

CHAPTER 340**(HB 348)**

AN ACT relating to worker's compensation.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. KRS 342.315 is amended to read as follows:

- (1) The commissioner shall contract with the University of Kentucky and the University of Louisville medical schools to evaluate workers who have had injuries or become affected by occupational diseases covered by this chapter. Referral for evaluation may be made to one (1) of the medical schools whenever a medical question is at issue.
- (2) The physicians and institutions performing evaluations pursuant to this section shall render reports encompassing their findings and opinions in the form prescribed by the commissioner. ***Except as otherwise provided in Section 2 of this Act***, the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.
- (3) The commissioner or an administrative law judge may, upon the application of any party or upon his own motion, direct appointment by the commissioner, pursuant to subsection (1) of this section, of a medical evaluator to make any necessary medical examination of the employee. Such medical evaluator shall file with the commissioner within fifteen (15) days after such examination a written report. The medical evaluator appointed may charge a reasonable fee not exceeding fees established by the commissioner for those services.
- (4) Within thirty (30) days of the receipt of a statement for the evaluation, the employer or carrier shall pay the cost of the examination. Upon notice from the commissioner that an evaluation has been scheduled, the insurance carrier shall forward within seven (7) days to the employee the expenses of travel necessary to attend the evaluation at a rate equal to that paid to state employees for travel by private automobile while conducting state business.
- (5) Upon claims in which it is finally determined that the injured worker was not the employee at the time of injury of an employer covered by this chapter, the special fund shall reimburse the carrier for any evaluation performed pursuant to this section for which the carrier has been erroneously compelled to make payment.
- (6) Not less often than annually the designee of the secretary of the Cabinet for Health Services shall assess the performance of the medical schools and render findings as to whether evaluations conducted under this section are being rendered in a timely manner, whether examinations are conducted in accordance with medically recognized techniques, whether impairment ratings are in conformity with standards prescribed by the latest edition available of the "Guides to the Evaluation of Permanent Impairment" published by the American Medical Association, and whether coal workers' pneumoconiosis examinations are conducted in accordance with the standards prescribed in this chapter.
- (7) The General Assembly finds that good public policy mandates the realization of the potential advantages, both economic and effectual, of the use of telemedicine and telehealth. The commissioner may, to the extent that he finds it feasible and appropriate, require the use

of telemedicine and telehealth practices, as authorized under KRS 11.550, in the independent medical evaluation process required by this chapter.

Section 2. KRS 342.316 is amended to read as follows:

- (1) (a) The employer liable for compensation for occupational disease shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease. During any period in which this section is applicable to a coal mine, an operator who acquired it or substantially all of its assets from a person who was its operator on and after January 1, 1973, shall be liable for, and secure the payment of, the benefits which would have been payable by the prior operator under this section with respect to miners previously employed in the mine if it had not been acquired by such later operator. At the same time, however, this subsection does not relieve the prior operator of any liability under this section. Also, it does not affect whatever rights the later operator might have against the prior operator; and
- (b) The time of the beginning of compensation payments shall be the date of the employee's last injurious exposure to the cause of the disease, or the date of actual disability, whichever is later.
- (2) The procedure with respect to the giving of notice and determination of claims in occupational disease cases and the compensation and medical benefits payable for disability or death due to the disease shall be the same as in cases of accidental injury or death under the general provisions of this chapter, except that notice of claim shall be given to the employer as soon as practicable 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, or a diagnosis of the disease is first communicated to him, whichever shall first occur.
- (3) The procedure for filing occupational disease claims shall be as follows:
 - (a) The application for resolution of claim shall set forth the complete work history of the employee with a concise description of injurious exposure to a specific occupational disease, together with the name and addresses of the employer or employers with the approximate dates of employment. The application shall also include at least one (1) written medical report supporting his claim. This medical report shall be made on the basis of clinical or X-ray examination performed in accordance with accepted medical standards and shall contain full and complete statements of all examinations performed and the results thereof. The report shall be made by a duly-licensed physician. The commissioner shall promulgate administrative regulations which prescribe the format of the medical report required by this section and the manner in which the report shall be completed.
 1. For coal-related occupational pneumoconiosis claims, each clinical examination shall include a chest X-ray ***interpretation by a National Institute of Occupational Safety and Health (NIOSH) certified "B" reader. The chest X-ray upon which the report is made shall be filed with the application***~~examination~~ as well as spirometric tests when pulmonary dysfunction is alleged.
 2. For other compensable occupational pneumoconiosis claims, each clinical examination shall include a chest X-ray examination and appropriate pulmonary function tests.

- (b) To be admissible, medical evidence offered in any proceeding under this chapter for determining a claim for occupational pneumoconiosis resulting from exposure to coal dust shall comply with accepted medical standards as follows:
1. Chest X-rays shall be of acceptable quality with respect to exposure and development and shall be indelibly labeled with the date of the X-ray and the name and Social Security number of the claimant. Physicians' reports of X-ray interpretations shall: identify the claimant by name and Social Security number; include the date of the X-ray and the date of the report; classify the X-ray interpretation using the latest ILO Classification and be accompanied by a completed copy of the latest ILO Classification report. ***Only interpretations by National Institute of Occupational Safety and Health (NIOSH) certified "B" readers shall be admissible.***
 2. Spirometric testing shall be conducted in accordance with the standards recommended in the latest edition available of the "Guides to the Evaluation of Permanent Impairment" published by the American Medical Association and the 1978 ATS epidemiology standardization project with the exception that the predicted normal values for lung function shall not be adjusted based upon the race of the subject. The FVC or the FEV1 values shall represent the largest of such values obtained from three (3) acceptable forced expiratory volume maneuvers as corrected to BTPS (body temperature, ambient pressure and saturated with water vapor at these conditions) and the variance between the two (2) largest acceptable FVC values shall be either less than five percent (5%) of the largest FVC value or less than one hundred (100) milliliters, whichever is greater. The variance between the two (2) largest acceptable FEV1 values shall be either less than five percent (5%) of the largest FEV1 value or less than one hundred (100) milliliters, whichever is greater. Reports of spirometric testing shall include a description by the physician of the procedures utilized in conducting such spirometric testing and a copy of the spirometric chart and tracings from which spirometric values submitted as evidence were taken.
 3. The commissioner shall promulgate administrative regulations pursuant to KRS Chapter 13A as necessary to effectuate the purposes of this section. The commissioner shall periodically review the applicability of the spirometric test values contained in the latest edition available of the "Guides to the Evaluation of Permanent Impairment" published by the American Medical Association and may by administrative regulation substitute other spirometric test values which are found to be more closely representative of the normal pulmonary function of the coal mining population.
 4. The procedure for determination of occupational disease claims shall be as follows:
 - a. Immediately upon receipt of an application for resolution of claim, the commissioner shall notify the responsible employer and all other interested parties and shall furnish them with a full and complete copy of the application.
 - b. The commissioner shall assign the claim to an administrative law judge and, ***except for coal workers' pneumoconiosis claims,*** shall promptly refer

the employee to such physician or medical facility as the commissioner may select for examination. The report from this examination shall be provided to all parties of record. The employee shall not be referred by the commissioner for examination within two (2) years following any prior referral for examination for the same disease.

- c. ***Except for coal workers' pneumoconiosis claims***, within forty-five (45) days following the notice of filing an application for resolution of claim, the employer or carrier shall notify the commissioner and all parties of record of its acceptance or denial of the claim. A denial shall be in writing and shall state the specific basis for the denial. ***In coal workers' pneumoconiosis claims, the employer's notice of claim denial or acceptance shall be filed within thirty (30) days of the issuance by the commissioner of the notice of the consensus reading unless the consensus is that the miner has not developed coal workers' pneumoconiosis category 1/0 or greater. In the event the consensus procedure is exhausted without consensus being established, the employer's notice of claim denial or acceptance shall be filed within thirty (30) days of the commissioner's notification to the administrative law judge that consensus has not been reached.***
- d. ***Within forty-five (45) days of assignment of a coal workers' pneumoconiosis claim to an administrative law judge, the employer shall cause the employee to be examined by a physician of the employer's choice and shall provide to all other parties and file with the commissioner the X-ray interpretation by a "B" reader. The examination of the employee shall include spirometric testing if pulmonary dysfunction is alleged by the employee in the application for resolution of a claim. The commissioner shall determine whether the X-ray interpretations filed by the parties are in consensus.***
- e. ***If the readings are not in consensus, the commissioner shall forward both films, masking information identifying the facility where the X-ray was obtained and the referring physician, consecutively to three (3) "B" readers selected randomly from a list maintained by the commissioner for interpretation. Each "B" reader shall select the highest quality film and report only the interpretation of that film. The commissioner shall determine if two (2) of the X-ray interpretations filed by the three (3) "B" readers selected randomly are in consensus. If consensus is reached, the commissioner shall forward copies of the report to all parties as well as notice of the consensus reading which shall be considered as evidence. If consensus is not reached, the administrative law judge shall decide the claim on the evidence submitted.***
- f. ***"Consensus" is reached between two (2) chest X-ray interpreters when their classifications meet one (1) of the following criteria: each finds either category A, B, or C Progressive Massive Fibrosis; or findings with regard to simple pneumoconiosis are both in the same major category and within one (1) minor category (ILO category twelve (12) point scale) of each other.***

~~g.~~ The administrative law judge shall conduct such proceedings as are necessary to resolve the claim and shall have authority to grant or deny any relief, including interlocutory relief, to order additional proof, to conduct a benefit review conference, or to take such other action as may be appropriate to resolve the claim.

~~h.~~ Unless a voluntary settlement is reached by the parties, *or the parties agree otherwise*, the administrative law judge shall issue a written determination within *sixty (60)* ~~ninety (90)~~ days following *a hearing* ~~assignment of the claim~~. The written determination shall address all contested issues and shall be enforceable under KRS 342.305.

5. The procedure for appeal from a determination of an administrative law judge shall be as set forth in KRS ~~342.285~~ ~~[342.275]~~.
- (4) (a) The right to compensation under this chapter resulting from an occupational disease shall be forever barred unless a claim is filed with the commissioner within three (3) years after the last injurious exposure to the occupational hazard or 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; and if death results from the occupational disease within that period, unless a claim therefor be filed with the commissioner within three (3) years after the death; but that notice of claim shall be deemed waived in case of disability or death where the employer, or his insurance carrier, voluntarily makes payment therefor, or if the incurrence of the disease or the death of the employee and its cause was known to the employer. However, the right to compensation for any occupational disease shall be forever barred, unless a claim is filed with the commissioner within five (5) years from the last injurious exposure to the occupational hazard, except that, in cases of radiation disease or asbestos-related disease, a claim must be filed within twenty (20) years from the last injurious exposure to the occupational hazard.
 - (b) Income benefits for the disease of pneumoconiosis resulting from exposure to coal dust or death therefrom shall not be payable unless the employee has been exposed to the hazards of such pneumoconiosis in the Commonwealth of Kentucky over a continuous period of not less than two (2) years during the ten (10) years immediately preceding the date of his last exposure to such hazard, or for any five (5) of the fifteen (15) years immediately preceding the date of such last exposure.
- (5) The amount of compensation payable for disability due to occupational disease or for death from the disease, and the time and manner of its payment, shall be as provided for under the general provisions of the Workers' Compensation Act, but:
 - (a) In no event shall the payment exceed the amounts that were in effect at the time of the last injurious exposure;
 - (b) The time of the beginning of compensation payments shall be the date of the employee's last injurious exposure to the cause of the disease, or the date of actual disability, whichever is later; and
 - (c) In case of death where the employee has been awarded compensation or made timely claim within the period provided for in this section, and an employee has suffered continuous disability to the date of his death occurring at any time within twenty (20)

years from the date of disability, his dependents, if any, shall be awarded compensation for his death as provided for under the general provisions of the Workers' Compensation Act and in this section, except as provided in KRS 342.750(6).

- (6) If an autopsy has been performed, no testimony relative thereto shall be admitted unless the employer or his representative has available findings and reports of the pathologist or doctor who performed the autopsy examination.
- (7) No compensation shall be payable for occupational disease if the employee at the time of entering the employment of the employer by whom compensation would otherwise be payable, falsely represented himself, in writing, as not having been previously disabled, laid off, or compensated in damages or otherwise, because of the occupational disease, or failed or omitted truthfully to state to the best of his knowledge, in answer to written inquiry made by the employer, the place, duration, and nature of previous employment, or, to the best of his knowledge, the previous state of his health.
- (8) No compensation for death from occupational disease shall be payable to any person whose relationship to the deceased, which under the provisions of this chapter would give right to compensation, arose subsequent to the beginning of the first compensable disability, except only for after-born children of a marriage existing at the beginning of such disability.
- (9) Whenever any claimant misconceives his remedy and files an application for adjustment of claim under the general provisions of this chapter and it is subsequently discovered, at any time before the final disposition of the cause, that the claim for injury, disability, or death which was the basis for his application should properly have been made under the provisions of this section, then the application so filed may be amended in form or substance, or both, to assert a claim for injury, disability, or death under the provisions of this section, and it shall be deemed to have been so filed as amended on the date of the original filing thereof, and compensation may be awarded that is warranted by the whole evidence pursuant to the provisions of this chapter. When amendment of this type is submitted, further or additional evidence may be heard when deemed necessary. Nothing this section contains shall be construed to be or permit a waiver of any of the provisions of this chapter with reference to notice of time for filing of a claim, but notice of filing a claim, if given or done, shall be deemed to be a notice of filing of a claim under provisions of this chapter, if given or done within the time required by this subsection.
- (10) When an employee has an occupational disease that is covered by this chapter, the employer in whose employment he was last injuriously exposed to the hazard of the disease, and the employer's insurance carrier, if any, at the time of the exposure, shall alone be liable therefor, without right to contribution from any prior employer or insurance carrier, except as otherwise provided in this chapter.
- (11) (a) Income benefits for coal-related occupational pneumoconiosis shall be paid fifty percent (50%) by the Kentucky coal workers' pneumoconiosis fund as established in KRS 342.1242 and fifty percent (50%) by the employer in whose employment the employee was last exposed to the hazard of that occupational disease.
(b) Compensation for all other occupational disease shall be paid by the employer in whose employment the employee was last exposed to the hazards of the occupational disease.

- (12) A concluded claim for benefits by reason of contraction of coal workers' pneumoconiosis in the severance or processing of coal shall bar any subsequent claim for benefits by reason of contraction of coal workers' pneumoconiosis, unless there has occurred in the interim between the conclusion of the first claim and the filing of the second claim at least two (2) years of employment wherein the employee was continuously exposed to the hazards of the disease in the Commonwealth.
- (13) *For coal-related occupational pneumoconiosis claims, the consensus procedure shall apply to all claims which have not been assigned to an administrative law judge prior to the effective date of this Act. The consensus classification shall be presumed to be the correct classification of the employee's condition unless overcome by clear and convincing evidence. If an administrative law judge finds that the presumption of correctness of the consensus reading has been overcome, the reasons shall be specially stated in the administrative law judge's order.*

Section 3. KRS 342.732 is amended to read as follows:

- (1) Notwithstanding any other provision of this chapter, income benefits and retraining incentive benefits for occupational pneumoconiosis resulting from exposure to coal dust in the severance or processing of coal shall be paid as follows:
- (a) *1. If an employee has a radiographic classification of category 1/0, 1/1 or 1/2, based on the latest ILO International Classification of Radiographies, resulting from exposure to coal dust, which is validated by report of X ray which conforms to the standards for X-rays contained in subsection (3) of KRS 342.316, and respiratory impairment resulting from exposure to coal mine dust as evidenced by spirometric test values of fifty five percent (55%) or more but less than eighty percent (80%) of the predicted normal values contained in the chapter on the respiratory system of the latest edition available of the "Guides to the Evaluation of Permanent Impairment" of the American Medical Association], coal workers' pneumoconiosis and spirometric test values of eighty percent (80%) or more, the employee shall be awarded a one (1) time only retraining incentive benefit which shall be an amount equal to sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage as determined by KRS 342.740 but not more than seventy-five percent (75%) of the state average weekly wage, payable semimonthly for a period not to exceed one hundred four (104) weeks, except as provided in subparagraph 3. of this paragraph.*
- 2. Except as provided in subparagraph 3. of this paragraph, these benefits shall be paid only while the employee is enrolled and actively and successfully participating as a full-time student taking the equivalent of twelve (12) or more credit[twenty four (24) or more instruction] hours per week in a bona fide training or education program that if successfully completed will qualify the person completing the course for a trade, occupation, or profession and which program can be completed within the period benefits are payable under this subsection. The program must be approved under administrative regulations to be promulgated by the commissioner. These benefits shall also be paid to an employee who is a part-time student taking not less than the equivalent of six (6) nor more than eleven (11) credit hours per week, except that benefits shall be an amount equal to thirty-three and one-third percent (33-1/3%) of the*

employee's average weekly wage as determined by KRS 342.740, but not more than thirty-seven and one-half percent (37-1/2%) of the state average weekly wage, payable biweekly for a period not to exceed two hundred eight (208) weeks.

3. *These benefits shall also be paid biweekly while an employee is actively and successfully pursuing a General Equivalency Diploma (GED) in accordance with administrative regulations promulgated by the commissioner. These benefits shall be paid in the amount of sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage not to exceed seventy-five percent (75%) of the state average weekly wage for a maximum period not to exceed seventeen (17) weeks. These income benefits shall be in addition to the maximum amount of retraining incentive benefits payable under this paragraph.*
4. *The employer shall also pay, directly to the institution conducting the training or education program, instruction, tuition, and material costs not to exceed five thousand dollars (\$5,000).~~The benefit shall not be paid for a period in which the employee ceases to participate in the program. In no event shall the benefit be paid to the employee while the employee is working in the mining industry in the severance and processing of coal as defined in KRS 342.0011(23)(a).~~*
5. *The period of~~one hundred four (104)~~ weeks during which this benefit is payable shall begin no later than the **thirtieth**~~one hundred eightieth~~ day after the **administrative law judge's** order awarding the benefit becomes final *except that an employee may elect to defer the beginning of such benefits up to the three hundred sixty-fifth day following the thirtieth day the order becomes final. Unless the employee has requested deferral of income benefits, those income benefits payable under subparagraphs 1. and 2. of this paragraph shall begin no later than thirty (30) days following conclusion of income benefits paid under subparagraph 3. if such benefits were paid.**
6. *If an employee who is awarded retraining incentive benefits under this paragraph successfully completes a bona fide training or education program approved by the commissioner, upon completion of the training or education program, the employer shall pay to that employee the sum of five thousand dollars (\$5,000) for successful completion of a program that requires a course of study of not less than twelve (12) months nor more than eighteen (18) months, or the sum of ten thousand dollars (\$10,000) for successful completion of a program that requires a course of study of more than eighteen (18) months. This amount shall be in addition to retraining incentive benefits awarded under this paragraph, and tuition expenses paid by the employer~~If an employee completes an approved program of training in less than one hundred four (104) weeks and that employee has accepted a bona fide offer of employment at a location more than fifty (50) miles from the employee's usual residence in the field for which the employee has been trained, the employee shall be paid in a lump sum for relocation the lesser of the sum of three thousand dollars (\$3,000) or the amount remaining in unpaid weekly training benefits as provided by this section.~~*

7. *An employee who is age fifty-seven (57) years or older on the date of last exposure and who is awarded retraining incentive benefits under subparagraph 1. to 4. of this paragraph, may elect to receive in lieu of retraining incentive benefits, an amount equal to sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage, not to exceed seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740 multiplied by the disability rating of twenty-five percent (25%) for a period not to exceed four hundred twenty-five (425) weeks, or until the employee reaches sixty-five (65) years of age, whichever occurs first, KRS 342.730(4) notwithstanding.*
 8. *A claim for retraining incentive benefits provided under this section may be filed, but benefits shall not be payable, while an employee is employed in the severance or processing of coal as defined in KRS 342.0011(23).*
 9. *If an employer appeals an award of retraining incentive benefits, upon an employee's motion, an administrative law judge may grant retraining incentive benefits pending appeal as interlocutory relief.*
 10. *If an employee elects to defer payment of retraining incentive benefits for a period of retraining longer than three hundred sixty-five (365) days, benefits otherwise payable shall be reduced week-for-week for each week retraining benefits are further deferred.*
- (b) 1. *If an employee has a radiographic classification of category 1/0, 1/1, or 1/2 coal workers' pneumoconiosis and respiratory impairment evidenced by spirometric test values of fifty-five percent (55%) or more but less than eighty percent (80%) of the predicted normal values, or category 2/1, 2/2, or 2/3 coal workers' pneumoconiosis and spirometric test values of eighty percent (80%) or more of the predicted normal values, there shall be an irrebuttable presumption that the employee has a disability rating of twenty-five percent (25%) resulting from exposure to coal dust, and the employee shall be awarded an income benefit which shall be an amount equal to sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage, but not to exceed seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740 multiplied by the disability rating of twenty-five percent (25%). The award shall be payable for a period not to exceed four hundred twenty-five (425) weeks.*
2. *An employee who is awarded benefits under this paragraph may, at the time of the award or before benefit payments begin, elect to receive retraining incentive benefits provided under subparagraphs 1. to 6. of paragraph (a) of this subsection, in lieu of income benefits awarded under this paragraph, provided that such option is available one (1) time only and is not revokable, and provided that in no event shall income benefits payable under this paragraph be stacked or added to retraining incentive income benefits paid or payable under subparagraphs 1. to 6. of paragraph (a) of this subsection to extend the period of disability.*
- (c) ~~(b)~~ *If it is determined that an employee has a radiographic classification of category 1/0, 1/1, or 1/2, [based on the latest ILO International Classification of Radiographies] and respiratory impairment resulting from exposure to coal dust as evidenced by*

spirometric test values of less than fifty-five percent (55%) of the predicted normal values ~~contained in the chapter on the respiratory system of the latest edition available of the "Guides to the Evaluation of Permanent Impairment" published by the American Medical Association~~, or category 2/1, 2/2, or 2/3 coal workers' pneumoconiosis and respiratory impairment evidenced by spirometric test values of fifty-five percent (55%) or more but less than eighty percent (80%) of the predicted normal values, **or category 3/2 or 3/3 coal workers' pneumoconiosis and spirometric test values of eighty percent (80%) or more**, there shall be an irrebuttable presumption that the employee has ~~a~~~~an occupational~~ disability rating of fifty percent (50%) resulting from exposure to coal dust, and the employee shall be awarded an income benefit which shall be an amount equal to sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage **but not to exceed seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740** multiplied by the disability rating of fifty percent (50%) ~~but not to exceed seventy five percent (75%) of the state average weekly wage as determined by KRS 342.740~~. The award shall be payable for a period not to exceed four hundred twenty-five (425) weeks~~, but in no event shall benefits be paid under this subsection while the employee continues to work in the mining industry in the severance and processing of coal as defined in KRS 342.0011(23)(a)~~.

~~(d)~~~~(e)~~ If it is determined that an employee has a radiographic classification of category 2/1, 2/2, or 2/3 coal workers' pneumoconiosis, based on the latest ILO International Classification of Radiographics, and respiratory impairment as evidenced by spirometric test values of less than fifty-five percent (55%) of the predicted normal values ~~contained in the chapter on the respiratory system of the latest edition available of the "Guides to the Evaluation of Permanent Impairment" published by the American Medical Association~~ or category 3/2 or 3/3 pneumoconiosis and respiratory impairment evidenced by spirometric test values of fifty-five percent (55%) or more but less than eighty percent (80%) of the predicted normal values, there shall be an irrebuttable presumption that the employee **has a**~~is~~ **disability rating**~~disabled~~ resulting from exposure to coal dust and the employee shall be awarded income benefits which shall be equal to sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage **but not to exceed seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740** multiplied by the disability rating of seventy-five percent (75%) ~~but not to exceed seventy five percent (75%) of the state average weekly wage and not less than twenty percent (20%) of the state average weekly wage as determined by KRS 342.740~~. The award shall be payable for a period not to exceed five hundred twenty (520) weeks. Income benefits awarded under this paragraph shall be payable to the employee during the disability~~, but in no event shall benefits be paid under this subsection while the employee continues to work in the mining industry in the severance and processing of coal as defined in KRS 342.0011(23)(a)~~.

~~(e)~~~~(d)~~ If it is determined that an employee has radiographic classification of 3/2 or 3/3 occupational pneumoconiosis ~~based on the latest ILO International Classification of Radiographs~~, and respiratory impairment evidenced by spirometric test values of less than fifty-five percent (55%) of the predicted normal values ~~contained in the latest edition of the "Guides to the Evaluation of Permanent Impairment" of the American Medical Association~~, **or complicated pneumoconiosis (large opacities category A, B, or C progressive massive fibrosis)**~~, based on the latest ILO International~~

~~Classification of Radiographies}], there shall be an irrebuttable presumption that the employee is totally disabled resulting from exposure to coal dust, and the employee shall be awarded income benefits equal to sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than one hundred percent (100%) of the state average weekly wage and not less than twenty percent (20%) of the average weekly wage of the state as determined by KRS 342.740. Income benefits awarded under this paragraph shall be payable to the employee during such disability~~], but in no event shall benefits be paid under this subsection while the employee continues to work in the mining industry in the severance and processing of coal as defined in KRS 342.0011(23)(a)].~~~~

- (2) The presence of respiratory impairment resulting from exposure to coal dust shall be established by using the largest forced vital capacity (FVC) value or the largest forced expiratory volume in one second (FEV1) value determined from the totality of all such spirometric testing performed in compliance with accepted medical standards.
- (3) When valid spirometric tests are not provided and a physician certifies to the administrative law judge that spirometric testing is not medically indicated because of the permanent physical condition of the employee, the administrative law judge shall make his decision on the basis of evidence admitted which establishes the existence of a diagnosis of occupational pneumoconiosis and respiratory impairment due to the occupational pneumoconiosis. The evidence submitted by the employee shall include one (1) or more arterial blood gas studies performed in accordance with accepted medical standards. Income benefits shall not be awarded in the absence of valid spirometric tests if the claimant's PO2 arterial blood gas value is equal to or higher than one (1) standard deviation from the normal value obtained by the formula $(103.5 - 0.42X)$, where X equals the claimant's age at the time of the arterial blood gas study.
- (4) ***Upon request, the commissioner shall refer an employee who has been awarded retraining incentive benefits under subsection (1)(a) of this section to the Department of Vocational Rehabilitation for evaluation and assessment of the training, education, or other services necessary to prepare the employee for a trade, occupation, or profession that will return the employee to remunerative employment, or services necessary and appropriate to prepare and enable the employee to successfully complete a bona fide training or education program approved by the commissioner. The commissioner shall contract with the Department of Vocational Rehabilitation to provide vocational rehabilitation or education services commensurate with the skill levels and abilities of the employee. Services provided under this subsection shall be funded by the coal workers' pneumoconiosis fund, KRS 342.1242 notwithstanding.***
- (5) ***The commissioner shall promulgate administrative regulations sufficient to effectuate the provisions relating to retraining incentive benefits provided under subsection (1)(a) of this section. The administrative regulations shall:***
 - (a) ***Define a "bona fide training or education program" to mean a postsecondary education or training program, including but not limited to the postsecondary programs registered with the Higher Education Assistance Authority, and successful completion of which will qualify the person completing the course for a trade, occupation, or profession, and which program can be completed within the period benefits are payable under subsection (1)(a) of this section;***

- (b) *Establish requirements for approval and certification of a bona fide training or education program;*
 - (c) *Provide that funds paid to the training or education program by the employer as required under subsection (1)(a)4. of this section shall be applied only to instruction, tuition, material costs, and any fees necessary for the completion of the program;*
 - (d) *Establish requirements for successful participation in and completion of an approved and certified bona fide training or education program, and eligibility standards that must be satisfied to receive sums to be paid by the employer pursuant to subsection (1)(a)6. of this section; and*
 - (e) *Establish attendance, performance and progress standards, and reporting requirements in consultation with the Department of Adult Education and Literacy as conditions that must be satisfied to receive retraining incentive income benefits pursuant to subsection (1)(a)3. of this section.*
- (6) In no event shall income benefits awarded under this section be stacked or added to income benefits awarded under KRS 342.730 to extend the period of disability *and in no event shall income or retraining incentive benefits be paid to the employee while the employee is working in the mining industry in the severance or processing of coal as defined in KRS 342.0011(23)(a).*

SECTION 4. A NEW SECTION OF KRS CHAPTER 342 IS CREATED TO READ AS FOLLOWS:

- (1) *The claim of any miner last exposed to the occupational hazards of coal workers' pneumoconiosis between December 12, 1996, and the effective date of this Act shall nonetheless be governed by the provisions of Section 3 of this Act and notwithstanding the provisions of KRS 342.125 all claims for benefits which were filed for last injurious occupational exposure to coal dust occurring between December 12, 1996, and the effective date of this Act shall be considered pursuant to the provisions of Section 3 of this Act and administrative regulations promulgated by the commissioner, and closed claims, except claims dismissed for reasons other than failure to meet medical eligibility standards, may be reopened by the claimant. Income or retraining incentive benefits shall be awarded thereon as if the entitlement standards established by the amendments to Section 3 of this Act were effective at the time of last exposure. Any benefits previously granted by an award or settlement shall be credited against any subsequent award or settlement and no interest shall be payable on additional benefits. A previous grant of retraining incentive benefits shall be credited only to the extent that the benefits were actually paid. All income or retraining incentive benefits greater than those which would have been awarded were not these new provisions applicable shall be paid without interest from the Kentucky coal workers' pneumoconiosis fund, the provisions of KRS 342.1242 notwithstanding.*
- (2) *The original claim of any miner last exposed to the occupational hazards of coal workers' pneumoconiosis prior to December 12, 1996, which was subject to a university evaluation pursuant to Section 1 of this Act and was dismissed upon a finding that the miner did not prove the presence of coal workers' pneumoconiosis radiographically may be reopened by the claimant notwithstanding the provisions of KRS 342.125, pursuant to administrative regulations adopted by the commissioner. Income benefits may be awarded thereon pursuant to entitlement standards effective as of the date of last exposure, except the*

income or retraining benefits shall be paid without interest from the Kentucky coal workers' pneumoconiosis fund, the provisions of KRS 342.1242 notwithstanding.

- (3) *Notwithstanding the provisions of subsection (4)(a) of Section 2 of this Act, the coal workers' pneumoconiosis claim of any miner last exposed between December 12, 1996, and the effective date of this Act, may be filed with the commissioner on or before December 12, 2003, or within the time frame prescribed by subsection (4)(a) of Section 2 of this Act, whichever is longer. All income or retraining incentive benefits greater than those which would have been awarded were not these new provisions applicable shall be paid by the Kentucky coal workers' pneumoconiosis fund without interest, the provisions of KRS 342.1242 notwithstanding.*
- (4) *Administrative regulations promulgated by the commissioner pursuant to subsections (1) and (2) of this section shall provide that chest X-rays previously taken at university medical schools pursuant to Section 1 of this Act shall be obtained by the commissioner and forwarded to three (3) randomly selected "B" readers for determination of consensus pursuant to subsection (3)(b)4.e. of Section 2 of this Act. The claim shall be assigned to an administrative law judge for determination of whether the claim should be reopened and the award of additional benefits, if any.*

SECTION 5. A NEW SECTION OF KRS CHAPTER 342 IS CREATED TO READ AS FOLLOWS:

- (1) *The commissioner shall maintain a list of duly qualified "B" reader physicians who are licensed in the Commonwealth. The list shall include "B" reader physicians at the university medical schools and other "B" reader physicians certified by the National Institute of Occupational Safety and Health (NIOSH) who have agreed to interpret chest X-rays pursuant to Section 2 of this Act for a fee to be fixed by the commissioner and paid by the Kentucky coal workers' pneumoconiosis fund, the provisions of KRS 342.1242 notwithstanding.*
- (2) *Physicians from the "B" reader list shall be utilized as necessary to obtain consensus classifications of chest films in coal workers' pneumoconiosis claims. The consensus classification shall be presumed to be the correct classification of the employee's condition unless overcome by clear and convincing evidence. If an administrative law judge finds that the presumption of correctness of the consensus reading has been overcome, the reasons shall be specially stated in the administrative law judge's order.*
- (3) *"B" reader" means a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO classification for interpreting chest roentgenograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of the National Institute of Occupational Safety and Health (NIOSH) or by the Appalachian Laboratory for Occupational Safety and Health (ALOSH), or successors.*
- (4) *The university medical schools in consultation with the commissioner shall jointly develop a procedure to annually report the performance of physicians on the "B" reader list who have participated in the consensus procedure established in Section 2 of this Act. The physicians shall be evaluated with respect to the timeliness and completeness of their reports, as well as the frequency at which the physician's classification of X-rays differs from the consensus reading. The commissioner shall remove a physician from the "B" reader list if the physician consistently renders incomplete or untimely reports, or if the physician's interpretations of X-rays are not in conformity with the consensus reading*

fifty percent (50%) of the time. The report required under this subsection shall be provided to the Interim Joint Committee on Labor and Industry beginning in July 1, 2003 and by July 1 of each year thereafter.

SECTION 6. A NEW SECTION OF KRS CHAPTER 342 IS CREATED TO READ AS FOLLOWS:

- (1) *Notwithstanding any provisions of the KRS to the contrary, every employer engaged in the severance or processing of coal, as defined in KRS 342.0011, at its principal office and such other locations where employees customarily report for payroll and personnel matters, shall conspicuously post a notice advising employees of the education and training opportunities available under this chapter. The notice shall include:*
 - (a) *Toll-free telephone numbers for the:*
 1. *Department of Workers' Claims;*
 2. *Kentucky Community and Technical College System; and*
 3. *Kentucky Higher Education Assistance Authority;*
 - (b) *Telephone numbers for the local board of education and centers for adult education and literacy; and*
 - (c) *A list of approved education and training programs available to employees engaged in the severance or processing of coal.*
- (2) *The notice shall be made available to all employers at no cost and upon request of the employer. The notice shall also be posted on the Web sites maintained by the Department of Workers' Claims and the Kentucky Community and Technical College System.*

Approved April 13, 2002