1965

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An Analysis of the 1964 Amendments to the Kentucky Revised Statute CH 342-1964

By Herbert L. Segal

This is the third article to appear in the Kentucky Law Journal concerning analysis of the Kentucky Workmen’s Compensation Law.¹

During the 1962 Legislature, a bill was introduced which authorized the Governor to appoint a committee to study the Workmen’s Compensation Law in an effort to improve it and perhaps prepare for passage by the Legislature a model act.

That committee met for a number of months during 1963 and formalized suggestions for incorporation into a Workmen’s Compensation Act.

Although some of the suggestions were incorporated into the 1964 Amendments, the actual amendments themselves and the bill introduced was the “Governor’s Bill.”

The 1964 Amendments became effective August 1, 1964. Essentially, therefore, this is a continuation of the previous articles and the same general format, i.e., an analysis of each amendment and its effect on the existing Statute and case law, will be utilized.

Ky. Rev. Stat. 342001 [hereinafter cited as KRS]—Definition:

A new position, that of “director” whose duties are defined more specifically in other sections, is created. The director is and

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¹ Mr. Segal is a former member of the Kentucky Workmen’s Compensation Board and a member of the Labor Committee of the American Bar Association, and founder and past Chairman of the Labor Section of the Kentucky Bar Association. A member of the Louisville, Kentucky and American Bar Association, Mr. Segal is a practicing attorney in Louisville, Kentucky where he specializes in Labor-Management Relations, Labor Law and Workmen’s Compensation.

² Segal, H. L.: An Historical Analysis of the Kentucky Workmen’s Compensation Law. 47 Ky. L.J. 279 (1959); An Analysis of the 1960 Amendments to the Kentucky Workmen’s Compensation Law, 49 Ky. L.J. 225 (1960-61).
means the director of the Workmen’s Compensation Board. See KRS 342.230.

KRS 342.005—Employers and employees to whom Chapter applies; functions of the Board in determining applicability; voluntary election to come under Chapter:

This section was reinacted en toto and the following new subsection (5) added:

All employees of departments, administrative bodies, and agencies of the State shall be covered by the provisions of this Chapter. The Commissioner of Finance shall exercise the election if necessary to extend coverage to those State employees for which coverage is not otherwise required by this Chapter.

This new section when read with the changes in KRS 342.010 provides for mandatory coverage for all employees of departments, administrative bodies and agencies of the State.

KRS 342.010—Employer to include municipal operations in State:

This Section was re-written to conform with the changes set forth in KRS 342.005 and the new subsection (5) thereunder.

KRS 342.010 therefore deletes certain language which was superfluous and reads as follows:

‘Employer’ as used in this chapter includes municipal corporations and any subdivision or corporation thereof. Any election with reference to this chapter shall be exercised by the lawmaking or other governing body thereof. Nothing contained in this chapter shall amend, repeal or interfere with any statute or ordinance relating to associations or funds for the relief, pension, retirement or other benefits of any employee of such municipal employer, or the widows, children or dependents of such employees.

KRS 342.020—Medical Treatment at Expense of Employer; artificial members and braces:

The amendment to this section is a dramatic one.

Although the employer’s liability and total expense for medical benefit payments is limited to $3,500.00, a further amendment to section 2 hereof provides that:

However, further medical, surgical and hospital treatment may be ordered by the Board upon application and sufficient showing of justifiable need therefor,
Prior to the 1964 Amendment there was a limitation for further medical, surgical and hospital treatment "not to exceed an additional $1,000.00."

Even though it seems clear that the employer's responsibility for medical benefits payment is limited to $3,500.00 as contrasted with $2,500.00 previously,\(^2\) the amendment is not clear as to who is responsible for the additional medical benefits when ordered by the Board.

In subsection (3), which provides for furnishing of a modern artificial member and proper braces, this is in addition to all other medical and surgical and hospital benefits enumerated in subsection (1) and (2), growing out of the amputation of the arm, hand, leg or foot, loss of hearing, enucleation of the eye or the loss of teeth, the limitation of the $2,500.00 employer liability is deleted.

We have here again an unlimited potential liability for the initial furnishing of such modern artificial members and braces.

KRS 342.070—Compensation in Case of Death:

In order of chronology this is the first section of the Act which concerns direct money compensation benefits. This section involves, therefore, the use of the new "formula" for determining compensation benefits based upon the average weekly wage of the State for the year in which the injury occurred.

Section 342.070(1) provides that if there are one or more wholly dependent persons, 66\(\frac{2}{3}\) per cent\(^3\) of the average weekly earnings of the deceased employee shall be paid for the period between the date of death and 400 weeks thereafter, subject to the limitations contained in subsection (4) and (5) of KRS 342.070.

Subsection (2)(a) also provides for the same limitation as to the payment of benefits being subject to the provisions of subsection (4) and (5) of KRS 342.070. The definition of "dependency," and the fact that the death must result within two years from an accident for which compensation is payable under the Act as a condition precedent to recovery in case of death, remain unchanged.

Subsection (5) of KRS 342.070 is completely new and pro-

\(^2\) In addition to another $1,000.00 on sustained motion.
\(^3\) Raised from 65 per cent.
vides the formula applicable in determining the amount of benefits, to wit:

(5) The minimum weekly benefits payable for death under this section shall be 25 per cent of 85 per cent of the average weekly wage of the State as determined under subsection (2) of KRS 342.140 and maximum weekly benefits payable for death under this section shall be 50 per cent of 85 per cent of the average weekly wage of the State as determined under subsection (2) of KRS 342.140.

It has been conceded that this proposal would cut benefits in certain wage areas. However, it was felt by the proponents of this formula that the percentage method of computing benefits with the maximums and minimums determined by a percentage formula tied into the average State wage was desirable in providing a built-in escalator clause.

The benefits are raised immediately from 65 per cent of the injured employee's average weekly wage\(^4\) to \(66\frac{2}{3}\) per cent with a maximum of 50 per cent of 85 per cent for the average weekly wage of the State, and with a minimum of 25 per cent of 85 per cent of the average weekly wage of the State, with a limitation of 400 weeks.

The use of 85 per cent takes into consideration and supposedly reflects the "take-home pay" after taxes.

The figures that have been presented as the average weekly wage for the State during the year 1962 show an average weekly wage of $87.03, and was so certified. The average State wage for 1963 was $89.54, and in 1964 it is estimated that it will be in excess of $91.00.

Thus, the proposed formula would increase immediately the minimum death benefits by $2.49 based on the 1962 average State wage. The maximum based on 1962 would be increased to $36.99. The period of payment would be the same as in the present law.

KRS 342.080—When Compensation Ceases:

Prior to this amendment, compensation ceased at the death of a legal or common law marriage of the dependent, or a child

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\(^{4}\) Previously maximum benefits $34.00, minimum $16.00, total of 400 weeks.
reaching the age of 20 years unless incapacitated from wage earning.

Now, added to the above is an exception that if the child is enrolled as a full-time student in any accredited educational institution, compensation shall cease upon termination of such enrollment or upon his attaining the age of 25 years, whichever shall first occur.

KRS 342.095—Compensation for Total Disability:

This is the second section providing for benefit payments affected by the new formula. At the outset, it is provided in the amendment that when the injury or occupational disease causes total disability for work, except for the first seven days thereof, the employee shall receive a weekly compensation equal to \( \frac{662}{3} \) per cent\(^5\) of his average weekly earnings, as computed under the new formula, during the period of total disability not to exceed 425 weeks after the date of the injury or after the date disability from an occupational disease begins.

Subsection (2) of KRS 342.095 is completely new and provides that the maximum basic weekly income benefits for total disability shall not exceed 55 per cent of 85 per cent of the average weekly wage of the State, computed as provided in KRS 342.140(2) and rounded to the nearest dollar. The minimum basic weekly income benefit for total disability shall not be less than 25 per cent of 85 per cent for the average weekly wages of the State, computed as provided in KRS 342.140(2) and rounded to the nearest dollar.

This Amendment raises the minimums as in the preceding section, and increases the maximum up to $41.00 (rounded) based on the average State wage for 1962. Because there was not an increase of $2 or more since 1962, the maximum benefits payable under the Act remain $41.00 for the calendar year 1965. However, the minimum benefits increased $1.00 or more commencing January 1, 1965, thereby making the minimum weekly benefits $19.00.

KRS 3429.100—Compensation for Temporary Partial Disability:

Here again is a section affected by the new formula. The

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\(^5\) Previously 65 per cent.
weekly compensation payable for temporary partial disability is $66\frac{2}{3}\text{ per cent}^6$ of the difference between the employee's average weekly earnings before the injury, or disability from an occupational disease, and the average weekly earnings that he earns, or is able to earn in some suitable employment during such disability, not to exceed 400 weeks from the date of the injury or from the date his disability from an occupational disease began.

There is a new subsection to KRS 343.100 which provides that the maximum basic weekly income benefits for temporary partial disability shall not exceed 50 per cent of 85 per cent of the average weekly wage of the State, computed as provided by KRS 342.140(2) and rounded to the nearest dollar.

KRS 342.105—Compensation for EnumeratedPermanentPartial Disability:

This section is also directly affected by the new formula and now provides that the weekly compensation payable here shall be equal to $66\frac{2}{3}\text{ per cent}^7$ of the injured employee's average weekly earnings, subject to the limitations in subsection (5) of KRS 342.070 for the applicable period stated for each member.$^8$

Still retained in KRS 342.105 is a twenty week compensatory period for actual temporary total disability.

KRS 342.110—OtherPermanentPartial Disability:

Here is another section affected by the new wage formula. At the outset, compensation is paid at the rate of $66\frac{2}{3}\text{ per cent}^9$ of the average weekly earnings of the employee, subject to the limitations contained in KRS 342.075(5), multiplied by the percentage of disability caused by the injury or occupational disease for such period as the Board determines, not to exceed 400 weeks.

Based on the 1962 average State wages, this raised the

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$^6$ Previously 65 per cent.
$^7$ Previously 65 per cent.
$^8$ Under KRS 342.105, prior to the Amendment, the enumerated losses were paid on the basis of 65 per cent of the average weekly earnings, not to exceed $32.00 or an amount less than $16.00.
$^9$ Previously 65 per cent.
minimum benefits from $16.00 to $18.49 and the maximum from $32.00 to $36.99.

The period of payment remains unchanged.

**KRS 342.120—Subsequent Injury, Compensation; Subsequent Claim Fund to be Made Party:**

As heretofore provided and referred to, the name of the Subsequent Claim Fund was changed to the “Special Fund” throughout the Act.

Subsection (4) (KRS 342.120) was changed by adding that any remaining compensation due and owing an employee shall be paid out of the Special Fund directly to the employee by the carrier or self-insured employer who is liable for compensation under subsection (3) of KRS 342.120, and the carrier or self-insured employer shall be reimbursed for such payments from the Special Fund on a quarterly basis and under such regulations as the Board may provide for such purpose.

This change in the method of payment will avoid the intolerable delay in the payments from the Special Fund which has resulted in such an unfortunate situation since the 1962 Amendment. This new method of payment will expedite payments to the employees and will set up a definite procedure for reimbursement to the self-insured employer or the insurance carrier who makes the payments directly to the employee.

KRS 342.120(5), which provided for the then named Subsequent Claim Fund to pay to the injured employee the compensation benefits due him during the period the claimant is employed at wages equal to or greater than he was earning before the injury, along with provisions for a lump sum payment pursuant to KRS 342.150, is eliminated completely. This leaves the employer still liable for payments even if the employee is reemployed at wages equal to or greater than those he was earning prior to the injury.

Lump summing is still possible under KRS 342.150, which provides for lump sum compensation, where compensation has been paid for not less than six months, and where the Board determines that it is for the best interest of either party and will not subject the employer or his carrier to undue risk of overpay-
ment of future payments with a discount of five per cent per annum on each payment.

KRS 342.121—Reference of Medical Questions and Subsequent injury cases to physicians; reports; fees and expenses; decision of board:

The only changes here are those substituting “Special Fund” for “Subsequent Claims Fund”, and other grammatical changes in subsection (3) of KRS 342.121, the last sentence thereof now reading:

The Physician shall also include in his report a statement indicating the physician or physicians, if any, who appear before him, and what, if any, medical reports were considered by him.

KRS 342.122—Subsequent Claim Fund Tax; Adjusting Costs; Credit; Withdrawal; Maximum; Additional Assistance; Transfer from Subsequent Injury Fund; Transfer from Special Fund:

Here again the primary change is the substitution of “Special Fund” for “Subsequent Claim Fund.”

The first sentence of subsection (6) of KRS 342.122 provides that if the Commissioner of Labor finds that the Special Fund tax levied is insufficient to pay such claims awarded under the Special Fund provisions, then he may levy additional assessments against all insurance companies writing workmen’s compensation insurance in Kentucky, including every employer carrying his own risk, for an amount not to exceed $100,000.00.

KRS 342.140—Computation of benefits:

Under this section prior to the Amendment, the average weekly wage was determined as if the employee were working full time.

Under the Amendment, the average weekly wage upon which benefits are based is defined in great particularity and constitutes a completely different method of computing an employee’s average weekly wage upon which benefits are based.

KRS 342.140 now provides, except as otherwise provided in

10 Previously the pronoun was “them.”
11 Previously, grammatically incorrect “them” was used.
12 Previously the words “an additional assessment” were in the Act and there is now deleted the word “an.”
the Act, that the average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be taken as the basis upon which to compute his compensation, and shall be determined as follows, as set forth in the section, with a specific section for seasonal occupations and certain occupations and individuals:

1. *If* at the time of the injury which resulted in death or disability, or the last date of injurious exposure preceding death or disability or occupational disease:
   a. the wages were fixed by the week, the amount so fixed shall be the average weekly wage;
   b. if the wages were fixed by the month, the average weekly wage shall be the monthly wage, so fixed, multiplied by twelve and divided by 52;
   c. if the wages were fixed by the year, the average weekly wage shall be the yearly wage, so fixed, divided by 52;
   d. if the wages were fixed by the day, hour or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee, computed by dividing by thirteen the wages (*not* including overtime or premium pay) of said employee, earned in the employ of the employer in the first, second, third or fourth period of thirteen consecutive calendar weeks in the 52 weeks immediately preceding the injury;
   e. if the employee has been in the employ of the employer *less* than thirteen calendar weeks immediately preceding the injury, his average weekly wage shall be computed under previous paragraph (d), taking the wages (*not* including overtime or premium pay) for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation;
   f. if the hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees.

2. *Seasonal Occupations:* In occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, the average weekly wage shall be taken to be 1/50 of the total wages which the employee has earned.
from all occupations during the twelve calendar months immediately preceding the injury.

3. Firemen, policemen, and civil-defense members or trainees: In the case of volunteer firemen, police and civil-defense members or trainees, the income benefits shall be based on the average weekly wage of their employment.

4. Minors or trainees: If the employee is a minor, apprentice, or trainee when injured, and it is established that under normal conditions his wages should be expected to increase during the period of disability, that fact may be considered in computing his average weekly wage.

5. Moonlighting—An employee working under two or more employers: If an employee is working under concurrent contracts with two or more employers and the defendant employer has knowledge of such employment prior to the injury, then the wages from all such employers shall be considered as if earned from the employer liable for compensation.

6. Definition of the term “wages” and what shall be included: The term “wages” used in this section means, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging and fuel or similar advantages received from the employer, gratuities received in the course of employment from others than the employer to the extent such gratuities are reported for income tax purposes.

7. The Board shall, from time to time, based upon the best available information, determine by regulation industries which ordinarily do not have a full working day for five days in every week. In such industries, compensation shall be computed at the average weekly wage earned by the employee at the time of injury, reckoning wages as earned while working full-time. “Full-time” as used herein means a full working day for five working days in every week, regardless of whether the injured employee actually worked all or part of the time.

KRS 342.143—Computation of Average Weekly Wage:

This is a completely new section and sets forth how the State Average Weekly Wage is determined. For the purpose of this Act, the average weekly wage of the State shall be determined by the Director of the Workmen’s Compensation Board as follows: On or before September 1 of each year, the total wages
reported by subject employers under the Kentucky Unemployment Insurance Law for the preceding calendar year shall be divided by the average monthly number of insured workers (determined by dividing the total number of insured workers reported for the preceding year by twelve.)

The average annual wage thus obtained shall be divided by 52 and the average weekly wage thus determined, rounded to the nearest cent.

Such average weekly wage shall be certified to the Director of the Workmen's Compensation Board by the Department of Economic Security in a manner prescribed by the Workmen's Compensation Board by regulation.

The average weekly wage as so determined shall be applicable for the full period during which income of death benefits are payable, when the date of occurrence of injury or of disablement in the case of disease or death, falls within the calendar year, commencing January 1, following the September 1 determination.

This method leaves a hiatus from September to January, and even though the average change would be sufficient to effect the benefits, a claimant injured during September through December 81 would receive the previous year's computed rate.

Whenever a change in the average weekly wages is of such amount that the minimum weekly income benefits for total disability or for death are increased or decreased by $1.00 or more, the maximum weekly income benefits for total disability or for death are increased or decreased by $2.00 or more, computed in

1. An error appears in the 1964 Supplement, KRS 342.143(2) and in the Kentucky Workmen's Compensation Law Annotated, 1964, published by the Department of Labor, wherein the language refers to a decrease by $2.00 or more, only, and erroneously omits the words "increased or". The provision should read:

"Whenever a change in the average, weekly wage of the state is of such amount that the minimum weekly income benefits for total disability or for death are increased or decreased by one dollar or more, or the maximum weekly income benefits for total disability or for death are increased or decreased by two dollars or more, computed in each case and rounded to the nearest dollar, an adjustment in those minimums or maximums which are affected in the requisite amount by the change in the
average weekly wage of the state shall be made which will reflect this increase or decrease, but no change in such limitations shall otherwise be made. (1964 H 483, §14. Eff. 8-1-64. 1946 e 37,§ 7)"

In Attorney General’s Opinion OAG 65, dated January 8, 1965, this error is recognized and the following stated:

“House Bill 483 of the 1964 Regular Session, as originally introduced and passed by the House, contained the words “increased or” in referring to both the minimum and maximum benefits. The Senate adopted the Bill as passed by the House, making no amendments thereto. Somehow, through a printer’s error, the words “increased or” were omitted from the Legislative Journal but the enrolling clerk of the House discovered the error and the enrolled Bill filed in the office of the Secretary of State contains the proper wording. Of course, in this state the enrolled Bill controls. Fiscal Court of Fayette County v. Nichols, 287 Ky 478, 153 SW 2d 986 (1941); Shannon v. Dean, 279 Ky 279, 130 SW 2d 812 (1939). The correct version of the statute may be found in Baldwin’s 1964 Legislative Issue of the KRS Service at Section 342.140, subsection (2). I have called this matter to the attention of the Reviser of the Statutes, and he advises me that the proper correction will be made in the next publication of the Section as it appears in KRS.”

The Director of the Workmen’s Compensation Board also requested an opinion from the Attorney General on the following situation:

“...if there is any increase required to be made in the maximum benefits where the change in the average weekly wage is less than $2.00, rounded to the nearest dollar.”

The Attorney General answered:

“In our opinion it is clear that the statute does not permit an increase in the maximum benefits of less than $2.00.”

The Attorney General’s Opinion approves the procedure and practices already formulated by the Director.

each case and rounded to the nearest dollar, an adjustment in those minimums or maximums which are affected in the requisite amount by the change in the average weekly wage of the state
shall be made which reflect this increase or decrease, but no such change in such limitations shall otherwise be made.

KRS 342.215—Compensation Board; appointment; term; vacancy; chairman:

The only change in this section provides that the Workmen's Compensation Board shall be attached to the Department of Labor for administrative services, and the five board members must now have the qualifications required of a circuit judge.

KRS 342.230—Employees and Assistants of the Board:

The Amendments to this section provide for a number of fundamental changes in Board procedure. From the recommendation of the Director of the Board, within the limits of the appropriations therefor, the Board shall establish and fill any positions, including medical services and advice, necessary to carry on the Board's work.

The Governor shall appoint a director of the Workmen's Compensation Board who must be admitted to the practice of law in the State of Kentucky and who must have practiced for at least three years, whose duties are comparable to the former Executive Secretary. In addition to these previous duties the Director annually reports the activities of the Board to the Governor.

The Governor now can appoint not more than fifteen hearing officers, each of whom must be an attorney admitted to the practice of law in Kentucky and who shall have practiced for at least three years. These hearing officers, upon the direction of the Director or the Board, shall conduct hearings, and otherwise supervise the presentation of evidence and perform any other duties assigned to them by the Director or the Board. Except that such hearing officers shall not render final decisions, orders, or awards.

However, such hearing officers may, in receiving evidence on behalf of the Board, make such rulings affecting the competency, relevancy, and materiality of the evidence about to be presented.

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13 This section previously stated that the Board was "a part of."
14 Previously the Commissioner of Labor.
15 Previously called referees.
and upon motions presented during the taking of evidence, as will expedite the preparation of the case for decision.

The Board may at any time recommend removal of the Director or any hearing officer\(^\text{16}\) by filing with the Governor\(^\text{17}\) a full written statement of its reasons for such removal.

The purpose of precluding the hearing officers from the writing of final decisions, orders or awards is to expedite the rendering of final decisions by the Workmen's Compensation Board. The hearing officers' duties, therefore, are primarily limited to presiding at the hearings since all decisions are written by a Board member.

\textit{KRS 342.245—Meetings; record of proceedings:}

The Board must now meet at least once a week\(^\text{18}\) for the transaction of its business. A quorum of the Board must be present at the main office of the Board in Frankfort, Kentucky, and remain there or available thereto during regular working hours on the days designated.\(^\text{19}\)

The Director assumes all the duties heretofore vested in the Executive Secretary.

\textit{KRS 342.255—Quorum; what constitutes an order of Board:}

A majority of the five-member Board still constitutes a quorum. The only change in this section is the insertion of "director" and "hearing officer" for "executive secretary" and "referee," with the Board being permitted as always to authorize the Director or hearing officer to investigate or inquire into that which the Board itself could do.

\textit{KRS 342.270—Board hearings; applications for; time and place of; notice; informal conference with the parties:}

If the parties fail to reach an agreement in regard to compensation under this Chapter, either party may make written application to the Board for a hearing in regard to the matter in issue and for ruling thereon, with the same statutory limitations applying. Previously, this Section provided:

\(^{16}\text{Previously listed in the Act as any appointee.}\\
^{17}\text{Previously Commissioner of Labor.}\\
^{18}\text{Previously the Board met on the 1st & 3rd Tuesday of each month.}\\
^{19}\text{Previously there was a "not later than 11:00 a.m. and until 5:00 p.m." work period.}
or if they have previously filed such an agreement with the Board and compensation has been paid or is due in accordance therewith and the parties thereafter disagree, either party may make written application to the Board.

As has been the practice, the Director or a hearing officer or a Board member is authorized by the Board to attempt to informally settle the issues between the parties.

There is a new KRS 342.270(4) which provides that if the parties have previously signed an agreement which has been approved by the Board, and compensation has been paid or is due in accordance therewith, and the parties thereafter disagree; either party may proceed under KRS 342.125 which remedy shall be exclusive. This change, of course, ties in directly with the omitted language in KRS 342.270(1) and eliminates a previous ambiguity.

There is also a new KRS 342.270(5) which provides that an application for adjustment of claim shall be held in abeyance by the Board during any period voluntary maximum payments of compensation are being made under any benefit section of this Act, unless prosecution of the employee's claim would be prejudiced by delay. This section is a very fair one in that it prevents the employee's benefits being reduced merely by the filing of an application by an attorney and subsequent payment of attorney's fees where the injured employee is receiving the maximum benefits that he can receive under the Act.

Subsection 5 cannot and should not be used as a means of delaying hearings, pressuring claimants into inequitable settlements, or depriving claimants of competent counsel. This subsection cannot and should not be used as a strategy by turning benefits "off and on," as this was certainly not the intent of the Legislature. Rather, Subsection 5 envisioned continuous, good-faith, voluntary payment of benefits.

The only possible disadvantage might be the delay in his case being processed because of the tremendous backlog now in existence. After the new procedure has been in effect, that backlog should be greatly reduced.

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20 Previously the referee.
21 KRS 342.125 is the section providing for re-opening of an order or award.
KRS 842.275—Board hearings; when awards are to be made; records filed; copy of award sent to parties:

This section now provides that the Board or any of its members, the Director or any hearing officer directed by the Board, shall hear the parties at issue and their representatives and witnesses, but only the full Board shall determine the dispute in a summary manner. The award, order, or decision of the full Board shall be made within thirty days after final submission, unless the record is complicated or unusual, and then the decision shall be made within sixty days\(^2\) after final submission. However, if the award, order or decision is not rendered within thirty days, the Board shall notify the parties of the reasons for such delay.

The purpose of this change is to expedite the decisions, orders, and awards of the Board.

A new section is added here which provides that within fourteen days after the date of the award, order, or decision, any party may file a petition for reconsideration which must clearly set out the errors relied upon, with the reasons and arguments for reconsideration. All other parties shall have ten days thereafter to file a response to the petition.

The Board is limited in such review to the correction of errors patently appearing on the face of the award, order, or decision, and shall overrule the petition for reconsideration or make such correction within ten days after submission.

This is not a second bite at the apple, but a mere opportunity to correct errors patently appearing on the face of the award, order, or decision in the nature of a misprision.

KRS 342.285—Appeal to Circuit Court:

In conformity with the previous new section and its provision for a petition for reconsideration, KRS 342.285 was amended to provide that an award or order of the Board, as provided for in KRS 324.275, if a petition for consideration is not filed,\(^3\) shall be conclusive and binding as to all questions of fact with the right of appeal within twenty days to the Circuit Court having juris-

\(^2\) Previously ninety days.
\(^3\) Previously the Act read, "... if application for review is not filed as provided for in KRS 342.280 ..."
The Board shall be named respondent and service shall be had upon the Director.\footnote{Previously the Executive Secretary.}

KRS 342.285 provides no new or additional evidence may be introduced in the Circuit Court except as to fraud or misconduct of some person engaged in the administration of this Chapter and effecting the order, ruling or award, but the Court shall otherwise hear the cause upon the record as certified by the Board and shall dispose of the case in summary manner. Added to the above is the following new language:

The Court shall not substitute its judgment for that of the Board as to the weight of evidence on questions of fact, its review being limited to determine whether or not a) the Board acted without or in excess of its powers;\footnote{In previous Act.} b) the order, decision, or award was procured by fraud;\footnote{In previous Act.} c) the order, decision, or award is not in conformity with the provisions of this Chapter;\footnote{In previous Act.} d) the order, decision, or award is clearly erroneous on the basis of the reliable, probative, material evidence contained in the whole record; or e) the order, decision, or award is arbitrary or capricious or characterized by abuse of discretion or clearly an unwarranted exercise of discretion.

Deleted is the following subsection:

(d) If findings of fact are in issue, whether such findings of fact support the order, decision or award.

Although at first blush it would appear that the Court has additional power of review over the Board’s order, decision, or award, it is submitted that the change here merely codifies the existing case law on the subject.

See: Imperial Elkhorn Coal Co., et al. v. Newson, Kentucky, 385 S.W.2d 865 (1964); Savage v. Clausner Hosiery Co. Kentucky, 379 S.W.2d 473 (1964); and, Lee v. International Harvester Co., Kentucky, 373 S.W.2d 418 (1963), all of which demonstrate the Court’s approach to awards of the Board and that the Court is doing what the Amendments now say it should do.

KRS 342.280 has been repealed and replaced by the procedure set forth in KRS 342.275.
KRS 342.290—Appeal to the Court of Appeals:

The only change in this section corrects and eliminates references to the old civil code of procedure. This section contains the proper designation of Rules of Civil Procedure which controls appeals to the Court of Appeals in Workmen’s Compensation cases.

KRS 342.316—Occupational disease; defined; compensation; claim; allowance; subsequent claim fund:

The first change noted is in subsection (3) which now provides that in cases of radiation disease a claim must be filed within ten years from the last injurious exposure to the occupational hazard. It is submitted that ten years is arbitrary and should be raised as more information and knowledge is obtained on the long-term effects of radiation exposure.

The next change in this section occurs in paragraph 13(a) with the substitution of Special Fund for Subsequent Claim Fund and the additional revision affecting liability payments for occupational diseases other than silicosis or any compensable pneumoconiosis.

Provided, however, that when there is a joint award against the carrier or self-insured employer and the Special Fund under this section, all of the compensation awarded shall be paid by the carrier or self-insured employer, and the carrier or self-insured employer shall be reimbursed for such payments from the Special Fund on a quarterly basis and under such regulations as the Board may provide for such purpose.

This section ties in with and makes uniform the changes made in KRS 342.120.

KRS 342.320—Regulation of charges by attorneys, physicians and hospitals:

A new sentence added to subsection (2) of KRS 342.320 provides that no attorney’s fee in any case involving benefits under this Act shall be paid until the fee is approved by the Board, and of course the fee cannot exceed an amount equal to 20 per cent of the amount received. Any contract for the payment of attorneys’ fees otherwise than as provided in this section shall be void.
This section tightens up the payment of attorneys' fees and eliminates any possible ambiguity existing in the previous language.

KRS 342.480—Maintenance fund; publication of Board proceedings; fund not to lapse:

The following changes were made in this section.

In subsection (1) the maintenance fund shall be used for ordinary recurring expenses of operation and "for no other purpose."

In subsection (2), at such intervals as determined by the Board, the Director may compile and publish for distribution all or any part of its official proceedings and may charge a subscription fee sufficient to defray expenses.

In subsection (3), any sum remaining in the maintenance fund to the credit of the Board at the end of any fiscal year shall be transferred by the Department of Finance to the credit of the Special Fund established by KRS 342.122.

The following sections of the Act are repealed outright:

KRS 342.225 Supervision by Commissioner of Labor. All final decisions of the Board shall be certified to the Commissioner of Labor who shall supervise and manage all financial matters for the Board.

KRS 342.280 Review by full Board; cost of attendance of certain witnesses.

KRS 351.240 Office, equipment, seal; meetings, proceedings against the Board or members.

The 1964 Amendments to the Act should prove beneficial in the Administration of the Act, particularly in the areas of expediting the processing of claims and prompt payment of benefits.

However, there still exists a delay in the docketing and hearing of cases in Louisville and Jefferson County. Perhaps the reason for this is that the greatest number of cases arise in this area and because the hearings are held only once a week.

28 Previously Commissioner of Labor.
29 Previously Board.
30 Previously the words "set up" were used.
31 Previously the credit was due to the Workmen's Compensation Board.
The Board has in the past ordered hearings on more than one day and might well want to consider returning to that procedure, at least temporarily, until the case load becomes more current.

The problem is much less acute, if it in fact exists at all, in other areas.

Some thought might further be given to modernizing Workmen's Compensation hearings along the following lines:

1. Medical or other testimony might be taken by deposition prior to the hearing and introduced as evidence at the hearing.
2. Both the claimant and the defendant might introduce all of its proof, either through depositions or witnesses, at the initial hearing, which would be the only hearing before the referee.
3. Both the claimant and defendant might be given a period of time not to exceed ten (10) days to introduce any rebuttal testimony.

Since it is not within the purview of this Article to discuss or suggest changes in the substantive law, we would only state that the most obvious void in the Workmen's Compensation Law is the lack of any rehabilitation provisions.

The Board itself has made extensive changes and improvements in its Rules and Regulations, effective August 1, 1964, pursuant to KRS 342.260. The major changes are the following:

WCB 1-1 Procedure

Section 1. Definitions.

a. "Board" means the Workmen's Compensation Board;
b. "Director" means the Director appointed pursuant to KRS 342.230(2);
c. "Hearing Officer" means a Hearing Officer appointed pursuant to KRS 342.230(3), and also includes the Director when acting under Rule 6 hereof;
d. The masculine gender includes the feminine and the neuter, and the singular number includes the plural.

Section 4. Motions.

1. Every motion for the allowance of an attorney's fee shall (in addition to service upon the adverse party) also be served upon said attorney's client and the fact of such service certified in the manner prescribed by this Rule.
2. Every motion, the grounds of which depend upon the existence of one or more facts not appearing in evidence at the time of the filing of the motion, shall be supported
by an affidavit or affidavits evidencing such fact or facts, which affidavit or affidavits shall be served and filed with the motion. Controverting affidavits may likewise be served and filed by the opposing party.

3. Every motion, the grounds of which depend upon the existence of one or more facts which the movant contends are shown in evidence or are admitted by the pleading of the adverse party, shall contain a reference to the hearing transcript or deposition containing such evidence and to the page thereof, or to the pleading containing such admission.

4. No motion will be considered at any meeting of the Board unless same has been served and filed at least five days prior to the date of such meeting, to which three days shall be added to the service when service has been made by mail. A response to such motion will be considered if served and filed at any time prior to the day of such meeting.

Section 5. Board Meetings.

Regular meetings of the Board will be held weekly each Monday at the offices of the Board at Frankfort, unless otherwise ordered by the Board. Special meetings will be held, when necessary, upon the call of the Chairman of the Board, at such times and places as said Chairman may designate.

Section 6. Hearings.

1. . . . The use of depositions taken under this subsection is not subject to the limitations contained in Rule 26.04(3) of the Rules of Civil Procedure.

2. Rulings made by a hearing officer pursuant to KRS 342.230(3) may be reviewed by the Board upon written application made by any party prior to final submission of the case, which application shall be served and filed in the manner provided by Rule 4 for the service and filing of motions.

3. Unless otherwise ordered by the Board for good cause, the proof introduced at each hearing may relate to all issues in the case, and preliminary hearings upon issues such as limitations or jurisdiction will not be held.

4. Promptly following each hearing, the hearing officer conducting same shall transmit to the Board a field order reciting the appearances on behalf of the parties, the general nature of the proceedings had at the hearing, and the time given by him to each party for completion by deposi-
tion, and shall mail a copy thereof to counsel for each party and to each party who is not represented by counsel. The field order shall be filed with the Board's case record but will not be entered upon its order book.

Section 7. Stipulation of Facts and Judicial Notice.

The Board will take judicial notice of the election of the parties to operate under the provisions of the Workmen's Compensation Act, in the absence of stipulation thereof, where such election is shown by the records of the Board. In all cases where there has been no such stipulation, the Director as custodian of the records of the Board shall, at the time of submission of the case, file in the case record an attested copy, pursuant to Rule 44 of the Rules of Civil Procedure, of the employer's election to operate under the Act (Form No. 1) or a certificate that no such record is found, as the case may be.

Section 8. Informal Conferences.

At any time before hearing, the Board upon motion of either party will direct the holding of an informal conference as provided by KRS 342.270(3) in an attempt to assist the parties to adjust their differences, but will not delay the granting of a hearing, over the objection of either party, for such purposes.

Section 9. Although there was no change made in this Rule, the Court of Appeals in Vicals v. Beaver Creek Mining Company, Kentucky 387 S.W.2d 590 (1965) interpreted the predecessor Rule (WCB-12) as requiring that good cause must be shown in order to require the production for inspection of X-ray films upon which the employer's medical expert primarily based his testimony, which was in direct conflict with claimant's physician as to the existence of silicosis or pneumoconiosis; the board's refusal to make such films available under reasonable terms was held an abuse of discretion.

Section 10. Exceptions.

Formal exceptions to rulings or orders of the Board or of any member or hearing officer thereof are unnecessary.

Section 12. Failure to Appear.

Where the defendant fails to appear at the hearing of a case and no good cause is shown for his failure to appear, the hearing officer may proceed with the hearing of the case.
1. Continuances of hearings, whether requested of the Board

Section 13. Continuances, Extensions and Motions to Hold in Abeyance.

or of the hearing officer, and extensions of time will be granted for good cause and upon motion, supported by affidavit stating facts making a proper showing of such cause, and upon due notice to the adverse party. Continuances or extensions merely by consent or agreement will not be granted. The existence of, or the necessity of attending to other business on the part of counsel will not be considered "good cause" within the meaning of this Rule.

2. Upon motion and notice in conformity with this Rule, the Director is authorized to enter orders granting extensions of not more than fifteen days without the approval of the Board.

3. The provisions of this Rule shall apply to motions or applications requesting that proceedings in a case shall be held in abeyance pending settlement or for any other reason.


1. The plaintiff may file a brief on the merits of the case within fifteen days after the submission of the case as provided by Rule 15 hereof. The defendant may file a brief in opposition thereto within fifteen days after the filing of plaintiff's brief or within the like period after the expiration of plaintiff's briefing time, whichever shall first occur. Plaintiff may file a reply brief within five days after the filing of defendant's brief. No other or further briefs shall be filed, unless otherwise ordered by the Board.

2. Five copies of all briefs shall be filed. Every brief shall be served, and the fact of such service certified, in the manner provided by Rule 3(c).

Section 15. Submission and Decision of Cases.

1. Each case shall stand submitted at the first regular meeting of the Board following the expiration of the time allowed for the taking of all proof.

2. No deposition will be considered unless it has been filed with the Board within ten days after submission of the case; but upon motion and for good cause shown within said period the Board may grant an extension of time for such filing.

3. All cases will be decided by the Full Board. Every decision upon the merits shall contain findings of fact and
rulings of law as required by KRS 342.275; but formal opinions will be delivered only in those cases in which the legal questions are novel or important, or the facts are so complicated as to require detailed analysis.

4. Every final order or award of the Board has the effect of overruling all pending motions or objections not otherwise specifically disposed of by such final order.


The Board upon motion may permit oral argument of cases in which novel or important legal questions are presented or the factual situation is complicated. No such motion shall be made until all briefs have been filed.

Section 17. Petitions for Reconsideration.

Five copies of each petition for reconsideration of a final order, award, or decision, and five copies of each response to such a petition, shall be filed.

Section 18. Subsequent Proceedings.

Every application for reopening or review of any order or award of the Board pursuant to KRS 342.125, and every application pursuant to KRS 342.111, shall be in writing, shall be verified or supported by affidavit as required by Rule 4(c), shall be styled with the names of the original parties, plaintiff and defendant, as in the proceedings in which the order or award was made, shall bear the number of the original proceedings, and shall be filed in triplicate.

Section 20. Depositions of Physicians Appointed under KRS 342.121.

An examining physician appointed by the Board under the provisions of KRS 342.121 shall not be examined by deposition on his report except by permission of the Board. No motion requesting such permission will be entertained unless review of the report has been sought under KRS 342.121(4).

Section 21. Examinations by Disinterested Physicians.

When a disinterested physician or surgeon has been appointed by the Board pursuant to KRS 342.315, no party shall furnish such physician or surgeon with any copies of reports previously made or depositions given by any physicians or surgeons who have previously examined the plaintiff, or with any copy of any decision previously rendered by the Board in the same cause. Either party
may, however, transmit to such physician or surgeon, through the office of the Director, properly identified X-ray photographs previously made of the plaintiff but shall not include therewith any interpretation of such X-ray photographs by any person.

Section 22. Regulations DIR-52, WCB-1 through WCB-23, and WCB-25, are superseded.

UCB-2-1. Self-Insurers.

WCB-2-1 contains procedural provisions concerning how to operate under the Act as a self-insurer and shall not be discussed here since these regulations do not concern the substantive operation of the Workmen’s Compensation Law.

WCB-3-1 Reimbursement of Carriers and Self-Insured Employers by Special Fund.

Section 1. On or before September 1 of each year, the Com- applying for reimbursement by the Special Fund under the provisions of KRS 342.120(4) or KRS 342.316(13)(a) shall furnish the Board quarterly a statement in duplicate showing the name of the employee, the amount of compensation paid such employee, and the periods for which such compensation has been paid, which statement shall be filed with the Board within thirty days from the end of each quarter for which reimbursement is sought, or within such further time thereafter as the Board may for good cause permit, and shall be certified by a designated officer or employee of the employer or insurance carrier.

WCB-4-1 Certification of Average Weekly Wage of the State.

Section 1. Each insurance carrier and self-insured employer missioner of the Department of Economic Security shall certify to the Director the “average weekly wage of the State” for the preceding calendar year, pursuant to KRS 342.140(2). This certification shall include the mathematical calculation used in determining the average weekly wage in accordance with KRS 342.140.

All of the above regulations became effective August 1, 1964.
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Communications of either an editorial or a business nature should be addressed to Kentucky Law Journal, University of Kentucky, Lexington, Kentucky.

The purpose of the Kentucky Law Journal is to publish contributions of interest and value to the legal profession, but the views expressed in such contributions do not necessarily represent those of the Journal.

The Journal is a charter member of the Southern Law Review Conference and the National Conference of Law Reviews.

Subscription price: $5.00 per year $2.00 per number