OPINION ENTERED: AUGUST 8, 2012

CLAIM NO. 200977799

CASTELLINI COMPANY PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

JOSHUA CROSS
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

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BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

SMITH, Member. Castellini Company ("Castellini") appeals from the March 29, 2012 Opinion, Award and Order rendered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), awarding Joshua Cross ("Cross") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, medical benefits and vocational rehabilitation benefits for a work-related back injury. Castellini makes three arguments on appeal. First it argues the ALJ's

determination Cross has a 24% whole person impairment rating is clearly erroneous. Second, Castellini argues, given the evidence presented, it was error to award vocational rehabilitation. Finally, Castellini challenges the ALJ's conclusions relating to the duration of TTD benefits. We affirm.

Cross filed a Form 101 on August 15, 2011 alleging that on July 6, 2009 he sustained a work-related injury to his lower back as he was attempting to pick up a box of produce. Cross testified by deposition on November 14, 2011 and at the hearing conducted February 1, 2012. He is a high school graduate and attended three semesters at Northern Kentucky University. His employment history consists of work in his father's machine shop making parts, work at Kohl's Department Store unloading trucks, and work as a machine operator for his brother. In October of 2005 Cross began working for Castellini in its warehouse loading and unloading trucks, staging orders, sorting produce and cleaning. He was required to lift up to 70 pounds and typically worked in excess of 40 hours per week.

Cross denied any prior injuries to his lumbar spine or other health problems. He acknowledged he had been diagnosed with high blood pressure, a non-work-related issue, for which he took medication.

Cross testified he was unloading a truck on July 6, 2009 when a box of tomatoes fell from the top of the skid. He was picking up the 25 pound box when he felt a sharp pain in his back, radiating down his right leg and into his toes. Cross reported the incident to his supervisor and was taken by ambulance to St. Elizabeth Medical Center in Edgewood, Kentucky. He was diagnosed with a pulled muscle, prescribed medication and released. He was also treated at Business Health Center in Edgewood, Kentucky where he received medication and physical therapy. Cross stated there was no benefit from the physical therapy. After an MRI scan was ordered, he was referred to Dr. John Kelly who treated him with epidural injections. Cross testified the initial epidural injection helped “a little bit” but two additional injections did not help.

Cross testified he was released to return to work at Castellini on July 1, 2010 with restrictions. He continued to treat with Dr. Kelly. He worked through September 8, 2010 when his back pain returned. He had completed his shift, finished his paperwork and was driving home when he began having pain down his right leg so intense he had to pull over and wait for it to subside. He called Dr. Kelly but could not get an appointment for three weeks. Dr. Kelly administered additional epidural injections and Cross

underwent radiofrequency treatment. Cross indicated he has not worked for Castellini since September 8, 2010.

In his deposition, Cross testified he continues to have pain in the middle of his back, down his right leg and into his foot. He denied any additional injuries. He acknowledged Dr. Kelly released him to return to work with permanent restrictions. He looked for work in occupations that did not require lifting and has applied for jobs at Fifth Third Bank, Verizon/Cingular, AT&T, Macy's, and Fidelity.

At the formal hearing, Cross indicated he spent most of his work life performing manual labor including running machinery, moving parts, unloading trucks, and working for Castellini. Cross reiterated that he returned to work in July 2010 with restrictions of no lifting more than 25 pounds and no pulling or pushing more than 50 pounds. He worked through September 8, 2010 when he had a recurrence of his low back pain with radiation down his right leg.

Dr. Rohmiller, his treating physician, would not recommend surgery due to Cross’s age, weight and smoking habit. Cross testified he has attempted to lose weight and had dropped approximately 50 pounds before he returned to work in July 2010. After the recurrence of his pain in September 2010, he became less active and regained the

weight. He attempted to return to work at Castellini but was told it could not accommodate him. Cross has not worked since September 8, 2010. He states he is physically incapable of returning to the type of work he was performing at Castellini. He testified he wanted to return to school to earn a degree that would enable him to find a less strenuous job.

Cross, now age 26, testified he continues to have low back pain with intermittent pain down his right leg. He stated he has difficulty performing activities of daily living and spends most of his days sitting around or sleeping. He indicated simple household tasks and activities such as fishing cause increased pain. Cross testified he would be capable of performing light duty work at Castellini if he were not taking pain medication. Cross admitted he continues to smoke and was on a diet in an attempt to lose weight. However, he was not having much success losing weight since he was unable to exercise.

Cross submitted reports from Dr. John Kelly who initially saw him on August 24, 2009 for evaluation and management of the lumbar injury. Cross provided a history of the July 6, 2009 work incident and subsequent treatment. Dr. Kelly performed a physical examination and reviewed an MRI scan which revealed a small central disc herniation at

T11–T12 creating mild central thecal sac indentation, central disc protrusions or sub-ligamentus herniations at L4–L5 and L5–S1, at L4–L5 creating moderate central paracentral thecal sac compression possibly encroaching on the descending L5 nerve root bilaterally, slightly greater on the left than on the right, and small central sub-ligamentous protrusion or herniation at L5–S1 creating minimal thecal sac indentation abutting the descending S1 roots bilaterally, left greater than right. Dr. Kelly diagnosed a work-related lumbar injury and noted Cross had persistent right lumbar radicular pain. He administered injections on August 28, 2009 and September 11, 2009. On September 25, 2009, Dr. Kelly noted the radicular component had resolved but back pain was still very bothersome. A third epidural injection was deferred.

On June 29, 2010, Dr. Kelly noted Cross had completed a functional capacity evaluation. On physical examination he concluded Cross sustained a work-related lumbar injury. He noted the right lumbar radicular pain resolved after two epidural steroid injections but Cross continued to have axial and paravertebral low back pain. Dr. Kelly noted small central disc protrusions at T11–T12, L4–L5 and L5-S1. He determined Cross was at maximum medical improvement ("MMI") as of June 29, 2010. He assessed permanent

restrictions of no lifting or carrying more than 25 pounds, no pushing or pulling more than 50 pounds, and no repetitive bending or stooping.

Cross returned on September 29, 2010. Dr. Kelly noted Cross continued to have low back pain 6 to 8 in intensity on a scale of 1 to 10. He saw Cross again on October 8, 2010 and reviewed an updated MRI scan noting no significant changes. The scan revealed significant disc disease at L4–L5 and particularly at L5-S1 where there was impingement on the left and right S1 nerve roots. Dr. Kelly administered lumbar epidural steroid injections on October 15, November 5, and November 19, 2010. Additionally, Dr. Kelly administered a lumbar facet joint injection on March 22, 2011 and performed radiofrequency ablations on April 5 and April 27, 2011.

Dr. Kelly saw Cross again on August 23, 2011, noting Cross had been off work since September 8, 2010 and the employer was not able to accommodate him under his current restrictions. On November 19, 2011 Dr. Kelly opined Cross had reached MMI on September 8, 2011. His final diagnosis was sub-ligamentous disc protrusion/herniation at L4–L5 and L5–S1. Dr. Kelly opined the range of motion ("ROM") method would be the proper method for determining Cross's impairment since there were two levels of disc involvement.

Using the ROM method, Dr. Kelly assessed a 24% functional impairment rating to the body as a whole pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment 5th Edition ("AMA Guides"). Dr. Kelly indicated the impairment was solely due to the work injury of July 6, 2009. He assigned permanent work restrictions of no lifting or carrying more than 25 pounds, no pushing or pulling more than 50 pounds, and no repetitive bending or stooping.

Castellini submitted the report of Dr. David Randolph who examined Cross on June 13, 2011. Dr. Randolph recorded a history of the July 6, 2009 work–related incident. He noted Cross complained of low back pain radiating into his legs. He received a history of Cross's treatment in the emergency room and subsequent treatment with Dr. Kelly and Dr. Rhomiller. Cross indicated his current complaints consisted of constant pain in his back occasionally radiating into his right buttocks, right lateral heel and foot, and into his toes on the right.

On physical examination Dr. Randolph noted Cross was alert and in no apparent distress. He was 6'2" tall and weighed 350 pounds making him "morbidly obese". He also noted Cross, then age 25, smoked one and a half packs of cigarettes per day, and had done so since age 22.

Dr. Randolph diagnosed degenerative disc disease with evidence of spondylosis, facet disease at L4–L5 and L5–S1, and disc protrusions at both L4–L5 and L5–S1 with evidence of some neurologic displacement but with minimal objective examination findings. He opined the protrusions at L4–L5 and L5–S1 were related to the July 6, 2009 work-related injury. He stated Cross's physical examination was essentially normal but he had slight limitation and range of motion consistent with morbid obesity. Dr. Randolph indicated Cross should be able to return to restricted work activities but was not capable of returning to his previous work activities as a warehouse worker involving selecting and loading orders. He indicated Cross had reached MMI, should avoid repetitive bending, twisting, stooping and can lift and carry objects weighing 25 to 30 pounds but should avoid repetitive activities of that nature.

Dr. Randolph indicated Cross was not a surgical candidate and should take responsibility for his own health care by discontinuing tobacco use and by losing weight. Dr. Randolph placed Cross in DRE category II and assigned a 6% functional impairment rating pursuant to the 5th Edition of the AMA Guides.

Castellini submitted a December 13, 2011 supplemental report from Dr. Randolph. He disagreed with Dr. Kelly's

November 19, 2011 report and impairment rating, and use of the ROM method. Dr. Randolph opined the DRE method was more appropriate, noting Dr. Kelly had not documented his physical examination findings and simply stated Cross had loss of ROM. He further noted Dr. Kelly made no comment regarding Cross's comorbid states, i.e. his weight and tobacco usage.

Dr. Randolph acknowledged the AMA Guides indicate the DRE method is utilized when there is a single level involved and the ROM technique is used for multiple levels. Dr. Kelly stated "I selected the DRE system based on the fact that his subjective complaints appeared to be primarily attributable to a single rather than the double level."

With regard to restrictions, Dr. Randolph indicated as follows:

> Essentially, I agree with the majority of these restrictions based upon (primarily) his morbid obesity and his significant tobacco abuse coupled with the degenerative changes noted in his lumbar spine. I would recommend that the restrictions be maintained on a permanent basis; however, "permanent" is a long time. Should Mr. Cross actually assume responsibility for his own health care, lose weight and discontinue tobacco, he may be able to improve his functional capabilities but that is not a predictable phenomenon. Therefore, for all intents and purposes, I would agree with the restrictions placed on

> Mr. Cross. They are essentially the same as those described by me.

The ALJ found as follows relative to this appeal:

> Mr. Cross argues that [he] is entitled to additional TTD benefits from September 9, 2010, through September 30, 2010. They [sic] argue it is undisputed that he last worked on September 8, 2010, and was specifically told by Castellini not to return until he had seen Dr. Kelly which did not occur until September 29, 2010. In addition, a review of Dr. Kelly's records reflects that he did not find Mr. Cross to be at maximum medical improvement until September 8, 2011.
>
> In this specific instance, the Administrative Law Judge finds that based upon Mr. Cross' credible testimony, and the credible testimony of Dr. Kelly, that Mr. Cross was temporarily totally disabled from July 7, 2009, to July 1, 2010, and again from September 8, 2010, to September 8, 2011, and shall receive TTD benefits payable to [sic] a rate of $406.95 per week for these periods of time.
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> . . . .
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> The true question is which functional impairment rating is the appropriate one to use for the assessment of permanent partial disability benefits. There have been two functional impairment ratings assessed in regards [sic] to Mr. Cross' lumbar spine condition.
>
> Dr. Randolph, who evaluated Mr. Cross at the request of the Defendant Employer, opines that the DRE method of determining functional impairment from the Fifth Edition of the AMA Guides

should be used in determining the appropriate functional impairment rating to be assessed. Dr. Randolph reasoned that the DRE method is more appropriate, based on the fact that Mr. Cross' subjective complaints appear to be primarily attributable to a single rather than a double level involvement of the lumbar disc. Dr. Randolph opines that the appropriate functional impairment rating for Mr. Cross should be a 6% functional impairment rating. Dr. Randolph disagreed with Dr. Kelly's assessment of impairment and use of the range of motion method.

Dr. Kelly, Mr. Cross's treating physician, opines that the range of motion method is appropriate for determining Mr. Cross' functional impairment rating. Dr. Kelly sets forth that there are two levels of involvement consisting of sub ligamentous disc protrusion/herniations at L4–L5 and L5–S1 and according to the Fifth Edition of the AMA Guides the range of motion method is preferred. Dr. Kelly assessed Mr. Cross a 24% functional impairment rating pursuant to the Fifth Edition of the AMA Guides using the range of motion method.

In this specific instance, the Administrative Law Judge finds persuasive and relies upon the opinion of Dr. Kelly and finds that Mr. Cross retains a 24% functional impairment rating as a result of his lumbar spine injury causing sub ligamentous disc herniations at L4–L5 and L5–S1.

In so determining, the ALJ notes that the Fifth Edition of the AMA Guides, specifically on page 379, states that the range of motion method is used when there is multi–level involvement in the same spinal region. In this case,

there is no question and even Dr. Randolph agreed that Mr. Cross suffered from disc protrusion/herniations at the L4–L5 and L5–S1 levels. This clearly indicates that Mr. Cross had multi–level involvement in the same spinal region and therefore use of the range of motion method by Dr. Kelly was appropriate.

The Administrative Law Judge specifically does not find Dr. Randolph's opinions to be persuasive. Dr. Randolph seems to contradict himself when he states that Mr. Cross suffered from disc herniation/protrusions at multi levels that were caused by the work–related injury yet attempts to limit his assessment of functional impairment by using the DRE model stating that he only found one level to be symptomatic on physical examination. In addition, Dr. Randolph is inconsistent when he states that Mr. Cross is entitled to a 6% functional impairment rating, does not retain the physical capacity to return to the job he was performing at the time of his injury, yet, opines that his physical examination in terms of neurologic status is essentially normal.

. . . .

The last issue for determination is whether or not Mr. Cross is entitled to vocational rehabilitation benefits. KRS 342.710(3) states in pertinent part, “when as a result of the injury he is unable to perform work for which his [sic] previous training or experience, he shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment.”

> Mr. Cross testified that he has worked primarily as a laborer since leaving high school. He has worked in a machine shop operating machines for both his father and his brother, and has worked unloading trucks at Kohl's Department Store and since October 2005 for Castellini Company. These jobs have required him to be capable of lifting over 50 pounds on occasion and to work on his feet most of the day. The parties have stipulated that Mr. Cross does not retain the physical capacity to return to this type of work. In addition, it appears it would be difficult, if not impossible, based on the restrictions assessed him by Dr. Kelly for Mr. Cross to be capable of returning to any of the prior jobs [for] which he had previous training or experience.
>
> Therefore, the Administrative Law Judge finds that Mr. Cross is entitled to vocational rehabilitation benefits and shall be referred to the Department of Vocational Rehabilitation for an evaluation at the expense of the Defendant Employer.

Castellini did not file a petition for reconsideration and appealed directly to the Board. On appeal, Castellini argues the ALJ's decision to rely upon the 24% impairment rating instead of the 6% impairment rating is clearly erroneous. Castellini asserts other people with injuries discussed in the 5th Edition of the AMA Guides that have similarly high impairment ratings are persons who have undergone surgery. Castellini contends a 24% impairment is an exceptionally high rating for a person who has not had

any type of surgical intervention. Castellini notes Cross is not even a surgical candidate. Castellini notes Dr. Randolph assigned a 6% rating based upon the DRE method and explained in his report that method was far more accurate in this situation because the ROM method utilized by Dr. Kelly did not account for Cross’s limited motion due to obesity. Castellini contends Dr. Kelly did not account for Cross’s body mass which created the limited motion. Further, Castellini notes Dr. Kelly's report did not state the ROM measurements, how the measurements were taken, or any other basis for his impairment rating or opinion. Castellini argues Dr. Randolph's report, in contrast, provided a thorough discussion and explanation of the DRE method he utilized.

Castellini argues the ALJ's decision to award vocational rehabilitation was clearly in error and not based on the facts in the record. Castellini notes Cross is a high school graduate with some college course work and is still capable of lifting objects up to 25 pounds. Castellini also notes Cross testified he was capable of activities such as washing dishes, doing laundry and fishing. Castellini contends Cross possesses skills that would enable him to perform light duty employment.

Castellini argues Cross has limited his employment options by failing to take responsibility for his own health. Castellini notes Dr. Rohmiller and Dr. Kelly indicated Cross was not a surgical candidate due to his age, tobacco use and obesity. Castellini asserts Cross would be a surgical candidate and could benefit from surgery if he made healthier lifestyle choices. Castellini contends Cross has chosen to maintain a state of poor health, perpetuating his inability to engage in the type of work he did in the past. Castellini asserts Cross has voluntarily limited his physical capabilities and created difficulty in obtaining employment. Castellini argues the award of vocational rehabilitation is not based on sound reasoning derived from the facts in the record because the evidence shows Cross currently possesses skills that make him employable without any further education or certification.

Finally, Castellini argues it paid TTD benefits for the correct duration. Castellini notes it stipulated Cross was temporarily totally disabled from July 7, 2009 through July 1, 2010 and from September 30, 2010 through June 23, 2011. Castellini asserts, upon review of Dr. Kelly's records, Cross was released to work with light duty restrictions until September 29, 2010, when Dr. Kelly advised him that he should not return to work. Castellini notes it started to

pay TTD benefits to Cross beginning the next day and it continued payments until Cross reached MMI.

Cross, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including extent of impairment, entitlement to vocational rehabilitation benefits and TTD benefits. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Cross was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson

v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We reject Castellini's argument that the impairment rating of Dr. Kelly does not constitute substantial evidence, and only the rating assessed by Dr. Randolph is

of probative value on the issue of Cross's permanent impairment. Although Castellini's doctor criticized the use of the ROM method, such an opinion would not necessarily be legally determinative or in any way binding. Staples v. Konvelski, Ky., 56 S.W.3 412 (2001); Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977).

The ALJ, as fact finder, is free to pick and choose whom and what to believe. The AMA Guides is a tome consisting of 613 pages written by physicians for physicians. Our courts of justice in recognizing this fact have routinely held that proper interpretations of the AMA Guides are medical questions. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003). The AMA Guides make it clear its purpose is to provide objective standards for the "estimating" of permanent impairment ratings by physicians. Because Dr. Kelly is a licensed physician, the ALJ is permitted to assume his expertise in utilizing the AMA Guides is comparable or superior to that of Dr. Randolph. Furthermore, the ALJ, as fact-finder, has no responsibility to examine an impairment rating or the AMA Guides to determine whether an impairment assessment harmonizes with that treatise's underlying criteria. Except under compelling circumstances where it is obvious even to a lay person that a gross misapplication of the AMA

Guides has occurred, the issue of which physician's AMA rating is most credible is a matter within the ALJ's discretion. REO Mechanical v. Barnes, 691 S.W. 2d 224 (Ky. App. 1985).

In this case, the ALJ specifically concluded Dr. Kelly's use of the ROM method in determining Cross had a 24% impairment was appropriate. Although Dr. Randolph disagreed with Dr. Kelly's use of the ROM method, the ALJ had the right to reject that opinion. Dr. Kelly simply disagreed with the opinions of Dr. Randolph. Dr. Kelly provided an explanation of why he felt the ROM method was appropriate, citing the involvement of more than one disc level. The totality of the medical evidence reveals nothing more than conflicting evidence on the appropriate method to be used in determining the impairment rating. Since the ALJ has authority to pick and choose, he was free to rely on Dr. Kelly's impairment rating as more credible and this Board is not authorized to disturb that choice on appeal. Special Fund v. Francis, supra.

There was agreement Cross had sustained a physical injury. Dr. Kelly explained his reasons for opining Cross had a 24% impairment as a result of the work injury. Further, the ALJ considered the opinions of Dr. Randolph and sufficiently explained why he chose to disregard his

opinions and rely on the opinions of Dr. Kelly. Since the decision of the ALJ is supported by substantial evidence, it will not be disturbed on appeal. Special Fund v. Francis, supra.

KRS 342.0011(11)(a) defines temporary total disability as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." A two part analysis must be applied before TTD benefits are awarded, including determination of whether 1) maximum medical improvement has not been reached; and 2) the employee has not reached a level of improvement that permits a return to employment. *See* Magellan Behavioral Health v. Helms, 140 S.W.2d 579 (Ky. App. 2004).

As to the first prong, Kentucky courts have noted MMI is reached when medical evidence establishes that the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition is over. *See* Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

As to the second prong, the Kentucky Supreme Court provided clarification in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), stating:

> "It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work and not the type that is customary or that he was performing at the time of the injury."

Moreover, entitlement to TTD benefits, including the duration for which such benefits are awarded, is a question of fact to be decided by the ALJ. Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327, 329 (Ky. App. 2000).

The evidence pertaining to Cross's entitlement to TTD benefits does not compel a contrary finding. The medical reports of Dr. Kelly provide substantial evidence supporting the ALJ's finding. Cross testified he had a recurrence of pain radiating into his leg on September 8, 2010 and could not get an appointment with Dr. Kelly until September 29, 2010. The ALJ found Cross's testimony credible concerning the issue of the appropriate period of TTD benefits. The evidence was sufficient to commence an additional period of TTD benefits on September 8, 2010, the date Cross ceased working, rather than September 30, 2010, the day after he returned to Dr. Kelly for treatment. The ALJ was well within his role as fact-finder in choosing to rely on Dr. Kelly's opinion Cross reached MMI on September 8, 2011 with regard to the recurrence of the problem. Dr. Kelly's opinion is substantial evidence supporting the ALJ's

determination. Having reviewed the evidence and the arguments of the parties, and based on Cross's testimony and the medical reports of Dr. Kelly, we conclude there is substantial evidence to support the ALJ's finding that Cross is entitled to TTD benefits for the disputed period. *See* Central Kentucky Steel v. Wise*, supra.*

Finally, with regard to rehabilitation benefits, we begin by noting KRS 342.710 provides an employee, who is unable to perform work for which he has previous training or experience, shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment. Suitable employment has been defined as work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of the injury, his age and education, his income level and earning capacity, his vocational aptitude, his mental and physical abilities and other relevant factors, both at the time of injury and after reaching his post-injury maximum level of medical improvement. Wilson v. SKW Alloys, 893 S.W.2d 800 (Ky. App. 1995).

Here, the parties stipulated, and the ALJ found, Cross lacked the physical capacity to return to the work he

performed at the time of his injury. The ALJ accepted the restrictions assigned by Dr. Kelly which included a twenty-five pound lifting restriction. While Cross attended college for three semesters, he does not have a degree and has no specialized or vocational training. His past employment consisted of work as a laborer involving lifting in excess of his permanent restrictions. Cross never returned to employment at an average weekly wage equal to or greater than that earned at the time of his injury. Since Cross has limited vocational experience, does not have specialized or vocational training, and does not have a college degree, the ALJ could reasonably conclude Cross would need vocational rehabilitation in order to secure suitable employment. There is nothing in the record to indicate Cross had training for, experience in or was capable of performing any previous job that would constitute suitable employment. We cannot say the ALJ unreasonably ordered a rehabilitation evaluation.

For the foregoing reasons, the March 29, 2012 Opinion, Award and Order rendered by Hon. R. Scott Borders, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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