OPINION ENTERED: March 15, 2013

CLAIM NO. 200998399 & 200870079

LANE'S END FARM — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

CAROLYN VORISEK, BAPTIST PHYSICIANS SURGERY CENTER — RESPONDENTS/ CROSS-PETITIONERS

and

HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE — RESPONDENT

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

* * * * * *

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

ALVEY, Chairman. Lane's End Farm ("Lane's End") appeals and Carolyn Vorisek ("Vorisek") cross-appeals from the Opinion, Award and Order rendered June 25, 2012 by Hon.

Joseph W. Justice, Administrative Law Judge ("ALJ Justice") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. The parties also appeal from the order on reconsideration issued August 13, 2012, by Hon. Steven G. Bolton[1], Administrative Law Judge ("ALJ Bolton").

On appeal, Lane's End raises the following arguments: 1) The assessment of a three multiplier is not supported by substantial evidence or the findings of fact; 2) An analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) is required; 3) It was error to determine notice of the carpal tunnel injuries was provided as soon as practicable; 4) It was error to fail to provide credit for salary continuation payments made to Vorisek by Lane's End; and 5) It was error to fail to correct a miscalculation in the amount of out-of-pocket medical expenses paid by Vorisek.

In addition to the issues raised by Lane's End, Vorisek argues the following in her cross-appeal: 1) The failure to correct a miscalculation in the amount of out-of-pocket medical expenses paid, which must be reimbursed was erroneous; 2) It was an error to limit payment of medical

[1] This claim was reassigned to ALJ Bolton by order issued July 13, 2012.

expenses for the carpal tunnel syndrome injuries through only October 23, 2008; 3) Beginning TTD benefits on December 19, 2008 rather than October 24, 2008 was erroneous; and 4) It was error to terminate TTD benefits due to the shoulder injury on April 23, 2009, resuming on July 10, 2009, rather than a continuous award throughout the entire time period.

We affirm in part, vacate in part, reverse in part, and remand.

Vorisek filed two Form 101 - Application for Resolution of Injury Claims on January 20, 2009. In the first she alleged repetitive trauma injuries to both wrists while working at Lane's End from January 1, 2004 through September 15, 2008, caused by repetitive motion from working with horses. In the second Form 101, Vorisek alleged an injury to her right shoulder occurring on September 14, 2008 when the horse she was leading jerked her right arm.

Vorisek testified by deposition on June 3, 2009 and at the hearing held April 19, 2012. Vorisek is a resident of Lexington, KY, and was born on February 23, 1951. She completed high school and obtained a two-year degree in Equine Science at the University of New Hampshire. Her work history since college includes breeding and foaling mares, horse farm management, and training race horses. She also worked briefly as a veterinary assistant where she

cleaned and set up the operating room, and sterilized equipment. Her position at Lane's End required her to occasionally drag or pull foals weighing one hundred to one hundred and fifty pounds. She also lifted hay and feed weighing up to one hundred and fifty pounds. Other work duties included brushing and watering horses, and cleaning their stalls. Subsequent to her injuries, she worked briefly in shipping for Amazon in Lexington. She later worked for six months transporting baked goods for a bakery. Her most recent work has been as a foaling agent earning $480.00 per week, but she testified she would most likely be unemployed after the foaling season which generally runs from January through late May or early June. She also testified she is physically incapable of returning to her previous job at Lane's End.

Vorisek stated she first experienced wrist problems in 1997 while working for a previous employer as a foaling attendant. She was given wrist splints, and her problems dissipated after she ceased employment in 1998. Vorisek began working for Lane's End in January 2004, and first experienced wrist problems in May 2006. She advised her family physician of those problems and was prescribed wrist splints. Vorisek testified she was first advised she had work-related carpal tunnel syndrome on June 27, 2007.

She stated she was subsequently advised by her employer her repetitive trauma injuries were not covered by workers' compensation.

On September 14, 2008, Vorisek was leading a horse which jerked her arm. She had an immediate onset of right shoulder pain, but did not report the incident because she believed she had merely sustained a muscle strain which would resolve while she was off work for an upcoming carpal tunnel surgery. She took pain medication a few hours later, worked the rest of the day, and part of the next. The pain in her right shoulder progressed, and she stated she reported it to Lane's End on September 18, 2008, or September 23, 2008 at the latest.

Vorisek was paid no TTD benefits for either her carpal tunnel or shoulder injuries. She was paid $180.00 per week from September 15, 2008 through October 30, 2008 in salary continuation. She was terminated from her job on October 22, 2008 for failing to return after she recovered from her carpal tunnel surgery. She had previously been paid $180.00 per week for salary continuation for three weeks in July 2008 when she was off work recuperating from a previous carpal tunnel surgery.

Curtis Paul Ramsey ("Ramsey"), the assistant farm manager for Lane's End, testified by deposition on June 29,

2011. Ramsey stated Vorisek began working for Lane's End as a foaling person. He stated the foaling season is from January through May. He also stated Vorisek advised him she had carpal tunnel syndrome on one of the first occasions he spoke with her. He testified Vorisek never provided notice of a work injury. Finally, Ramsey testified Vorisek's restrictions would be accommodated if she was still employed there, but he would not hire someone with her restrictions.

David Monroe Denton ("Denton"), the yearling manager at Lane's End, testified by deposition on June 29, 2011. Denton stated Vorisek's work duties included assisting in preparation of yearlings for the treadmill, picking stalls, filling water buckets, sweeping the aisleway, lifting and dumping feed bags weighing up to fifty pounds, filling feed bags, lifting hay, placing salt blocks, and some overhead work. She was not required to groom horses due to her inability to perform repetitive activity. He stated small bales of hay weigh forty to one hundred pounds. He also stated feed bags and salt blocks weigh fifty pounds.

Shannon Foley ("Foley"), the executive assistant at Lane's End, testified by deposition on June 19, 2009. She testified Vorisek never reported a work injury to her, including the one to her right shoulder. Sometime in the

spring of 2008, Vorisek advised she was going to undergo carpal tunnel surgery in July 2008. Vorisek was paid salary continuation after her surgeries in July 2008 and September 2008. Foley denied advising Vorisek her carpal tunnel injuries are not covered by workers' compensation.

Vorisek submitted office notes from Dr. Margaret Napolitano with Kleinert and Kutz Hand Care Center, from October 29, 2007 through January 27, 2010. Dr. Napolitano diagnosed moderate bilateral carpal tunnel syndrome, and initially treated with injections. She performed a right carpal tunnel release on July 3, 2008, and a left carpal tunnel release on September 16, 2008. Vorisek was released to full duty, with no restrictions on August 9, 2008, after she recovered from her right carpal tunnel surgery. Vorisek was restricted from working with her left hand through October 23, 2008 while recuperating from her left carpal tunnel surgery, but began treatment for the right shoulder on October 22, 2008. On November 5, 2008, Dr. Napolitano indicated she was continuing to treat Vorisek for right shoulder pain and right trigger thumb problems. Dr. Napolitano's last note dated January 27, 2010 indicates Vorisek was seen for left thumb pain.

Vorisek submitted records from Dr. Glen A. McClung, II, an orthopedic surgeon, from October 2008

through November 17, 2009. Dr. McClung initially saw Vorisek on October 30, 2008 who complained of right shoulder pain for approximately one month. He diagnosed a probable partial tear of the rotator cuff versus full thickness tear of the supraspinatus; impingement; and, AC arthrosis. He requested a right shoulder MRI which demonstrated a full thickness rotator cuff tear. After noting her right shoulder pain had progressively worsened, on December 19, 2008, Dr. McClung performed a right shoulder arthroscopy, subacromial decompression, and debridement of partial thickness rotator cuff tear. On April 23, 2009, he released her to return to work with no restrictions. On July 10, 2009, he noted she had stiffness with internal rotation, administered injections to the right shoulder, and again took her off work. On October 29, 2009, Dr. McClung's office note indicates he released her to return to full duty work with no restrictions. However, the return to work slip reflects she was restricted from leading yearlings, overhead work, and lifting over fifty pounds. Those restrictions were confirmed in his November 12, 2009 office note.

Vorisek filed records from Bluegrass Orthopedics, where she was seen by Dr. Martin Favetto on May 19, 2006 and June 27, 2006. Dr. Favetto diagnosed mild carpal tunnel syndrome and de Quervains, along with a mass on the right

wrist. She saw Dr. William O'Neill on July 18, 2007 who diagnosed bilateral carpal tunnel syndrome and de Quervain's, for which he recommended surgery.

Vorisek submitted the Form 107-I report prepared by Dr. Scott Prince on December 14, 2009. Dr. Prince diagnosed bilateral carpal tunnel syndrome, status post release; and right supraspinatus tear with AC arthrosis and impingement, status post arthroscopic surgery. Dr. Prince determined the conditions were due to her work, which contributed to her need for surgery. Dr. Prince assessed a 5% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") for her shoulder injury, and none for her carpal tunnel syndrome. Dr. Prince opined she does not retain the capacity to return to the type of work she performed at the time of her injuries. He restricted her from overhead work with the right arm, lifting greater than fifty pounds, and leading animals at a high risk for unpredictable behavior.

Vorisek also submitted the December 2, 2010 report prepared by Dr. Martin Fritzhand. Dr. Fritzhand noted the surgery for the September 2008 right shoulder injury, and assessed a 5% impairment rating pursuant to the AMA Guides for that condition. He also assessed a 7% impairment rating

pursuant to the AMA Guides for her bilateral carpal tunnel condition. Dr. Fritzhand opined she does not retain the capacity to return to the type of work performed at the time of injury. He assessed restrictions of no repetitive reaching with the right upper extremity, no repetitive use of the hands, and no lifting over thirty-five to forty pounds.

Lane's End submitted reports of Dr. Joseph Zerga dated June 16, 2009; June 3, 2010; and February 7, 2011. Dr. Zerga performed a physical examination of Vorisek on June 16, 2009. He noted the September 14, 2008 injury to the right shoulder, and assessed a 3% impairment rating pursuant to the AMA Guides. He assessed no impairment for the carpal tunnel condition. He noted an EMG was normal, and indicated she should not work overhead with the right upper extremity. Dr. Zerga performed a records review on June 3, 2010, and assessed a 2% impairment rating pursuant to the AMA Guides for the right shoulder injury. He opined Vorisek should not work overhead with her right arm, lift over fifty pounds, nor lead animals at a high risk for unpredictable behavior. On February 7, 2011, Dr. Zerga noted he would assess no impairment rating for Vorisek's hands, but again indicated she qualified for a 3% impairment rating pursuant to the AMA Guides for her shoulder.

Lane's End submitted the report of Dr. Gregory Snider who evaluated Vorisek on July 6, 2009. It also submitted the subsequent report he prepared on June 7, 2010 based upon a records review. Finally, it filed the report generated as a result of the March 8, 2011 examination.

In his July 6, 2009 report, Dr. Snider diagnosed Vorisek as status post carpal tunnel syndrome; status post right rotator cuff debridement and subacromial decompression; and right shoulder adhesive capsulitis. He determined neither the right shoulder condition nor the carpal tunnel syndrome was due to her work for Lane's End. He further determined she needed no additional treatment for her carpal tunnel syndrome, but needed either manipulation or arthroscopic release of her right shoulder. He indicated she would have 0% impairment for her carpal tunnel, and he was unable to assess an impairment rating for her right shoulder because she had not reached maximum medical improvement ("MMI"). He assessed restrictions of no overhead work or lifting over thirty-five pounds with the right arm.

In his June 7, 2010 report, Dr. Snider stated Vorisek had reached MMI, and he assessed a 2% impairment rating pursuant to the AMA Guides for her right shoulder. He stated no restrictions should be imposed, and she

required no additional treatment. In his report dated March 8, 2011, Dr. Snider reiterated Vorisek had 0% impairment for her carpal tunnel condition, and he assessed a 1% impairment rating for the right shoulder pursuant to the AMA Guides. He again indicated no restrictions should be imposed.

A Benefit Review Conference ("BRC") was held on February 17, 2012. The BRC order and memorandum indicates the issues preserved for resolution included benefits per KRS 342.730; unpaid or contested medicals; TTD; work-relatedness/causation; injury as defined by the Act; notice; credit for salary continuation; vocational rehabilitation; average weekly wage for the shoulder injury; exclusion for pre-existing active condition; salary in lieu of TTD; Fawbush; and statute of limitations.

In the opinion rendered June 12, 2005, ALJ Justice first addressed Vorisek's right shoulder injury finding it compensable, and finding she provided due and timely notice. Specifically he found as follows:

> The ALJ finds plaintiff credible in her testimony
>
> . . .
>
> The ALJ finds that plaintiff sustained a work-related right shoulder injury on September 14, 2008.

ALJ Justice specifically outlined the history of Vorisek's shoulder injury, including a discussion of notice, which he found was sufficiently provided. He then addressed extent and duration, as well as application of multipliers as follows:

> The ALJ was persuaded by the report and opinions of Dr. Scott Prince, who performed an IME of plaintiff on December 14, 2009, when he assigned 5% WPI for the shoulder. He was also persuaded by Dr. Prince's restrictions of: 1. No overhead work with the right arm; 2. No lifting greater than 50 pounds; No leading animals at high risk for unpredictable behavior. Dr. Prince demonstrated more independence when he found favorably and unfavorably for Plaintiff. The ALJ finds that Plaintiff is entitled to the three-multiplier for her shoulder injury.

Regarding TTD benefits due to the shoulder injury, ALJ Justice found as follows:

> Plaintiff terminated her work on September 15, 2008, because of her carpal tunnel surgery the next day. There is no indication that Plaintiff would not have continued working without the CT surgery. She was released by Dr. Napolitano for her last carpal tunnel surgery on October 23, 2008. She did not return to work after September 15, 2008. She had her shoulder surgery on December 19, 2008. Dr. McClung released her with no restrictions on April 23, 2009. She returned on July 10, 2009, with capsulitis, for which Dr. McClung performed a procedure. She was again

> released to return to work with no restrictions on October 29, 2009.
>
> Plaintiff is entitled to TTD benefits for her right shoulder injury from December 19, 2008, Through April 23, 2009; and from July 10, 2009 through October 29, 2009.
>
> She is entitled to medical benefits for treatment of the right shoulder and any out of pocket expenses for this medication treatment.
>
> Plaintiff's AWW for the shoulder injury was $537.38.

ALJ Justice next addressed Vorisek's claim for benefits for her carpal tunnel condition as follows:

> The most difficult issue is Plaintiff's claim for income benefits as a result of her carpal tunnel syndrome. Defendant has pled that Plaintiff's claim for carpal tunnel is barred by notice and the statute of limitations. First, it is not when Plaintiff learned that she had carpal tunnel, but when she learned that it was work-related. The fact that she knew that certain types of her work exacerbated the condition is not decisive. It has to be communicated to her that the CTS was work-related. The ALJ has not seen any report that communicated this fact prior to June 27, 2007.
>
> It is undeniable that Plaintiff had CTS prior to her going to work for Defendant. She worked for Shadwell Farm in 1997 and had numbness and tingling in her hands. She was a foaling attendant, doing much the same work as for Defendant. Dr. Douglas Wegner diagnosed CTS, and gave her

splints. In 2000 she was treated by Dr. Weinrich and in her report she said Plaintiff had a history of CTS. In August 2001, CTS was mentioned as "mild symptoms" of CTS. Plaintiff introduced a medical record of Dr. Von Unrug dated June 27, 2007, in which the records of Dr. Leung was [sic] reviewed and she was informed that the CTS was work-related, and that she would need to have surgery.

When Plaintiff was working at Keenland sales in November 2003, doing "intensive brushing and cleaning of the horses for Lane's End Farm" when Callan Strouss offered her a job doing foaling at Lane's End. She told him that she had just done work that bothered her hands, and he assured her that she would not have to brush horses. She started there January 4, 2004. Then in March, she was asked by him to brush mud off the mares as they came in from the field. Then in June she had to prepare the mares and foals for the September sale. And again in January she was involved in preparing horses which involved a lot of brushing. On a visit to Dr. Schneider, he made an incidental finding that she was having "pain and numbness in the forearm and hands, right greater than left," after only five days of grooming. Plaintiff requested a note from Dr. Schneider which she gave to her employer that brushing horses would not be a good activity for her. Then on May 19, 2006, she saw her new family physician, Dr. von Unrug, complaining of hand pain. He referred her to Dr. Favetto, a hand specialist, who noted that in February 2006 she began to develop debilitating pain in [sic] hand and wrist. On June 27, 2006, she saw Dr. Favetto after de Quervain's injections. This resolved her pain for a time.

Finally on January 20, 2007, she had an EMG/NCS with Dr. Leung on June 27, 2007. After which his report was reviewed with Dr. von Unrug, which indicated the diagnosis of moderate CTS that it was work-related and he referred her to a hand surgeon, Dr. William O'Neill. After she saw Dr. O'Neill on July 18, 2007, she called the office and reported that fact to Mr. Strouss. She wanted a second opinion and saw Dr. Napolitano on October 29, 2007, who injected the hands on that day. She had a good response and returned to see Dr. Napolitano on December 12, 2007 and reported good relief. She then went to the office in December 2007 to discuss her situation with Mr. Foley and Mr. Strouss, and was told by Mr. Foley that she would not be covered by Workers' Compensation. She used her health insurance to pay for the treatment and surgeries. When her insurance would not pay for all her therapy, she paid for the balance out of her own funds. She was paid a salary for about a 25 hour work week during her time off, and after the surgery on September 16, 2008, she was paid through October 30, 2008.

The ALJ finds that Plaintiff's claim for benefits for her CTS is not defeated by lack of notice or the statute of limitations. He finds that Plaintiff's CTS pre-existed the employment at Defendant; that the work duties at Defendant exacerbated the condition, causing Plaintiff to have bilateral carpal release; that following her release by Dr. Napolitano, Plaintiff did not have a permanent impairment, and that her condition had returned to the pre-exacerbation baseline; and that she is

not entitled to future medical care for her CTS.

. . .

Plaintiff had a pre-existing condition of CTS. Her work duties at Defendant exacerbated that condition causing it to require medical treatment in surgery to both hands. The ALJ rejects any opinion of Drs. Snider or Zerga that her work at Lane's End did not exacerbate her CTS, requiring surgery. Therefore, the medical treatment for her bilateral CTS is compensable up until she was released by Dr. Napolitano.

The ALJ was persuaded by the reports and opinions of Drs. Prince, Snider, and Zerga that Plaintiff did not have WPI from the bilateral CTS following MMI from the surgeries. Dr. Napolitano released Plaintiff to work without restrictions. The ALJ did not find in the record that Plaintiff had returned to the doctor for any assignment of WPI. Plaintiff has, subsequent to the surgeries, complained of problems with her hands in working with her horses, which is similar to her work at Lane's End. But this condition is no different than her condition when she began her employment with Defendant that grooming of horses caused an exacerbation of her symptoms. Therefore, Plaintiff did not have any impairment greater than when she began work for Defendant. She is not entitled to PPD benefits. She is not entitled to future medical benefits for her CTS.

Plaintiff is entitled to TTD benefits for the periods of July 3, 2008 through August 9, 2008; and

> September 16, 2008 through October 23, 2008.

Finally, in addressing Lane's End's request for credit for salary continuation paid to Vorisek while she was recuperating from her carpal tunnel surgeries, ALJ Justice found as follows:

> Defendant has raised the issue that Defendant is entitled to credit for the wages paid Plaintiff while she was off work for the CTS surgeries. Defendant has not presented any authority that would entitle Defendant to a credit under KRS 342.730. The payments to her were not *in lieu* of compensation.
>
> Plaintiff's AWW for her CTS injury was $533.10; and for the shoulder injury was $537.38.

Both Lane's End and Vorisek filed petitions for reconsideration. In its petition, and supplement, Lane's End argued: 1) Vorisek is not entitled to the application of the three multiplier, and requested ALJ Justice to perform an analysis pursuant to Fawbush, supra; 2) Vorisek's carpal tunnel syndrome manifested in 2004; 3) Requested ALJ Justice to provide additional findings as to why a four week delay in providing notice of the carpal tunnel injury in 2007 was due and timely; and 4) Requested ALJ Justice provide additional findings as to why its request for credit for salary continuation was denied.

In her petition, and supplements, Vorisek argued: 1) ALJ Justice erred in limiting compensability of medical treatment for the carpal tunnel syndrome through October 23, 2008, and requested he place no time limitation on payment for her treatment for that condition; 2) ALJ Justice erred in his determination of the amount of out-of-pocket medical expenses to be reimbursed, and requested the actual amount should be $2,260.63 for the carpal tunnel syndrome, and $1,963.65 for the right shoulder without the inclusion of an additional $69.95 which is already included in the above amounts; 3) ALJ Justice erred in resuming her TTD benefits on July 10, 2009, rather than June 22, 2009, and later argued she should have been awarded TTD benefits continuously from December 19, 2008 through October 29, 2009, and requested the award be revised accordingly; 4) ALJ Justice erred in failing to address the request for vocational rehabilitation which had been properly preserved, and requested this be addressed; 5) ALJ Justice erred in stating she last worked on September 16, 2008, and the opinion should reflect her last day of work with Lane’s End was September 15, 2008; 6) The language in the opinion providing credit for TTD benefits previously paid should be deleted since none were in fact paid; and 7) Requested ALJ

Justice to provide specific findings as to when she reached MMI.

On August 13, 2012, ALJ Bolton issued an order addressing the issues raised for reconsideration by both parties. ALJ Bolton granted Vorisek's request to amend the opinion to reflect her last day of work was September 15, 2008. He denied her request to remove language allowing Lane's End credit for TTD benefits which may have been paid. Citing to Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), and Shelby Motor Co. v. Quire, 246 S.W.3d 443 (Ky. 2007), ALJ Bolton denied Vorisek's request to amend the decision regarding the limitation of medical benefits for the carpal tunnel syndrome only through October 28, 2008. ALJ Bolton also denied Vorisek's request to amend the amount of out-of-pocket medical expenses to be reimbursed.

Regarding Vorisek's request to amend the period of TTD benefits awarded, ALJ Bolton found as follows:

> Plaintiff's request that the ALJ modify the periods during which TTD was awarded is **DENIED**. Her request is based on counsel's analysis of the evidence in the record. However, the ALJ not only summarized the evidence before him, but commencing at page 23 of the Opinion, Award & Order alludes specifically to the factual evidence in the record upon which he bases his award. The ALJ may choose to accept or reject any testimony, or to believe or disbelieve any part of the evidence,

> regardless of whether it harkens from the same witness or the same adversary party's total proof. *Magic Coal v. Fox*, 19 S.W.3d 88 (Ky., 2000). His award here is based on his analysis of the most probative facts in the record according to his analysis and is not an error "… patently appearing upon the face of the award, order, or decision…".

Regarding Lane's End's request to amend the opinion to reflect Vorisek did not provide due and timely notice of the carpal tunnel injury in 2007 and the claim was untimely filed, ALJ Bolton found as follows:

> Defendant/Employers[sic] request that the Opinion, Award & Order be modified to bar Plaintiff's claim for untimely notification of a work-related injury (her carpal tunnel syndrome) is **DENIED**. The Defendant/Employer asserts that Plaintiff's carpal tunnel claim should be barred based on the statute of limitations. However, the ALJ engaged in a lengthy factual analysis at pages 26-29 as to why the claim is not barred and cited supporting law. Defendant here does nothing more than re-argue her position, which ignores the ALJ's factual finding that her EMG/NCS report as interpreted by Dr. von Unrug during her consult of June 27, 2007 resulted in a diagnosis of moderate CTS that was work related accompanied by a referral to Dr. O'Neill. The Plaintiff may not have definitely felt she had a compensable work-related injury until her consult with Dr. O'Neill on July 18, 2007 resulted in a recommendation for surgery, after which she immediately called her employer's representative. The Defendant/Employer certainly has a right to disagree as to

> the timeliness of the notification, but does not raise sufficient reason to modify the ALJ's Order with regard to this issue. It also appears on the facts that the filing of the Form 101 was timely.

ALJ Bolton denied Lane's End's request for additional findings regarding the denial of its request for credit for salary continuation stating, "[p]resumably there are sound public policy reasons for limiting credit to payment of benefits under the statute. See *Collins v. Cumberland Gap Provision Co.*, 754 S.W.2d 864 (Ky. App., 1988)."

Regarding Vorisek's request for specific findings as to when she reached MMI, ALJ Bolton found, "the evidence seems to sustain a conclusion that MMI as to Plaintiff's right shoulder injury was reached on or about October 29, 2009."

Regarding Land's End's request for an analysis pursuant to Fawbush, supra, ALJ Bolton found as follows:

> While the ALJ did not specifically cite to *Fawbush v. Gwinn*, 107 S.W.3d 5 (Ky., 2003) in his Opinion, Award and Order, it does appear from his extensive review of the Plaintiff's work history, medical history, medical evidence as to her current injury as well as the restrictions placed on her by both the treating and examining physicians that he fully considered all of the relevant factors in awarding the

> three-multiplier, as well as the applicable periods of compensation.
>
> For these reasons, the remaining issues raised in Defendant/Employer's Petition(s) for Reconsideration are **DENIED**.

Finally, regarding Vorisek's request for vocational rehabilitation, ALJ Bolton found as follows:

> [t]he ALJ failed to specifically address vocational rehabilitation pursuant to KRS 342.710, probably because the Plaintiff testified at her hearing that she had returned to work at another horse farm as a foal attendant, which was her usual and customary employment, albeit with restrictions. As there was no evidence that the Plaintiff is unable to perform work for which she has previous training or experience, her request for vocational rehabilitation is **DENIED.**
>
> To the extent not modified or otherwise addressed by this Order, the Order, Award and Opinion is hereby incorporated herein and made a part hereof, the same as if set out in words and letters.

Vorisek, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Where she was successful in her burden, the question on appeal is whether the ALJ's finding is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App.

1984). Substantial evidence is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

Where she was unsuccessful, the question is whether the evidence compels a finding in her favor. Wolf Creek Collieries v. Crum, supra. Compelling evidence is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The 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 supporting a different outcome than 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).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 79 (Ky. 1999).

I.

NOTICE OF CARPAL TUNNEL INJURIES.

We will first address Lane's End's request for findings supporting ALJ Justice's determination Vorisek gave due and timely notice of her carpal tunnel claim, despite a delay in doing so. Vorisek was first apprised her carpal tunnel condition was work-related on June 27, 2007, but she did not notify her employer until July 18, 2007. Lane's End argues notice must be provided as soon as practicable pursuant to KRS 342.185, and a three week delay in doing so is insufficient.

Regarding notice of the carpal tunnel injuries, ALJ Justice found, "Plaintiff's claim for benefits for her CTS is not defeated by lack of notice or the statute of

limitations." He did not explain why he found the delayed notice sufficient. In its petition for reconsideration, Lane's End requested additional findings of fact regarding this issue. In the order on reconsideration, ALJ Bolton provided an explanation, and declined to reverse ALJ Justice's determination.

As noted by Lane's End, Shields v. Pittsburgh and Midway coal Mining Co., 634 S. W.2d 440 (Ky. App. 1982), requires an ALJ to make sufficient findings of fact in order to permit meaningful review on appeal. ALJ Bolton's explanation, while brief, is sufficient to provide such review, does not appear to be erroneous, and will not be disturbed.

II

APPROPRIATE PERIOD(S) OF TTD BENEFITS.

We next turn to the issue of the appropriate period(s) of TTD benefits. We cannot say the outcome arrived at by ALJ Justice in finding Vorisek entitled to TTD benefits only for the periods of December 19, 2008, through April 23, 2009, and again from July 10, 2009 through October 29, 2009, is so unreasonable based upon the evidence it must be reversed as a matter of law.

KRS 342.0011(11)(a) defines TTD as follows:

> [T]he condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

The above definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Supreme Court further explained:

> "[i]t would not be reasonable to terminate the benefits of an employee when she is released to perform minimal work but not the type that is customary or that she was performing at the time of his injury."

In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant's level of improvement permits a return to the

type of work he was customarily performing at the time of the traumatic event.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court in Helms, supra, stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
>
> Id. at 580-581.

Here the ALJ found most persuasive Dr. McClung's report dated April 29, 2009 releasing Vorisek to return to work without restrictions. Because she was released without restrictions, it was reasonable for the ALJ to infer she could perform all of her previous work, including the type she was performing at the time injury. There is no evidence of record confirming she was incapable of working until July 10, 2009 when a procedure was performed releasing her capsulitis. While a physical therapy note from June 22, 2009 may have noted a frozen shoulder, she was not taken off work at that time. The award of TTD benefits is supported

by substantial evidence, and a contrary result is not compelled.

III

FAWBUSH ANALYSIS –
APPLICATION OF THREE MULTIPLIER.

Lane's End next argues the ALJ erred by failing to perform an analysis pursuant to Fawbush, supra. We disagree. Vorisek's average weekly wage ("AWW") at the time of her September 2008 shoulder injury was $537.38. At the time of her carpal tunnel injury it was $533.10. She did not return to work for Lane's End after September 15, 2008. Her first employment subsequent to her injuries was at Amazon performing a seasonal job from November 29, 2010 through December 23, 2010. A W-2 was filed, and Lane's End by extrapolation attempted to calculate an AWW while she worked there to be greater than she earned prior to her injuries, without having filed the actual wage records. Such argument is speculative. We do not believe a Fawbush analysis is required in this instance, and ALJ Justice's application of the three multiplier found in KRS 342.730(1)(c)1 was not in error. Where there is insufficient evidence to calculate a post-injury AWW, a Fawbush analysis is inapplicable. A Fawbush analysis is only required where the facts establish both KRS

342.730(1)(c)1 and 2 could apply. In this instance, a Fawbush analysis was not required, and the determination of the application of the three multiplier will not be disturbed.

IV

REIMBURSEMENT OF OUT-OF-POCKET EXPENSES PAID BY VORISEK.

Both Vorisek and Lane's End argue the award of reimbursement for out-of-pocket expenses was incorrect. Vorisek argues ALJ Justice correctly found she should be reimbursed $2,260.63 for out-of-pocket expenses paid for the carpal tunnel syndrome, and $1,963.65 for the right shoulder. However, ALJ Justice erred in awarding an additional $69.95 which is already included in the above amounts. Lane's End agrees. In the order on reconsideration, ALJ Bolton failed to correct this error. Therefore, on remand, he is directed to correct this finding since the parties agree the additional $69.95 is not owed.

V.

CREDIT FOR SALARY CONTINUATION.

It is undisputed Vorisek received $180.00 per week in salary continuation, after taxes withheld, for three weeks in July 2008, and again from September 16,

2008, through October 30, 2008. Lane's End argues it is entitled to credit for these payments against the award of TTD benefits. ALJ Justice determined it was not entitled to such credit, as did ALJ Bolton on reconsideration.

Lane's End argues the credit issue is governed by KRS 342.730(6), and it is entitled to a dollar for dollar credit for voluntary payments made pursuant to Triangle Insulation & Sheet Metal Co., Div. of Triangle Enterprises, Inc. v. Stratemeyer, 782 S.W. 2d 628 (Ky. 1990).

Lane's End had the burden of establishing entitlement to such credit. Dravo Lime Co. Inc., v. Eakins, 166 S.W. 3d 283 (Ky. 2005). Foley testified the payments were made, and Vorisek admitted she received them. Although Lane's End denied the carpal tunnel injuries were compensable, it never-the-less provided voluntary payments to Vorisek. Although ALJ Justice determined these payments were not made in lieu of TTD benefits, the fact remains they were paid voluntarily for a condition which was later found compensable. It is axiomatic the payment of voluntary income benefits should be encouraged rather than discouraged.

The Board has no fact-finding authority, so it is necessary to remand this matter for additional findings. On remand, ALJ Bolton must determine whether the salary

continuation payments were *de facto* made in lieu of the payment of TTD benefits. Although we are vacating and remanding this matter for the proper analysis and additional findings, we are not compelling any particular result. After performing this analysis, the ALJ may either conclude a credit for voluntary payment of benefits is or is not applicable.

VI.

AWARD OF MEDICAL BENEFITS FOR THE CARPAL TUNNEL INJURIES ONLY THROUGH OCTOBER 23, 2008.

In this instance, ALJ Justice specifically found Vorisek sustained only exacerbations of her ongoing active carpal tunnel condition from when she first complained in 1997 while working for a previous employer. He provided his reasonable explanation for doing so based upon the evidence. We find no error in the ALJ's award of temporary medical benefits for the carpal tunnel injuries injury consistent with Robertson, supra, and FEI Installation Inc. vs. Williams, 214 S.W.3d 313 (Ky. 2007). The ALJ's findings are supported by substantial evidence and in conformity with the Act.

VII.

COMMENCEMENT DATE OF PPD AWARD.

KRS 342.285(2)(c) provides the Board may determine on appeal whether an order, decision, or award is in conformity to the provisions of KRS Chapter 342. KRS 342.285(3) provides, in relevant part, the Board may, "in its discretion," remand a claim to an ALJ "for further proceedings in conformity with the direction of the board." These provisions permit the Board to *sua sponte* reach issues even if unpreserved in order to properly apply the law. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

Although not raised in this appeal, it is clear ALJ Justice erred in determining the PPD benefits award would commence on October 30, 2009, despite the injury occurring on September 14, 2008. Pursuant to Sweasy v. Wal-Mart Stores, Inc. #1269, 295 S.W.3d 835 (Ky. 2009), and KRS 342.730(1)(d), PPD benefits are to be paid from the date the impairment rises, which is when the work-related injury produces a harmful change in the human organism.

In Sweasy, the Kentucky Supreme Court held:

> This appeal concerns KRS 342.730(1)(d), which provides compensable periods of 425 weeks for disability ratings of 50% or less and of 520 weeks for disability ratings that exceed 50%. KRS

342.730(1)(d)'s failure to specify when the period of a 425–week award begins may be read to imply legislative intent to permit such an award to begin on a date other than when the permanent impairment or disability of 50% or less arises. Yet, mindful of policy and purpose for which KRS 342.730(1)(b)-(e) were enacted, we conclude that the legislature intended no such absurdity. Neither the Court of Appeals nor the employer points to a reasonable basis for an ALJ to commence benefits on a date other than the date that the permanent impairment or disability arises. Perceiving there to be no reasonable basis, we turn to the question of when permanent impairment or disability arises for the purpose of commencing partial disability benefits.

A condition “arises” when it comes into being, begins, or originates. Thus, impairment arises for the purposes of Chapter 342 when work-related trauma produces a harmful change in the human organism. That usually occurs with the trauma but sometimes occurs after a latency period. In either circumstance the authors of the American Medical Association's Guides to the Evaluation of Permanent Impairment consider the amount of impairment that remains at MMI to be “permanent.” The fact that they direct physicians to wait until MMI to assign a permanent impairment rating does not alter the fact that the permanent impairment being measured actually originated with the harmful change. We conclude, therefore, that the compensable period for partial disability begins on the date that impairment and disability arise, without regard to the date of MMI, the worker's disability rating, or the compensable period's duration.

> The evidence compelled a finding that the claimant's injury produced permanent impairment and disability from the outset. Thus, it also compelled a partial disability award in which the compensable period began on the date of injury. The claim must be remanded for that purpose.

Sweasy, 840, 841 (footnotes omitted).

Based upon the foregoing, it was error for ALJ Justice to determine the 425 week payment period of PPD benefits did not begin until October 30, 2009. No period of latency as discussed in Sweasy is present here. Specifically, Vorisek experienced the injury and subsequently missed work due to an unrelated condition. She did not return to work after she recovered from the unrelated carpal tunnel injuries. No TTD benefits were paid, but it cannot be said Vorisek had any delay in onset of her disability. We therefore reverse ALJ Justice's determination of the appropriate PPD onset date. On remand, ALJ Bolton shall order the compensable period began commensurate with the September 14, 2008 injury date, extended by periods of TTD benefits pursuant to KRS 342.730(1).

Accordingly, the opinion and award rendered on June 25, 2012 by Hon. Joseph W. Justice, Administrative Law Judge, and the order ruling on the petition for

reconsideration issued August 13, 2012, by Hon. Stephen G. Bolton, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART, REVERSED IN PART, AND REMANDED** for further findings and entry of an amended opinion and award in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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