

THE **Kentucky Lawyer** <sup>sm</sup>  
— the LawWire - Kentucky eLegal Law Summaries

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***The Kentucky Decisions***

- 30 [Supreme Court Decisions - June 16, 2005](#)
- **Home Page: LouisvilleLaw**
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for the following decisions***

- [Ky State Appellate Opinions](#)
- [Western District of Ky - Federal](#)
- [Sixth Circuit Court of Appeals - Federal](#)
- [United States Supreme Court](#)

***Briefly Speaking***

***Published -***

- Two bar disciplinary matters.
- Criminal - wanton murder
- Criminal argument - "send a message"
- Criminal - excited utterances by victims at hospital
- Gov't disability benefits and exhaustion of administrative remedies
- Juveniles and court's contempt powers

***NonPublished -***

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- Open records and need in criminal case
- Domestic violence and prior bad acts
- Sentencing and other cases during penalty phase
- Jury instructions and complicity
- Boykin, Boykin, Conviction affirmed.
- Adoptive admissions
- Child sec offenses
- Adequate remedy and extraordinary writs
- Homicide directed verdict
- Preserving error in DV in criminal case
- Batson issue and race neutral strike
- Meth manufacturing
- Out of state custody, or all my ex's live in Texas.
- Workers comp and SOL
- Workers comp and reopening
- Workers comp and black lung med treatment
- Workers comp and impairment rating guides

Cherry Henault  
Mike Stevens  
Chad Kessinger

- **Wills, Estates, and Probate**  
James Worthington
- **Workers Compensation**  
Peter Naake
- **Zoning**  
Sam Hinkle

Can always use more help. Agreeing to one opinion to summarize per week makes the work go faster and spreads the job out evenly.

## *Around the Circuit*

### **Court House Rock?**

For an amusing video/music clip on "Hearsay" in the vein School House Rock. Then go to this web site - [www.Putfile.com](http://www.Putfile.com). For a direct link to the song, [CLICK HERE](#).

## **Kentucky Supreme Court Decisions**

**June 16, 2005 - 30 Decisions**

**AOC LINKS - FULL TEXT**

**SUMMARIES OF DECISIONS**

### **PUBLISHED DECISIONS OF KY SUPREME COURT FOR 6/16/2005**

[2005-SC-000204-.pdf](#)

Date: 6/16/2005  
PUBLISHED

**KBA V. SLOAN  
ATTORNEY DISCIPLINE**

[2005-SC-000216-.pdf](#)

Date: 6/16/2005  
PUBLISHED

**KBA V. SIVALLS  
ATTORNEY DISCIPLINE**

[2003-SC-000716-TG.pdf](#)

Judge: COOPER  
AFFIRMING  
Date: 6/16/2005  
PUBLISHED

**BROWN V. COM**

**CRIMINAL - Wanton Murder**

SC affirmed Defendant's convictions and 20 year sentence for two counts of wanton murder, KRS 507.020(1)(b), and two counts of wanton endangerment in the first degree, KRS 508.060, following motor vehicle accident. Defendant was not entitled to a directed verdict of acquittal on the wanton murder charges. Defendant's conduct was substantially more than a mere traffic violation. In addition to driving at a rate exceeding the speed limit and violating a traffic signal, there was substantial evidence that Defendant was watching television rather than monitoring the traffic at the intersection and that he attempted to "time" the traffic light despite the fact that it remained red at all times during his approach.

Defendant was not entitled to new trial based upon allegation of juror misconduct. Allegation of improper redirect examination and closing argument by the prosecutor did not warrant reversal.

[2003-SC-000927-DG.pdf](#)

Judge: JOHNSTONE  
REVERSING  
Date: 6/16/2005  
PUBLISHED

**COM. V. MITCHELL**

**CRIMINAL - Argument (Send a Message)**

Defendant sentenced to 7 1/2 years for selling 6 Oxycontin drugs to an undercover police informant. REVERSED COA WHICH HAD REVERSED Defendant'S CONVICTION. Prosecutor in closing argued it was time for the jury to "send a message" to the community that KY was going to punish drug dealers. Defendant did not object to this argument at trial. After jury deliberations began, defense counsel argued that the comment was improper. TC treated such as a motion for a mistrial and denied it. SC noted that the prosecutor cannot place upon the jury what is necessary to protect the community. However, comments did not rise to level of reversal of conviction since KY was responding to defense counsel's arguments not to send his client away for a long time for 6 year and that Defendant did not look like a drug dealer.

At trial, the lead detective also testified about the nature of Oxycontin. The SC noted that such testimony has little relevance as to whether Defendant sold the drug or not. However, the SC noted that it did not think that such testimony fell under "matters of specialized scientific knowledge" under KRE 702.

SC also held that detective's comments that they had "identified several targets and had purchased narcotics from them" as a basis for using an undercover agent in this case was not improper investigative hearsay or improper KRE 404(b) evidence. In large part, SC held Defendant did not properly preserve this objection at trial.

[2003-SC-000989-MR.pdf](#)

Judge: COOPER  
REVERSING  
Date: 6/16/2005  
PUBLISHED

**THOMAS V. COM**

**CRIMINAL**

Thomas was convicted of first-degree assault and second-degree assault and was sentenced to 24 years. In a 5-1 opinion, SC reversed and remanded for a new trial. The primary issues on appeal were: (1) whether the TC erred by failing to instruct on Assault under Extreme Emotional Disturbance; (2) whether statements from the victims made at the hospital while they were being treated for their injuries were properly admitted as excited utterances; and (3) whether opinion testimony concerning the higher rate of alcohol absorption in the body of an alcoholic was proper. SC held that the trial judge improperly denied an EED instruction because there was evidence from which a jury could infer a reasonable explanation or excuse for the defendant's conduct under the circumstances as he believed them to be. KRS 507.020(1)(a) and Engler v. Commonwealth, 627 S.W.2d 582 (Ky. 1982). In addition, the Commonwealth did not prove that the victim's statements at the hospital while they were undergoing treatment were "excited" utterances because there was no proof that either man was still under the stress of the startling event.

Souder v. Commonwealth, 719 S.W.2d 730 (Ky. 1986). And finally, opinion evidence that Thomas had a higher blood-alcohol level on the night in question because of his history of alcoholism was improper because there was no proof that he actually did have such a history of alcohol abuse. Justice Wintersheimer dissented, stating that the failure to give an EED instruction was proper under the evidence and that the excited utterances of the victims were properly admitted.

[2003-SC-000730-DG.pdf](#)

Judge: JOHNSTONE  
REVERSING  
Date: 6/16/2005  
PUBLISHED

**KY RETIREMENT SYSTEMS V. LEWIS**

**EMPLOYMENT LAW - Government (Exhaust Administrative Remedies)**

The Court of Appeals erred in holding that Lewis was relieved of her obligation to exhaust all administrative remedies due to an inconsistency between 105 KAR 1 :210 and KRS 61 .665(2)(e) . Lewis was obliged to obtain a final order from the agency before seeking judicial redress.

[2002-SC-000516-DG.pdf](#)

Judge: JOHNSTONE  
REVERSING  
RENDERED: 3/17/2005  
MODIFIED: 6/16/2005  
PUBLISHED

**KENTUCKY RETIREMENT SYSTEMS V. LEWIS**

**EMPLOYMENT LAW - Government Disability Benefits**

Medical examiner reviewed Lewis' disability application and determined there had not been a substantial change in condition and thus denied the application. However, Lewis is still required to pursue her administrative remedies to conclusion before seeking judicial intervention.

[2003-SC-000424-DG.pdf](#)

Judge: 936  
Date Modified: 6/16/2005  
PUBLISHED

**A.W., A CHILD V. COM.**

**FAMILY LAW - Juveniles (Contempt)**

KRS 635.060 does not act as a limitation on the length of sentence a juvenile court may impose in the appropriate exercise of its inherent contempt powers for violation of its orders. The Juvenile Code simply does not allow a court to give up on the rehabilitation of a juvenile who refuses to perform the terms of probation . Thus, the contempt power exists for the purpose of compelling the juvenile to comply with the court's orders and to enable the court to help the juvenile become a productive citizen .

**NONPUBLISHED DECISIONS OF KY SUPREME COURT FOR 6/16/2005**

[2004-SC-000907-MR.pdf](#)

JUDGE: COOPER  
AFFIRMING  
Date: 6/16/2005  
PUBLISHED

**BOWLING V. LEXINGTON-FAYETTE URBAN COUNTY GOV'T**

**ADMINISTRATIVE LAW - OPEN RECORDS**

Appellant, sentenced to death in a separate criminal proceeding, brought an action under the Kentucky Open Records Act alleging the county government had willfully and wrongfully withheld records that Appellant requested to bolster his claims that he had been framed in the criminal case. Held: the trial court acted properly when, pursuant to KRS 61.878(1)(h), it quashed the Appellant's subpoenas for records that were part of an ongoing criminal investigation. The Court of Appeals further held that there was no evidence that the county's refusal of Appellant's request was made in bad faith.

[2003-SC-000915-MR.pdf](#)

AFFIRMING  
Date: 6/16/2005  
NOT PUBLISHED

**BEARD V. COM**

**CRIMINAL - Domestic Violence, Prior Bad Acts**

SC affirmed Defendant's convictions and 40 year sentence for Murder and PFO 2nd. TC did not err in permitting the prior bad act evidence. The prior crimes and bad acts were relevant, probative and the potential for prejudice did not outweigh their probative value. TC did not err in allowing the jury to be informed of two sentencing guidelines -eligible for parole after serving twenty percent of her sentence under the domestic violence provision, or eighty-five percent under the violent offender provision. In order to be eligible under the former, the trial judge was required to make a finding that Beard was a victim of domestic violence and abuse. Defense counsel had not complied with the procedural requirements of the statute and it was not certain at that time which percentage applied.

[2003-SC-001063-MR.pdf](#)

AFFIRMING  
Date: 6/16/2005  
PUBLISHED

**CHAMBERS V. COM**

**CRIMINAL - Resentencing**

SC affirmed Defendant's sentence following remand on appeal. TC did not deny Defendant due process of law by refusing to allow him to be re-sentenced by a jury. A jury sentenced Defendant, those sentences were reviewed and affirmed by SC, and therefore no basis exists to re-sentence Defendant on those convictions. Next, Defendant's due process rights were not violated when the TC failed to obtain an updated PSI before his re-sentencing hearing.

[2004-SC-000853-MR.pdf](#)

AFFIRMING  
Date: 6/16/2005  
NOT PUBLISHED

**COOK V. COM.**

**CRIMINAL - Evidence, Sentencing**

SC affirmed Defendant sentence following remand. The trial judge correctly declined to admit evidence of sentences imposed in other cases during the penalty phase of the trial.

[2004-SC-000198-MR.pdf](#)

affirming  
Date: 6/16/2005  
NOT PUBLISHED

**DAUGHERTY V. COM**

**CRIMINAL - Complicity; Jury Instructions**

SC affirmed Defendant's conviction for Complicity to Rape. There was sufficient evidence that accomplice committed act of rape to justify denial of directed verdict. Objection over jury instructions was not properly preserved. Counsel for the Commonwealth clearly explained to the jury that the first instruction referred to Daugherty's actions as a principal, while the latter addressed his actions as Brooks' accomplice, leaving no room for juror confusion. Daugherty was not substantially prejudiced by the instructions nor did they contribute to any manifest injustice.

[2003-SC-000363-MR.pdf](#)

AFFIRMING  
Date: 6/16/2005  
NOT PUBLISHED

**DAWSON V. COM**

**CRIMINAL**

SC affirmed Defendant's convictions and 25 year sentence for First-Degree Trafficking in a Controlled Substance and First-Degree Possession of a Controlled Substance. Defendant unequivocally admitted his guilt with no discernible uncertainty or lack of conviction. Defendant gave the trial judge no reason to question the voluntariness of his consent to the lawyer's chosen trial strategy, thus the failure to engage in a Boykin colloquy was not error. Next, Defendant was not entitled to a mistrial based upon the testimony of the arresting officer as to Defendant's resistance during his arrest. Finally, the possession charge should not have merged with the trafficking charge as they involved separate quantities of cocaine.

[2003-SC-000374-MR.pdf](#)

AFFIRMING  
Date: 6/16/2005  
NOT PUBLISHED

**DEAN V. COM**

**CRIMINAL - Child-Sex Offenses; Adoptive Admissions; Harmless Error**

Dean was convicted of first-degree sodomy and other sex offenses involving two child-victims. His convictions and underlying sentence of 20 years were upheld. The primary issues on appeal were: (1) whether Dean's reaction to a statement made in his presence could be used as an admission by silence; and (2) whether Dean's failure to notify family services when one of the child victims lived in his home for an extended period of time could be used as an admission by conduct. On the first issue, the statement was improperly admitted because there was no evidence of manifestation of adoption or belief in the truth of statement. Perdue v. Commonwealth, 916 S.W.2d 148 (Ky. 1995). On the second issue, the "conduct" of Dean's residing with the child victim was not a reaction to an earlier statement made in his presence. Therefore, the statement preceding the conduct was improperly admitted as an admission. Nonetheless, because there was no substantial possibility that the outcome would have been different in the absence of the errors, they were considered harmless.

[2004-SC-000059-MR.pdf](#)

AFFIRMING  
Date: 6/16/2005  
NOT PUBLISHED

**DOWNING V. COM**

**CRIMINAL - Child-Sex Offenses; Relevancy; Directed Verdict; Instructions**

Downing was convicted of attempted rape, kidnapping, and first-degree sexual abuse and was sentenced to 40 years. The primary issues on appeal were: (1) whether the TC abused its discretion in admitting evidence that the victim's family was poor and that Downing had made conflicting remarks about his sexual activity with his wife; (2) whether a directed verdict should have been granted on the kidnapping and attempted rape charges; and (3) whether the TC properly denied Downing's request for instructions on unlawful imprisonment. On the first issue, SC held that such evidence was properly admitted under the circumstances because it was relevant to explain the victim's behavior and to help the jury assess the defendant's credibility. On the second issue, the TC properly denied the DV motions because sufficient evidence existed to support the convictions. And finally, there was no evidence with which to justify an instruction on unlawful imprisonment. Affirmed.

[2004-SC-000649-MR.pdf](#)

AFFIRMING  
Date: 6/16/2005  
NOT PUBLISHED

**EDWARDS V. COM**

**CRIMINAL - Child-Sex Offenses; Directed Verdict**

Edwards was convicted of first-degree sodomy (two counts) and first-degree sexual abuse (two counts). On appeal, SC rejected his argument that there was insufficient evidence to support his convictions. Affirmed.

[2004-SC-000871-MR.pdf](#)

AFFIRMING  
Date: 6/16/2005  
NOT PUBLISHED

**HOOTEN V. COM**

**CRIMINAL**

**EXTRAORDINARY REMEDIES - Writ of Prohibition**

Hooten's request for a writ of prohibition stemming from her transfer to circuit court under KRS 640.010 was denied because there was an adequate remedy by appeal.

[2004-SC-000106-MR.pdf](#)

AFFIRMING  
Date: 6/16/2005  
NOT PUBLISHED

**ISAACS V. COM**

**CRIMINAL - Homicide; Directed Verdict**

Isaacs was convicted of wanton murder, first-degree robbery, and tampering with physical evidence and was sentenced to life in prison. On appeal, SC rejected his argument that the TC improperly denied his motion for a directed verdict on the wanton murder charge. Affirmed.

[2004-SC-000269-MR.pdf](#)

AFFIRMING  
Date: 6/16/2005  
NOT PUBLISHED

**PAYNE V. COM**

**CRIMINAL**

Defendant convicted of multiple counts of Rape 1<sup>st</sup> and Sodomy 1<sup>st</sup>, and being a persistent felony offender. Defendant argued on appeal that TC erred in denying his motion for a directed verdict; that the prosecutor engaged in misconduct; and that his counsel was ineffective. SC affirmed conviction. Defendant did not preserve directed verdict argument or prosecutorial misconduct argument. Defendant cannot raise ineffective assistance of counsel claim on direct review.

[2004-SC-000462-MR.pdf](#)

AFFIRMING

Date: 6/16/2005

NOT PUBLISHED

**VAUGHN V. COM  
CRIMINAL**

Defendant convicted at trial of Assault 1<sup>st</sup>, Robbery 1<sup>st</sup>, Arson 1<sup>st</sup>, and being a persistent felony offender. Defendant found to have beat up victim and setting his house on fire. During the assault, Defendant allegedly told victim: "I can't let you live and that I [the defendant] had no trouble killing my daughter." Defense counsel did not cross-examine as to this statement.

The lead detective testified and defense counsel tried to cross-examine the detective about the unrelated prior event involving the death of Defendant's daughter. TC denied this line of cross-examination. SC held that trial judge had wide discretion in limiting cross-examination. SC held that the proposed cross-examination was factual inquiry into the daughter's death and was not intended to impeach, show bias against the defendant etc. Defense wanted to show that Defendant was not a suspect in daughter's death. SC held that TC did not abuse its discretion regarding cross-examination.

[2003-SC-000206-TG.pdf](#)

AFFIRMING

Date: 6/16/2005

NOT PUBLISHED

**WINGATE V. COM  
CRIMINAL**

Defendant convicted of 1<sup>st</sup> degree manslaughter. Defendant claimed that dismissal of juror who was 45 minutes late on 2<sup>nd</sup> day of trial was error. Juror was only African-American on jury and Defendant was African-American also. SC held that TC dismissal of juror was not an abuse of discretion because it was done for a race neutral and valid reason and there were sufficient jurors to proceed.

Defendant was given not jail time credit at sentencing because he was serving a federal sentence. Defendant did not object until 3 years later. SC held that issue should have been raised at sentencing and thus was not preserved.

Defendant objected to jury instructions. Defense counsel participated in jury instruction process and since he made no objections, such arguments on appeal are waived.

[2004-SC-000032-MR.pdf](#)

AFFIRMING

Date: 6/16/2005

NOT PUBLISHED

**WILLIS V. COM  
CRIMINAL**

Defendant convicted of manufacturing methamphetamine, possession of anhydrous ammonia in unapproved container; and PFO. Defendant sentenced to 69 years.

Defendant claimed on appeal the KY did not either show that he actually manufactured methamphetamine or had that he had dominion and control over the items found in the case that could be used to manufacture meth. SC ruled there was sufficient evidence since Defendant was found hiding near where the police found the meth items and Defendant told police he had been present when methamphetamine was made at the location. Further, methamphetamine related items and methamphetamine were found in Defendant's car.

[2003-SC-000443-DG.pdf](#)

AFFIRMING

Date: 6/16/2005

NOT PUBLISHED

**SCOTT V. SCOTT  
FAMILY LAW - Visitation (Jurisdiction, Out Of State, Modification)**

Parties divorce mom is named as the primary residential caregiver of the parties' two children. Mom moves to Texas and got an Agreed Order from Livingston CC (KY) that modified visitation with dad to most of the spring, summer, Christmas and Thanksgiving breaks. Mom then files a motion in Dallas, Texas and succeeds in getting orders for change of custody and an ex parte restraining order with the Texas court taking jurisdiction because the children had been there more than 8 mos. and under UCCJEA. Dad filed a motion to hold mom in contempt in Livingston CC but the TC denied his motion and relinquished jurisdiction to Texas because the children resided there for more than 6 mos. and that KY was no longer the home state of the children. Although the Texas court was without jurisdiction to modify custody unless the KY court declined its jurisdiction to modify, the KY court could decline jurisdiction under UCCJA and PPKA.

[2004-SC-000631-WC.pdf](#)

AFFIRMING  
Date: 6/16/2005  
NOT PUBLISHED

**AKERS V. PIKE COUNTY BOARD OF EDUCATION  
WORKERS COMP - Statute of Limitations**

The claimant filed his application for adjustment of claim more than two years after voluntary TTD benefits were terminated. Upon termination, the Office of Workers Claims is notified by the carrier of the termination and the OWC notifies the claimant that he has two years from that date to file a claim for permanent benefits. In cases where the termination letter is not sent due to the carrier's failure to notify it of the termination, the statute of limitations is tolled. In this case, the carrier notified the OWC, and the OWC sent the letter to the claimant's address, but the claimant testified that he did not receive it. The ALJ noted that the claimant's testimony was credible, but refused to apply estoppel to toll the statute, and dismissed the claim. The Board, CA, and Supreme Court affirmed, holding that estoppel does not apply where there is no failure to follow the law on its part. The claimant's argument that the letter should have been sent by registered mail also failed.

[2004-SC-000665-WC.pdf](#)

AFFIRMING  
Date: 6/16/2005  
NOT PUBLISHED

**BOWLING V. THE CHISHOLM COAL CO.  
WORKERS COMP - Reopening**

The claimant settled his claim for benefits against his employer and listed as a source of income during disability \$167 per week in sickness and accident disability benefits, paid for by the employer. When the claimant applied for and received Social Security Disability benefits, the sickness and accident plan demanded reimbursement for benefits paid, and eventually sued Bowling over it. Bowling moved to reopen the claim on the grounds of fraud, alleging that the settlement extinguished any right Chisolm Coal had against him, and that Chisolm misled the ALJ by asserting otherwise. The Chief ALJ refused to reopen the award on these grounds, and the decision was affirmed, finding that the allegations made in the motion to reopen were unrelated to the workers compensation proceeding and the listing of other income in the standard settlement agreement did not constitute an agreement regarding the sickness and accident benefits.

[2004-SC-000648-WC.pdf](#)

AFFIRMING  
Date: 6/16/2005  
NOT PUBLISHED

**CLARK REGIONAL MEDICAL CENTER V. OSBORNE  
WORKERS COMP -**

The employer reopened a claim for partial disability benefits to contest certain medical treatment, for deep vein thrombosis and pulmonary embolus, which were found to be non-compensable. However, during the proceeding the claimant moved to reopen the award for a worsening of disability, which was not opposed. The ALJ found that the claimant was totally disabled, but based on the same impairment rating as prior to the reopening. The Board reversed and remanded, but the ALJ again found grounds for a total disability. This time the Board reversed stating that the claimant had not shown a prima facie worsening of impairment, so as to allow reopening. However, the Court of Appeals reversed, citing Dingo Coal v. Tolliver 129 S.W. 3d 367 (Ky 2004). That case was decided while this one was before the Court of Appeals, and it states that the increased impairment standard according to the current reopening statute only applies to the motion to reopen, which went unopposed here. Once the claim is reopened for proof, it is the law in effect at the time of the injury which applies, and in this case, total disability was proven by age, education, and effect of the injury, by substantial evidence.

[2004-SC-000654-WC.pdf](#)

AFFIRMING  
Date: 6/16/2005  
PUBLISHED

**KIRK V. RUTH CONTRACTORS  
WORKERS COMP - Medical Treatment for Black Lung**

The claimant was found to be totally disabled as a result of coal workers pneumoconiosis in 1986. He was awarded lifetime medical treatment for the cure and relief of the disease. In 2002 the employer re-opened the case to contest medical treatment for pulmonary disease. The claimant, however, had smoked cigarettes one half a pack a day for 37 years before he quit in 1991. There was testimony from doctors that the treatment the plaintiff was receiving was for diseases other than pneumoconiosis, and testimony that it was for the disease. However, the testimony from Dr. Broudy, a frequent witness in these cases, was that the treatment was for Chronic Obstructive Pulmonary Disease (COPD). Dr. Broudy admitted, however, that he believed the claimant did not have pneumoconiosis. However, the other two medical experts did not admit to that, and Dr. Broudy testified the treatment could have been for COPD even if the claimant did

have pneumoconiosis. Although the burden of proof was on the employer to prove that the treatment was unrelated to the claimant's work-related disease, the ALJ found the medical expenses on compensable. Thus, there was substantial evidence to support the decision. This is a strange decision, and one that will encourage many reopenings for contest of medical expenses against miners with black lung.

Either the ALJ did not believe that the claimant really quit smoking, or he failed to apply the law of the case and accept that the claimant had black lung. The coal company certainly found more doctors to testify than the claimant, but that is to be expected because there is no money recovery from which an attorney can be paid to defend a reopening for medical expenses.

[2004-SC-000442-WC.pdf](#)

REVERSING AND  
REMANDING

Date: 6/16/2005

NOT PUBLISHED

### **THORNTON V. WORKERS COMP BOARD**

#### **WORKERS COMP - Impairment Rating Guides**

This is a case which is very interesting to practitioners in that it looks behind the medical testimony as to the claimant's impairment rating and reverses the ALJ for failing to apply the A.M.A. Guides to the evaluation of permant impairment properly.

The Court held that where the evidence is uncontradicted that the claimant has one herniated disc and one bulging one, it is error for the ALJ to rely on an impairment rating that only takes into account a resolved radiculopathy. This is a must read for practitioners of the all too common unoperated back injury case.

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- Thank you, LouisvilleLawWire

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