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The purpose of this paper is to acquaint the younger lawyer with the procedure and practice of typical workmen's compensation cases and problems. It is hoped, of course, that the general practitioner, regardless of his years at the Bar, will also benefit from the following step-by-step procedure generally followed in the preparation, litigation and briefing of workmen's compensation cases before the Kentucky Workmen's Compensation Board. Because the younger lawyer will usually be representing claimants in compensation cases rather than defending against claimants, this article is developed in that posture.

I. GENERAL BACKGROUND INFORMATION AND THE NON-LITIGATED CASE

It is unusual for the attorney to "get in on the ground floor" of a compensation case. He is generally asked to represent the claimant only after (1) the company, if it is self-insured, or the insurance carrier has completely denied any liability, or (2) a controversy has arisen as to the duration or extent of disability.

In advising a client, the attorney must be prepared emotionally as well as legally. In many cases, the employee has not yet returned to his employment and his condition may be such that he may never be able to return. The client, facing dire financial difficulties, is understandably emotionally upset about his future, his ability to secure employment and to provide a living for his family. All too often the first question posed to the attorney is whether his client can be guaranteed a means of financial support. Where the employee is able to return to work, it may be of great benefit to call the employer or his attorney and bring to his attention KRS 342.120(5). This section provides that if the employee becomes re-employed by the employer against whom an award is made, at wages equal to or greater than he was

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earning before the injury, and if his employment continues, any unpaid portion of the award shall be charged against the Subsequent Claim Fund and be paid by the Commissioner of Industrial Relations.

It is imperative that the attorney establish the date upon which the injury occurred. Claims for workmen's compensation benefits must be filed within one year from the time of the compensable injury or within one year after the cessation of voluntary payments of compensation if any have been made.[1] In the case of an occupational disease, the claim must be filed within one year after the last injurious exposure to the occupational hazard or within one year after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, whichever shall last occur.[2]

Inquiry will often be made with respect to the client's medical attention, whether he may change physicians, or whether he must continue with the employer's doctor. Pursuant to KRS 342.020 the client will be well advised to continue with the employer's physician. In instances where the employee has not been treated by the employer's physician, the employer may request a physical examination of the claimant at any time while compensation is being claimed subject to the Board's discretion.[3] Since this puts the compilation of medical records and reports in the hands of the employer's doctor, the claimant's counsel may be at a disadvantage in proving the extent of disability. But the employer is under a statutory duty on demand to furnish copies of medical reports and if there is any question about the medical disability rating given by the employer's doctor, the claimant can and should be referred to a doctor of his own choice.[4] It should be borne in mind, however, that while the Board may approve a medical allowance up to $3500,[5] most insurance car-

[1] Ky. Rev. Stat. § 342.270 (hereinafter cited as KRS). The payment of hospital and doctor bills are not payment of compensation within the meaning of the act and do not stop the running of the statute. Pipes Chevrolet Co. v. Bryant, 274 S.W.2d 663 (Ky. 1955).

[2] KRS 342.316(3).

[3] KRS 342.205. See E. & L. Transp. Co. v. Hayes, 341 S.W.2d 240 (Ky. 1960).

[4] Just as the claimant is entitled to a copy of all medical records in the hands of the employer's physician, the employer is entitled to the medical determination of disability report made by the claimant's doctor. KRS 342.021.

[5] KRS 342.020.

riers have refused to recognize examination by claimant's personal physician as covered medical *treatment*. A claim for this allowance should be made for any treatment, certainly that which continues over a period of time, if it is performed by claimant's personal physician.

Foremost among the issues in a workmen's compensation case is the degree of disability. There are two general categories of workmen's compensation benefits: (1) payment for temporary total or partial disability, and (2) compensation for permanent total or partial disability.[6] One of the key points to be remembered is that the determination of disability is not solely a medical question. The purpose of the Workmen's Compensation Act is to compensate the employee proportionately to the effect the injury has on his ability to compete in the general labor market.[7] While medical testimony is of primary importance, it is not the exclusive determinant. Essentially disability is measured by the injured employee's ability to do the kind of work he is by training and experience fitted to do.[8] Other factors to be considered are whether the claimant has suffered any previous disability, the nature of the physical injury or disfigurement, the education of the injured employee and his occupation at the time of injury.[9] For example, where the claimant possessing only a sixth grade education, while learning the plumbers trade, sustained injuries rendering him incapable of performing any manual labor, though capable of performing other work at about $\frac{1}{4}$-$\frac{1}{3}$ of the earnings he would have made as a plumber, the Board found the claimant totally disabled within the meaning of the act.[10]

In many instances where the claimant has suffered only partial disability he will be offered other employment. If this offer of employment is reasonably suited to his capacity and physical condition, the claimant must accept, for if the Board later determines that a refusal of employment was unjustified, the claimant's right to compensation may be forfeited.[11]

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[6] KRS §§ 342.095; 342.100; 342.105 and 342.110.

[7] E. & L. Transp. Co. v. Hayes, 341 S.W.2d 240 (Ky. 1960), and cases cited therein.

[8] Garmedia Coal Co. v. Marsee, 300 Ky. 414, 189 S.W.2d 399 (1945).

[9] KRS 342.110.

[10] Anderson v. Whitaker, 247 S.W.2d 980 (Ky. 1952).

[11] KRS 342.115; see E. & L. Transp. Co. v. Hayes, 341 S.W.2d 240 (Ky. 1960).

Where the employee is unable to obtain employment he should be advised concerning unemployment benefits. While there is nothing in the act which prohibits filing for unemployment compensation, the claimant must be very careful that his application not become damaging evidence against him. When a claimant applies for unemployment benefits he must indicate that he is ready, willing and able to work. This may well be contradictory to his claim for workmen's compensation benefits. If, however, the claimant informs the Unemployment Compensation Commission that he has or is in the process of filing a workmen's compensation claim and that although he has been injured he is able to do "some work" or "some light work," if that be true, fully apprising the commission of his limitations, he may draw unemployment benefits without jeopardizing his workmen's compensation claim. There is nothing immoral or illegal about this procedure. The Kentucky Court of Appeals has lent its full support to this position by stating that an employee's need to work to support his family does not mean he is not suffering from a compensable disability.[12]

If the claimant and the employer are in agreement as to the amount to be paid for an injury or disease, this amount is reduced to a percentage of disability and the respective forms, as furnished by the Board, are completed.[13] These settlement agreements should be filed with the Board, and upon approval they become the award of the Board subject to reopening under KRS 342.125. The danger which could result from the employer's failure to file these settlement agreements with the Board has been obviated by the 1960 amendments to the statutes.[14] The statute now provides that limitations should not begin to run until the date the agreements are filed with and approved by the Board.[15] One way for the claimant to insure that the agreement is filed with the Board is by sending his original to the Board, retaining a copy for himself.

Many claimants prefer a lump sum settlement over the receipt of regular weekly payments. The statute provides that a lump sum settlement may be authorized: (1) if the Board deems it in the best interest of both parties; (2) if compensation has been

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[12] Peabody Coal Co. v. Taulbee, 294 S.W.2d 925 (Ky. 1956).
[13] S.F. 4, S.F. 5, S.F. 19. (Board's Approved Forms). See also KRS 342.265.
[14] KRS 342.265.
[15] *Ibid.*

paid for not less than six months;[16] and (3) if the payment will not subject the employer or his insurer to undue risk of overpayment.[17]

II. THE LITIGATED CASE

Every lawyer should have in his library a copy of the *Kentucky Workmen's Compensation Law Annotated* which is published every two years by the Department of Industrial Relations and is obtainable without cost from the Department. This is a paperback copy of the Workmen's Compensation Act coupled with annotations of the most recent and significant cases and rulings. The booklet also contains the Rules of Practice and Procedure of the Board as well as an explanation of all forms used by the Board.

Form No. 11, which must be filed in triplicate with the Board, is the application for a hearing on the claim. After the three copies have been signed by the claimant and notarized, they are forwarded to the Board in Frankfort, Kentucky. No filing fee is required. Form No. 11 is easy to complete, requiring essentially only the names of the claimant and the employer, the date of injury, a brief description of the injury, the wage rate of the claimant, the amount of compensation paid, if any, the issues in controversy, and the names of the physicians who have attended the injured employee. If the employer is represented by an insurance carrier, the carrier should be joined as a party defendant at the filing of the claim.[18] Within two or three weeks after the filing of the claim, notice of a hearing should be received by the applicant, his attorney and the employer or his attorney.[19]

It is not necessary for the employer to file a formal answer to the claim since all allegations set forth are automatically deemed denied by him. The defendant, however, may file an answer and certainly must do so if he desires to set forth a special defense. The answer must be filed at least five days before the

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[16] KRS 342.150. This section has been construed by the Board to mean that the claim for compensation must have been in existence for more than six months. This construction differs somewhat from the terms of the statute itself.

[17] KRS 342.150.

[18] See Travelers Ins. Co. v. Cole, 336 S.W.2d 583 (Ky. 1960), where failure to list the insurer as a party defendant precluded a judgment against it.

[19] Within a few days after the application is received, the Secretary of the Board will send a form letter to the parties requesting them to settle amicably if possible.

hearing or in not less than five days after the defense was discovered or could have been discovered in the exercise of due diligence.[20] Special defenses include a plea of limitations and lack of jurisdiction.[21] If a special defense has been set up, the Board will normally order a hearing on that issue only. Briefs will be submitted and an opinion rendered on that issue prior to a determination of the case on its merits.

The first regular hearing is generally held in the county where the injury was sustained, but by mutual agreement of the parties it may be held at some other convenient place.[22] These hearings are practically always presided over by a Referee of the Board, though in some rare instances a Board member may preside. The purpose of this initial hearing is to give the claimant an opportunity to introduce his proof. However, prior to the claimant's offer of proof, the Referee may attempt to obtain a stipulation as to certain facts and issues which need not be litigated. In a case where compensation has been paid but a dispute exists as to the extent and duration of disability, a typical stipulation would read as follows:

> It is stipulated by and between the parties that the employer had elected to and was operating under the Kentucky Workmen's Compensation Law; that on the ..... day of ....., 19....., the plaintiff sustained a traumatic[23] personal injury or is suffering from an occupational disease within the meaning of the statute, arising out of and in the course of his employment, with due and timely notice to his employer; that the plaintiff was earning $..... per week at the time of his injury; that the employer has paid compensation for ..... number of weeks, as well as medical expenses in the amount of $..... The only issue to be determined is the extent and duration of the plaintiff's disability, if any.

Under the above stipulation, with only the issue of disability remaining, the claimant must introduce evidentiary proof as to the difference between his ability to perform work before and

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[20] Rule 4, Ky. Workmen's Comp. Bd., Rules of Proc. Ky. Admin. Reg. Serv. (1960). (Hereinafter cited as KARS W.C.B.).

[21] See Adkins v. International Harvester Co., 286 S.W.2d 528 (Ky. 1956).

[22] KRS 342.270(3).

[23] Grimes v. Goodlett & Adams, 345 S.W.2d 47 (Ky. 1961).

after the accident. In addition, any medical testimony bearing on his disability would be introduced. If the Referee is unsuccessful in his efforts to obtain a stipulation, it becomes incumbent on the claimant to prove all of the necessary elements for compensable recovery. These can be discerned by an elemental breakdown of the above stipulation. In addition to the plaintiff's own testimony, other witnesses may be introduced to testify as to the manner in which the injury occurred. Generally, medical testimony is introduced by deposition. However, under the subpoena powers of the Board, doctors as well as other witnesses may be required to appear and testify.[23a]

Even though the strict rules of evidence are not applicable to workmen's compensation proceedings,[24] incompetent evidence must be objected to just as in any other type of litigation. Where the evidence is objected to, exception will be given and entered on the record in favor of the party against whom a ruling is made unless such party has defaulted.[25] In the event any testimony is rejected by the Referee, it can be placed in the record by avowal. The plaintiff's testimony with respect to his ability to do some work, being of paramount importance to his claim, is always admissible.[26]

After the employer has had an opportunity to cross-examine the plaintiff's witnesses, the plaintiff may request an additional thirty days in which to complete his proof by deposition.[27] This allows him time to introduce his medical testimony and any other testimony to substantiate his claim of disability. When the plaintiff has announced whether or not he desires the additional time in which to complete his proof, the Referee will give the defendant the option of either having the case redocketed for his proof or being permitted to introduce his proof entirely by depo-

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[23a] KRS 342.260(3).

[24] Perry McGline Constr. Co. v. Shaw, 283 Ky. 84, 140 S.W.2d 829 (1940).

[25] KARS W.C.B. 7.

[26] United Electric Coal Co. v. Adams, 299 S.W.2d 246 (Ky. 1957).

[27] Depositions must be taken in accordance with the provisions of the Kentucky Rules of Civil Procedure, Rules 26–37.06, inclusive, except Rules 27, 33 & 36 which have not been adopted by the Board and do not apply to the practice before it. (KARS W.C.B. 12). In addition, the Board requires that the depositions be filed within ten days after submission unless upon motion showing good cause for delay. KARS W.C.B. 23. This poses a problem for the plaintiff in rebuttal since the case is usually submitted very shortly after the time closes for the plaintiff's rebuttal proof.

sition. If the defendant decides in favor of redocketing the case, the Referee will set the date for the defendant's hearing. After the defendant's hearing, the defendant may request an additional thirty days in which to complete his proof by deposition, after which the plaintiff will be allowed an additional five days for rebuttal proof. With regard to rebuttal proof, the Kentucky Court of Appeals has ruled that since the strict rules of evidence are not applicable in compensation cases, evidence offered in rebuttal which should have been taken in chief may be considered by the Board in its discretion.[28] In the event the parties complete their proof before the respective periods end, the Board should be notified so that the case can be stepped up for its final determination.

Failure to appear on the claimant's part without good cause will result in an order dismissing the suit either with or without prejudice for lack of prosecution.[29] If the defendant fails to appear and good cause is not shown for his failure, the Referee may proceed with the hearing of the case and may thereafter submit the case in accordance with the rules of the Board.[30]

If during the course of investigation or hearing it is discovered that the claimant has previously suffered a disabling compensable injury or occupational disease, or that the claimant has a dormant non-disabling disease which has been aroused into a disabling condition by reason of the subsequent compensable injury, the Subsequent Claim Fund should be made a party defendant to the action.[31] This may be accomplished either in the original application, by motion of either party or upon the Board's own motion.[32] If the issue of disability has not been settled, an impartial physician must be appointed to examine the claimant on the Subsequent Claim Fund's behalf.[33] Where the Fund is held responsible, the employer is liable only for that disability which is attributable solely to the subsequent injury, the Subsequent Claim Fund being liable for the remaining compensation awarded resulting from the combined additional disability.[34]

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[28] International Harvester Co. v. Brown, 286 S.W.2d 921 (Ky. 1956).
[29] KARS W.C.B. 13.
[30] *Ibid.*
[31] KRS 342.120.
[32] *Ibid.*
[33] KRS 342.121.
[34] KRS 342.120.

After all the proof is in, the case stands submitted. The parties are then informed by letter that the plaintiff has fifteen days in which to submit his brief, and the defendant fifteen days thereafter to submit its brief.[35] Following the submission of the defendant's brief, the plaintiff may be granted five days in which to prepare a reply brief. If the Board's Executive Secretary's letter is not immediately forthcoming, it is well to write informing him that all the proof is in and the case stands submitted.

In preparing a workmen's compensation brief, it is well to remember that the act is to be liberally construed on questions of law as distinguished from questions of fact, with the purpose of carrying out the sociological purposes of the legislation.[36] Briefs need not be lengthy, but they should point up decisively the factual evidence relied upon and the controlling case law. On this latter point, it is extremely important that every case cited be "Shepardized" and the date of the case carefully noted. This is necessary because of the numerous amendments which frequently modify or overrule existing case law.[37] It is most embarrassing to cite a case to the Referee or the Board only to learn that it no longer represents the law either because of a subsequent amendment to the act or a reversal in the position taken by the court in a subsequent decision.

Pursuant to statute a final determination with award, order and statement of findings of fact and rulings of law is made within thirty days after final submission.[38] An exception, however, allows an additional sixty days where the Referee has notified the Board that due to the voluminous quantity of records and complexities involved, he will need more time. If an award is not forthcoming within thirty days after final submission, the attorney should write the Board's Secretary requesting information on the status of the case.

Because of the peculiar nature of the Referee system, opinions are not released until "Board day."[39] This prevents any unwarranted notion that the opinion expressed is not that of the Board. In the event either party is not satisfied with the order or award,

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[35] KARS W.C.B. 14.
[36] KRS 342.004.
[37] See Segal, "An Analysis of the 1960 Amendments to the Kentucky Workmen's Compensation Law," 49 Ky. L.J. 225 (1960).
[38] KRS 342.275.
[39] The Board meets on the first and third Tuesday of each month.

a request for a full Board hearing may be made within fourteen days of the date of the award.[40]

Again it is important that briefs be prepared pointing out the erroneous rulings of the Referee or the correctness of these rulings. Five copies of the appellant's brief must be filed within ten days after the date of the motion for full Board review.[41] A copy of the brief must be sent to opposing counsel. The appellee has an additional ten days in which to prepare his brief, allowing a total of twenty days from motion date in which all briefs must be submitted unless an additional period is granted the appellant for filing a reply brief.

After all the briefs are filed,[42] the case is submitted for the full Board's consideration. A motion for oral argument may be made but is rarely granted.[43] The appeal is then docketed and one of the clerks of the Board will assign the case to a Board member. At the next meeting after the Board member receives the case he reports the case and submits his written opinion to the full Board. A discussion of the case then follows.[44] A rarely used section of the act provides the Board with the discretion of hearing the parties in issue and their witnesses.[45] If the reporting member's opinion is adopted by the Board, it then is sent out as a final award or order.

Upon its own motion or upon the application of either party the Board may reopen any award or order upon a showing of a change of conditions, mistake or fraud.[46] The party attempting to reopen files affidavits, usually from a doctor if a change of condition is alleged, and from the interested party himself setting forth the reasons why the award or order should be reopened. If upon consideration of the motion and accompanying affidavits, the Board sustains the motion, it then refers the case to a hearing in chief, with the burden of proof falling on the movant.[47] After reviewing the record, the Board may terminate,

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[40] KRS 342.280.
[41] KARS W.C.B. 16.
[42] KARS W.C.B. 18.
[43] KARS W.C.B. 21.
[44] A majority of the Board constitute a quorum for the determination of issues before it. KRS 342.255. *But see* Childers v. Hackney's Creek Coal Co., 337 S.W.2d 680 (Ky. 1960), where a quorum was held not to exist where there was a dissenting opinion.
[45] KRS 342.280.
[46] KRS 342.125.
[47] W. E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (1946).

diminish or increase the compensation previously awarded within the maximum and minimum limits provided in the law.[48]

Except for its ability to correct clerical errors and upon motion to reopen under KRS 342.125, the Board loses jurisdiction after issuance of the final award.[49] No motions for reconsideration may be filed with the Board.[50] A limited appeal is available to the circuit court if filed within twenty days after the rendition of the case by the Board.[51] The circuit court's review is limited to determining whether: (1) the Board acted in excess of its power; (2) the decision awarded was procured by fraud; (3) the order or award is in conformity with provisions of the act; and (4) the findings of fact support the order or award.[52] Upon motion by either party and upon a showing of sufficient cause the circuit court may permit the Board's final award to continue in force pending its decision on appeal. A suspension of the award may be obtained by execution of a supersedeas bond to the Court of Appeals. If either party is dissatisfied with the circuit court's decision, final appeal lies in the Court of Appeals as in all civil actions.[53]

When an award has become final and binding, if one of the parties refuses to abide by the award, the other party may file a certified copy of the order with the circuit court and demand judgment thereon.[54] The benefits from an award have a preference or priority against the assets of the employer as allowed by law for unpaid wages.[55] In addition, the benefits under the act are non-assignable and are exempt from creditors of the claimant.[56]

Although obviously all the possible situations have not been covered, particularly those covering a minor or an alien, or where there is a conflict of laws issue as to which state law will apply, an attempt has been made to examine the general procedure in a workmen's compensation case. The practice of workmen's compensation cases is difficult, time consuming and perhaps not as

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[48] KRS 342.125.
[49] Jerry's Drive-In, Inc. v. Young, 335 S.W.2d 323 (Ky. 1960).
[50] Washington v. Clover Fork Coal Co., 269 Ky. 604, 108 S.W.2d 502 (1937).
[51] KRS 342.285. For a discussion of the limited authority of the circuit court, see Columbus Mining Co. v. Pelfrey, 237 S.W.2d 847 (Ky. 1950).
[52] KRS 342.285.
[53] KRS 342.290.
[54] KRS 342.305.
[55] KRS 342.175.
[56] KRS 342.180.

lucrative as other fields of practice.[57] It does have its rewards and the practice undoubtedly fills a very great social and economic need.

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[57] The client should be informed that attorney fees are limited by statute and are subject to approval by the Board. KRS 342.320. No attorney can receive a fee exceeding an amount equal to twenty per cent of the award recovered, with the Board having the power to reduce the attorney's fee to an amount commensurate with the services he performed or it may reduce or deny a fee entirely upon proof of solicitation of employment. The attorney is entitled to receive payment in full even though the Board refused a lump sum settlement to the claimant. KARS W.C.B. 20.