

Kentucky Supreme Court
Cases of Note
March-April, 2011

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1. Hold down the control (“Ctrl”) key and click on the link.
2. Right-click on the link and select “Open Hyperlink”.

WORKERS COMPENSATION

Pella Corporation v. Joyce Bernstein, et al.

2010-SC-000448-WC April 21, 2011

Opinion of the Court. All sitting; all concur. Bernstein alleged repetitive trauma injuries to her neck, back, and shoulders. The ALJ found that the neck and back injuries produced a combined permanent impairment rating of 33%. The ALJ also found that Bernstein sustained a permanent left shoulder injury but that the right shoulder injury did not warrant a permanent impairment rating, basing the latter finding on certain medical evidence and Bernstein’s testimony that she no longer had any right shoulder complaints. Inasmuch as her physician failed to apportion the 10% impairment rating that he assigned based on “adhesive capsulitis of the shoulders greater on the left than the right,” the ALJ concluded that the evidence did not permit an award for the left shoulder injury. Reversing, the Board held that the ALJ had discretion to apportion the impairment rating and could find reasonably that the left shoulder injury produced a 6 to 10% rating. The Court of Appeals affirmed. Also affirming, the Supreme Court noted that the permanent impairment rating an injury produces is a medical question but that an ALJ has some discretion to select the impairment rating upon which to base an award. The court concluded that the ALJ was free under the present circumstances to consider the relevant medical evidence; select a reasonable impairment rating; and award income benefits.

Ila Nickell v. Diversicare Management Services, et al.

2010-SC-000481-WC April 21, 2011

Opinion of the Court. All sitting. All concur. The Board entered an opinion that affirmed a decision in Diversicare’s favor on November 3, 2009. On December 3, 2009 Nickell transmitted to the Clerk of the Court of Appeals by United States Postal Service express mail a document styled as a motion for an extension of time in which to file her “brief.” She sought leave for an extension of time through December 15, 2009 in which to file her petition for review; stated various justifications for the request; and asserted that neither CR 76.25(2), nor CR 6.02, nor any judicial decision prohibited enlargement of the time for filing a petition for review. The Court of Appeals construed CR 76.25(2) as mandating dismissal and denied the motion. The Supreme Court reversed and remanded, however, directing the Court of Appeals to consider the merits of the motion for an extension of time and proceed accordingly. The court noted that a petition for review serves two functions, much like a motion for discretionary review. It is both the means to invoke the court’s jurisdiction over the matter and the means to allege error in the decision below. The court concluded that use of the phrase “within the time allowed” in the second sentence of CR 76.25(2) rather than the words “30 days” has significance and implies that the time for filing a petition for review may be enlarged pursuant to a motion filed before it expires. The court reasoned that Nickell invoked the Court of Appeals’ appellate jurisdiction by filing her motion for an extension of time within the 30-day period specified in CR 76.25(2); thus, the court erred by denying the motion without considering the merits of her request for what amounted to an enlargement of time in which to file a brief.