OPINION ENTERED: March 8, 2013

CLAIM NO. 201099647 & 200875597

COLLECTIVE BRAND, INC. PETITIONER/CROSS-RESPONDENT

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

MARY WEDDING RESPONDENT/CROSS-PETITIONER
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENT

and

MARY WEDDING CROSS-PETITIONER

VS.

COLLECTIVE BRAND, INC. PETITIONER/CROSS-RESPONDENT
STRIDE RITE CORPORATION
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. Collective Brand, Inc. ("Collective Brand") appeals and Mary Wedding ("Wedding") cross-appeals from the April 30, 2012, opinion, award, and order and the July 9, 2012, order ruling on the petitions for consideration rendered by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"). In the opinion, award, and order, the ALJ determined Wedding sustained a cumulative trauma injury to the right wrist which manifested on January 24, 2005, while in the employ of Stride Rite Corporation ("Stride Rite") and awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. The ALJ also determined Wedding sustained a cumulative trauma injury to her right shoulder "on or about February 13, 2008," while in the employ of Collective Brand and awarded TTD benefits, PPD benefits, and medical benefits.

On appeal, Collective Brand argues the ALJ erred in relying upon the 10% impairment rating assessed by Dr. Warren Bilkey as the basis for the award of PPD benefits and in awarding vocational rehabilitation benefits.

On cross-appeal, Wedding asserts should the Board determine she is not entitled to an award of benefits against Collective Brand for the injuries to "her extremities, that Stride Rite should be ordered to do so."

Wedding also asserts Collective Brand should be responsible for all future medical benefits for the treatment of both injuries due to the magnitude of the injuries she sustained while in the employ of Collective Brand. Stride Rite has not appealed.

Wedding began working for Stride Rite in April 1997. In 2005, while employed by Stride Rite, Wedding developed carpal tunnel syndrome in both hands and symptoms in her left elbow. On April 18, 2005, Dr. Richard H. DuBou performed the following surgical procedures on Wedding's left hand and elbow:

1. Left carpal tunnel release.
2. Flexor tendon synovectomy.
3. Reconstruction of transverse carpal ligament.
4. Release of Guyon's canal.
5. Cubital tunnel release.
6. Flexor carpi ulnaris fasciotomy to junction of proximal middle third of the forearm.

On June 1, 2005, Dr. DuBou performed the following surgical procedure on Wedding's right hand:

1. Carpal tunnel release.
2. Flexor tendon synovectomy.
3. Reconstruction of the transverse volar ligament.
4. Release of the Guyon canal.

Dr. DuBou's September 29, 2005, office note states Wedding was released to full duty. His February 23, 2006, note reflects the EMG performed on Wedding's right

hand revealed mild residual carpal tunnel syndrome for which Dr. DuBou assessed a 4% upper extremity impairment which translated to a 2% whole person impairment. Sometime after Wedding's 2005 injury, Stride Rite was acquired by Collective Brand.

In 2007, Wedding began to experience additional problems in her shoulder, arms, and hands. In February 2008, her symptoms worsened to the extent she had sharp pain in her right shoulder, elbow, and wrist. Because it was determined Wedding had a labrum tear in the right shoulder, surgery was performed by Dr. Cyna Khalily. The August 20, 2008, operative report reflects the following surgical procedures were performed: right shoulder arthroscopic labrum repair, right shoulder subacrominal decompression and placement of a non-biodegradable drug delivery device. Because Wedding subsequently developed right shoulder adhesive capsulitis, on November 7, 2008, Dr. Khalily performed a manipulation of the right shoulder under anesthesia. After being off work for a period of time and receiving TTD benefits, Wedding returned to work at regular duty in late December 2008 or early January 2009. She stopped working for Collective Brand in mid-2010 and has not worked since.

Wedding initially filed a Form 101 on February 1, 2010, alleging a 2008 cumulative trauma injury to the right shoulder while in the employ of Collective Brand. During the proceedings it was determined that even though Wedding had received TTD benefits and a check for a lump sum as a result of the 2005 injury while in the employ of Stride Rite, a Form 110- settlement agreement had not been executed by the parties and approved by an ALJ. Further, it was determined Stride Rite had not complied with KRS 342.040 by notifying the Executive Director of the termination of Wedding's TTD benefits. Consequently, the Executive Director did not provide a letter to Wedding advising her of her right to prosecute a claim pursuant to the Act.

On November 23, 2010, Wedding filed a Form 101 asserting a claim against Collective Brand for a cumulative trauma injury occurring on January 24, 2005, to her arms and left elbow. Later, Wedding filed a motion to file an amended consolidated Form 101 and attached a "Consolidated Form 101" listing Stride Rite and Collective Brand as the defendant/employer. The consolidated Form 101 alleged a January 24, 2005, cumulative trauma injury and four 2008 cumulative trauma injuries. For the 2005 injury, Wedding listed the injured body parts as the left wrist, right

wrist, and left elbow. For the 2008 injuries, Wedding listed the injured body parts as right wrist, left wrist, right shoulder, and left shoulder. By order dated July 15, 2011, ALJ Kerr sustained the motion to file the consolidated Form 101.[1]

Relative to the nature and significance of the injuries occurring in 2005 and 2008 and the impairment caused by the injuries, Wedding relied upon the opinions of Dr. Bilkey. Stride Rite and Collective Brand relied upon the opinions of Drs. Ellen M. Ballard and DuBou.

After summarizing the medical and lay testimony concerning the 2005 injury, the ALJ entered the following findings of fact and conclusions of law:

> 4. The 2005 injury will be discussed first. Ms. Wedding claimed that cumulative trauma while she was employed at Stride Rite manifested on January 24, 2005 in left carpal tunnel syndrome and left cubital tunnel syndrome. Dr. Richard DuBou performed three surgeries in 2005, one for left carpal tunnel on April 18, 2005; a second surgery for right carpal tunnel on June 1, 2005; and a third surgery to remove a foreign body on July 6, 2005.
>
> 5. It is undisputed that plaintiff was paid temporary total disability benefits while she was off from work in 2005 and her medical bills were also paid by the defendant-employer, and/or its workers' compensation insurance

[1] The claim was later ordered transferred to ALJ Hays.

carrier. It is also undisputed that plaintiff was issued a check on June 12, 2006 in the amount of $1,686.97. This check was intended as a settlement of the claim and this fact was acknowledged by the plaintiff. However, no Form 110 (Agreement as to Compensation) was ever executed or filed with the Department for Workers' Claims. Apparently, the settlement was never approved by any Administrative Law Judge. The treating physician, Dr. DuBou, opined that plaintiff retained a 2% permanent impairment to the body as a whole as a result of the 2005 injuries. Based on plaintiff's average weekly wage in 2005 of $498.17, a 2% permanent impairment calculated to $4.32 per week ($498.17 x 2/3 = $332.11 per week x 2% x disability factor of 0.65 = $4.32 per week). In 2006, when the check was issued to the claimant, the present value discount for 425 weeks was 366.0779. The present value or lump sum value of the indemnity benefits based on a 2% impairment with a 1x multiplier calculates to $1,581.46.

6. The ALJ finds that plaintiff did sustain a 2% permanent impairment as a result of the 2005 injury. This finding is based upon the opinion of the treating surgeon, Dr. DuBou. Dr. DuBou has rendered treatment to the plaintiff since 2005 and he performed three surgical procedures upon Ms. Wedding. Whereas the ALJ has considered the impairment rating rendered by Dr. Bilkey (6% to the body as a whole), Dr. Ellen Ballard agrees with Dr. DuBou that the 2% impairment from the 2005 carpal tunnel injury is the accurate impairment rating. The ALJ is persuaded by the opinions of Dr. DuBou and Dr. Ballard with respect to

> the permanent impairment rating for the 2005 injury.
>
> 7. The ALJ will award indemnity benefits on the basis of a 2% permanent impairment for the 2005 injury. None of the statutory multipliers set forth in KRS 342.730(1)(c) are applicable. Following the plaintiff's recovery from the last surgery in 2005, she returned to the same job for the defendant-employer and continued to work at that job full-time until 2008. Although plaintiff is entitled to an award of indemnity benefits for the 2005 injury, the defendant-employer, Stride Rite, is entitled to receive a credit for the $1,686.97 which was paid to the claimant in 2006.
>
> 8. With respect to the 2005 injury, the plaintiff is also entitled to future medical expenses per KRS 342.020. Plaintiff's right to future medicals is not barred by the statute of limitations due to the defendant-employer's failure to properly report the injury, thereby causing a failure by the Commissioner to advise Ms. Wedding in writing of the limitations or deadline for filing an appropriate claim.

Concerning the 2008 injury, the ALJ entered the following findings of facts and conclusions of law:

> 10(a) The next question to be considered by the ALJ is whether or not the plaintiff sustained an "injury" as defined by the Act, and more specifically, whether or not the cumulative trauma sustained during her work culminated in a harmful change in her human organism in 2008.

(b) Ms. Wedding commenced treatment with Dr. Winders in early 2008. Dr. Winders noted on May 30, 2008 that plaintiff's job involved repetitive lifting. Dr. Winders referred Ms. Wedding to Dr. Dripchak in July of 2008, who diagnosed her as having a subacromial impingement of her right shoulder. In a questionnaire dated June 24, 2008, Dr. Dripchak confirmed that plaintiff's repetitive work was the cause of her problems and he took plaintiff off from work as of June 24, 2008. He referred the plaintiff to Dr. Khalily, who performed surgery on the right shoulder on August 20, 2008. A second surgery involving the manipulation of the right shoulder under anesthetic so as to combat a "frozen shoulder" was done on November 7, 2008 by Dr. Khalily. Dr. Khalily released Ms. Wedding to return to work on December 5, 2008, but she did not actually return to work until January 2, 2009. The ALJ finds that Ms. Wedding was temporarily totally disabled from June 24, 2008 until December 5, 2008, based on the evidence from Dr. Khalily, who performed the surgeries on plaintiff's right shoulder. Dr. Khalily opined in a questionnaire dated June 21, 2010 that the surgeries were caused and brought about by cumulative trauma at work.

(c) Based on the evidence from the treating physicians, including Dr. Winders, Dr. Dripchak, and Dr. Khalily, the repetitive nature of the claimant's work for Collective Brand, Inc. was the cause of the plaintiff's injury to her right shoulder.

. . .

14(a) The next issue to be determined is the plaintiff's entitlement to

benefits under KRS 342.730, including multipliers.

(b) Both Dr. DuBou and Dr. Ballard assess 0% permanent impairment as a result of the shoulder condition. They also deny that plaintiff's work activities contributed to the problem. The evidence from Dr. DuBou and Dr. Ballard is countered by evidence from the treating physicians, including Dr. Winders, Dr. Dripchak, and Dr. Khalily. The ALJ is persuaded by the evidence from the treating physicians and does hereby find that plaintiff did sustain a cumulative trauma injury to her right shoulder on or about February 13, 2008.

(c) None of the treating physicians, including Dr. Khalily, have given an opinion as to a percentage of permanent impairment. Dr. Ballard opined the work activities did not cause Ms. Wedding to incur the SLAP tear to her right shoulder, that she would have no permanent impairment, and that she retained the physical capacity to return to her previous employment with Collective Brand without restrictions. Dr. DuBou agrees with Dr. Ballard and assesses no permanent impairment.

(d) Dr. Warren Bilkey has examined the claimant, reviewed all the medical records, and has rendered multiple reports. Dr. Bilkey opines that plaintiff has a 10% permanent impairment to the body as a whole due to the upper extremity conditions. More specifically, he attributes 3% of the impairment to the right shoulder, 1% of the impairment to the left shoulder caused by having to over-compensate for the right shoulder condition, and the remaining impairment based on pain. The Defendant, Collective Brands, has attacked Dr.

> Bilkey's methodology in his calculation of impairment rating through reports from Dr. DuBou and Dr. Ballard. The ALJ has carefully considered the criticisms by these physicians, as well as Dr. Bilkey's response to such criticisms. The ALJ is faced with deciding between 0% impairment and 10% impairment to the body as a whole. It cannot be ignored that plaintiff has undergone two surgical procedures to her right shoulder. The Plaintiff complains to have continuing pain of such severity that she believes she is precluded from any of the former work which she has ever done. She is not working at present and has not worked for a considerable period of time. She is not asking for total occupational disability, but has requested vocational rehabilitation. She appears credible to the ALJ and she has a past work record which indicates she would rather be working than unemployed. When faced with the decision of awarding this claimant nothing versus the 10% impairment rating opined by Dr. Bilkey, the ALJ will follow the opinion of Dr. Bilkey and does hereby find Ms. Wedding to have a 10% permanent impairment under the AMA Guidelines, Fifth Edition as a result of the 2008 injury.

The ALJ determined Wedding's PPD benefits for the 2008 injury should be enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1. The ALJ also determined Wedding was entitled to rehabilitation benefits pursuant to KRS 342.710, finding as follows:

> 15. Plaintiff's entitlement to rehabilitation benefits pursuant to KRS 342.710 was reserved as an issue. The

> claimant has specifically requested that she be afforded vocational rehabilitation. KRS 342.710 provides, in part, that "an employee who has suffered an injury covered by this chapter shall be entitled to prompt medical rehabilitation services for whatever period of time is necessary to accomplish physical rehabilitation goals which are feasible, practical, and justifiable. When as a result of the injury he is unable to perform work for which he has 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. In this case, Mary Wedding has proven that she is unable to perform the work for which she has had previous training and experience. She requested vocational rehabilitation at the Benefit Review Conference and reserved vocational rehabilitation as an issue herein. It appearing that Ms. Wedding qualifies for such relief, the ALJ will refer the plaintiff for a vocational rehabilitation evaluation under the terms of KRS 342.710.

For the 2005 injury, the ALJ awarded TTD benefits in the amount of $332.11 per week during the periods Wedding was totally disabled as a result of a 2005 injury and PPD benefits of $4.32 per week for 425 weeks.[2] Stride Rite was granted a credit for TTD benefits previously paid and the lump sum of $1,686.97 previously paid. The ALJ

[2] Apparently, the parties were unable to provide the specific period TTD benefits were paid.

ordered Stride Rite is responsible for the medical benefits for the cure and relief from the effects of the 2005 injury.

For the 2008 injury, the ALJ awarded TTD benefits of $312.66 per week from June 24, 2008, to December 5, 2008, and PPD benefits of $79.74 per week commencing February 13, 2008, for 425 weeks. The ALJ ordered Collective Brand is responsible for the medical benefits for the cure and relief from the effects of the 2008 injury. Pursuant to KRS 342.710, Wedding was to be referred for a vocational rehabilitation evaluation and "shall be entitled to the benefits enumerated therein."

Collective Brand filed a petition for reconsideration arguing, as it does on appeal, the ALJ erred in relying upon Dr. Bilkey's 10% impairment rating for the 2008 injury. It argued the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), does not permit Dr. Bilkey to assess a 3% pain rating for each wrist and the right shoulder and a 1% pain rating for the left shoulder. It asserted the opinions of Drs. Ballard and Dubou established the pain rating permitted by the AMA Guides is a "one-time global score given for the claimant's overall condition" of up to 3%.

Citing to the ALJ's finding Wedding sustained a cumulative trauma injury to the right shoulder on February 13, 2008, Collective Brand also argued the ALJ improperly relied upon an impairment rating which assessed impairment ratings for both wrists and the left shoulder. It argued there is no objective evidence supporting a 10% whole person impairment for non-existent 2008 injuries to the left shoulder and both wrists. Therefore, it asserted the ALJ was left with choosing between the zero impairment assessment by Drs. Ballard and Dubou or the 3% impairment assessed by Dr. Bilkey for the right shoulder.

Collective Brand also asserted the ALJ erred by failing to provide the appropriate findings of fact and conclusions of law regarding the award of vocational rehabilitation. Accordingly, the ALJ was requested to revise his opinion to include sufficient findings of fact and conclusions of law to support his award of vocational rehabilitation.

Wedding filed a petition for reconsideration contending, based upon the ALJ's decision, Collective Brand is responsible for the payment of all future medical expenses for the left and right shoulder and both defendants are responsible for the injuries to her right and left wrists. She asserted it was better for Collective

Brand to be responsible for all future medical treatment. Citing to Derr Construction Co. v. Bennett, 837 S.W.2d 824 (Ky. 1994), Wedding asserted the ALJ is permitted to order Collective Brand responsible for the medical care of both wrists because the injuries to her wrists were significantly worsened by the 2008 work injury. Thus, because the new injuries to her wrists were not a mere aggravation, but were a serious change in the condition of her wrists, she requested the ALJ order all future medical benefits be paid exclusively by Collective Brand. Alternatively, she requested the ALJ order Stride Rite is responsible for the medical bills related to the treatment of her wrists.

Regarding Dr. Bilkey's impairment rating, in the ALJ's July 9, 2012, order overruling the petitions for reconsideration, the ALJ stated as follows:

> This claim is before the Administrative Law Judge on Petitions for Reconsideration filed by both parties. The ALJ has considered both Petitions, as well as the plaintiff's response to the defendant's Petition.
>
> The Defendant first asserts that the ALJ committed a patent error with respect to the determination that the impairment rating assessed by Dr. Warren Bilkey is the appropriate one in this claim. The Defendant further cited a quote from page 30 of the Opinion which the ALJ acknowledges was superfluous,

unnecessary, and not entirely correct. Whereas the statement was indicative of the contrast between Dr. Bilkey versus Dr. DuBou and Dr. Ballard, it failed to recognize that some “in between” option existed. In an effort to clarify the Opinion, the ALJ adopts the 10% impairment rating as calculated and opined by Dr. Bilkey. The ALJ does not find that Dr. Bilkey erroneously interpreted the AMA Guides, Fifth Edition. As argued by plaintiff at pages 22-23 of her original brief filed herein on April 16, 2012, Dr. Ballard agreed that Chapter 18 of the Guide allows a 3% pain rating as was provided by Dr. Bilkey, but she insisted there could be only one pain rating assessed for one event. Under cross-examination, Dr. Ballard acknowledged that some of the AMA Guidelines are ambiguous, including the one in contention, and she could not identify any particular provision in the AMA Guides which precludes ratings for separate body parts for physical injuries caused and brought about by the same work accident event. Dr. Ballard acknowledged that plaintiff did not exaggerate her complaints and that her complaints of pain appeared genuine. Dr. Ballard further represented that she would take the AMA Guides home with her, read it again, and provide the specific language in support of her position if she could find it. The record does not reflect that any supplementation was made by Dr. Ballard.

On balance, the ALJ finds that Dr. Bilkey’s impairment rating of 10% to the body as a whole is amply supported by the evidence herein and that it accurately represents the permanent impairment of the plaintiff.

The ALJ stated his findings in the opinion had dealt with the appropriateness of vocational rehabilitation.

Concerning Wedding's petition for reconsideration, the ALJ concluded as follows:

> Finally, the plaintiff has argued under Derr Construction Co. v. Bennett, Ky. 873 S.W.2d 824 (1994) that the Kentucky Supreme Court interpreted KRS 342.020 and held that the existence of a subsequent re-injury affecting the same body part supersedes the previous injury in regards to the responsibility for future medical expenses to that body part. Based on Derr Construction, plaintiff urges the ALJ to specifically provide that all medicals to the right wrist and the left wrist are the responsibility of Collective Brand, because the injuries to the right and left upper extremities were significantly worsened by the work injury suffered by plaintiff while employed at Collective Brand. Whereas, Derr represents a specific factual situation under which the court found it appropriate to apportion all subsequent medical treatment to the subsequent employer, there is also authority which supports a 50/50 allocation under the right set of circumstances [see Sears Robuck & Co. v. Dennis, 131 S.W.3d 351 (2004)]. In the case at hand, the allocation of future medical expenses was not really litigated and the evidence does not strongly suggest an appropriate apportionment. Whereas, all of the medical expenses incurred after February 13, 2008 to date are the responsibility of Collective Brand, the ALJ does not deem it appropriate to

> attempt an appropriate apportionment of future medical expenses.

On appeal, Collective Brand again asserts Dr. Bilkey erroneously interpreted the AMA Guides "when he gave pain ratings to multiple body parts for one date of injury and combined them." It contends Chapter 18 of the AMA Guides allows a three percent impairment for overall pain and not for each injured body part. It argues Dr. Bilkey provided no impairment rating for any of Wedding's physical problems but instead gave pain ratings for multiple body parts and combined them for a whole person impairment.

Collective Brand next argues the ALJ found Wedding's February 13, 2008, injury was to the right shoulder and he made no finding of injuries to the wrists and left shoulder due to this event. It observes this fact was noted in the petition for reconsideration which the ALJ overruled. Consequently, Collective Brand asserts the ALJ erroneously stated his only option was either to rely on the 0% impairment rating assessed by Drs. Ballard and Dubou or the 10% impairment rating assessed by Dr. Bilkey. It argues the ALJ had the option of relying upon the 0% impairment rating assessed by Drs. Ballard and Dubou or Dr. Bilkey's 3% impairment rating for right shoulder pain.

Next, Collective Brand argues the ALJ failed to provide findings of fact and conclusions of law to support the award of vocational rehabilitation. It asserts Wedding did not meet the requirements set forth in Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387, 392 (Ky. 2001) and Wilson v. SKW Alloys, Inc., 893 S.W.2d 800 (Ky. App. 1995). It maintains Wedding admitted she had previously worked as a cashier and a driver and has a driver's license. Collective Brand contends the only restrictions on Wedding's activities were provided by Dr. Bilkey and he only restricted her from repetitive use of the upper extremities. While these restrictions may prevent Wedding from returning to her previous jobs at Collective Brand and Stride Rite, Collective Brand maintains the restrictions do not prevent her from engaging in other work for which she has experience and training.

On cross-appeal, Wedding again argues if Collective Brand is not responsible for medical benefits for the injuries to her extremities then Stride Rite is responsible for the medical benefits. Thus, Stride Rite is to pay for the medical care of any body part for which Collective Brand is not responsible. Wedding also maintains since the injuries to her wrists are now more

significant than the injuries suffered in 2005, Collective Brand should be responsible for all medical benefits.

Because the ALJ found the February 13, 2008, work injury resulted in a cumulative trauma injury to the right shoulder, his reliance upon Dr. Bilkey's 10% impairment rating as the basis for an award of PPD benefits is error. Dr. Bilkey's June 16, 2010, independent medical examination ("IME") report states Wedding's current impairment is 10% and of that percentage, 3% is attributable to the right shoulder injury and 7% is attributable to the injuries to her wrists. Prior to the February 13, 2008, injury, because of her bilateral carpal syndrome, Dr. Bilkey assessed a 3% whole person impairment for each wrist or 6% for a whole person impairment. However, upon attaining maximum medical improvement ("MMI") after the February 13, 2008 injury, Dr. Bilkey opined Wedding has a 7% impairment rating due to her wrist injuries. The impairment for the left wrist was unchanged; however, the impairment for the right wrist increased to 4%. Thus, Wedding had a worsening of her pre-existing condition in the right wrist as a result of the February 13, 2008, injury.

In a May 26, 2011, addendum to his June 16, 2010, report, Dr. Bilkey stated the purpose of his addendum was to "clarify the outcome of the 2/13/08 work injury in

comparison to the 1/24/05 work injury." He noted the addendum also took into account changes which occurred since his June 16, 2010, IME. Regarding Wedding's current impairment rating, Dr. Bilkey stated as follows:

> With respect to the 1/24/05 work injury, Ms. Wedding has bilateral carpal tunnel syndrome. I previously stated, in my IME report of 6/16/10, that Ms. Wedding had 5% upper extremity impairment or 3% whole person impairment with respect to carpal tunnel syndrome, each side. This is referenced in the AMA Guides on page 495, Scenario No. 2.
>
> With respect to the 2/13/08 work injury, I previously stated in my IME report of 6/16/10, that Ms. Wedding had 3% whole person impairment affecting the right shoulder. This is referenced in the Chapter on Chronic Pain on Fig. 18.1. All of these impairment ratings continue to apply.
>
> With respect to the left shoulder pain from favoring the right, since this is an ongoing pain problem but not as severe as the right, again Fig. 18.1 is referred to, there is 1% whole person impairment. With respect to both wrists, the problem is one of ongoing pain limiting tolerance for repetitive upper extremity work. There is wrist joint tenderness to palpation. Pending confirmatory tests indicating a diagnosis of degenerative joint disease, or the evaluation by the appropriate orthopedic specialist, an impairment rating of 3% to the whole person exists for wrist pain on each side, again referenced on Fig. 18.1 in the Chapter on Chronic Pain.

> This means that following the 1/24/05 work injury there is a total of 6% whole person impairment with respect to carpal tunnel syndrome on each side.
>
> With respect to the 2/13/08 work injury, there is a total of 10% whole person impairment combining the impairments for right and left shoulder and right and left wrists for degenerative joint disease and wrist pain.
>
> Combining the impairments for the 1/24/05 and the 2/13/08 work injury yields 15% whole person impairment.

Dr. Bilkey's subsequent reports do not alter the impairment rating set forth in the May 26, 2011, addendum.

Dr. Bilkey's 10% impairment rating, which includes an impairment rating for the left shoulder and both wrists, is not consistent with the ALJ's finding regarding the nature of Wedding's February 13, 2008, injury. Consequently, the ALJ should not have considered Dr. Bilkey's impairment ratings for the left shoulder and both wrists in determining the extent of the impairment of the right shoulder. Stated another way, based on the ALJ's determination Wedding sustained only a right shoulder injury, the ALJ could not rely upon the entirety of Dr. Bilkey's impairment rating which included impairment ratings for each wrist and the left shoulder.

Significantly, Collective Brand raised this issue in its petition for reconsideration. Since the ALJ refused to alter his finding that Wedding sustained only a cumulative trauma injury to her right shoulder and there was no finding of left shoulder and bilateral wrist injuries due to the 2008 event, the only impairment ratings relevant to the 2008 injury are those assessed for the right shoulder. The ALJ must choose between the 0% impairment rating assessed by Drs. DuBou and Ballard and the 3% impairment rating assessed by Dr. Bilkey. Therefore, the award of PPD benefits enhanced by the three multiplier and the award of medical benefits for the February 13, 2008, injury must be vacated and the claim remanded for a finding of the impairment rating attributable to the right shoulder injury.

On remand, as the ALJ found Wedding only sustained a cumulative trauma injury to her right shoulder as a result of the February 13, 2008, event, he must only consider the impairment ratings attributable to the right shoulder injury. If the ALJ chooses to again accept Dr. Bilkey's impairment rating for the right shoulder, his award of PPD benefits must be based on the 3% impairment rating. Stated another way, the ALJ may not base the award of PPD benefits on the entirety of Dr. Bilkey's impairment

rating which includes impairment ratings for both wrists and the left shoulder.

Similarly, on remand the decision concerning the applicability of KRS 342.730(1)(c)1 must be based on the effects of the 2008 right shoulder injury. Since the ALJ relied upon an impairment rating for injuries to both wrists and the left shoulder which is contrary to his finding regarding the nature of the injury, it is necessary for him to determine whether only the 2008 right shoulder injury resulted in Wedding being unable to perform the job she was performing at the time of the injury. We believe the ALJ impermissibly relied upon Wedding's testimony concerning the problems she experiences in both wrists and shoulders in determining KRS 342.730(1)(c)1 is applicable. In summarizing Wedding's testimony regarding her ability to perform the work she was performing at the time of the injury, the ALJ noted Wedding testified she was unable to perform her previous job because of the pain she experienced in both wrists and shoulders. Even though Wedding testified her right shoulder was the most significant problem, her testimony reflects she continually emphasized her problems in both wrists and her left shoulder also prohibited her from returning to the

employment she was performing at the time of the 2008 injury.

Addressing Wedding's entitlement to medical benefits for the 2005 injury, we observe Stride Rite and Wedding do not contest the ALJ's award for the 2005 injury. In defining Wedding's 2005 injuries, the ALJ accepted Dr. DuBou's 2% impairment rating for the right wrist injury. Dr. DuBou did not assess an impairment rating for the left wrist and left elbow conditions even though carpal tunnel release and cubital tunnel release procedures were performed on the left wrist and left elbow, respectively. In relying primarily on Dr. DuBou's opinions, the ALJ specifically stated he considered the impairment rating assessed by Dr. Bilkey's of 6% for both wrists, but found the opinions of Drs. Ballard and Dubou regarding the impairment rating more persuasive. Consequently, based on the ALJ's definition of the 2005 injury, Wedding sustained no injury to her left wrist and elbow. Since the ALJ found the opinions of Drs. DuBou and Ballard more persuasive and Dr. DuBou opined Wedding needed no additional medical treatment for the 2005 injury, Wedding is not entitled to future medical benefits for the left wrist and left elbow conditions.

That said, regardless of Dr. DuBou's opinion regarding the necessity of further medical treatment of the right wrist, since the ALJ determined Wedding had a 2% impairment due the right wrist injury, by law she is entitled to future medical benefits for the treatment of the right wrist injury. *See* FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007) and KRS 342.020(1).

Likewise, if on remand the ALJ awards PPD benefits for the right shoulder injury, Wedding is entitled to an award of medical benefits for treatment of the shoulder injury. As the ALJ did not find Wedding sustained an injury to her left shoulder or wrists due to the February 2008 injury, she is not entitled to an award of medical benefits for the treatment of her wrists and left shoulder. However, as previously noted, Stride Rite is responsible for the medical benefits for the 2005 right wrist injury.

In determining the ALJ erred in accepting Dr. Bilkey's impairment rating, we do not reach Collective Brand's argument Dr. Bilkey improperly assessed impairment ratings for pain at each injured body part as opposed to imposing a total 3% impairment collectively for all injuries.

Concerning the ALJ's referral to vocational rehabilitation evaluation, KRS 342.710 provides in pertinent part as follows:

> (1)One of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment, and preference shall be given to returning the employee to employment with the same employer or to the same or similar employment.
>
> ...
>
> (3)... When as a result of the injury he is unable to perform work for which he has 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. In all such instances, the administrative law judge shall inquire whether such services have been voluntarily offered and accepted. The administrative law judge on his own motion, or upon application of any party or carrier, after affording the parties an opportunity to be heard, may refer the employee to a qualified physician or facility for evaluation of the practicability of, or training necessary and appropriate to render him fit for a remunerative occupation.

The fundamental purpose of vocational rehabilitation is the restoration of an injured worker to gainful and suitable employment. KRS 342.710(1)(3) and Wilson v. SKW Alloys Inc., supra. "Suitable employment" has been interpreted to mean work that bears a reasonable

relationship to the employee's experience and background, taking into consideration the type of work the person was doing at the time of 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, supra.

At the hearing, Wedding testified she has never performed anything other than jobs involving manual labor and she could not return to her previous work. She also testified because she had no other training she did not know of any other work she could perform. Accordingly, she desired a rehabilitation opportunity at light work such as computer or clerical work. However, Wedding's testimony that she could not perform any of her past work was based on the problems she experiences in both wrists and shoulders.[3] In the findings of fact and conclusions of law, the ALJ stated Wedding had proven she was unable to perform the work for which she had previous training and experience. However, the ALJ did not provide the basis for this conclusion and declined to provide any further

[3] See pages 44-57 of the hearing transcript.

explanation in response to Collective Brand's petition for reconsideration which pointed out he failed to provide the appropriate findings of fact and conclusions of law and requested a revision of the opinion to include sufficient findings of facts and conclusions of law.

In the summary of Wedding's testimony, the ALJ discussed her testimony regarding the pain in her shoulders and wrists. He noted she continued to have pain in her wrists, elbow, and both shoulders and those problems existed when she returned to work in early 2008. The ALJ cited extensively to Wedding's hearing testimony indicating she could not go back to work because of the pain in her shoulders and wrists. He also noted she could not put any pressure on her wrists because of the pain. He stated Wedding also indicated reaching up or lifting heavy objects hurt her shoulders and her left shoulder gives her problems at night while sleeping. At the hearing, Wedding's testimony dealing with her inability to perform her previous job at Collective Brand pertained to her symptoms in both shoulders and wrists. Based on the ALJ's summary of Wedding's testimony, we conclude he awarded vocational rehabilitation benefits based upon Wedding's testimony regarding the effects of her problems in both wrists and shoulders, and not just her problems due to the right wrist

and right shoulder injuries. We also conclude remand is appropriate in light of Collective Brand's request for additional findings of fact in its petition for reconsideration regarding Wedding's entitlement to vocational rehabilitation benefits.

In summary, because the ALJ relied upon Dr. Bilkey's impairment rating attributing impairments to both wrists and shoulders and Wedding's testimony she could not return to her previous employment because of her bilateral problems in both wrists and shoulders, we believe remand is necessary. On remand, the ALJ must provide sufficient findings of facts and conclusions of law regarding Wedding's entitlement to vocational rehabilitation benefits based on the effects of the right wrist and right shoulder injuries.

We disagree with Collective Brand's contention Wedding is ineligible for vocational rehabilitation if she is able to perform some of her previous jobs. Though KRS 342.710 specifically provides that a person who is unable to perform work for which he has previous training or experience is entitled to vocational rehabilitation services, that provision cannot be viewed in isolation. Importantly, one of stated statutory goals is to return the injured worker to "suitable, gainful employment." In

Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387, 391 (Ky. 2001), the Supreme Court wrote "[r]estoring a worker to 'suitable employment' means attempting to achieve a reasonable relationship between the worker's pre- and post-injury earning capacity." Thus, the fact Wedding may be able to return to minimal wage earning employment performed in the past or for which she has training should not preclude her from entitlement to rehabilitation benefits. Wilson V. SKW Alloys Inc., supra. The fact there may be some jobs in Wedding's work history which she could still perform does not mean she is not entitled to vocational rehabilitation rights. As pointed out in Haddock v. Hopkinsville Coating, Corp., supra, one of the statutory goals is to return the injured worker to suitable gainful employment. Clearly, returning to a job she may have performed early in her work life does not necessarily establish Wedding is capable of returning to suitable gainful employment. Rather, Wedding is entitled to be restored to suitable employment which means achieving a reasonable relationship between the pre- and post-work earning capacity. In this case, we do not believe the jobs which Collective Brand asserts Wedding is still capable of performing necessarily constitutes suitable employment.

Addressing Wedding's cross-appeal, based on the ALJ's determination she sustained a work-related right wrist injury in 2005, Wedding is entitled to medical benefits for the treatment of the right wrist injury. Since the ALJ's determination Wedding sustained an injury to her right wrist resulting in a 2% impairment has not been appealed by Stride Rite, it is responsible for the medical benefits for the treatment of Wedding's right wrist injury. The ALJ explicitly stated he was relying upon Dr. DuBou in determining the extent of Wedding's 2005 injury. Dr. DuBou's records generated at the time he treated Wedding in 2005 and 2006, and his January 17, 2012, letter, clearly establish she sustained an injury to her right wrist for which he assessed a 2% impairment. Therefore, due to the 2005 injury, Wedding is only entitled to medical benefits for treatment of the right wrist injury for which Stride Rite is solely responsible. Conversely, Wedding is not entitled to medical benefits for treatment of her left wrist as the ALJ did not determine she sustained a left wrist injury in 2005 or 2008.

Concerning entitlement to medical benefits for the 2008 injury, if on remand the ALJ relies upon Dr. Bilkey's impairment for the right shoulder injury, Collective Brand is only responsible for medical benefits

for the treatment of the right shoulder injury. Collective Brand is not responsible for medical benefits for the treatment of the left shoulder and wrists.

Accordingly, on appeal and cross-appeal, those portions of the April 30, 2012, opinion, award, and order and the July 9, 2012, order ruling on the petitions for reconsideration relating to the ALJ's determination Wedding has a 10% impairment as a result of the February 13, 2008, injury and the award of PPD and medical benefits for the injury are **VACATED**. This matter is **REMANDED** to the ALJ for entry of an amended opinion, award, and order determining the impairment rating, if any, attributable to Wedding's February 13, 2008, right shoulder injury and, if appropriate, an award of PPD benefits and medical benefits. On remand if the ALJ accepts Dr. Bilkey's 3% impairment rating for the 2008 right shoulder injury, he must also determine whether the three multiplier is applicable based on the effects of the right shoulder injury. Similarly, the award of medical benefits for the February 13, 2008, injury shall be for the treatment of the right shoulder for which Collective Brand shall be responsible. Collective Brand shall not be responsible for any other medical benefits other than for treatment of the right shoulder injury. The ALJ shall also clarify that Stride Rite shall

only be responsible for medical benefits relating to the treatment of Wedding's 2005 right wrist injury.

The decision of the ALJ referring Wedding for a vocational rehabilitation evaluation pursuant to KRS 342.710 is also **VACATED**. On remand, in the amended opinion, award, and order, the ALJ shall enter sufficient findings of facts and conclusions of law regarding Wedding's entitlement to vocational rehabilitation rights pursuant to KRS 342.710 in conformity with the views expressed herein.

ALL CONCUR.

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