requirements the injured man is physically capable of performing (taking into consideration his qualifications and training). The board’s determination of the extent to which the man’s earning capacity is impaired then should be made on the basis of evidence as to the existence in the local area or region, of regular employment opportunities for the type of work the medical testimony shows the man is

26 Griffith v. Blair, 430 S.W.2d 337 (Ky. 1968).
capable of performing, and the prevailing wage rates in such employment.\textsuperscript{27}

In a footnote the Court adds this qualification: “Medical percentages still would be significant in apportionment cases.”\textsuperscript{28}

It thus becomes abundantly clear that the doctor is now cast in a vastly different role, one which is both unfamiliar and uncomfortable for the reasons heretofore noted. His testimony is limited, not to the clinical impairment with which he is familiar, but the translation of this medical determination into work capability with which he is not concerned (or equipped to estimate). If the literal language of the Court is applied, what happens to our traditional concept that the Board shall be the sole arbiter of the nature and extent of occupational disability? Why the radical departure from the traditional role of the physician in such cases? And why would his estimates of clinical impairment (whether couched in actual figures or general capacity statements) not continue to be helpful to the Board in the ordinary case as well as the apportionment case (where mandated by law)?

(b) \textit{The New Disability Formula}

Having reaffirmed its preoccupation with occupational disability, the Court addressed its intention to the new tests which would be determinative of such disability, and dipped heavily into Larson in announcing these controlling criteria. Because of the reliance of the Court on this authority, we quote the cited passage from this test:

Compensable disability is inability, as the result of a work-connected injury, to perform or obtain work suitable to the claimant’s qualifications and training. 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.\textsuperscript{29}

\textsuperscript{27} 432 S.W.2d at 803 (emphasis added).
\textsuperscript{28} Id. at 803 n.2.
\textsuperscript{29} Id. at 802, quoting from A. Larson, supra note 19, § 57.00.
The Court slightly oversimplified this language in its announced conclusion that its only concern need be:

To what extent has the injured workman's earning capacity been impaired? And it would seem that it would involve only these determinations: (1) what kind of work normally available on the local labor market was the man capable, by qualifications and training, of performing prior to injury; (2) what were the normal wages in such employment; (3) what kind of work normally available on the local labor market is the man capable of performing since his injury; and (4) what are the normal wages in such employment?

In more succinct language, the Court rephrased this proposition as follows:

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 wage rates in the kind of employment available to him, to the wage rates earnable by him before being injured.

The Court further emphasized its complete rejection of the job capacity factor by announcing that no significance would be given to the workman's usual occupation except as it concerned comparative wages before and after injury (the new test of disability). Undoubtedly the most unequivocal commitment to the comparative wage earnings as the sole determinate of disability appeared in this strident summation, "From the foregoing discussion, a conclusion would seem to be that if the injured workman for the present time can earn the same wages as before being injured, he is not disabled at all for Workmen's Compensation purposes."

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30 432 S.W.2d at 803.
31 Id.
32 Id. at 804.
True, the Court did concede that a permanent injury of appreciable proportions could reduce future earnings, and therefore suggested that the Workmen’s Compensation Board “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?” However, the Court specifically limited such an award to cases where there had been no reduction in income. To put it simply, it means that a claimant must obtain no award (because there is no disparity in pre-injury and post-injury wages) before he may be eligible for this somewhat nebulous allowance for future impairment. One wonders, as a practical matter, what proof would be required to establish the probability for future impairment; what would be the predictable basis, the proper percentage; what would be the persuasive testimony as to this future occurrence, its nature and extent; and how could it ever achieve the requisite standard of probability? In fact, the writer has been unable to find one instance either in the cases appealed or the myriad of Board decisions since Osborne where such an allowance has been awarded under this provision.

In its final effort to make this wage test more acceptable, the Court indicated that post-injury earning capacity is to be based upon normal employment conditions, undistorted or complicated by business boom, good luck, sympathy or efforts. In the light of the Board’s preoccupation with wages as the sole and compelling criterion of disability, it would appear that such factors would not be persuasive of total disability where post-injury earnings were comparable to those preceding the asserted disability.

In concluding this opinion, the Court conceded that under this test full recompense would be denied the claimant because no consideration is given to reduction of job opportunities as a result of the injury, but concluded that “the inclusion of this factor would require use of a highly complicated formula by no means accurate in result. The Workmen’s Compensation law has never proximated the giving of full compensation for the

33 Id. (emphasis added).
losses attributable to disability.”\textsuperscript{34} In somewhat paradoxical language, the Court added that “the approach adopted in this opinion comes closer to fair compensation than one in which the workman gets only an allowance for partial disability even though he can’t get a job or one in which the workman gets an allowance for total disability even though he can get a job.”\textsuperscript{35}

The final pronouncement of this Court noted that this holding in no way affects the rule in occupational disease cases as stated in Allen v. Commonwealth.\textsuperscript{36}

(c) Analysis

In attempting an analysis of this important decision which brings new perspective and procedures into our Kentucky Workmen’s Compensation law it is not suggested that the Osborne criterion of disability (based on wage earnings) is not an improvement over the Leep test (based on work performance). It is respectfully suggested that in repudiating one test as too narrow and unrealistic, the Court may have substituted another formula only slightly less restrictive in scope; and thus perpetuated the inherent weakness in Leep. It is understandable why the wage formula carries such an immediate appeal. It is a comfortable test affording a mathematical formula for gauging disability in terms of wage earnings with such mathematical precision that it could easily be computerized. There is a sonorous ring to the phrase “the best evidence of a man’s capacity to work is the fact that he is working.” Our early decisions recognized the inherent practicality as well as appeal in this consideration. However, they also recognized while a persuasive factor it was by no means the controlling or exclusive factor in determining disability.\textsuperscript{37}

It is abundantly clear that Osborne not only places the premium on wage earnings, but it also virtually emasculates other considerations as a persuasive of disability. For example, the Court noted its complete rejection of the job capacity factor by announcing that no significance would be given to the claimant’s

\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} 425 S.W.2d 283 (Ky. 1968).
\textsuperscript{38} Seligman Distrib. Co. v. Brown, 360 S.W.2d 509 (Ky. 1962).
usual work except as it concerned comparative wages before and after injury. It must be evident that true earning capacity (or disability) isn’t always reflected in the cold statistics of wages before and after injury and available jobs. To note a few:

1. Economic necessity. The inability to support his family on small Workmen's Compensation benefits may compel the totally disabled employee to attempt some type of work to survive. Yet, under this uncompromising formula, any employment income from any source would automatically classify him as not totally disabled. Essentially, it rejects our original concept that a claimant need not be reduced to a vegetable or abject helplessness in order to be considered totally disabled since there are few injuries so disabling that a claimant is precluded from performing any type of work.

2. Employer assistance. Employers, frequently and commendably, will rehire a disabled employee at the same wages subsequent to injury and give him light work or a nominal job. Again, the rigidity of this formula would preclude adequate or any recovery even though the disability was evident in the diminution of work capacity.

3. Lowered productivity. Again, the employee, incapable of performing work duties demanded of his job may succeed in maintaining it by working longer hours or with the assistance of fellow employees, and thus maintain the same wages for an indeterminate period.

4. Discourages rehabilitation. Perhaps the ultimate weakness in exclusive reliance on earnings as the determinate of disability is the fact that it frequently discourages the efforts of an injured man to rehabilitate himself or to follow his physician’s advice to attempt some activity or some light work. If he undertakes either, he is penalized rather than applauded for his efforts by having award denied or diluted; certainly this would appear to be contrary to the basic philosophy of workmen’s compensation benefits which encourages the employee’s effort to rise above

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38 A. Larson, supra note 19 at § 57.21 warns:
It is uniformly held, therefore, without regard to statutory variation in the phrasing of the test, that a finding of disability may stand even when there is evidence of some actual post-injury earnings equaling or exceeding those before the accident.

39 Peabody Coal Co. v. Taulbee, 294 S.W.2d 925 (Ky. 1956).
his handicaps and rehabilitate himself. At one stage, legislation was designed to encourage re-employment of the disabled by transferring payments of such awards to the Special Fund. While impractical in operation and subsequently repealed, the basic concept (to encourage re-employment efforts of the disabled) remains fundamental to Workmen's Compensation law.

Although the Court gave passing reference to Larson's recognition of these as factors,\(^{40}\) it is evident that they are rendered meaningless by the absorption of this decision with wage earnings as evidenced by the Court's generalization that if he is earning same wages after injury, a claimant isn't disabled at all. The inherent weakness of the Osborne test is that it confuses earnings with earning capacity, which Larson emphasized are not synonymous,\(^{41}\) and tends to overlook his warning that earnings are at best presumptive and not conclusive of disability.\(^{42}\)

Another aspect of this new definition invites practical consideration, viz., "available work on the local labor market which claimant is capable of performing."\(^{43}\) How is this determined? Do we adopt the Social Security claims approach of bringing in labor experts to determine available jobs? What are the geographic limits of the local labor market? And more to the point, how does the doctor, in his newly found role as expert on job capabilities advise as to the capabilities of a claimant for such jobs until he is apprised of their nature and availability? And does the availability of jobs in an area necessarily suggest that such jobs are available to an impaired or disabled applicant? A familiar and practical example should illustrate this point. A coal miner sustains an injury which precludes performance of many former work activities, but the defendant establishes that there is mine work available to a man with his impairment in this area. This would deny recovery to the claimant unless he could prove that the job was not available to him, an evidentiary burden which is both difficult and unfair.

Further evidence of the Court's preoccupation with earnings as the sole criterion of disability appears in its announced con-

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\(^{40}\) Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968).

\(^{41}\) A. Larson, supra note 19 at §§ 57.30-57.31.

\(^{42}\) Id.

\(^{43}\) Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968).
clusion that partial disability will be governed by the same formula, *viz.*, wage earning ratio before and after employment at available jobs. This would appear contra to KRS § 342.110, which provides:

> compensation payable under this section shall not be affected by the earnings of the employee after the accident, or after his disability from an occupational disease, whether they be the same or greater or less than prior to the accident or disability from an occupational disease.⁴⁴

Kentucky cases emphasize this point noting that there is no prohibition against consideration of earnings under the total disability section (KRS § 342.095) as there is under the partial disability provision (KRS § 342.110).

How can the *Osborne* language be reconciled with these legislative and judicial provisions? The conclusion must be that *Osborne*’s earnings test can apply only to *total* disability awards and does not apply to permanent partial disability claims. The practical question then arises—one must first establish whether the disability is total or partial before knowing whether earnings are relevant, yet earnings are the basic factors under *Osborne* in determination of disability. Should a claimant (subsequently re-employed) then assert in his application a claim for permanent partial disability so as to obviate the defense and relevancy of wage earnings? Equally disquieting is the Court’s candid admission that a significant area of compensable loss (reduction of job opportunities as a result of injury) would be denied a claimant because it would require an additional complicated formula.

**CONCLUSION**

1. The present posture of our Kentucky Workmen’s Compensation law renders disability virtually indefinable. Some suggested improvements are: (a) abolition of the distinctions between disability produced by personal injuries, occupational diseases and schedule injuries; (b) legislative amendment to allow recovery for “work-related disability” rather than “traumatic

personal injuries by accident or occupational diseases, arising out of and in the course of employment."

2. The Osborne decision (our present test for disability) is somewhat questionable for the following reasons: (a) it tends to confuse wage earnings with earning capacity, and by overemphasizing the former, renders testimony as to medical impairment and condition, work capacity and performance, reduction of job opportunities and other disability factors inconsequential; (b) in its effort to escape the inherent weakness in the Leep test of disability (overemphasis on work performance), the Osborne test may perpetuate this original error by overemphasis on wage earnings.

3. The medical witness should be relieved from his present role under Osborne, as arbiter of job capacity and return to his more appropriate role, viz., diagnosing a claimant’s existence, condition and impairment, and the Workmen’s Compensation Board’s specific responsibility of translating such testimony into terms of occupational disability should be restored.

4. The Osborne language extends its wage earning formula to computation of permanent partial disability benefits in violation of the statutory prohibition contained in KRS § 342.110 and should be modified or deleted.

Conceivably we may never achieve an acceptable, specific test for disability. Hopefully, we may find it unnecessary.