

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 4, 2015

CLAIM NO. 201368008 & 200778610

RIVER CITY DISTRIBUTING, INC.

PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

TONY PENTA
GENERAL ELECTRIC COMPANY
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING
* * * * *

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

STIVERS, Member. River City Distributing, Inc. ("River City") seeks review of the March 25, 2015, Opinion, Award, and Order of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") finding Tony Penta ("Penta") sustained a temporary injury while in the employ of General Electric Company ("GE") and awarding temporary total disability

("TTD") benefits from September 5, 2013, through November 19, 2013, and medical benefits. No petition for reconsideration was filed.

On March 27, 2014, Penta filed a Form 101, Claim No. 201368008, alleging on August 21, 2013, he was injured at GE when a co-worker "yanked refrigerator and twisted me around injuring my back with leg pain." He indicated the body part injured is his back.

On June 26, 2014, during the pendency of his claim against GE, Penta filed a motion to reopen his claim against River City, Claim No. 200778610, asserting there had been a change in his condition and he was now more disabled since the June 29, 2010, Opinion and Award entered by Hon. James L. Kerr, Administrative Law Judge ("ALJ Kerr"). Penta noted he was injured while working for River City and ALJ Kerr determined he had a 27% impairment and the award of permanent partial disability ("PTD") benefits was enhanced by the three multiplier. Penta stated he had been referred to vocational rehabilitation but instead sought employment with GE where he was injured on August 21, 2013. Penta asserted GE was contending his missed work, the medical treatment he received, and potential additional impairment were the result of the prior work

injury and not the alleged injury at GE. Penta's affidavit was attached.

River City filed the medical records of Dr. Mohammad E. Majd, the orthopedic surgeon, who had previously performed fusion surgery on Penta's low back as a result of the 2007 injuries at River City. It also filed a special answer citing KRS 342.035(3) and asserting there was an issue as to whether Penta unreasonably failed to submit to or follow competent medical aid or advice. In addition, River City filed a Form 112 contesting the medical bills it had been paying, specifically those of Dr. Majd. It also filed a motion to join Dr. Majd. River City noted Penta had sustained two work-related injuries while in its employ on April 1, 2007, and on August 12, 2007, and was awarded income and medical benefits. It represented it had paid all of Penta's medical benefits but based on the medical records of Dr. Majd as well as the filing of a new injury claim against GE, it asserted Penta's current medical treatment is not reasonable and necessary or causally related to the 2007 injuries. Instead, the medical treatment was due to the 2013 injury.

By order dated August 6, 2014, Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") sustained both motions to reopen to the extent the claim

would be assigned to the ALJ for further adjudication. In addition, the motion to join Dr. Majd was sustained and he was joined as a party.¹

In a June 29, 2010, Opinion and Award, ALJ Kerr found Penta sustained work-related injuries and had a 27% impairment rating as a result of two level fusion surgery performed by Dr. Majd. Penta's income benefits were enhanced by the three multiplier. ALJ Kerr awarded TTD benefits from August 13, 2007, through August 28, 2009. Beginning August 29, 2009, Penta was to recover \$507.59 per week for the period not to exceed 425 weeks.

There is no dispute that after ALJ Kerr's decision and before the August 21, 2013, injury, Penta had received medical treatment for his low back problem. In fact, on August 15, 2013, he saw Dr. Majd for low back problems. On that date, Dr. Majd ordered an x-ray performed that same day and an MRI which was performed on August 31, 2013. Penta contended this visit for low back problems related to kidney problems, and not symptoms from his previous work injuries. However, Dr. Majd testified that at the time he saw Penta on August 15, 2013, for low

¹ The ALJ subsequently ordered the claims consolidated.

back complaints he had no indication the back pain was due to a kidney problem.

The telephonic Benefit Review Conference ("BRC") Order and Memorandum of December 9, 2014, reveals the contested issues for the 2007 injury on reopening were as follows:

1. Whether there is a worsening of the lumbar condition/increase in impairment, entitlement to TTD and PTD.
2. Failure to follow medical advice.
3. Entitlement to vocational rehabilitation, failure to pursue and application of a 50% reduction for failure to pursue.
4. Compensability of ongoing and future medical benefits.

The contested issues for the August 21, 2013, claim were as follows:

1. Exclusion for preexisting active condition.
2. Work-relatedness/causation.
3. Injury as defined by the ACT.
4. Extent and duration - entitlement to income benefits, TD and PTD.
5. Exclusion for disability due to failure to pursue vocational rehabilitation.
6. Credit for income benefits due to 2007 claim.
7. Credit for unemployment.

GE introduced the report of Dr. Thomas Loeb and the depositions of Drs. Loeb and Majd. River City introduced the report of Dr. John Vaughn. In addition numerous medical records from Dr. Majd and other medical providers were also introduced. Penta introduced the independent medical evaluation ("IME") report of Dr. Warren Bilkey.

The ALJ entered the following findings of fact and conclusions of law:

Related to the 2007 claim:

A. Whether there is a worsening of the lumbar condition/increase in impairment, entitlement to TTD and PTD.

1. Principle of law.

When work-related trauma arouses or exacerbates a pre-existing condition, it has caused a harmful change in the human organism, i.e., an injury as defined by KRS 342.0011(1). Although impairment that results is compensable, the type and duration of benefits depends on whether the impairment is permanent or temporary. To the extent that the condition is active immediately before the trauma occurs, it cannot have been aroused by the trauma and, thus, to that extent cannot be compensable. "[T]o be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury." *Finley v. DBM Technologies*, 217 S.W. 3d 261 (Ky. App.

2007). The employer bears the burden of proving the existence of a pre-existing, active disability.

2. Findings of fact and conclusions of law.

Plaintiff did not suffer a harmful change, only a temporary exacerbation and, therefore, is not entitled to additional PPD, only TTD.

3. Evidentiary basis and analysis.

After careful consideration of the conflicting medical evidence, the opinion of Dr. Majd is convincing that no harmful change occurred and is supported by the opinions of Dr. Loeb and Dr. Stephens. Dr. Bilkley [sic] has added a worsening of 3% but this opinion is not found persuasive.

The evidence does, however, support a finding of a temporary exacerbation occurring on August 21, 2013. GE has strenuously argued that the additional pain was preexisting and active at the time of the August 21, 2013 injury based on the medical evidence and the ongoing treatment by Dr. Majd and particularly the scheduling of the MRI prior to the August 21, 2013 event. Still, Plaintiff is found credible and his testimony that his pain increased significantly with the event is persuasive. While he is not entitled to additional income benefits, he is entitled to a period of TTD from the date Dr. Majd took him off work on September 5, 2013 through November 19, 2013 when he allowed Penta to return to full duty.

B. Unreasonable Failure to follow medical advice.

1. Principle of law.

Pursuant to KRS 342.035(3), no compensation shall be payable for disability of an employee if his disability is aggravated, caused or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice. The burden to prove an affirmative defense, in this instance the application of KRS 342.035(3), rests with the employer. *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334, 336 (Ky. App. 1995). The determination of whether failure to follow medical advice was unreasonable is a question of fact for the ALJ. *Fordson Coal Co. v. Palko*, 282 Ky. 397, 138 S.W.2d 456 (1940).

2. Findings of fact and conclusions of law.

Penta did not unreasonably fail to follow medical advice and no reduction will be assessed.

3. Evidentiary basis and analysis.

The evidence supports the finding Penta, to the best of his ability, was compliant. He was hired by GE in a job within his restrictions and continued to try and remain within those restrictions. If he ever worked outside his restrictions, the proof does not show an "unreasonable" event.

C. Entitlement to vocational rehabilitation, failure to pursue and application of a 50% reduction for failure to pursue.

1. Principle of law.

Under KRS 342.710(3), an employee, who is unable to perform work for which he has previous experience or training as the result of a work injury, shall

be entitled to vocational rehabilitation services, including retraining and job placement, in order to "restore [him] to suitable employment." "Suitable employment" is defined as work that bears a reasonable relationship to an employee's experience and background, taking into consideration the type of work performed at the time of injury, age, education, income level, earning capacity, physical and mental abilities, vocational aptitude, and other relevant factors. See *Wilson v. SKW Alloys, Inc.*, 893 S.W.2d 800 (Ky. App. 1995). Whether to award vocational rehabilitation is a matter committed to the discretion of the ALJ. See *Carnes v. Parto Bros. Contr. Inc.*, 171 S.W.3d 60 (Ky. App. 2005). The purpose of vocational rehabilitation is the "restoration of the injured employee to gainful employment." KRS 342.710(1).

2. Findings of fact and conclusions of law.

No decrease will apply for failure to pursue vocational rehabilitation.

3. Evidentiary basis and analysis.

There is simply not enough evidence to find a 50% reduction for not pursuing vocational rehabilitation. Furthermore, the point of vocational rehabilitation is to return workers to some form of employment and Penta did that on his own by working at GE.

The contested issue as set out by the parties includes "entitlement to vocational rehabilitation" but there appears to be no evidence in the record that Penta wishes to pursue vocational rehabilitation. Therefore, this issue will not be addressed.

D. Compensability of ongoing and future medical benefits.

1. Principle of law.

KRS 342.020 mandates that the employer pay for the cure and relief from the effects of the injury as may reasonably be required at the time of the injury and thereafter during disability. Unlike KRS 342.0011(11) and KRS 342.730(1), KRS 342.020(1) does not state eligibility for medical benefits requires proof of a permanent impairment rating, of a permanent disability rating, or of eligibility for permanent income benefits. Moreover, it states clearly liability for medical benefits exists "for so long as the employee is disabled regardless of the duration of the employee's income benefits." See *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007). To be compensable, however, medical treatment must be reasonable and necessary.

2. Findings of fact and conclusions of law.

GE is responsible for medical benefits related to the temporary exacerbation; River City's responsibility is suspended only for the period from the date of injury, August 21, 2013 through the date Penta was released to full duty, November 19, 2013, with the exception of the post injury MRI.

3. Evidentiary basis and analysis.

Dr. Vaughan's report is most convincing on this issue relating to the temporary exacerbation as a result of the event at GE. As such, the only medical bills for which GE is responsible are those following the

August 21, 2013 temporary exacerbation until Penta was released to return to work. The MRI, however, had already been scheduled prior to that event and GE should not have to bear this burden. Once Penta was released to full duty, River City is responsible for ongoing medical care related to the low back.

Related to the August 21, 2013 claim:

A. Work relatedness/causation and preexisting active impairment of low back.

B. Injury as Defined by the Act.

C. Benefits per KRS 342.730 and credit for unemployment and income benefits due to 2007 claim.

D. Extent and duration entitlement to income benefits, TTD benefits and PTD.

As noted above, the August 21, 2013 event is found only to be a temporary exacerbation. The ALJ believes all the issues are addressed in the above section and, as there is no additional permanency found as a result of the August 21, 2013 event, additional findings are not necessary.

Neither party filed a petition for reconsideration.

On appeal, River City challenges the ALJ's decision on three grounds. First, it contends the finding KRS 342.035(3) does not apply is not supported by substantial evidence. It submits Penta was given medical restrictions by Dr. Majd following the 2007 injury of no lifting more than ten to fifteen pounds, no repetitive

bending, and no prolonged sitting or twisting. River City contends GE's job description reveals Penta was required to bend and twist continuously. It argues Penta's perception of whether his job required repetitive bending or twisting is somewhat shaky as he testified his job did not really require that much bending or twisting. However, he also testified he had to bend around twenty to thirty times per day as well as turn to retrieve parts on a regular basis. At the hearing, it contends Penta admitted he was required to do "a lot of twisting a lot of turning around." River City maintains Drs. Majd and Vaughn concluded Penta's job at GE was outside his work restrictions. It contends Dr. Majd assigned these restrictions because repetitive twisting and bending would aggravate his pain. River City argues Penta's failure to abide by the restrictions aggravated and exacerbated his lumbar condition which is demonstrated by the fact he had not received any treatment for the 2007 injury for two years prior to beginning work at GE. It notes that after Penta returned to work, he saw Dr. Majd four times in 2013. River City contends it met each element of KRS 342.035(3) and there is no evidence upon which the ALJ could rely in finding Penta's failure to follow medical advice had not caused his current lumbar complaints.

Next, River City asserts the finding KRS 342.710(3) does not apply is not supported by substantial evidence. It takes issue with the finding there is not enough evidence to find a 50% reduction for not pursuing vocational rehabilitation. River City contends a review of the record shows it met its burden of showing vocational retraining was ordered and Penta failed to undergo this retraining. It argues ALJ Kerr awarded vocational retraining and Penta admitted he failed to undergo the retraining even though available. Penta's only explanation for his failure to undergo retraining was that he was not sure what direction he wanted to go with retraining at that time. Further, Penta did not present any evidence to show retraining was impracticable or inappropriate. Therefore, the ALJ's failure to order a 50% reduction in benefits is not supported by the evidence.

Finally, River City argues the ALJ's refusal to address whether Penta is entitled to undergo retraining in relation to the 2007 claim is improper. It notes the parties listed as a contested issue whether Penta was entitled to vocational retraining at the present time or whether his failure to undergo the retraining should bar him from undergoing retraining now. River City complains that even though the issue was listed as a contested issue,

the ALJ improperly refused to address this issue. Further, it contends her stated reason for refusing to address this issue, there is no evidence in the record Penta wishes to pursue vocational retraining, is not supported by the record. River City notes Penta testified that since his 2013 injury at GE he is now interested in pursuing retraining in gunsmithing. Therefore, this matter should be remanded to the ALJ with instructions to enter findings on this issue.

Concerning the first issue raised by River City, KRS 342.035(3) reads as, in relevant part, follows:

No compensation shall be payable for the death or disability of an employee if his or her death is caused, or if and insofar as his disability is aggravated, caused, or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice.

River City's first argument is puzzling, as the March 25, 2015, decision does not impose liability for medical or income benefits upon River City other than those previously awarded by ALJ Kerr in 2010. The March 2015 decision only imposes liability for income and medical benefits upon GE.

That said, the record is far from conclusive as to whether Penta unreasonably failed to submit to or follow

competent medical aid or advice. During his June 25, 2014, deposition, Penta testified his restrictions were no repetitive bending or twisting, no standing over twenty-five minutes, and no lifting over twenty pounds. However, he later testified he mentioned to GE's doctor his restriction was not to lift more than twenty-five pounds. In addition, he was hired with a twenty-five pound weight limit restriction.

During his September 4, 2014, deposition, Penta again identified bending, twisting, lifting, and standing as restrictions previously imposed. He testified he would bend to move dishwashers on and off the conveyer belt and to assemble a door. He estimated he bent approximately twenty to thirty times a day. However, he held no weight when bending and denied stooping or twisting. Penta also indicated a couple of the jobs he performed at GE involved no twisting and bending.

During the hearing, Penta disagreed with GE's job description stating his job required no bending or twisting. He expressly stated his injury did not occur when he was lifting but rather when he was jerked while working on the refrigerator line. Thus, we believe the ALJ's finding that to the best of his ability Penta was compliant with his restrictions is supported by the

evidence. The ALJ specifically found Penta was hired by GE within the restrictions and continued to try and remain with those restrictions. The ALJ's finding that if Penta ever worked outside his restrictions, the proof does not show an unreasonable event is supported by the evidence and will not be disturbed.

Since River City is the appealing party the question on appeal is whether the evidence compels a different result than sought by River City. "Compelling evidence" is defined as evidence that is 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d

329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

In the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is any substantial evidence in the record to support the ALJ's conclusion. Stated otherwise, where no petition for reconsideration was filed

prior to the Board's review, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

River City did not contest the ALJ's finding by filing a petition for reconsideration. Thus, we are bound by the ALJ's finding and have no authority to disturb her finding since it is supported by substantial evidence. Since the evidence does not compel the result River City seeks, the ALJ's decision on this issue will be affirmed.

Moreover, we note both Drs. Majd and Vaughn stated there was no change in Penta's physical condition since the injury of August 21, 2013. Both doctors indicated there was no recurrent focal disc herniation or structural abnormalities other than what would be expected following the 2008 injury. Further, Dr. Loeb, upon whom the ALJ relied in determining "no harmful change occurred," opined Penta experienced a transient soft tissue strain or sprain of the lumbar spine. He found no evidence of any structural anatomical or physiological change. Dr. Loeb specifically stated Penta's actions did not cause any further permanent

harm to the work injury site. He also noted the August 31, 2013, MRI revealed no acute change or recent trauma. Dr. Majd stated there was no basis to assert the incident at GE caused a new acute condition, structural change, or physiological change. Dr. Vaughn believed Penta's problems related to the previous work injury which necessitated the two level fusion.

Other than Dr. Bilkey, there is no evidence Penta's low back condition was adversely affected by his alleged failure to follow medical advice. Relative to that issue, Dr. Vaughn does not state Penta worked outside his restrictions. Rather, he stated that if Penta was working outside his restrictions from the 2007 injury it would increase the likelihood of an exacerbation of the symptoms or re-injury to his back. The testimony of Dr. Majd on this issue is somewhat equivocal. Although Dr. Majd acknowledged being in a seated position which required twisting to grab parts could be considered an unreasonable failure to follow medical advice, he also testified as follows:

Q: Doctor, I just have one area that I want to discuss with you. Would it be fair to say that without knowing exactly what your previous restrictions were, the permanent restrictions, and without knowing in detail what Mr. Penta's job at GE involved; that you could not tell the judge if he had unreasonably followed your advice?

A: That is fair.

Thus, the ALJ's finding Penta did not unreasonably fail to follow medical evidence is supported by the evidence.

Regarding River City's argument the ALJ erroneously determined KRS 342.710(3) does not apply, KRS 342.710(3) reads, in relevant part, as follows:

The administrative law judge on his or her 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, need for, and kind of service, treatment, or training necessary and appropriate to render him or her fit for a remunerative occupation. Upon receipt of such report, the administrative law judge may order that the services and treatment recommended in the report, or such other rehabilitation treatment or service likely to return the employee to suitable, gainful employment, be provided at the expense of the employer or its insurance carrier. Vocational rehabilitation training, treatment, or service shall not extend for a period of more than fifty-two (52) weeks, except in unusual cases when by special order of the administrative law judge, after hearing and upon a finding, determined by sound medical evidence which indicates such further rehabilitation is feasible, practical, and justifiable, the period may be extended for additional periods.

The evidence in the record consists in part of the vocational evaluation report of Goodwill Industries of Kentucky and two letters dated September 24, 2010, and January 28, 2011, from Carol Hughes ("Hughes"), a Workers' Compensation Specialist, Vocational Rehabilitation. The vocational evaluation report reads, in relevant part, as follows:

3. Mr. Penta should begin to research academic programs in his area. He should contact the Kentuckiana College Access Center to schedule an appointment. The representatives at KCAC can help him find academic programs that will allow him to pursue careers in his interest areas. If Mr. Penta is unsure which degree is best suited for him, then his KCAC representative can help him apply for admission and financial aid and Mr. Penta can meet with an academic advisor for additional career guidance once he is accepted into a program. Mr. Penta seems to have a fairly good grasp of his vocational options based on his skills, interests, and limitations, but it is important for him to explore a variety of vocational skills to make sure he will enjoy a program before committing to it.

4. Mr. Penta's TABE scores indicate that he will, most likely, excel in post-secondary courses. He should require no remedial courses or tutoring to do well in school.

5. If Mr. Penta's worker's compensation benefits end before he finishes his degree, then he may need to work at least part time, and will therefore

need to find a job. Mr. Penta should begin looking into positions to find out more information about them. If able, working while attending school may make Mr. Penta more employable following graduation. However, without pursuing training for a career, finding a position may be difficult. While Mr. Penta's physical limitations restrict him from doing much of the work he has performed throughout his life, Mr. Penta is still qualified to perform a variety of positions that do not require lifting over 20 pounds, twisting, bending, or long standing periods. Mr. Penta should be encouraged to learn what he can and cannot do on the job. This will make him more aware of his limitations, and better suited to discuss these limitations with employers to negotiate positions. He may also benefit from job placement services through a workforce development center, career center, or the job placement services at the school he attends. Here, he will have access to mock interviews, resume' building workshops, etc. that may help him find a job when he is ready to return to work.

6. While in school, Mr. Penta should join any clubs or organizations that relate to his degree program. Participation in a group will allow Mr. Penta networking opportunities which may prove beneficial when looking for a job.

7. Depending on the nature of his work, Mr. Penta may need to arrange accommodations with his employer. These accommodations include: no lifting over 20 pounds, no standing over 25 minutes, and no repetitive bending or twisting. Mr. Penta will also need to be allowed

breaks as needed if a chair is unavailable in his work space.

8. Mr. Penta may want to consider the following occupations or variations of the following occupations:

This report does not indicate Penta requires vocational training but rather makes recommendations as to what training and educational opportunities are available to him. The report specifically notes Penta has the ability within his restrictions to be employed without the need for vocational rehabilitation and he should be encouraged to learn what he can and cannot "do on the job."

The letter from Hughes dated September 24, 2010, indicates Penta's scores were below the 12th grade level and he may need to enroll in an adult education or GED program to improve his skills. However, Penta testified he graduated from Montreal High School and had an Associate's Degree from Rosemont Technology in computer-aided designing involving mechanical drafting. Hughes stated if Penta was interested in a training program or college courses he would need to gather information from a prospective school and send it to her. After receiving it, Hughes would submit the request to the carrier for consideration and for voluntary payment. She provided what the materials to be submitted should include. Hughes further stated:

If your request for training is not approved, you may have to ask an Administrative Law Judge to make a determination as part of your workers' compensation claim, and there is no guarantee that you will prevail. For example, carriers may object to the length and/or cost of a program.

Please call me within 15 days if you are interested in pursuing vocational rehabilitation or retraining benefits and I will discuss your options with you. If you have questions regarding the vocational evaluation report, you can contact me at 502-782-4544 or toll free at 1-800-554-8601, ext. 4544.

In the January 28, 2011, letter, Hughes stated as follows:

On September 24, 2010 I mailed a letter and vocational report to you, and asked you to call this office if you are interested in vocational rehabilitation. After the report was sent, I spoke to you several times of the possibility of enrolling in a local community college. I left voice messages for you twice in January, but have not received a call back.

If I do not hear from you in the next ten days, I will close your vocational rehabilitation file and assume that you are not interested in retraining. Your file may be reopened in the future if you decide to pursue retraining. If you have questions regarding vocational rehabilitation, you can contact me toll free at 1-800-554-8601, ext. 4544 or at 502-782-4544. My email address is CarolK.Hughes@ky.gov.

Clearly, there is no recommendation by Hughes that Penta undergo vocational rehabilitation. More

importantly, ALJ Kerr, after receiving the report, did not order Penta undergo vocational rehabilitation. We are unable to locate an order in the record from ALJ Kerr in response to the vocational evaluation and Hughes' letters. It appears that because there was no specific service requested or treatment recommended in the report ALJ Kerr did not order any treatment or service likely to return Penta to suitable gainful employment at the expense of the employer or the insurance carrier. In his 2010 decision, ALJ Kerr noted as follows:

The plaintiff has requested vocational rehabilitation and the Administrative Law Judge finds that the plaintiff is unable to return to work for which he has prior training and experience. Consequently, plaintiff shall be referred for vocational rehabilitation per KRS 342.710.

However, in the award, ALJ Kerr merely ordered Penta undergo a rehabilitation evaluation. More importantly, he did not order Penta undergo vocational rehabilitation or retraining. Thus, there was no refusal by Penta to accept rehabilitation pursuant to an order of ALJ Kerr. That being the case, Penta's benefits could not be reduced by 50%.

This issue relates to Penta's previous award and not to the decision on appeal. The ALJ determined River

City had no additional liability other than that determined by ALJ Kerr in his June 29, 2010, award. We believe the ALJ had no authority to reduce the benefits awarded by ALJ Kerr.

In addition, substantial evidence supports the ALJ's finding there is not enough evidence to support a 50% reduction in benefits for not pursuing vocational rehabilitation. Penta testified he did not pursue vocational rehabilitation because he had not decided which field to pursue. When he felt capable of returning to work he sought and obtained employment with GE. River City did not contest this finding in a petition for reconsideration, we and the parties are bound by the ALJ's finding.

We find no merit in River City's argument the ALJ erred by failing to address whether Penta was entitled to undergo retraining in relation to the 2007 claim. A review of River City's brief to the ALJ reveals that regarding this issue it argued as follows:

Plaintiff was awarded vocational rehabilitation as part of the 2010 Opinion and Award as related to the 2007 work event. The Plaintiff did not undergo any such training because he decided not to do so. (Plf. Depo. 9/4/14 exhibit #1 and p. 6-8 and F.H. p. 25). His failure to undergo vocational retraining when he qualified for the same should result in a 50% discount to any benefits that Plaintiff

is awarded per KRS 342.710. Furthermore, he should not be awarded any additional vocational retraining.

It was River City's position before the ALJ that Penta decided not to undergo any vocational training. Thus, his failure to undergo vocational training should result in a 50% discount in any benefits Penta was awarded in these proceedings. River City also opposed any additional award of vocational retraining. Here, River City prevailed on both issues. It did not incur any further liability as a result of the ALJ's March 25, 2015, decision. Similarly, the ALJ did not award vocational retraining. Since River City did not incur any further liability as a result of the March 25, 2015, decision, and the ALJ did not award any additional vocational retraining as River City requested, there is no controversy as far as River City is concerned. Thus, we find no merit in River City's argument the ALJ erred in refusing to address the issue of whether Penta is entitled to undergo vocational retraining in relation to the 2007 claim.

Although Penta states in his brief he wants to undergo retraining, he did not testify to this fact. Further, in his brief to the ALJ, Penta did not seek vocational rehabilitation benefits pursuant to KRS 342.710(3). During his September 4, 2014, deposition,

Penta testified he never contacted vocational rehabilitation to pursue retraining in other areas. He testified he looked into gunsmithing after his injury at GE. He reiterated this testimony at the January 28, 2015, hearing indicating he did not go to school because he was not sure the direction he wanted to go. Penta's action did not constitute a refusal to accept rehabilitation. Penta never testified he desired vocational retraining to become a gunsmith. We emphasize we have been unable to locate an order from ALJ Kerr ordering Penta accept rehabilitation. Further, we agree with the ALJ that although entitlement to vocational rehabilitation was listed as a contested issue, there appears to be no evidence in the record that Penta wished to pursue vocational rehabilitation. This determination by the ALJ is supported by the record.

In addition, River City did not seek to correct this finding or request the ALJ to further address the issue by filing a petition for reconsideration. Thus, it has waived the right to assert on appeal the ALJ's failure to determine whether Penta is entitled to vocational rehabilitation is error.

Accordingly, the March 25, 2015, Opinion, Award, and Order of the Administrative Law Judge is **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON EMILY F WETMORE
300 E MAIN ST STE 400
LEXINGTON KY 40507

COUNSEL FOR RESPONDENT:

HON WAYNE C DAUB
600 W MAIN ST STE 300
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON JUDSON DEVLIN
1315 HERR LN STE 210
LOUISVILLE KY 40222

ADMINISTRATIVE LAW JUDGE:

HON JANE RICE WILLIAMS
217 S MAIN ST STE 10
LONDON KY 40741