

**Kentucky Supreme Court**  
**Cases of Note**  
**[September-October, 2010](#)**

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1. Hold down the control (“Ctrl”) key and click on the link.
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**WORKERS COMPENSATION**

**Quebcor Book Company v. Lou Mikletich, et. al.**

**[2010-SC-000122-WC](#) September 23, 2010**

Opinion of the Court. All sitting; all concur. An Administrative Law Judge based income benefits for disability from hearing loss on the claimant’s entire 24% permanent impairment rating although a physician had informed him that the condition was work-related more than two years before he filed his claim. The Workers' Compensation Board affirmed and the Court of Appeals affirmed the Board. The Supreme Court also affirmed, noting that the 6% permanent impairment rating attributed to hearing loss that existed more than two years before the filing date was inadequate to be compensable at that time. Although the claimant sustained additional hazardous noise exposure and additional impairment thereafter, the court distinguished *Special Fund v. Clark*, 998 S.W.2d 487 (Ky. 1999), because it did not involve a hearing loss claim or the implications of KRS 342.7305(2)’s threshold requirement. The court concluded that the 6% impairment rating need not be excluded from the impairment rating present when the claim was heard and income benefits were calculated.

**Zurich American Insurance Co. v. Journey Operating, LLC**

**[2009-SC-000796-WC](#) October 21, 2010**

Opinion of the Court. All sitting; all concur. The widows of Tennessee residents who were employed by a Tennessee corporation but killed in Kentucky while performing work for a Kentucky contractor sought workers’ compensation benefits in Kentucky. Having found that the policy Zurich American Insurance Co. issued the Tennessee employer covered benefits provided by Tennessee law but did not cover Kentucky claims, the Administrative Law Judge (ALJ) ordered the Kentucky contractor to pay income benefits but granted credit for benefits that Zurich admitted were due and owing under Tennessee law and was paying voluntarily. The Kentucky employer moved to reopen the final awards based on mistake or fraud after Zurich ceased paying Tennessee benefits and denied liability based on Tennessee’s election of remedies doctrine. Having found that KRS 342.125(1) permits reopening to be based on fraud and that Zurich committed a constructive fraud by failing to reveal its intention to terminate Tennessee benefits throughout the initial litigation, the ALJ ordered Zurich to continue paying the Tennessee benefits for which it admitted liability. Although the Workers’ Compensation Board reversed, the Court of Appeals reinstated the ALJ’s decision. Affirming, the Supreme Court held that KRS 342.325 and KRS 342.125(1) grant an ALJ jurisdiction to reopen a final award when its accuracy and integrity are affected by fraud or constructive fraud. The court also held that the record supported the ALJ’s finding that Zurich committed constructive fraud and warranted an estoppel in order to prevent it from benefiting from its conduct.

## MEDICAL MALPRACTICE

**Jerry Woolum, M.D. v. Lisa Ann Hillman**

**[2008-SC-000396-DG](#) October 21, 2010**

Opinion of the Court by Justice Noble. All sitting. In a medical malpractice case over the alleged wrongful death of a stillborn fetus, Dr. Woolum appealed a judgment against him, affirmed by the Court of Appeals, on four grounds. (1) In permitting the plaintiffs to demonstrate the bias of a medical expert witness for the defense, the trial court allowed evidence of the commonality of insurance between the witness and the defendant. Due to the bias exception to KRE 411, such evidence was not per se inadmissible, but instead subject to a balancing test under KRE 403. The trial court exercised proper discretion in weighing the evidence in favor of admissibility due to several factors specific to the case adding probative value to the evidence's imputation of bias. (2) A video of an ultrasound of the then-alive fetus was played for the jury. Although the ultrasound had minimal probative value, its admission did not violate KRE 403 due to its equally minimal prejudicial effect. (3) The trial court denied a directed verdict requested on the basis that plaintiffs had allegedly failed to prove viability of the fetus. This ruling was correct because expert testimony provided that a fetus at its stage before the alleged malpractice occurred was viable. (4) A six-day delay occurred during jury deliberations, resulting from the illnesses of two jurors. This delay did not mandate a mistrial because, amongst other reasons, the cause for delay was legitimate, it was unavoidable, and it did not result in any apparent prejudice. The Chief Justice issued a concurring opinion, in which Justice Abramson joined, emphasizing that this case represents a narrow exception to the bar against evidence of insurance, and also stating that, while perhaps the better practice would have been to exclude the ultrasound video, its minimal value rendered any error in that regard harmless. Justice Cunningham issued a dissenting opinion, stating that the six-day delay in deliberations, combined with the concurrent illnesses of two jurors assigned to the case, deprived both parties of their entitlement to uninterrupted deliberation by able-minded jurors.