Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 10, 2015

CLAIM NO. 201177648

CHRISTOPHER GREGORY PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

A & G TREE SERVICE
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Christopher Gregory ("Gregory") seeks review of the September 11, 2014, Opinion, Award, and Order of Hon. Douglas W. Gott, Administrative Law Judge ("ALJ") finding he sustained multiple work-related physical injuries as a result of a motor vehicle accident ("MVA") occurring on August 18, 2011, and awarding temporary total

disability ("TTD"), permanent partial disability ("PPD") benefits, and medical benefits. The ALJ declined to enhance the award of income benefits by 30% pursuant to KRS 342.165(1). Gregory also appeals from the October 20, 2014, Order overruling his petition for reconsideration.

On appeal, Gregory challenges the ALJ's determination he is not totally occupationally disabled and the determination Gregory is not entitled to enhanced benefits since A & G Tree Service ("A & G") committed no safety violation.

Gregory testified by deposition on October 17, 2013, and again on February 17, 2014. Gregory is a high school graduate and completed specialized training as a heavy equipment operator at the Job Corp. Prior to working for A & G, Gregory had worked for multiple employers, working as a deck hand on a barge, helping install water and sanitation lines, laborer for UPS scanning and loading items, grounds keeper at Louisville Memorial Gardens, roofer, end-welder, IG line operator, warehouse worker for Franklin Precision Industry, and a laborer helping install underground pools. He had also worked for two tree trimming companies as a groundsman. He explained the work as a groundsman entailed using ropes to lower limbs, cutting big limbs, dragging brush and logs to the chipper,

cleaning, and raking. During the six days Gregory was employed with A & G, his supervisor was Jay Coleman ("Coleman").

Gregory testified he, Coleman, Dale Cherry ("Cherry"), and David Crocker ("Crocker") had been working in Clarksville, Tennessee, on August 18, 2011. All four men were riding in A & G's extended cab truck after the work day ended. Coleman was driving the truck. Since Gregory had met his co-workers in Russellville, Kentucky, and rode with them to Clarksville, he was to be dropped off in Russellville where he had left his vehicle. Gregory described the accident as follows:

> Q: Tell us what happened on that date.
>
> A: He was driving very erratic, very crazy, fast, going in and out of cars. It was lightly raining outside, and he went – like I said, he was going in and out of cars, and it was raining, and he went to pass a school bus.
>
> And when he went to pass the school bus, from what I remember, there was an oncoming car or a truck. I'm not sure which one. And he went to cut over to not get hit head on, and when he did, he didn't totally clear the school bus.
>
> And then from there, I just remember waving out, the feeling of losing control, you know, and that's it. That's all I remember.

Gregory underwent extensive treatment including multiple surgeries at Vanderbilt University Medical Center ("Vanderbilt"). At the time of his first deposition, Gregory was taking blood pressure medication, Paxil, inhalers, Seraquil, and Tramadol. In addition to the initial surgeries performed at Vanderbilt, Gregory underwent additional abdominal and hernia repair surgeries.

Because he does not believe he was capable of working, Gregory has not sought employment. He identified his biggest problems as confusion, memory loss, and constant pain. He is afraid of riding in cars. He takes medication for pain in the mid to lower back, neck, right shoulder, and stomach. Because he has shortness of breath he takes Albuterol and Symbicort. Gregory also has blurred vision.

At the time of his February 17, 2014, deposition, Gregory was still taking the same medication plus Ultram. He still had the same problems with his back, shoulder, neck, and stomach. He also had shortness of breath, memory problems, occasional headaches, and blurred vision. Gregory had not looked for work and does very little on a daily basis. He lives with his mother.

At the time of his second deposition, Gregory had amended his claim to include a claim for enhanced benefits

pursuant to KRS 342.165(1). Thus, the second deposition dealt primarily with his allegation concerning Coleman's actions that day. Gregory testified Coleman drove extremely fast, recklessly weaving in and out of traffic. He characterized Coleman as "driving like a maniac all the time." Gregory worked on the same four man crew all six days he worked for A & G. Rather, than drive to A & G's shop in Bowling Green, Kentucky, his co-workers would pick him up each day and drop him off at a designated meeting site. Coleman designated where they picked up Gregory each day. Gregory was unable to remember the time they started work daily. Coleman drove A & G's four door pickup truck every day. Gregory never complained to management about Coleman's driving. He explained he had never seen anyone in management and had never visited A & G's shop in Bowling Green, Kentucky, or its office in Litchfield, Kentucky.

Gregory testified he and Cherry had talked almost daily about Coleman's driving and Cherry had told him he was scared to ride with Coleman. Although Gregory did not talk to Crocker about Coleman's driving habits, he testified Crocker said he drove crazy. Even though Gregory was afraid to talk to Coleman about his driving habits, he remembered telling Coleman to slow down a couple of times.

The accident occurred on a two lane road in Kentucky. Gregory explained the allegation of a safety violation is based on the fact Coleman drove very fast and recklessly. Gregory did not know if A & G was aware of the manner in which Coleman drove. He testified that Coleman "smoked weed daily" on the job site including the day on which the MVA occurred. He estimated he saw Coleman smoke marijuana approximately thirty minutes to an hour before they got in the truck to go home. Gregory was not aware if any of the other employees saw Coleman smoke marijuana. Crocker and Cherry did not smoke marijuana. Gregory did not say anything to Coleman or any of the other employees about Coleman smoking marijuana. He acknowledged he did not see Coleman drink alcohol or take drugs.

At the hearing, Gregory testified he continues to experience the same physical problems he identified at his depositions. He characterized his most severe symptoms as constant neck and back pain. He is able to sit for approximately fifteen minutes before he has to stand and he is unable to lift his arm above eye level due to shoulder pain. If he stretches or bends the wrong way his ribs and stomach hurt. The vision in the right eye is blurry as he has scar tissue on the pupil. Because Gregory had a collapsed lung he has asthma and COPD. As a result, when

he walks twenty to thirty yards, he is out of breath. The heaviest item he has lifted with his right arm is a gallon of milk. He is capable of lifting slightly more weight with his left arm. Gregory explained he must use caution when lifting because it strains his abdomen, ribs, and back. He has problems sleeping. He characterized his psychological problems as being easily frustrated, really confused, and depressed. When this occurs, he tends to stutter. Gregory's mother, with whom he lives, helps him physically and will remind him to do certain tasks such as taking a bath. He is very nervous when riding in a car. He continues to take the same medication he previously identified. Gregory does not believe he is physically or mentally able to perform any job. He has never performed sedentary or sit down work. Although he is certified as a heavy equipment operator, he did not believe he can perform this work because he has no experience and the work severely jars the operator.

Gregory introduced the Kentucky Uniform Police Traffic Collision Report prepared by a Kentucky State Trooper. The report indicates the accident occurred as follows:

> Unit 1 and Unit 2 was traveling northbound on U.S. 79. According to the operator of Unit 2, Unit 1 entered the

> southbound lane in an attempt to pass Unit 2. It was then that the operator of Unit 1 swerved back into the northbound lane to avoid an oncoming vehicle. The operator of Unit 1 then lost control and ran off the northbound shoulder of the roadway, where Unit 1 rotated 180 degrees clockwise and struck a tree with the rear of Unit 1. Unit 1 then reentered the roadway and sideswiped the passenger side of Unit 2. Unit 1 came to final rest, in a ditch, on the right shoulder of the roadway and Unit 2 came to final rest in the northbound lane.

Relating to Coleman's operation of A & G's truck, the human factors were listed as "disregard traffic control," "improper passing," and "too fast for conditions." A slippery surface was listed as an environmental factor. The report reflects there was no suspected drinking driver and no tests were offered to Coleman. The report does not identify a violation code or citation number.

Gregory introduced Coleman's criminal history as compiled by the Administrative Office of the Courts. That document reflects Coleman was indicted in the Todd Circuit Court on September 20, 2013, on one count of Manslaughter in the Second Degree and twenty-three counts of Wanton Endangerment First Degree. In addition, Coleman had been convicted of: speeding over eighteen miles per hour over the limit on September 29, 2010, in Warren County,

Kentucky; speeding over twenty miles per hour over the limit on February 23, 2009, in McCracken County, Kentucky; and speeding over nineteen miles per hour over the limit on November 30, 2008, in Logan County, Kentucky. Coleman also pled guilty to a possession of marijuana charge in 2005 in Simpson County. Gregory also introduced the twenty-four count indictment against Coleman returned in Todd Circuit Court. Coleman was charged with Manslaughter Second Degree for wantonly causing the death of Cherry, "by driving at a high rate of speed in the rain while under the influence of marijuana, passing other vehicles in a no passing zone, resulting in a vehicle collision that killed Mr. Cherry." As previously noted, Coleman was also charged with twenty-three counts of Wanton Endangerment First degree related to the other passengers in A & G's vehicle and the passengers in the school bus. The indictment did not contain a count for an assault. No documents were introduced as to the outcome of the charges in the indictment. Further, no medical records were introduced reflecting Coleman had marijuana in his system, or was under the influence of marijuana on August 8, 2011.

Gregory introduced a copy of A & G's Employee Handbook and Safety Program.

Gregory introduced the September 3, 2013, report of Dr. Warren Bilkey, generated as a result of an independent medical evaluation ("IME") on August 18, 2011. Dr. Bilkey diagnosed numerous injuries. Significantly, Dr. Bilkey opined Gregory had not reached maximum medical improvement ("MMI") regarding the traumatic brain injury, the post-traumatic stress disorder, the right shoulder injury, and the right eye corneal injury. He stated Gregory was at MMI with respect to the cervical spine injury, the cervical spine, the thoracic spine, ribs, chest, abdominal injuries, abdominal wall hernias, and the de-conditioned state. Pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Bilkey assessed a 5% impairment rating for the cervical injury, a 20% impairment rating for the thoracic spine fractures, a 4% impairment rating for the right shoulder injury, a 10% impairment rating for the hernias, a 10% impairment rating for the traumatic brain injury, and a 7% impairment rating for post-traumatic stress. Combining those impairments yielded a 45% impairment rating.

Dr. Bilkey subsequently issued an October 15, 2013, Addendum to his IME report in which he commented upon the impairment ratings assessed by Dr. Ellen Ballard. Dr.

Bilkey stated Dr. Ballard had assessed a 15% impairment rating for Gregory's eye problems and he did not disagree with the impairment rating. He stated at the time he assessed his impairment ratings he did not have adequate information; therefore, he would not dispute Dr. Ballard's 15% impairment rating. Combining that impairment rating with his impairment rating of 45% yielded a 53% impairment rating attributable to the work injury. He also stated that after reviewing Dr. Ballard's report there were no changes in the conclusions expressed in his September 3, 2013, report except for the addition of the 15% impairment rating for the residual right eye problem.

Dr. Ballard's July 29, 2013, letter was introduced by A & G which indicates she had seen Gregory for a third IME on July 29, 2013. After setting forth the records she reviewed and conducting a physical examination, Dr. Ballard's impression was:

> 1. History of motor vehicle accident, multiple rib fractures, lung contusion status post abdominal surgery with hernia repair and reported head injury.
>
> 2. Neck pain, reported facet fractures.
>
> 3. Low back pain.
>
> 4. Right corneal abrasion.

Dr. Ballard believed the only possible ongoing treatment Gregory would require was continued medication.

She opined Gregory was at MMI and could not return to work as a tree trimmer. Based on the AMA Guides, she assessed a 5% impairment rating for cervical pain, a 2% impairment rating for rib fracture pain, a 10% impairment rating for a head injury, no impairment rating for abdominal hernia repair, no impairment rating for the lumbar spine condition, and 15% impairment rating for loss of visual acuity. A subsequent report from Dr. Ballard was introduced in which she commented upon Dr. Bilkey's impairment rating.

A & G introduced two letters from Dr. Richard Eiferman, Clinical Professor of Ophthalmology. In the most recent letter of May 29, 2014, Dr. Eiferman assessed a 6% impairment rating for impairment of the visual system.

A & G introduced the March 21, 2014, depositions of Gail Cain ("Cain"), David Gill ("Gill"), and Andrea Hampton ("Hampton"). Gill testified he and Eddie Anderson ("Anderson") are the owners of A & G. A & G's business is trimming trees for electrical companies. It has approximately 150 employees in the field which are broken down into crews which may consist of two, three, or four men. There were four men on Gregory's crew. Gill believed he had seen Gregory on one occasion. He had known Cherry all of his life as he had grown up with him. Because they had known each other all of their lives, Cherry had Gill's

cell phone number. Gill had also known Coleman all of his life. Gill had no knowledge Cherry was switching crews the next week due to Coleman's poor driving. If such had occurred, it would have been brought to his attention. He noted Coleman reported to Jerome Wilson ("Wilson"), his supervisor, and Wilson reports to Gill. Even though Gill would not have been aware of crew changes or requests to change crews, since he knew Cherry, Gill believed he would have known of any such request by Cherry. He emphasized Cherry had called him in the past to discuss certain job issues. Cherry was not shy about calling him and complaining or bringing something to his attention. Since Cherry never called him about this problem he did not believe Cherry was scheduled to change crews. Further, Cherry had never reported to him that Coleman was smoking marijuana. Gill testified that any crew changes because of a supervisor's poor driving record would have been brought to his attention.

Gill denied receiving complaints from employees concerning Coleman's driving or use of marijuana. He testified A & G has a drug policy and a policy for driving company vehicles. It also has a safety director who monitors the vehicles. Coleman had never had his vehicle

taken from him and Gill was not aware of any difficulties Coleman had regarding his driver's license.

Hampton testified she is the DOT Fleet and Human Resource Coordinator. Her job is to ensure compliance with government regulations and oversee the maintenance and repair of vehicles. She also takes care of employee benefits and personnel files. If she is not certain how to handle an issue, Hampton consults Gill, Anderson, or Marsha Pryor, the office manager.

Hampton testified she had received no complaints prior to August 18, 2011, regarding Coleman's driving. No one had informed her that Coleman may be smoking marijuana on the job prior to the August 18, 2011, accident. On August 18, 2011, Coleman was qualified to operate bucket trucks, chipper trucks, pickups, and passenger vehicles. On that date, Coleman was driving a company pickup which had been assigned to him.

Hampton testified that prior to allowing employees to drive; A & G obtains a driving history record or motor vehicle review ("MVR") which entails annually securing a driving history for employees who drive company vehicles. She introduced Coleman's MVR for the previous ten years.

Hampton testified a Driving Under the Influence ("DUI") conviction, enrollment in an alcohol treatment program, reckless driving, failure to obey traffic signals, and multiple speeding tickets within a year would be red flags. During 2014, she had disqualified two employees from driving. One of the employees had two separate accidents within a year and another employee had a DUI with reinstatement of a suspended license. The permanency of the disqualification is made on a case by case basis. Prior to August 18, 2011, Coleman's driving privileges had not been suspended by A & G. Her review of Coleman's MVRs dating back ten years revealed no red flags which would disqualify him from driving. She noted he had speeding tickets in 2002, 2009, and 2010. Hampton wrote the notation on Coleman's 2011 driving record that he was disqualified from driving as of August 2011 due to the August 18, 2011, accident. Coleman was disqualified from driving from August 11, 2011, through March 2013. Hampton introduced the results of the Department of Transportation physical examinations performed in 2006, 2008, and 2010. The results of the examinations did not produce a red flag regarding drug use nor did they disqualify Coleman from driving. Coleman received a certificate showing he passed the physical.

Cain testified she has been the safety coordinator with A & G since 2005. Her job entails visiting the crews in the field. She has dealt with Coleman since 2005. No employee has ever reported Coleman smoking marijuana. Further, she has not received a text, phone call, or email that Coleman has smoked marijuana. Similarly, no employee had ever complained about Coleman's driving.

Cain testified A & G's drug testing policy is contained in its handbook which was last revised in May 2011. Drug tests are administered pre-employment, post-accident, and upon reasonable suspicion. Random tests are conducted company-wide and the computer determines the employees to be tested once a month and sometimes every other month. Cain does the testing.

Cain testified Coleman was drug tested by the hospital and as far as she knew it was positive for marijuana. As a result, he was disciplined and did not return to work for three weeks to a month after the accident. Cain testified this was the first disciplinary action taken against Coleman. Coleman had been randomly tested in 2006 and 2008 with negative results.

In his September 11, 2014, decision, the ALJ concluded Gregory was not totally occupationally disabled and had a permanent partial disability finding as follows:

> Plaintiff's counsel submitted effective evidence on her client's behalf, and presented a well-written brief requesting total disability benefits. If concession were made for the traumatic nature of injuries sustained, and the "pain and suffering" that followed, Gregory might be entitled to the full relief he seeks; but, of course, such is not the criteria for judging a workers compensation claim. The ALJ finds that Gregory's age and education level mitigate against a finding of total disability. The ALJ believes he is capable of performing his prior jobs at UPS and Franklin Precision Industry, and otherwise is capable of providing labor on a regular and sustained basis. The ALJ found persuasive the explanations from Dr. Allen and Dr. Ranseen that Gregory has exaggerated the psychological effects of his injury, and does not believe Gregory's mental state is occupationally disabling. The physical injuries are not totally disabling. The combined effects of his physical and psychological complaints are not totally disabling. The ALJ finds that Gregory has permanent partial disability.

The ALJ concluded Gregory's work injuries resulted in a 45% whole person impairment rating finding as follows:

> Gregory's impairment is as follows. The ALJ relies on Dr. Bilkey and Dr. Ballard to find he has 5% cervical impairment. The ALJ relies on Dr. Bilkey

to find he has 20% thoracic impairment. The ALJ relies on Dr. Bilkey to find he has 4% right shoulder impairment. The ALJ relies on Dr. Bilkey to find he has 10% impairment from the hernias. The ALJ relies on Dr. Eifferman to find he has 6% impairment for the right eye injury.

For the closed head injury, the ALJ relies on Plaintiff's expert, Dr. Bilkey, and the Defendant's expert, Dr. Ballard, who agree that Gregory has 10% impairment under Chapter 13 of the Guides. As for why he did not accept the higher rating of Plaintiff's mental health expert, and why he does not find that Gregory has any current psychological impairment under Chapter 14 of the Guides, the ALJ notes the following from the evidence. Gregory's claim that he lost consciousness after the accident is disputed by the emergency room record at Logan Memorial Hospital, where he was taken after the accident. He testified several times to having been in a coma, but he was not; he was sedated, but the records do not document a coma. (Dr. Allen correctly stated from review of the records that Gregory did not lose consciousness, whereas Dr. Butler accepted Gregory's history that he had lost consciousness and lapsed into a coma). The Vanderbilt records document a "small" brain injury; the SKY rehab records document "no brain injury." An October 29, 2013, CT scan of the head ordered by Dr. Farrage was normal; Dr. Farrage was a treating physician and his records do not address a closed head injury. Gregory's testimony did not persuasively support his mental claim, and the ALJ did not observe him to exhibit the limitations identified by Dr. Butler. Dr. Allen effectively rebutted Dr. Butler's opinions. Dr. Harper's effort to explain away Gregory's failure of validity

> testing was not persuasive. (The award of medical benefits will be for both the closed head injury and psychological sequela. Even though the ALJ has not found any current psychological impairment, there is an injury, as identified by Dr. Allen, which requires continued medication.)
>
> Consulting the combined values chart on page 604 of the Guides, Gregory's whole person impairment is 45%.

The ALJ denied Gregory's claim for enhanced benefits pursuant to KRS 342.165(1) reasoning as follows:

> Plaintiff offers several theories of a safety penalty violation in its Brief. (For purposes of considering this issue, the ALJ did consider the evidence resisted by the Defendant in its motion to strike.) Plaintiff first suggests that imposition of the safety penalty is justified solely based on Coleman's reckless actions that caused the subject accident. While Coleman was Gregory's supervisor, he is not "the employer" for purposes of this section of the statute. The Defendant cannot be penalized for a single reckless act of an employee unless it knew or should have known of his propensity for such acts, which is Plaintiff's next argument.
>
> But there is no support for Plaintiff's argument that the Defendant was on notice of a supervisor who unsafely operated motor vehicles unsafely or used marijuana. Three representatives of the Defendant testified to having no prior knowledge of Coleman driving recklessly or smoking marijuana. There was no evidence to the contrary except Gregory's testimony; his

testimony that Coleman drove that way "all the time" would not lead one to believe Gregory had only worked for the Defendant for six days.

The Defendant obtained Coleman's driving record annually, and from that only obtained notice of three speeding tickets between 2003 and 2010. As noted by Ms. Hampton, there was a 19-month gap between the speeding tickets in 2009 and 2010, which does not raise a "red flag." Having 12 points assessed against a driver's license because of those two tickets does not reasonably give rise to revoking an employee's driving privileges at work. Coleman apparently attended traffic school, which is a customary disposition of traffic citations.

Plaintiff states that "better oversight and research" on Coleman's driving record would have prevented the accident (Brief, p. 12); the ALJ disagrees with that, and, regardless, such is a statement of negligence, not intentional violation of a safety policy. Plaintiff further points to the "wanton" acts alleged against Coleman in the Todd Circuit Court indictment, but such is an unproven allegation in a criminal case that has no current application to this claim.

Plaintiff couches various arguments under an alleged violation of KRS 338.031, also referred to as the "general duty" clause, which provides:

(1) Each employer:

(a) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

> (b) Shall comply with occupational safety and health standards promulgated under this chapter.
>
> To find a violation of the "general duty" clause, the ALJ must address the following: (1) Did the condition or activity present a hazard to the employee? (2) Did the employer's industry generally recognize this hazard? (3) Was the hazard likely to cause death or serious physical harm to employee? And (4) Did a feasible means exist to eliminate or reduce the hazard? *Lexington-Fayette Urban County Government v. Offutt*, 11 S.W.3d 598 (Ky. App. 2000). As indicated, Coleman clearly acted recklessly in causing the accident in which Gregory was injured; however, there is no evidence on which the ALJ could reasonably rely to find that the Defendant was aware that Coleman was a "hazard," predisposed to careless driving or drug use that should have caused it to prevent him from operating a company vehicle.

Gregory filed a petition for reconsideration requesting additional findings of fact related to the issue of his occupational disability. Citing to the opinions of his vocational evaluator, Robert Piper, Gregory asserted he was totally occupationally disabled. Gregory requested a finding his work-related injuries had rendered him permanently totally disabled.

Gregory also requested additional findings of fact relating to his claim for enhanced benefits pursuant to KRS 342.165(1). He asserted "the ALJ did not find there was

evidence to infer intent to [A & G] given [Coleman's] prior actions." Gregory argued that pursuant to KRS 342.165(1), intent for committing a safety violation is inferred to the employer "through [Coleman's] direct intentional actions as a supervisor and foreman." Accordingly, he requested application of the 30% increase on all benefits. In overruling the petition for reconsideration, the ALJ stated as follows:

> Plaintiff first challenges the ALJ's finding that he is partially as opposed to totally disabled. Such is a reargument of the merits of the case and not a basis for reconsideration under KRS 342.281. That said, the petition points out some inartful language the ALJ chose to partially explain his finding that Plaintiff was not totally disabled; such can unfortunately occur when writing "outside the box" in an effort to explain a decision for the client and not his counsel. On page 13 of the Opinion the ALJ was endeavoring to acknowledge, or recognize, Plaintiff's pain and suffering following the severe work injury he suffered, but explain that such "pain and suffering" – as that label is often understood by laypeople in the context of personal injury claims – is not the basis for an award under the Workers Compensation Act. However, such a statement erroneously suggests, as pointed out by Plaintiff's counsel in the petition, that ongoing functional limitations from pain are not a consideration in the decision of whether someone is partially or totally disabled. In this case, the ALJ did not find Plaintiff's

> current, residual pain sufficiently limits present function in a manner that would support a finding of total disability.
>
> Plaintiff's second point in his petition over the ALJ's finding that he had not proven entitlement to a safety penalty enhancement is overruled as a reargument of that issue.

On appeal, Gregory argues the lay and medical evidence compel a finding he cannot perform regular and sustained employment in a competitive economy as defined by KRS 342.0011(34). He contends any of the multiple traumas he sustained could be totally disabling. He observes his restrictions extend well beyond his physical limitations and the impairment ratings assessed. In support of his argument, Gregory cites to the work restrictions assessed by Dr. Bilkey and the conclusions of Piper regarding his ability to perform gainful employment based on his education, work history, and functional capabilities. He asserts Dr. Ralph Crystal, the evaluating vocational expert for A & G, did not consider the effects of excessive unscheduled breaks, the pain medication on performance of job skills, or any psychological or cognitive factors which may affect his ability to perform unskilled sedentary jobs. In addition, he asserts Dr. Crystal failed to take into consideration the cognitive abilities required for the

suggested job positions such as cashier or clerical work. Gregory notes the ALJ found he sustained a closed head injury resulting in a 10% permanent impairment rating and Dr. Crystal's opinion failed to consider all of the vocationally limiting aspects of his injuries and does not constitute substantial evidence. Gregory urges Piper's evaluation of his vocational capabilities is the only substantial evidence of his vocational capabilities. Therefore, he requests a reversal of the ALJ's reliance upon Dr. Crystal's report and a finding of total occupational disability.

Gregory also argues a finding A & G intentionally committed a safety violation is compelled. He observes Lexington-Fayette Urban County Government v. Offut, 11 S.W.3d 598 (Ky. App. 2000) provides a four part test to determine whether an employer violated KRS 338.031, commonly referred to as the general duty clause. Gregory asserts Coleman, A & G's foreman, intentionally violated driving statutes on August 18, 2011, noting the police investigation report notes a violation of specific speed and safety statutes. He also notes Coleman was driving under the influence of marijuana and violated statutes involving impaired driving. Further, Coleman was indicted for Wanton Endangerment, First Degree, for his actions toward Gregory.

He cites to the definition of “wanton” contained in KRS 501.020(3) and the definition of “wanton endangerment” contained in KRS 508.060. Gregory argues Coleman’s actions as his supervisor and foreman constitute an intentional disregard for the proper operation of a motor vehicle. Thus, he asserts “Coleman’s actions were more than mere negligence, and caused the death of [Cherry] and severe injury to [Gregory].”

Gregory notes in Chaney v. Dags Branch Coal Company, 244 S.W.3d 95, 101 (Ky. 2006), intent is imputed from the failure to comply with a specific statute or regulation. He maintains even though the ALJ found Coleman was his supervisor, the ALJ failed to address whether Coleman’s actions were intentional and whether Coleman’s actions and intent as a supervisor are imputed to A & G. Citing to Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996), Gregory posits knowledge of defective equipment was inferred to the employer “through its supervisory personnel and [his] own foreman.” In the same vein, he notes that in Lexington-Fayette County Government v. Offut, supra, intent and knowledge of a safety violation was imputed to the employer from the specific action of the officer who decided to lead recruit training in excessive heat thereby causing the claimant’s injury.

Gregory argues that despite the A & G's representatives' testimony denying prior knowledge of Coleman's drug or driving violations, intent is imputed to the employer through the actions of the supervisors. He contends an employer cannot avoid its statutory and regulatory obligation to provide a safe work environment and insulate itself from liability "through delegation to its supervisory personnel." Gregory contends Coleman, as a supervisor, had the ability to eliminate or materially reduce the hazard he created. Consequently, Coleman's intentional violation of driving regulations including driving under the influence of marijuana and driving recklessly in excess of the speed limit are imputed to A & G. Gregory maintains Coleman intentionally disregarded A & G's employee handbook and the motor vehicle safety rules and regulations. Gregory asserts A & G cannot publish a handbook and not take any action to assure compliance by its employees including supervisors.

Gregory also argues A & G knew or should have known Coleman's driving history as well as the risk involved with allowing Coleman to drive co-workers to and from work sites. He argues A & G's affirmative duty included assuring the equipment was operated in a proper and safe manner. Gregory argues to interpret the law otherwise would allow

employers to assert its supervisor was responsible for following statutory and regulatory provisions and thereby avoid its responsibility. Since the supervisor is the agent of the employer, his intention is imputed to A & G.

Finally, Gregory argues all parts of the Offut test had been satisfied. First, driving crew members to and from the work sites in company vehicles "poses the common hazard of motor vehicle accidents." Second, A & G recognized the driving of company vehicles as a hazard as noted in its employee handbook which required not only safe operation of all vehicles pursuant to traffic laws but also to report all work and non-work-related speeding tickets and violations. Third, the August 18, 2011, MVA was the direct and only cause of Gregory's severe injuries. Finally, A & G had a feasible means to eliminate or reduce the hazard by several avenues and failed to do so by ignoring Coleman's prior driving violations and license probation. Gregory argues a safety violation is imputed to A & G though both Coleman's intentional actions as the supervisor and through A & G's failure to monitor and prevent an employee with a history of driving violations from transporting its employees.

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). 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).

That said, the ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). We are cognizant the ALJ is not required to engage in a detailed discussion of

the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

We vacate the ALJ's finding Gregory has a 45% impairment rating as a result of his injuries, is permanently partially disabled, and the award of PPD benefits.

As set forth in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.2d 48 (Ky. 2000), determining an individual's occupational disability requires the following:

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson, supra*, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected

> by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. *See, Osborne v. Johnson, supra, at 803.*
>
> Although the Act underwent extensive revision in 1996, the ALJ remains in the role of the fact-finder. KRS 342.285(1). It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability. Although the ALJ must necessarily consider the worker's medical condition when determining the extent of his occupational disability at a particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. *See, Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985); Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976)*. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. *Hush v. Abrams*, Ky., 584 S.W.2d 48 (1979).

The ALJ provided more than an ample explanation for the finding Gregory did not sustain a psychological injury which was occupational disabling. However, in concluding the physical injuries are not totally disabling and the combined effects of the physical and psychological

complaints were not totally disabling, the ALJ did not explain the basis for the finding the effects of the physical injuries did not cause Gregory to be totally occupationally disabled. In his brief, Gregory assumes the ALJ relied upon the opinion of Dr. Crystal in support of the finding he is not totally disabled. We find no statement by the ALJ that he relied upon Dr. Crystal's opinions in concluding Gregory was only permanently partially disabled. The ALJ concluded Gregory's age and education level mitigate against a finding of total disability. He found Gregory was capable of performing his prior jobs at UPS and Franklin Precision Industry. However, he did not state the evidence upon which he relied in making that finding. A review of Dr. Crystal's report reveals he did not offer any opinion regarding Gregory's ability to perform the jobs at UPS and Franklin Precision Industry. In summarizing Dr. Crystal's report, the ALJ stated A & G filed the report of Dr. Crystal who evaluated Gregory on January 15, 2014, and concluded Gregory remained employable.[1] He did not discuss Dr. Crystal's opinion in determining the extent of Gregory's occupational disability. In fact, the ALJ did not cite to any evidence

[1] See pages 8 and 9 of the September 11, 2014, Opinion, Award, and Order.

in support of his finding the physical injuries are not totally disabling. Thus, we are unable to determine the basis for the ALJ's finding the effects of Gregory's physical injuries did not cause him to be totally occupationally disabled.

Dr. Crystal opined Gregory is not totally occupationally disabled and provided his reasoning and the jobs which he believed Gregory still retained the ability to perform. Similarly, the ALJ's observation as to what the surveillance video reflects indicates the ALJ did not believe Gregory had the severe physical limitations he described in his testimony. The ALJ also found persuasive the opinions of Drs. Allen and Ransom that Gregory had exaggerated the psychological effects of his injuries. However, the ALJ did not cite any of the above evidence as reasons for his finding Gregory is only permanently partially disabled due to his physical injuries.

We decline to remand and direct the ALJ to find Gregory is permanently totally disabled as we believe there is evidence in the record which would support a finding he is only permanently partially disabled. Our function is not to engage in fact-finding. That is the ALJ's task. Since the ALJ did not provide the evidence upon which he relied in determining the effects of Gregory's physical

injuries caused him to be permanently partially disabled, the finding Gregory is permanently partially disabled and the award of PPD benefits must be vacated and the claim remanded to the ALJ for further findings on the issue of the extent of Gregory's occupational disability.

Since we are remanding, we are compelled to point out the ALJ erroneously relied upon Dr. Bilkey's 4% impairment rating for the right shoulder condition. In his September 3, 2013, report in which he assessed a 4% impairment rating for the right shoulder condition, Dr. Bilkey opined Gregory had not attained MMI "with respect to the injury to the right shoulder." Consequently, the 4% impairment rating for the right shoulder condition was not assessed in accordance with the AMA Guides. Pursuant to the AMA Guides, Chapter 1.2, "A medical impairment is considered permanent when it has reached **maximal medical improvement (MMI)**, meaning it is well stabilized and unlikely to change substantially in the next year with our without medical treatment." (emphasis in original). Therefore, Dr. Bilkey's impairment rating for the right shoulder was not permanent at the time of his IME report. Significantly, Dr. Bilkey's subsequent report did not address whether Gregory had subsequently attained MMI. Rather, in that subsequent report Dr. Bilkey compared his

impairment ratings with the impairment ratings assessed by Dr. Ballard. At no time did Dr. Bilkey ever readopt his 4% impairment rating after determining Gregory had attained MMI. Thus, the 4% impairment rating for the shoulder injury cannot be utilized and any award of income benefits cannot include a 4% impairment rating for the shoulder injury. We add that although Dr. Bilkey stated Gregory was also not at MMI with respect to the traumatic brain injury problem, the ALJ's reliance, in part, upon Dr. Bilkey's impairment rating of 10% for the closed head injury is harmless error since the ALJ also relied upon Dr. Ballard's 10% impairment rating for the traumatic brain injury. Reliance upon Dr. Ballard's 10% impairment rating is permissible since at the time she assessed the impairment rating she had also expressed the opinion that Gregory had reached MMI.

In addition, the ALJ cannot rely upon Dr. Eiferman's 6% impairment rating for the right eye injury. In the May 29, 2014, letter in which he assessed a 6% impairment rating, Dr. Eiferman does not state the impairment rating was assessed pursuant to the AMA Guides. The letter contains no reference to the AMA Guides. Since the May 29, 2014, letter does not cite to the AMA Guides, the ALJ cannot rely on the impairment rating expressed

therein. As noted in Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 154 (Ky. App. 2006):

> To be useful for the fact-finder as competent, substantial evidence, a physician's opinion must be grounded in the AMA *Guides*, and an ALJ may not give credence to an opinion of a physician assigning a permanent impairment rating that is not based upon the AMA *Guides*.

We disagree with Gregory's assertion the evidence compels a finding A & G intentionally committed a safety violation. KRS 342.165(1) reads, in relevant part, as follows:

> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment. If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the commissioner or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been liable under this chapter shall be decreased fifteen percent (15%) in the amount of each payment.

Gregory did not establish A & G intentionally failed to comply with any specific statute or lawful administrative regulation. In addition, Gregory did not establish A & G had not complied with a specific statute or lawful administrative regulation "relative to the installation or maintenance of safety appliances or methods." Finally, there was no showing A & G failed to comply with its company policy regarding employee safety and motor vehicle operation.

Whether a claimant is alleging a violation of the general duty clause or the violation of a specific safety statute or regulation, the employer must have actual knowledge or there must be a presumption of knowledge in order for the safety penalty to apply. The issue presented in this case is whether the actions of an employee can be imputed to the employer in order to establish the employer's knowledge of a safety hazard and, thus, satisfy the 'intent' requirement of KRS 342.165(1). We are unable to find any Kentucky cases specifically addressing the extent to which an employee's actions, which injure another employee, can be imputed to the employer for purposes of imposition of a safety penalty. In Offutt, the actions of supervisors in conducting police officer recruit training sessions in hot weather, causing a recruit to suffer a heat stroke, were

imputed to the employer even though the supervisors were acting in direct contravention of the employer-provided manual. However, in Offutt, the employer placed the supervisors in a position of conducting the training session and thus the employer is responsible for their actions. More importantly, the fact that the employer had distributed an article discussing the risks of heat strokes evidences their awareness of a potential hazard during outdoor training sessions in hot weather. Similarly, in Hornback v. Hardin Memorial Hospital, 2012-SC-000195-WC, rendered May 23, 2013, Designated Not To Be Published, the claimant was injured while being rescued from a stalled elevator. The hospital security team counseled the employee to jump from the stalled elevator, causing her to fall down the shaft. In considering whether a hazard had been created, the Supreme Court noted that an elevator can potentially be dangerous, particularly when "the rescue staff is unaware of proper safety procedures" due to the hospital's failure to adopt the manufacturer's safety manual. Furthermore, the fact the manufacturer produced a pamphlet about stalled elevators "put the hospital on notice" of the potential hazard. At the other end of the "knowledge" spectrum, is Jones v. Aerotek Staffing, 303 S.W.3d 338 (Ky. App. 2010). There, the Court of Appeals determined the

claimant's employer, a temporary staffing agency, had no knowledge of a safety hazard existing at the plant at which the employee had been assigned. Absent a duty to inspect facilities at which it places employees, the claimant needed to prove that the temporary staffing agency "had knowledge of, approved of, directed, or acquiesced in its client's actions" Id. at 491. From these cases, we glean that the employer must have actual knowledge or a presumption of knowledge about the safety hazard in order for the KRS 342.165(1) penalty to be imposed.

In Gregory's case, the ALJ thoroughly considered the issue of whether his employer had knowledge of a safety hazard created by Coleman. Concerning the first of the four prong test set out in Offut, supra, whether a condition or activity in the workplace presented a hazard to employees, there is no evidence establishing that prior to the August 18 2011, MVA, A & G was aware of a condition or activity in the workplace that presented a hazard to its employee. The fact Coleman had pled guilty to speeding in 2008, 2009, and 2010, did not require the ALJ to find that failure to prohibit Coleman from driving a vehicle

presented a hazard to the employees.[2] We note nothing in the record indicates Coleman was convicted of any of the counts in the indictment pending in the Todd Circuit Court. As noted by the ALJ, the indictment is merely an accusation and carries no weight. Further, the accident report indicates Coleman was not cited for the violation of a traffic law. Specifically, he was not cited for operating a vehicle under the influence, speeding, or reckless driving. The Kentucky State Police Trooper indicated "no" under the category suspected drinking driver. Although the evidence established Coleman had ingested marijuana, there was nothing establishing that at the time he was operating the vehicle Coleman was under the influence of marijuana.[3] Thus, we do not believe the first prong of the test was met.

The second prong of the test, whether the cited employer or employer's industry recognized the hazard, has not been met. Here, there is nothing indicating A & G was

---

[2] Although A & G's records check reveals Coleman pled guilty to speeding in 2009 and 2010, there appears to be no dispute Coleman also was convicted of speeding in 2008.

[3] Gregory testified he saw Coleman smoke marijuana approximately thirty minutes to an hour before they left the work site. There was no testimony regarding the quantity ingested. Cain acknowledged Coleman tested positive for marijuana at the hospital. These facts alone do not establish Coleman was under the influence of marijuana at the time of the accident. In addition, there is no evidence quantifying the marijuana found in Coleman's system.

on notice or should have been on notice that allowing Coleman to operate one of its trucks created a potential hazard to employees riding in the truck. Coleman's three convictions for speeding do not require a finding by the ALJ a work hazard existed.

Regarding the third prong of the test, although Coleman's actions caused death and serious physical injury, there was no evidence establishing that allowing Coleman to drive a truck at work presented a hazard prior to the August 18, 2011, MVA likely to cause death or serious physical harm.

Concerning the fourth prong of the test, whether physical means existed to eliminate or materially reduce a material hazard, since A & G was not aware of a particular hazard prior to the MVA it had no duty to eliminate or materially reduce the hazard. Thus, we believe Gregory did not satisfy the four prong test and did not show A & G intentionally violated KRS 338.031.

Gregory was not able to dispute A & G's assertion it was never advised of any problem regarding Coleman's driving at work prior to the date of the MVA. Although Gregory testified Cherry was leaving that crew because of Coleman's driving, that testimony was rebutted by Gill who testified Cherry had never requested to move from the crew

or complained about Coleman's driving. As evidenced by his findings, we conclude the ALJ believed Gill's testimony that Cherry had not requested to switch crews because of Coleman's poor driving record. In the opinion, award, and order, the ALJ specifically found even though Coleman was Gregory's supervisor he was not the employer for the purposes of KRS 342.165(1). He concluded A & G could not be penalized for a single act of an employee because it did not know or should have known of his propensity to commit such acts. The ALJ noted Gill, Cain, and Hampton all testified they were never aware of Coleman driving recklessly or smoking marijuana. Further, the ALJ rejected Gregory's testimony that Coleman drove recklessly all the time, noting Gregory had only worked for A & G for six days.

We note the record reveals Coleman had amassed speeding tickets. However, the fact Coleman had three speeding tickets instead of two and the ALJ failed to acknowledge that fact does not cause the ALJ's finding the speeding convictions did not necessitate A & G revoking Coleman's driving privileges at work to be erroneous. After analyzing whether A & G violated KRS 338.031, the ALJ's conclusion there is no evidence on which he could reasonably rely to find A & G was aware Coleman was a

hazard and predisposed to careless driving or drug use which should have caused it to prevent Coleman from driving a company vehicle is supported by substantial evidence.

Finally, even though Coleman was the foreman of the four man crew, there was no showing as to the extent of his responsibilities. The record is also silent as to Coleman's position within the company hierarchy. Without more evidence concerning the nature of Coleman's position, as foreman of the crew in question, we find no error in the ALJ's refusal to impute Coleman's actions on August 18, 2011, to A & G for purposes of applying KRS 342.165(1) to the case *sub judice*.

In resolving this issue we have reviewed the facts and holding in Chaney v. Dags Branch Coal Co., supra. There, the Supreme Court specifically noted the case did not concern a violation of KRS 338.031 and therefore Apex Mining and Offut were of limited value. However, we believe certain language within the Chaney v. Dags Branch Coal Co., supra, opinion provides assistance; which is:

> Instead, KRS 342.165(1) gives employers and workers a financial incentive to follow safety rules without thwarting the purposes of the Act by removing them from its coverage. It serves to compensate the party that receives more or pays less for being subjected to the effects of the opponent's "intentional

> failure" to comply with a safety statute or regulation.

Applying that language to the case *sub judice*, there is nothing indicating A & G failed to follow safety rules nor did it intentionally fail to comply with a safety statute or regulation. We agree with the ALJ, given the facts in this case, Coleman's actions in operating the vehicle in a negligent and reckless manner cannot be imputed to the employer to the extent Gregory is entitled to enhanced benefits for A & G's failure to furnish him a place of employment free from recognized hazards causing or likely to cause death or serious physical injury.

We decline to hold as a matter of law that Gregory is entitled to enhanced benefits pursuant to KRS 342.165(1) due to A & G's failure to prevent Coleman from driving company vehicles on the basis of three separate speeding convictions unrelated to his employment prior to the MVA. In situations where the safety violation is committed by a co-worker and there was no failure by the employer to comply with a specific statute or administrative regulation, a claimant must establish the employer ignored or willfully overlooked a safety hazard that was reasonably foreseeable. Since there was no such showing in the case *sub judice*, the ALJ's refusal to

increase Gregory's award of income benefits pursuant to KRS 342.165 shall be affirmed.

Accordingly, the ALJ's determination regarding the extent of Gregory's occupational disability and the award of income benefits are **VACATED**. The ALJ's determination Gregory is not entitled to enhanced benefits pursuant to KRS 342.165(1) is **AFFIRMED**. This claim is **REMANDED** to the ALJ for entry of an amended opinion determining the extent of Gregory's occupational disability and entry of an award in conformity with the views expressed herein.

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, NOT SITTING.

COUNSEL FOR PETITIONER:

HON ALLISON A ZOELLER
429 W MUHAMMAD ALI BLVD STE 1102
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON RODNEY J MAYER
600 E MAIN ST STE 100
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON DOUGLAS W GOTT
400 E MAIN ST STE 300
BOWLING GREEN KY 42101