

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
JANUARY 2010**

I. ADMINISTRATIVE LAW

A. Commonwealth, Energy and Environmental Cabinet v. Spurlock

[2008-CA-001184](#) 01/22/2010 2010 WL 199411

Opinion by Judge Thompson; Judges Caperton and Wine concurred. The Court reversed and remanded orders of the circuit court declaring that the Energy and Environmental Cabinet's final orders entered against appellee, based on his failure to respond to the Cabinet's orders, were void. The Court first held that the trial court properly utilized a de novo standard of review. However, the Court then held that *Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc.*, 177 S.W.3d 718 (Ky. 2005), was distinguishable on its facts. Because the notice provided by the Cabinet incorrectly advised appellee that he was not entitled to an administrative hearing absent prepayment of penalties, appellee was entitled to request a formal hearing accompanied by a proper request for a waiver from the prepayment provisions.

II. CIVIL PROCEDURE

A. Peter v. Schultz-Gibson

[2009-CA-001151](#) 01/29/2010 2010 WL 323076

Opinion and order by Senior Judge Knopf; Judges Keller and Stumbo concurred. The Court denied a petition for a writ of prohibition wherein petitioner argued that the circuit court acted outside of its jurisdiction by maintaining jurisdiction of a complaint brought seeking an accounting as to funds originally held by petitioner under Kentucky's Uniform Transfers to Minors Act (UTMA). The Court held that, under the circumstances, the accounting was correctly pursued in circuit court. KRS 385.192 was applicable only when a minor, or someone acting on his behalf, was involved. The use of the subject funds prior to the real party in interest's majority and the use of the funds afterward became inextricably intertwined. Therefore, the circuit court could exercise its general subject-matter jurisdiction to consider an equitable remedy.

III. CONTRACTS

A. Harvest Homebuilders LLC v. Commonwealth Bank and Trust Company

[2008-CA-001897](#) 01/29/2010 2010 WL 323186

Opinion by Judge Taylor; Chief Judge Combs and Senior Judge Henry concurred. The Court affirmed a judgment of the circuit court awarding the appellee bank a deficiency judgment against appellants. The Court held that the trial court did not err by awarding the deficiency judgment as the record clearly established that the

bank did not breach the implied covenant of good faith and fair dealing. The Court distinguished the holding in *Pearman v. West Point National Bank*, 887 S.W.2d 366 (Ky. App. 1994), in that appellee neither entered into a contract to sell the real property during the foreclosure proceedings nor actually sold the real property to a third party. Further, its lack of consent to a sale of the property prior to foreclosure was based on appellants' insistence that the sale be conditioned upon their release from liability for any resulting deficiency.

IV. CORPORATIONS

A. **Bear, Inc. v. Smith**

[2008-CA-001556](#) 01/22/2010 2010 WL 199416

Opinion by Judge Moore; Judges Keller and Taylor concurred. The Court affirmed in part, reversed in part, and remanded a summary judgment of the circuit court dismissing the appellant corporation's action to collect unpaid fuel charges from appellees, a sole corporate shareholder and an unrelated company organized by the shareholder's son. The Court first held that the trial court did not err in granting summary judgment on appellant's fraud claims. First, the claim for fraud in the inducement failed as there was no evidence in the record demonstrating that alleged representations were made to induce appellant to act or refrain from acting and there was no evidence that at the time the debt was incurred that the shareholder never intended to pay the charges at the time they were incurred. Further, appellant was owed no statutory duty to disclose the fact of the company's dissolution. The language in KRS 271B.14-060 was permissive, rather than mandatory and therefore, did not prescribe the exclusive means of making adequate provision for the debts and liabilities of a dissolved corporation. Therefore, appellant's claim for fraud by omission failed. The Court next held that the trial court did not err in granting summary judgment to the corporation formed by the shareholder's son. There was no evidence that the newly formed LLC was a successor entity of the dissolved corporation, that it was a shareholder of the dissolved corporation, that it had agreed or represented to assume the debts, or that a novation occurred. The Court finally held that the trial court erred in granting summary judgment to the individual shareholder. There was a genuine issue of material fact as to whether he received corporate assets for which he could be held personally liable and there was some evidence in the record of abuse of the corporate form and the justification of a wrong to allow the corporate veil to be pierced.

V. CRIMINAL LAW

A. **Barker v. Commonwealth**

[2008-CA-001312](#) 01/22/2010 2010 WL 199413

Opinion by Judge VanMeter; Judge Nickell concurred by separate opinion; Senior Judge Lambert dissented by separate opinion. The Court affirmed an order of the circuit court revoking appellant's probation after appellant incurred assault charges while on probation, in violation of a condition that he not commit another offense. The Court first held that the trial court did not abuse its discretion in reaching the

conclusion that appellant violated the terms of his probation by incurring the new charges. The court gave notice of and conducted the probation revocation hearing at which appellant and his counsel were present and were afforded an opportunity to cross-examine the probation officer, as well as to present rebuttal testimony. The Court next held that the trial court's reliance on hearsay evidence presented by the probation officer did not violate appellant's due process rights nor was it an abuse of discretion. The Court finally held that the trial court did not violate appellant's due process rights by failing to make written findings when the order specifically stated that appellant violated the conditions of probation by his arrest on the new charges.

B. Commonwealth v. Lamberson

[2008-CA-000763](#) 01/15/2010 2010 WL 134063

Opinion by Judge Nickell; Judge Acree and Senior Judge Knopf concurred. The Court reversed and remanded an order of the circuit court suppressing appellant's prior conviction for operating a motor vehicle under the influence of intoxicants (DUI), first offense, to enhance a later charge of DUI, fourth offense. The Court first held that the circuit court's correctly found that the district court abused its discretion when it accepted appellant's guilty plea *in absentia* on the first offense without first obtaining a written waiver of his constitutional right to be present. However, the Court ultimately held that the circuit court erred in suppressing the conviction because appellant waived his right to challenge the original conviction when he failed to challenge it before pleading guilty to a later charge of DUI, second offense.

C. Peters v. Commonwealth

[2008-CA-001857](#) 01/08/2010 2010 WL 45888

Opinion by Chief Judge Combs; Judge Taylor and Senior Judge Henry concurred. The Court reversed and remanded a writ of prohibition issued by the circuit court against the district court after the district court ordered the Commonwealth to produce an arresting officer for a pretrial conference. The Court first held that the Commonwealth did not have an adequate remedy by appeal as KRS 23A.080 only allowed for an appeal from a final action of the district court and the order did not dispose of the ultimate issue of appellant's guilt of driving under the influence and did not include finality language. However, the Court then held that the potential results enumerated by the circuit court and the Commonwealth did not qualify as great and irreparable harm but rather, were highly speculative and generalized. The district court properly acted within the scope of its discretion under RCr 7.24(5) by choosing to expedite discovery by means of the pretrial conference.

D. Piercy v. Commonwealth

[2008-CA-002068](#) 01/29/2010 2010 WL 323196

Opinion by Judge Lambert; Judges Acree and Keller concurred. The Court affirmed a judgment of the circuit court entered after appellant entered a conditional guilty plea reserving the right to appeal the denial of a motion to suppress evidence. The Court ultimately held that the trial court did not err in denying the motion to suppress. In reaching that conclusion the Court first held that the trial court erred in

implicitly finding that the encounter between appellant and the police was consensual and not a stop under *Terry v. Ohio*, 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) because appellant was not driving his vehicle at the time the officers approached him. However, any error was harmless since the officers had a reasonable, articulable suspicion that appellant was about to drive a vehicle with expired tags and thus, the officers had grounds to conduct a *Terry* stop and to conclude that criminal activity was occurring under KRS 186.170(1). The Court then held that the trial court correctly found, based on an officer's testimony, that the officers had appellant's consent to enter his residence when appellant did not attempt to deny the officers' entry or make any movements to prevent them from entering. Thus, the officers had a right to be in the residence and, under the plain view/smell doctrine, to observe the smell of marijuana which they used to obtain a search warrant.

E. Stone v. Commonwealth

[2008-CA-001424](#) 01/08/2010 2010 WL 45885

Opinion by Judge Wine; Judge Stumbo concurred; Judge Thompson concurred in result by separate opinion. The Court affirmed appellant's conviction and sentence for first-degree attempted unlawful transaction with a minor. The Court first held that the trial court properly denied appellant's motion for a directed verdict. KRS 506.010, the criminal attempt statute, did not contain a requirement that an actual minor be involved and there was significant evidence that appellant believed he was dealing with a thirteen-year-old child, even though he was actually dealing with an adult male. Further, KRS 530.064 did not require that the sexual activity of the minor be illegal but rather, made the sexual activity with a minor illegal. The Court next held that the trial court did not err by denying appellant's motion for a mistrial after sexually explicit photographs of his penis were shown to the jury during opening arguments when the photographs were later properly authenticated and admitted at trial. The Court next held that the trial court did not err in precluding appellant from raising impossibility as a defense to the crime of attempt because the defense of impossibility is inapplicable to the crime of attempt. The Court next held that the trial court properly instructed the jury. There was no evidence to support a finding of not guilty on the charge of attempted unlawful transaction with a minor but that would support a conviction for a lesser offense of attempted rape, attempted sodomy, or attempted sexual abuse. The Court next held that the trial court properly refused to instruct the jury on entrapment as a defense, as neither element for a valid defense of entrapment was present when appellant approached the decoys first and initiated the sexual discussions and the discussion of setting up an in-person meeting. The Court then struck the portion of appellant's brief containing an alleged error regarding an oral instruction to the jury when appellant failed to cite to the record to support the argument and failed to cite any legal authority for the claim. The Court next held that the trial court did not err by sustaining the Commonwealth's objection during closing argument concerning the language of KRS 503.064 when defense counsel was arguing an erroneous interpretation of the statute.

VI. FAMILY LAW

A. **Commonwealth, Cabinet for Health and Family Services v. D.G.R.**

[2009-CA-000745](#) 01/22/2010 2010 WL 199576

Opinion by Judge Lambert; Judge VanMeter concurred; Senior Judge Henry dissented by separate opinion. The Court reversed an order of the circuit court denying a petition to terminate appellees' parental rights. The Court held that the trial court erred in finding that termination was not in the child's best interest when all but one of the factors in KRS 625.090(3) weighed in favor of termination being in the child's best interest. While there was some evidence presented in favor of the parents and their minimal efforts to improve the care of the child, the evidence did not constitute substantial evidence, much less clear and convincing evidence.

B. **Gertler v. Gertler**

[2008-CA-001367](#) 01/15/2010 2010 WL 135101

Opinion by Judge Acree; Judge Lambert and Senior Judge Harris concurred. The Court affirmed a judgment of the circuit court classifying certain gifts to the parties in a dissolution action as marital property and awarding sole custody of the parties' children to their mother. The Court first held that the trial court did not err in classifying the monetary gifts from appellant's parents as marital property. Appellant's and his father's testimony did not alone satisfy appellant's burden of establishing that the gifts were non-marital and the judge, as the trier of fact, could believe or not believe, in whole or in part, the testimony. The Court next held that the trial court did not err in finding that appellant would not be able to cooperate with his ex-wife in future decision-making regarding their children and therefore, awarding sole custody of the parties' children to their mother was not arbitrary, unreasonable, or unfair.

C. **Hunter v. Mena**

[2009-CA-000494](#) 01/08/2010 2010 WL 45919

Opinion by Judge Acree; Judges Keller and Lambert concurred. The Court affirmed in part and reversed in part and remanded a Domestic Violence Order. The Court first held that the family court erred in including a requirement in the DVO, entered pursuant to a petition by appellee, that appellant have no contact with his nephew. Appellee's petition was not filed on behalf of the nephew and therefore, could not justify entry of an order protecting the nephew. The Court next held that the family court had subject matter jurisdiction to enter the DVO to protect appellee. Although appellee was physically residing in Indiana with her mother at the time the petition, the evidence indicated that she desired to remain a resident of Kentucky and not that she intended to forever abandon the state as her domicile. The Court finally held that the evidence did not contradict the family court's determination that appellant committed acts of domestic violence against appellee. Although the evidence was conflicting, the family court was the proper arbiter to make the factual determination based upon substantial evidence.

VII. GOVERNMENT

A. **Northern Kentucky Area Planning Commission v. Cloyd**

[2008-CA-001104](#) 01/15/2010 2010 WL 134592

Opinion by Judge Acree; Judge Lambert and Senior Judge Harris concurred. The Court affirmed in part and reversed in part orders of the circuit court denying motions for summary judgment on appellee's claims that he was wrongfully discharged by his supervisor and the area planning commission in violation of Kentucky's Whistleblower Act, KRS 61.101-61.103; in violation of two provisions of the state building code - 198B.130 and KRS 198B.140; and for the tort of public policy wrongful discharge. The Court first held that the area planning commission was a political subdivision of the Commonwealth and as such, was an employer for purposes of the Whistleblower Act. Therefore, the circuit court properly denied the commission's and supervisor's motion for summary judgment on that claim. The Court next held that the trial court erred in denying the motion for summary judgment on the other claims because the commission was entitled to governmental immunity because of its parent body and functions and the supervisor derived official immunity from his status with the commission.

VIII. INSURANCE

A. **Lynch v. Claims Management Corporation**

[2007-CA-001840](#) 01/22/2010 2010 WL 199343

Opinion by Judge Wine; Judges Clayton and Dixon concurred. The Court reversed and remanded a summary judgment in appellee's favor on its intervening subrogation/reimbursement claim from settlement proceeds appellant received from his uninsured motorist carrier. Appellee was the claims administrator for a disability policy purchased by appellant, an independent contractor. The Court held that the trial court erred in granting summary judgment to appellee and denying summary judgment to appellant on the intervening claim. The insurance contract was both ambiguous and subject to a reasonable interpretation that appellee would only seek reimbursement from a third-party tortfeasor, not another insurer. Therefore, appellant was entitled to summary judgment.

IX. PROPERTY

A. **Pendleton v. U.S. 60 Associates, LLC**

[2008-CA-000744](#) 01/29/2010 2010 WL 323143

Opinion by Judge Acree; Judge Lambert and Senior Judge Harris concurred. The Court affirmed a summary judgment in favor of appellees that ordered appellants to pay unpaid rent, unpaid property taxes and late fees for their failure to pay city and county property taxes as subtenants of commercial property. The Court first held that KRS 383.010(5) allowed the landowner to collect unpaid rent via direct action against the subtenants for rent accrued during their subtenancy. The Court then held that because the terms of the lease and sublease provided that payment of utilities, taxes and all other payments were deemed additional rent and could be collected the

same as rent, the appellee could collect the unpaid rent, the unpaid property taxes and the late fees as rent.

X. TORTS

A. **Baxter v. AHS Samaritan Hospital, LLC**

[2008-CA-000541](#) 01/15/2010 2010 WL 133796

Opinion by Judge Keller; Judge Acree concurred; Judge Caperton dissented in part by separate opinion. The Court affirmed a judgment of the circuit court dismissing a medical malpractice action after a jury found that a doctor was not negligent in failing to remove a surgical sponge following an appendectomy. Following the holding in *Nazar v. Branham*, 291 S.W.3d 599 (Ky. 2009), the Court first held that the trial court did not err in overruling motions for partial summary judgment and directed verdict against the doctor under the doctrine of negligence per se. The Court next held that trial court correctly denied motions for partial summary judgment and directed verdict under the doctrine of *res ipsa loquitur*. Although the presence of the sponge constituted prima facie evidence of negligence, the expert testimony created a question of fact as to the doctor's liability for the injuries. The Court next held that the trial court did not err by failing to give an instruction on the doctrine of *res ipsa loquitur*. Although *Nazar* allowed the jury to infer negligence and a party to avoid a directed verdict or to win a directed verdict, the instructions on the doctrine should not be submitted to a jury. The Court finally held that the trial court did not err in granting partial summary judgment, precluding a deceased infant from bringing a wrongful death action pursuant to KRS 411.130, because the experts concluded that the infant was never viable and was not capable of sustaining life apart from his mother. Even so, because the jury determined that the doctor was not negligent, he could not have been liable for the death of the infant.

B. **Bobbitt v. Collins**

[2007-CA-001422](#) 01/22/2010 2010 WL 199308

Opinion by Judge Wine; Judges Stumbo and Thompson concurred. The Court reversed and remanded summary judgment orders dismissing personal injury claims arising from a multi-vehicle collision. The Court held that the trial court did not err in finding that the clear language of a general release discharged all the defendants. Because the claimant did not make a timely acceptance of an offer of judgment and the settling defendants did not extend the settlement offer beyond the ten-day period allowed by CR 68, the settlement offer was subject to ordinary contract law. The Court then held that the trial court correctly found that the general release, signed by the claimant, was enforceable as a contract provision. Because the release was not ambiguous, the trial court was not required to look beyond its terms to interpret it. However, the Court held that the trial court erred in finding that the release precluded the claimant from seeking rescission and that the parol evidence rule precluded an equitable claim for rescission or reformation based on fraud, illegality or mutual mistake. The Court then held that the evidence clearly established a mutual mistake and that the parties to the contract never intended the general release

language to be included. Therefore, the trial court erred by denying the request for rescission of the release.

C. Brett v. Media General Operations, Inc.

[2008-CA-000620](#) 01/29/2010 2010 WL 323136

Opinion by Senior Judge Harris; Judges Lambert and VanMeter concurred. The court affirmed a summary judgment entered by the circuit court in favor of appellant's former employer, a television station, and its general manager and an order awarding costs to the employer. The Court first held that summary judgment was not based upon improper evidence when the majority of the proof consisted of witness depositions that were properly certified and notarized. Further, appellant's deposition was complete, as he did not request a re-direct examination, nor did he file an affidavit to explain, correct, or contradict the testimony he gave under examination by opposing counsel, which was authorized by CR 56.03. The Court also held that although the employer and general manager may have violated office policies by destroying documents, appellant failed to demonstrate that any law or court orders were violated or that they were lost or destroyed in anticipation of litigation. The Court next held that appellant failed to present evidence demonstrating any genuine issue of material fact on his breach of contract claim. His contract contained a morals clause and his termination letter made it clear that he was terminated for cause after four women complained that he had sexually harassed them on numerous occasions. Absent a specific contractual provision, the employer was under no obligation to provide additional investigative measures or an opportunity to be heard. The Court next held that appellant failed to demonstrate the existence of any genuine issue of material fact on the basic element of material misrepresentation to support his claim that he was fraudulently induced into entering the employment contract. The Court next held that appellant failed to show how his allegations of misrepresentations and improper termination constituted contractual interference. The Court next held that appellant failed to specifically describe any alleged defamatory statements or state where they were published to show how the employer was responsible for dissemination of information to support a claim for defamation. The Court next held that appellant failed to produce evidence to show that his termination was outrageous or intolerable in the manner required under Kentucky law to support his claim for intentional infliction of emotional distress. The Court finally held that the ruling by the Kentucky Supreme Court in the employer's favor, in an original action wherein appellant argued that the trial court lost jurisdiction under CR 52.02 to award costs after appellant filed his Notice of Appeal, was dispositive of the appeal from the order awarding costs.

D. Caudill v. Salyersville National Bank

[2008-CA-000017](#) 01/08/2010 2010 WL 45882

Opinion by Judge Thompson; Judges Caperton and Wine concurred. The Court affirmed a judgment of the circuit court granting a directed verdict to the appellee bank on a estate's claim that the bank aided and assisted the deceased's nephew, acting under the authority of a power of attorney and as an authorized signatory on the deceased's personal checking account, to convert funds held by the Bank. The

Court held that there was no evidence that the bank acted in bad faith or with knowledge that the nephew breached his fiduciary duty when it conducted financial transactions concerning the account. It acted pursuant to a valid power of attorney and Consumer Account Agreement and was not obligated to look beyond the language of the power of attorney to determine the extent of the power.

E. Flint v. Stilger

[2009-CA-000475](#) 01/22/2010 2010 WL 199566

Opinion by Judge Caperton; Judge Dixon and Senior Judge Henry concurred. The Court reversed and remanded a summary judgment entered in favor of appellee on appellant's claim for defamation. The trial court found that statements made in response to appellant's appeal for the Attorney General to prosecute a condominium association's failure to comply with KRS 381.990 were entitled to absolute privilege. The Court first held that appellant's naming of additional appellees as "Jane and John Does" was not fatal to the appeal. As members of the Board of Directors of the association, they were not necessary parties because the defamation claim was only between appellant and the named appellee, the attorney for the association. The Court next held that review was confined to one for manifest injustice, as appellant failed to properly cite to the record as required by CR 76.12(4)(c)(iv)-(v). The Court ultimately held that the statements made in the response to the appeal for the Attorney General to prosecute was not entitled to absolute privilege because the Attorney General's office was undertaking an investigation and had not made known whether it would pursue a judicial remedy. Therefore, the statements were only entitled to a qualified privilege, which could be overcome by a showing of malice.

F. Higginbotham v. Keeneland Association

[2009-CA-000301](#) 01/29/2010 2010 WL 323287

Opinion by Judge Lambert; Judge Wine and Senior Judge Harris concurred. The Court affirmed a summary judgment entered in favor of appellee on appellants' claims related to a motor vehicle accident. A passenger was killed and a passenger was injured when the driver improperly reacted to a flat tire, lost control of her vehicle, and struck a vehicle owned by appellee's employee who had parked the vehicle on the shoulder to activate temporary signs directing traffic into Keeneland racetrack. The Court held that the trial court properly granted summary judgment in favor of the employer. The Court first declined to review appellants' argument or supporting documentation that the employee's parking on the shoulder constituted negligence per se because the argument was not raised before the trial court and the documents, which were not part of the record on appeal, were improperly attached as an appendix to the brief. The Court then held that the employee did not owe appellants a duty to refrain from parking on the shoulder of the road. The particular harm was not foreseeable as no reasonable person could have foreseen the injuries sustained or that the driver would lose control to the extent that she could not bring her vehicle to a complete stop utilizing the portions of the shoulder available. KRS 189.450(3) did not impose a duty of care because the statute was inapplicable to the road where the accident occurred, nor did KRS 189.290(1) because the employee

was not operating the vehicle at the time of the accident. The employee did not have a common law duty, as there was no authority for the proposition that the shoulder was reserved exclusively for emergency purposes. Public policy considerations also supported the finding that the employee did not have a duty to refrain from parking on the road, as he acted within the guidelines of the encroachment permit. The Court finally held that the trial court properly found that the employee's actions were not the proximate cause of the collision, when it was undisputed that the driver lost control of her vehicle when she improperly reacted to a flat tire. Further, the evidence established that the vehicle was out of control, traveling at a high rate of speed, and would have collided with whatever was in its path - either the temporary sign, the steep earth berm or both.

XI. WORKERS' COMPENSATION

- A. Damron v. Kentucky May Mining Company**
[2009-CA-000867](#) 01/29/2010 2010 WL 335602 N/A Filed in S. Ct.

THIS OPINION HAS BEEN APPEALED TO THE SUPREME COURT AND THEREFORE, IS NO LONGER LISTED AS PUBLISHED.

- B. Jones v. Aerotek Staffing**
[2009-CA-001238](#) 01/22/2010 2010 WL 254429
Opinion by Judge Keller; Judges Wine and Senior Judge Lambert concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming an administrative law judge's opinion and order that an employer was not liable for enhanced benefits under KRS 324.165 for failing to provide the injured worker with a safe work place. The Court held that to establish that a temporary employment agency intentionally violated a safety statute or regulation, an employee must show that the agency had knowledge of, approved of, directed, or acquiesced in its client's actions. Absent evidence that the agency had a duty to inspect the premises or knowledge of the safety violation, the Board correctly determined that the agency was not responsible for the safety violation.

- C. Kentucky Associated General Contractors Self-Insurance Fund v. Lowther**
[2008-CA-002090](#) 01/29/2010 2010 WL 323199
Opinion by Senior Judge Lambert; Chief Judge Combs concurred; Judge Moore dissented by separate opinion. The Court affirmed a judgment of the circuit court upholding a penalty imposed by the executive director of the Kentucky Office of Workers' Claims on an insurer and claims administrator for their failure to pay a claim. The Court held that after a final utilization review decision revealed a dispute, the obligor was required to file a Form 112 medical dispute within 30 days, whether services had been rendered and a bill sent, or whether pre-authorization had been denied. Because the insurer did not seek reopening of the claim, it was in violation of its duty under the workers' compensation laws to promptly pay or contest the claim. Upon the proper determinations by the executive director that the insurer failed to attempt in good faith to promptly pay a claim in which liability was

clear and that it failed to meet the appropriate time limits imposed by KRS Chapter 342, the Office of Workers' Claims was authorized to impose a fine for each violation.

D. Quebecor Book Company v. Mikletich

[2009-CA-001370](#) 01/22/2010 2010 WL 199300

Opinion by Chief Judge Combs; Judge Taylor and Senior Judge Henry concurred. The Court affirmed a decision of the Workers' Compensation Board that affirmed an administrative law judge's opinion and award of benefits to a worker for cumulative, work-related hearing loss. The Court held that the Board ruled correctly under the circumstances and statutory percentages unique to hearing loss by not applying the statutory limitation analysis codified in KRS 342.185. Since the worker would not have been eligible to receive income benefits unless and until he reached an 8% whole person impairment, pursuant to KRS 342.7305(2), and the employer had timely notice of the 6% disability that existed more than two years before the worker filed his claim, there was no legal or equitable basis to carve out from the final award that portion attributable to the earlier onset of the injury.