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An Analysis of the 1960 Amendments to the Kentucky Workmen's Compensation Law**

By HERBERT L. SEGAL*

In a recent issue of the KENTUCKY LAW JOURNAL there appeared an historical analysis of the Kentucky Workmen's Compensation Law and all of its amendments to that date.¹ That article contained the following statement: "Most of the amendments to the Act have been by agreement between the representatives of the employer groups and labor groups. Without an 'agreed bill' the chances for passage of proposed amendments have been extremely limited."² The statement was true at the time. However, the 1960 amendments, effective June 16, 1960, were not the result of an "agreed bill".

Essentially this is a continuation of the previous article, and the same general format, i.e., an analysis of each amendment and its effect on the existing statute and case law, will be used.

KRS § 342.005—EMPLOYERS AND EMPLOYEES TO WHOM CHAPTER APPLIES; VOLUNTARY ELECTION TO COME UNDER CHAPTER.

The changes in this section, i.e. new subsections (2) and (3), provide that the Board shall apportion the aggregate extent and duration of disability among, but not limited to, the following contributive causes:

** Ky. Rev. Stat. ch. 342 (1960) (hereinafter cited as KRS).

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¹ Segal, "An Historical Analysis of the Kentucky Workmen's Law", 47 Ky. L.J. 279 (1959).

² *Id.* at 359.

- (a) 'Traumatic injury by accident.'
- (b) Pre-existing disease previously disabling.
- (c) Pre-existing disease not previously disabling but aroused into disabling reality by the injury or occupational disease. . . .

The Board also must determine in each case whether the provisions of KRS 342.120 are applicable. If these provisions are applicable, the Board must then proceed in accordance with the law and the regulations established by the Board for the processing of claims involving the Subsequent Claim Fund, which was established by the new amendments.³

Apparently the Board is free to adopt certain regulations relative to the processing of claims under the Subsequent Claim Fund, within the limitations of KRS § 342.260 and consistent with the provisions of Chapter 342. To date no such regulations have been published.

It is submitted that the Legislature by adding the new sections has to a great extent restored the law as it existed prior to the 1948 amendment. That amendment added to the phrase "nor shall it include the results of a disease" the words "whether previously disabling or not".⁴

Under the 1960 Amendments, if a pre-existing disease was not previously disabling but is aroused into disability by an injury or occupational disease, the employer, in whose employment the current injury occurs, while not fully liable, is subject to the terms of KRS § 342.120 (the Subsequent Claim Fund—formerly the Subsequent Injury Fund).

If, therefore, an injured employee has been previously disabled, from a compensable injury *or* an occupational disease *or* a pre-existing disease, *or* if a pre-existing, dormant, non-disabling diseased condition is aroused and the claimant can meet the requisites of the Subsequent Claim Fund section, disability may

³ Before discussing the significance of these changes, it is interesting to point out that in KRS § 342.005 (2) (a) where injury by accident is described, the word "personal" is omitted, even though in the body of KRS § 342.005 (1) the words "traumatic personal injury by accident" are used. And although KRS § 342.005 (2) (b) speaks of pre-existing disease", there is no mention of a "pre-existing condition" in this section.

⁴ Wood-Mosaic Co. v. Shumate, 305 Ky. 368, 204 S.W. 2d 331 (1947). See also Belcher v. Cornman's Adm'x, 265 S.W. 2d 492 (Ky. 1954), and Highland Co., Inc. v. Goben, 295 Ky. 803, 175 S.W. 2d 124 (1943).

be paid both under KRS § 342.005 by his present employer and under KRS § 342.120 by the Subsequent Claim Fund.

KRS § 342.010—"EMPLOYER" TO INCLUDE MUNICIPAL
CORPORATIONS AND STATE

Although KRS § 342.010 has not been directly amended, House Bill No. 472 has enlarged and expanded this section by including the power of acceptance for the Department of Military Affairs covering members of the Kentucky National Guard. KRS § 342.010 provides that "employer" as used in the Chapter also includes any other department or agency of the Commonwealth of Kentucky.

It is assumed that House Bill No. 472 was passed in order to avoid any possible question being raised when the Department of Military Affairs makes its election.

KRS § 342.020—MEDICAL TREATMENT AT EXPENSE OF
EMPLOYER; ARTIFICIAL MEMBERS AND BRACES.

A new subsection of KRS § 342.020 provides for an additional sum of \$1,000 for medical, surgical and hospital treatments when ordered by the Board upon application and sufficient showing of justifiable need. The procedure for the additional payments will probably be by motion of the claimant, supported by an affidavit of a physician with notice to all interested parties. It is assumed that counter-affidavits by the employer could also be filed. Then, as in the case of a motion to reopen under KRS § 342.125, the matter would be referred to a Referee for a hearing.

A further amendment in this section changes the clause "for loss of natural teeth" to "loss of teeth", which of course means, medical benefits are now payable for loss of natural or artificial teeth.

It is submitted that even though the following may have been a mere oversight, nevertheless, some conflict exists in this amendment because of the following phrase; ". . . but the employer's liability for such artificial member or braces shall not including his liability for medical, surgical and hospital treatment exceed \$2,500". This seems in conflict with subsection (2) which may allow for the additional \$1,000 upon application and sufficient showing.

This section will probably be construed to mean that "where there is an additional order by the Board, the amount may be increased by \$1,000."

KRS § 342.070—COMPENSATION IN CASE OF DEATH

The only change in this section is the amount of compensation payable. The amendment increases the maximum benefits from \$12,000 to \$13,600 and increases payments for burial expenses commensurate with the standard of living of the deceased, from a maximum of \$300 to a maximum of \$500.

Even with the increased benefits the amount received by the dependents of a deceased employee is still \$2,000 less than the maximum benefits payable for total disability to an injured employee.

KRS § 342.095—COMPENSATION FOR TOTAL DISABILITY

The amendment to KRS § 342.095 increases the allowable compensation for total disability. The maximum benefits are now \$36 per week as increased from \$32 per week or a maximum of \$15,600 increased from \$13,600. In addition a new subsection was added which provides that compensation for an injury or disability to a member shall not exceed the amount allowable for the loss of such member, unless the effects of the injury or disability extend beyond the member to the body as a whole, so that it destroys a workman's general ability to labor or precludes him from obtaining the kind of work he is customarily able to do. This new clause is exactly the same as the language found in an amendment to KRS § 342.110. It is submitted that this new language in KRS § 342.095 does little more than codify the existing case law.⁵

KRS § 342.110—OTHER PERMANENT PARTIAL DISABILITY; COMPENSATION

In addition to the increase of maximum benefits payable under this section to \$31 per week or a total of \$12,400, significant

⁵ See *Clark v. Gilley*, 311 S.W. 2d 391 (Ky. 1958). Prior to the 1960 amendments to KRS § 342.110 that section contained a clause providing that in no event should compensation for injury or disability to a member exceed the amount allowable for the loss of such member. However, where total disability for work within the meaning of the Act existed, even though the injury was only to a member, the Court of Appeals had upheld awards for total disability since the limitation of KRS § 342.110 was not included in KRS § 342.095.

changes were made with respect to injuries to members of the body.⁶

Prior to the 1960 amendments, this section provided that in no event could compensation for injury or disability to a member exceed the amount allowable for the loss of such member. This language has been deleted from the section and replaced by the exact language found in KRS § 342.095. It is provided that compensation for an injury or disability to a member shall not exceed the amount allowable for the loss of such member, unless the effects of the injury or disability extend beyond the member to the body as a whole and adversely affect a woman's general ability to labor, or limits his occupational opportunities to obtain the kind of work he is customarily able to do.

This change overrules all of the Court of Appeals decisions construing this part of KRS § 342.110 after the 1946 amendment, holding that the amount of compensation for an injury to the member could not exceed the amount payable for the loss of the member.⁷

In the *Caney Creek Mining Company*⁸ case there is a discussion of the law as it existed prior to the 1946 amendment. It was held in that case that to be entitled to additional compensation for an injury to a member, other than for complete severance of the member, the employee must show that the injury is of such a nature as to more adversely affect his body, his mind, his sense of pain, his ability to labor, or his opportunity to obtain employment than would be the case had there been a complete severance.⁹

KRS § 342.111—CONTINUANCE OF DISABILITY PAYMENTS TO
DEPENDENTS WHEN EMPLOYEE DIES BEFORE ALL OF
DISABILITY AWARD HAS BEEN PAID.

The dependent of the deceased employee now has one year after the date of death to file his claim for continuance of pay-

⁶ Maximum benefits for temporary partial disability have been increased to \$31 per week, not to exceed a maximum sum of \$12,400. KRS 342.100. Maximum benefits for enumerated permanent partial disabilities have been increased to \$30 per week. KRS § 342.105.

⁷ *Caney Creek Mining Co. v. Rager*, 264 S.W. 2d 667 (Ky. 1954). See also Segal, "An Historical Analysis of the Kentucky Workmen's Compensation Law", *supra* note 1 at 311.

⁸ 264 S.W. 2d 667 (Ky. 1954).

⁹ See also *Black Mountain Corp. v. Letner*, 303 Ky. 807, 199 S.W. 2d 611 (1947); *American Bridge Co. v. Reit*, 303 Ky. 795, 199 S.W. 2d 447 (1947); *Patton v. Travis*, 298 Ky. 678, 183 S.W. 2d 956 (1944).

ments with the Workmen's Compensation Board. The period has thus been doubled.

This section was also amended to bring it in conformity with benefits payable for death as set forth in KRS § 342.070. The maximum weekly amounts now are not to exceed \$34 per week. Prior to this amendment the weekly payments could not exceed \$15 per week.

**KRS § 342.120—SUBSEQUENT INJURY, COMPENSATION IN
CASE OF; PAYMENTS FROM SUBSEQUENT CLAIM FUND**

The Subsequent Injury section has been so extensively revised that it is necessary to set its provisions out in full. KRS § 341.120 provides:

- (1) A claimant may in the original application for benefits, or either party may by motion while the case is pending, accompanied by proper allegations, and the board shall upon its own motion at any time before the rendition of the final award, cause the Subsequent Claim Fund to be made a party to the proceedings if either or both of the following appears:
 - (a) The employee is disabled, whether from a compensable injury, occupational disease, pre-existing disease, or otherwise, and has received a subsequent compensable injury by accident, or has developed an occupational disease.
 - (b) The employee is found to have a dormant non-disabling disease condition which was aroused or brought into disabling reality by reason of a subsequent compensable injury by accident or an occupational disease.
- (2) When the Subsequent Claim Fund has been made a party the Board shall direct the procedures provided in KRS 342.121.
- (3) If it is found that the employee is a person mentioned in subsection (1) (a) or (b) and a subsequent compensable injury or occupational disease has resulted in additional permanent disability so that the degree of disability caused by the combined disabilities is greater than that which would have resulted from the subsequent injury or occupational disease alone, and the employee is entitled to receive compensation on the basis of the combined disabilities, the employer shall be liable only for the degree of disability which would

have resulted from the latter injury or occupational disease had there been no pre-existing disability or dormant, but aroused diseased condition.

- (4) The remaining compensation for which such resulting condition would entitle the employe, including any compensation for disability resulting from a dormant disease aroused into disabling reality by the injury or occupational disease, but excluding all compensation which the provisions of this chapter would have afforded on account of prior disabling disease had it been compensated thereunder, shall be paid out of the Subsequent Claim Fund provided for in subsection (1) of KRS 342.122.
- (5) Upon motion, with notice to the Commissioner of Industrial Relations, and it appearing to the Board that a claimant who has been awarded compensation under any one of the several provisions of this chapter becomes re-employed by the employer against whom the award was made, or continues in his employment in which he was injured, any part of the award not paid at the time the claimant becomes re-employed shall be paid out of the Subsequent Claim Fund; or, if the claimant has continued in his employment then the whole award shall be paid from the Subsequent Claim Fund. Said unpaid portion of the award shall be awarded against the Subsequent Claim Fund and paid by the Commissioner of Industrial Relations as are all other Subsequent Claim awards. The employment or re-employment contemplated herein shall be at wages equal to or greater than the employee was receiving before the traumatic injury by accident.

As pointed out previously, the Board in *every case*, must determine whether the above provisions are applicable, by virtue of the mandate of KRS § 342.005 (3).

The actual proof necessary for a recovery under the subsequent injury provisions, i.e., that the combined disability be greater than that which would have resulted from the subsequent injury or occupational disease alone, has not been changed. The significant change is that if an employee is previously disabled from a compensable injury, pre-existing disease, either dormant, non-disabling, or otherwise,¹⁰ then the Subsequent Claim Fund

¹⁰ See *Shuman Co. v. May*, 327 S.W. 2d 14 (Ky. 1959) and *Combs v. Gaggey*, 282 S.W. 2d 817 (Ky. 1955) for discussions of this section prior to the deletion of the old KRS 342.120 (2).

shall be used, with the employer still being liable for only the degree of disability which would have resulted from the latest injury or occupational disease had there been no pre-existing disability or dormant but aroused diseased condition, with the Subsequent Claim Fund, assuming the necessary proof is presented, being responsible for the payment of the other benefits.

It is interesting to note the use of the words "dormant non-disabling disease condition" as contrasted with KRS § 342.005 (2) (c) which speaks in terms of pre-existing disease only, without the use of "condition".¹¹

The Subsequent Injury Fund (now the Subsequent Claim Fund), even though established by the original Act of 1916 and amended in 1946 and 1948, has not been extensively utilized by litigants. It is submitted, however, that with the changes made by the 1960 Legislature there will be more and more use of the Subsequent Claim Fund by employers, claimants and the Board.

KRS § 342.120 (5) is a most interesting and significant section, and should definitely encourage the employment of injured employees and particularly the handicapped. It specifically provides that upon motion and notice, where a claimant who has been awarded compensation under any one of the several provisions of this Chapter becomes re-employed by the employer against whom the award was made, or the claimant has continued in his employment after he was injured, any part of the award not paid at the time the claimant becomes re-employed shall be paid out of the Subsequent Claim Fund. Further, if the claimant has continued in his employer's employment, then the whole award shall be paid under the Subsequent Claim Fund. Any unpaid portion of the award shall be against the Subsequent Claim Fund and shall be paid by the Commissioner of Industrial Relations, as are all other subsequent claim awards. Note that this is compensation under any one of the several provisions of this Chapter, and not just KRS § 342.120.

Note further the limitation of subsection (5): "The employment or re-employment contemplated herein shall be at wages equal to or greater than the employee was receiving before the traumatic injury by accident." It is assumed that there was an

¹¹ See *Parrot v. Healy*, 290 S.W. 2d 798 (Ky. 1956) and its use of the word "condition".

oversight, or that it can be implied that this limitation would also include "before the occupational disease" as well.

KRS § 342.121—REFERENCE OF MEDICAL QUESTION IN SUBSEQUENT INJURY CASES TO PHYSICIAN; CONCLUSIVENESS OF FINDINGS; REVIEW.

The principal change in this section provides for a reference by the Board in subsequent injury cases, to *one* physician rather than to a medical panel. Further, this physician shall be paid a reasonable fee plus necessary expenses without the limitation of \$20.00 for examination and report as previously provided. The amendment further provides a specific date—not more than fifteen days after the examination—within which time the examining physician must submit his report to the Board.

In order to correct what may have been an oversight, the new amendment specifically includes claims for disability resulting from a subsequent injury by occupational disease as well as accidents.

KRS § 342.122—SUBSEQUENT CLAIM FUND; TAX FOR; CREDITS AND WITHDRAWALS; CONTINUANCE FROM YEAR TO YEAR; MAXIMUM LIMIT.

The commissioner of Industrial Relations, if he finds that the tax previously levied is insufficient to pay the claims awarded under the Subsequent Claim Fund, may levy an additional assessment against all insurance companies and every employer carrying his own insurance in an amount not to exceed \$100,000. The amount of each insurance company's assessment shall be in the proportion that each company's annual workmen's compensation premiums written in Kentucky bear to the total of all the annual workmen's compensation premiums written in Kentucky, as set forth in the last filed annual statement with the Department of Insurance.

The assessment against the employer carrying his own risk insurance will be based upon the premium which would have been paid had the coverage been carried by an insurance carrier, as determined by the payroll information filed with the Department of Industrial Relations.

The Subsequent Injury Fund is abolished and its monies and property are transferred to the newly created Subsequent Claim Fund.

KRS § 342.125—REVIEW BY BOARD OF PREVIOUS AWARD OR ORDER

A new subsection has been added which provides that where an agreement has become an Award by approval of the Board and a review of such Award is initiated, no statement contained in the agreement, whether as to jurisdiction, liability of the employer, nature and extent of the disability or as to any other matter, shall be considered by the Board as an admission against the interests of any party. The parties may raise any issue upon review of this type of award which could have been considered upon an original application for benefits. This amendment seems generally in line with Court of Appeals decisions on this point.¹²

This new subsection must be read in conjunction with the amendments to KRS § 342.265 which preclude the running of the Statute of Limitations where an agreement has been reached, until that agreement has been filed with the Board.

**KRS § 342.185—NOTICE OF ACCIDENT; CLAIM FOR COMPENSATION;
TIME OF FILING**

The 1960 amendment, which deletes the previous language to the effect that in cases of silicosis no application for compensation could be considered unless the notice was given and the claim was made within three years after the last injurious exposure to silicosis, brings the limitation period for silicosis claims in conformity with all other occupational diseases and eliminates any conflict between KRS § 342.185 and KRS § 342.316 that may have formerly existed.

**KRS § 342.265—COMPENSATION AGREEMENTS; SUBJECT TO
APPROVAL OF BOARD.**

This section now provides that if the injured employee and his employer reach an agreement for payment of compensation

¹² The last sentence of subsection 3 seems to contain an ambiguity or a grammatical error, when it states: "The physician shall also include in his report a statement indicating the physician or physicians, if any, who appeared before *them*. . . ." (emphasis added). Obviously the word "him" should be used since there is only one physician to be appointed under this section. The same comment would hold true in the following: ". . . and what, if any, medical reports and x-rays were considered by *them*." (emphasis added), unless "them" refers to the physicians appearing before the physician appointed by the Board. However, comparing this language with the language prior to this amendment it would seem that the reference here is to medical reports and x-rays considered by the Board's appointed physician.

¹³ See *Clear Fork Coal Co. v. Gaylord*, 286 S.W. 2d 519 (Ky. 1956).

conforming to the provisions of the act, a memorandum of the agreement must be filed with the board. If the agreement is filed and approved by the Board, it is enforceable as other awards of the Board. Voluntary payment of compensation as prescribed in the act, without formal agreement, are still permitted; however, nothing operates as a final settlement of a claim, except a memorandum of agreement filed with and approved by the board. Further, time limitations begin to run only upon the date the agreement is filed with and approved by the board. The amendment, in effect, nullifies by statute the decisions holding that the filing of the agreements was not mandatory.¹⁴

The section now is the same as before, except that the phrase "or the expiration of the time limit prescribed in KRS § 342.185" has been deleted. The following significant language has been added: "No limitations of time shall begin to run until the date upon which such agreement is filed with and approved by the Board."

Since the time limitations do not begin to run until the filing and approval, if the employee can show the requisites of reopening under KRS § 342.125, he still may be entitled to additional compensation benefits. What may happen is that the carriers of the employers will insist, when a claim is settled, that the claimant dismiss his application with prejudice, thereby precluding a reopening since there will be nothing to reopen. Employees should be wary of this procedure.

The statutory provisions setting out the procedure for appeals of Board decisions to the circuit courts¹⁵ has been changed in that the requirement that the petition be verified by the petitioner has been eliminated. The further requirement that copies of the petition be furnished to the respondent at the time of the filing of the petition, has likewise been eliminated. The procedure now brings appeals from the Workmen's Compensation Board in conformity with the procedure for filing petitions in circuit courts as set out in Rule 11, Kentucky Rules of Civil Procedure.

¹⁴ *Adkins v. International Harvester Co.*, 286 S.W. 2d 528 (Ky. 1956); *Fiorella v. Clark*, 298 Ky. 817, 184 S.W. 2d 208 (1944).

¹⁵ KRS 342.285.

KRS § 342.316—OCCUPATIONAL DISEASE; DEFINED; CLAIM AND ALLOWANCE OF COMPENSATION FOR.

Prior to the 1960 amendments, KRS § 342.316 (3) provided that where compensation had been paid or awarded, either for disability or death from an occupational disease, and payments had been discontinued, the claim for further compensation must be made within one year after the last payment of compensation. This provision had been interpreted as superseding KRS § 342.125 in silicosis cases.¹⁶

With the deletion of this section, the reopening of all awards for compensable injuries are controlled by KRS § 342.125. KRS § 342.316 (4) has been clarified so that now, in claims for compensation due to the occupational disease of silicosis, it must be shown that the employee was exposed to the hazards of the disease in his employment within this Commonwealth "for at least two years immediately next before his disability or death."

A further change in KRS § 342.316—the significance of which is not apparent to the writer other than perhaps as an improvement grammatically—is the use of the word "of" instead of "to" in the phrase "as a natural incident to the work".¹⁷

An increase in the net surplus of credit of the Maintenance Fund¹⁸ from \$200,000 to \$300,000 was provided for by the 1960 Legislature.

The penalties section of the Act¹⁹ has been amended by adding a new subsection (7) which provides that any person who violates the provisions of subsection (1) of KRS § 342.265, which is the statutory limitation on the filing of settlement agreements, shall be fined not less than \$100 nor more than \$500.

Conclusions

The 1960 amendments not only increased the awardable benefits but also dramatically and significantly revamped the employer's position as to the payments of compensation benefits.

The primary concerns of the injured employee and the philosophy underlying the Workmen's Compensation Act as well,

¹⁶ *Harvey Coal Co. v. Colwell*, 313 S.W. 2d 274 (Ky. 1958).

¹⁷ KRS § 342.316 (1) (a).

¹⁸ KRS § 342.485.

¹⁹ KRS § 342.990.

is whether he will receive benefits when he is unable to work and his ability to become gainfully employed again; and the effect his injury has on that ability to compete in the general labor market. The opportunity of the employer to reduce or eliminate that concern through the lessened financial responsibility provided by KRS § 342.120 (5) when employment is offered to injured employees, presents a solution to a most serious problem to the employee, the employer and to society in general. As concluded in the previous article, the one remaining general area wherein there still exists a void in the Kentucky Act is in the field of rehabilitation.

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