OPINION ENTERED: June 28, 2013

CLAIM NO. 201198539

WAUSAU PAPER CORP. PETITIONER

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

JERRY WOHNER
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

BEFORE: ALVEY, Chairman, and STIVERS, Member.

STIVERS, Member. Wausau Paper Corporation ("Wausau") appeals from the December 14, 2012, "Opinion, Award and Order" and the February 4, 2013, order denying Wausau's petition for reconsideration of Hon. Edward D. Hays, Administrative Law Judge ("ALJ"). In the December 14, 2012, opinion and order, the ALJ awarded Jerry Wohner

("Wohner") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. The ALJ also awarded the following: "Pursuant to KRS 342.710, Plaintiff shall be referred for a vocational rehabilitation evaluation, and shall be entitled to the benefits enumerated therein."

On appeal, Wausau asserts the ALJ erred by awarding "vocational rehabilitation benefits" as the award is not supported by substantial evidence. Wausau argues as follows:

> The testimony presented from various witnesses indicates that Wohner has a number of years of experience in the construction industry, and has operated in a supervisory capacity for quite some time. There is nothing to suggest that he would be unable to obtain a similar position with another contractor within any reasonable limitations that he perceives to be appropriate, but certainly within the restrictions outlined.

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

The Form 101 states Wohner injured his right arm, right elbow, and right shoulder on February 22, 2010, when he hit his right arm "against a metal guard" while in the employ of Wausau. The Form 101 further indicates Wohner worked as a machine operator at the time of the injury and performed the following tasks: "heavy lifting, climbing,

reaching 7 [sic] stretching, bending & stooping, pushing & pulling, prolonged standing & walking, overhead work, repetitive use of hands, arms [sic] shoulders, & back." The Form 104, Employment History, attached to the Form 101, indicates Wohner worked for Wausau from March 24, 2008 through 2011. It also indicates he works "intermittently" doing construction at Wohner Builders and was self-employed from 1999 to the "present."

The September 5, 2012, benefit review conference order lists the following contested issues: benefits per KRS 342.730 [handwritten: "including multipliers"], TTD [handwritten: "underpayment as to [illegible]"], and vocational rehabilitation.

In the December 14, 2012, "Opinion, Award and Order," the ALJ made the following findings of fact and conclusions of law regarding the issue of entitlement to vocational rehabilitation:

> Further, he is entitled to vocational rehabilitation under Wilson v. SKW Alloys, Inc., 893 S.W.2d 800 (Ky. App. 1995), which stands for the proposition that a claimant is entitled to vocational rehabilitation if he demonstrates he is no longer able to perform suitable work for which he has previous training or experience. Although Mr. Wohner has continued to work in the construction industry for his uncle, the evidence reflects that certain accommodations are made for him

> because of his family relationship with his employer. However, he is not capable of working above shoulder level and he is not capable of all of the physical activities required by his employment for his uncle. Accordingly, the plaintiff will be afforded vocational rehabilitation.

The issue of vocational rehabilitation benefits is governed by KRS 342.710(3) which states, in relevant part, as follows:

> When as a result of the injury he is unable to perform work for which he has previous training and 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, need for, and kind of service, treatment, or training necessary and appropriate to render him 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 his insurance carrier. Vocational rehabilitation training, treatment, or

> service shall not extend for a period of more than fifty-two (52) weeks….

(emphasis added.)

Use of the word "may" in KRS 342.710(3) indicates the award of vocational rehabilitation benefits is entirely within the discretion of the ALJ. Alexander v. S & M Motors, Inc., 28 S.W.3d 303 (Ky. 2000).

As articulated by the Court of Appeals in Wilson v. SKW Alloys, Inc., 893 S.W.2d 800, 802 (Ky. App. 1995), "workers' compensation statutes will be liberally construed to effect their humane and beneficent purposes." The Court of Appeals continued by stating the following:

> KRS 342.710(1) states that "[o]ne of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment." Further, KRS 342.710(3) provides that the gainful employment to which the injured employee that is eligible for rehabilitation is to be restored must be **suitable employment**. Clearly, a purpose of workers' compensation legislation is to restore the injured worker as soon as possible and as near as possible to a condition of self-support as an able-bodied worker.
>
> Workers' Compensation was developed not just to compensate a worker who has been injured on the job, but also to enable the worker to reenter the job market and become employed again in a position as near as possible in pay and status to the one the claimant has been forced by injury

> to leave. [citations omitted.]

Id. (emphasis added.)

The Court of Appeals provided insight into what comprises "suitable employment" stating as follows:

> In light of the spirit and purpose of the workers' compensation statutes, we hold that “work for which an [employee] has previous training or experience” must be suitable employment. By “suitable employment” we mean work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of 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 the injury and after reaching his post-injury maximum level of medical improvement.

Id.

Our sole task is to determine whether the ALJ's decision to refer Wohner for a vocational rehabilitation evaluation and the award of "the benefits enumerated therein" is supported by substantial evidence in the record.

Wohner was deposed on June 28, 2012. Wohner currently works full-time for Wohner Builders, a residential construction company owned by his uncle. Wohner works as a foreman and leads work crews on certain

jobs. Wohner described his current work with Wohner Builders as follows:

> A: Physically, most of the time I laid out everything to- like the walls to be built. I laid everything out where it went, used the nail gun. I very rarely packed lumber, like two-by-fours.
>
> Q: And tell me what you mean by laying out the walls to build.
>
> A: Like the wall there has the window in it. I went through and measured the plates for the wall to be built and laid out where the studs would go, where the windows went, versus like how they were shown on the blueprint, laid out where the windows and doors went throughout the house.
>
> Q: Okay. And how did you do that? I mean-
>
> A: With- I've got a pocket square with- I laid the two-by-fours side by side, take the tape measure, mark every 16 inches where the studs go, and just take a pencil down each side of the square and put a physical mark on the board where you can see where it needs to go so everything will be level and straight.

Wohner testified that a week before the deposition, he was working on a roof:

> Q: Okay. So you were actually physically out there roofing using both your hands?
>
> A: Yes.

> Q: All right. Climbing up a ladder, I assume, to get to the roof and down the ladder?
>
> A: Yes.
>
> Q: And if we had passed by, you would have been one of the guys up there tearing- did you tear off the old shingles and then put on the new ones?
>
> A: Yes.

Wohner had to stop working at Wohner Builders for a period of time after he was injured at Wausau. At the time of his injury, he was working as a machine operator. He described his duties as follows:

> A: Physically, I was roll prep. I prepped all the rolls, took the plastic off of them, got the labels. If they were black on the ends, I had to take a sander and sand the ends. Take what they called a skinner and skinned the torn paper off of the rolls. I checked the case packer. If the conveyor was down, I had stacked boxes that came off the line so the machine could still run.
>
> ...
>
> Q: Now, can you tell my physically what was required of you to perform these tasks. And let's just start with what you told me that you did. You said roll prep, I took the plastic off.
>
> A: Took- skinned the paper down. You had to take the paper and throw it up into the dumpsters. Sometimes you'd skin off five pound [sic] of paper. Sometimes you had to take off up to like 300 pounds of paper. And depending

> on what the damage was, whether you had to manually throw it in the recyclable dumpster or if a forklift came and got it and weighed it for damage.
>
> ....
>
> Q: Was there a certain amount of weight that you did not lift more than?
>
> A: No, there was no certain weight, you know. If it was a thick slab, you know, maybe if you thought you could pick it up, we'd pick it up and throw it in the dumpster. Maybe two of us would do it, or, you know, we could take it up in small sections and throw it away.

Sanding was also a part of his job at Wausau which Wohner described as follows:

> A: Yes, if- like if it had been set down in a trailer or on the floor and it got really black, it would make the end rolls of the paper towels really black, like on white paper. So we would take a- it was a belt sander and sanded it down, took a [sic] air hose and blowed [sic] it off until we thought it was the best that we could get or until it was clean.
>
> Q: Where would the ends be that you would be sanding in relationship to you? Would they be at chest height, waist height?
>
> A: It would go from the floor to like shoulder height.

Wohner was also forced to spend a certain amount of time working with his hands extended overhead. In addition, he hand stacked boxes of paper towels which

weighed over twenty pounds anywhere from fifteen minutes a day to six hours a day. Wohner testified that he would "probably not" be able to return to his job at Wausau because of the "[c]onstant reaching and stacking overhead" and he had to empty the barrel of the skinned off paper which weighed between forty to fifty pounds.

Wohner, who is right-handed, described his current symptoms in his right arm:

> A: It hurts constant. [sic] It hurts all the time in the front side of my shoulder. Sometimes my arm and hand will tingle. Using it like- up to like waist height I can use it frequently, you know, without causing any pain. But as far as like taking a gallon of milk and lifting it straight up, I probably couldn't do that.

Wohner testified that he cannot recall the last time he had to physically perform an overhead task. At Wohner Builders, he will sometimes "take a hammer and drive a nail overhead," but he typically uses a nail gun which weighs three and a half pounds. He uses his left arm "a lot of times" when he operates the nail gun.

At the October 17, 2012, hearing, Wohner described the pain in his right arm as follows:

> A: Okay. It hurts in the front side of my shoulder, mainly, if I go to lift anything over waist height. You know, bending down, picking up to, say, you know, waist, it doesn't hurt bad. As

> far as picking anything up overhead, it- it hurts tremendously. It will- if I go to lift anything that does hurt my arm will shake a little bit. It does hurt in the backside a little, but not very much, mainly in the front.

Wohner testified to his limitations at Wohner Builders and the accommodation provided by his uncle:

> Q: Okay. Now, is it true that because your uncle's the boss, that you get to limit your activities?
>
> A: Yes. Very well. If- if it wasn't my uncle, there- as far as doing the construction work, you know, if I wasn't working for my uncle, you know, there'd be no way that I would possibly still have a job doing this kind of work as far as limiting myself to what I can and can't do. I think in his deposition, you know, he stated that he had had a right shoulder surgery and so he knows what it's like to be limited as far as use of your arm. He's sympathetic with me and helps me the best he can, because he knows that I was working two jobs and I could better support my family, as far as now, versus, you know, only have one job, you know, the difference in the income is harder.

Wohner is able to avoid overhead work and heavy lifting at Wohner Builders by asking other workers to perform those tasks.

The deposition of Bruce Lee Fowler ("Fowler"), a part-time worker for Wohner Builders, was taken on

September 12, 2012. Concerning the work Wohner performs at Wohner Builders, Fowler testified as follows:

> A: He more or less lays out the walls, and he might nail some shingles on. But as far as the heavy and hard stuff, he don't [sic] even have no [sic] part of it.
>
> Q: Okay. And as far as him not doing the heavy or the hard stuff, do you know of any particular reason for that or, I mean, is it his-
>
> A: He said his shoulder can't do it no [sic] more.
>
> Q: Okay.
>
> A: He never did do no [sic] hard stuff anyways. That's what you get for being the boss's nephew.

Fowler testified Wohner occasionally climbs upon a roof to nail shingles and use a nail gun in framing walls. Fowler reiterated Wohner does not perform any heavy work. Fowler considers Wohner a supervisor.

The deposition of John Joseph Grigsby ("Grigsby") was taken on September 12, 2012. Grigsby, a lumber packer and framer for Wohner Builders, testified Wohner is unable to do what everybody else does at Wohner Builders. Grigsby testified as follows:

> Q: Now, you said that he complains about his arm. Have you seen him like physically wince when he tried to do something or physically draw back or anything?

> A: Well, most of the time if he thinks it's going to hurt his arm, he starts whining and he has somebody else come do it. He doesn't even, you know, attempt a whole lot of the time anymore. But like I say, in the past, like I say, I know this has been, you know, a year at least, like I say, I can remember him trying to do stuff and it just- you know, he couldn't do it. He was dropping stuff and just like I say. I don't know if he's still that bad or not. I don't know. I know he doesn't like- he doesn't do enough to know.

The deposition of Harold Wohner ("Harold") was taken on August 17, 2012. Harold is Wohner's uncle and owns Wohner Builders. He testified Wohner is his foreman "more or less" and "does the layout work." This work involves "[l]aying the walls off or the windows or the doors" and making sure they get in the right spot. Concerning the changes in Wohner's duties since the February 22, 2010, work injury, Harold testified as follows:

> A: Yeah. He's gone from doing minimum work to less work of the manual work, but he still does the layoff [sic] work, makes sure the workers do their work.
>
> Q: So before the work injury he didn't do a whole lot of manual labor to begin with?
>
> A: Well, he done [sic] his part, yes.

> Q: Okay. What type of manual labor will he do now?
>
> A: He can still use a nail gun. We have lumber technicians, which went by the other word earlier, they deliver it to the spot, like the heavy eye joists and so on, and then we just nail it. Lumber technicians instead of morons. A nail gun, it weighs like three pounds, three and half pounds loaded.

Harold testified Wohner works full-time at Wohner Builders and if there is heavy lifting or overhead work, Wohner always has somebody to help him.

Richard Tanhauser ("Tanhauser") was deposed on October 2, 2012. Tanhauser is the human resources manager at Wausau. Tanhauser testified regarding Wohner’s return to work at Wausau after his injury as follows:

> A: Oh, there are combinations. I mean, we originally brought Jerry back not to that job, but we brought him back actually sweeping and cleaning and different things like that. And then when he was released to be able to go back to his job because his restrictions allowed him, then we put him back on his normal job.
>
> Q: Okay. Now, as far as the light-duty position is concerned, was there ever any point when he was given light-duty restrictions that you-all weren't able to accommodate him? Obviously if the doctor says this person is completely off work, there's not really much you can do with that.

> A: Right, right. No, once he was able to come back with restrictions, we brought him back.

Wohner was terminated by Wausau on May 20, 2011, because of repeated violations of its attendance policy.

In his June 22, 2012, medical report, Dr. James Owen opines Wohner does not have the physical capacity to return to the type of work he was performing at the time of the injury. He opines as follows:

> In his functional capacity evaluation, as Dr. Sajadi suggests, it would [sic] indicate [sic] that he would be able to return to the type of work performed at the time of injury. However, it is my understanding that the exact type of work that he performed required intermittent over-shoulder lifting that would [sic] be [sic] exceeded by [sic] the restrictions placed on him by functional capacity.

Dr. Owen assessed an 11% whole person impairment rating and imposed the following restrictions:

> Restrictions are appropriate that Dr. Sajadi placed; that being, as previously indicated, static push cart height of 25 pounds, static pull cart height of 20 pounds, pushing and pulling shoulder height of 20 pounds, lifting bench height of 60 pounds, dynamic lift bench height of 90 pounds, and carrying of 75 pounds. However, it is my opinion that he would not be able to do any significant over-shoulder activity.

The above-cited evidence comprises substantial evidence in support of the ALJ's determination to refer Wohner for a vocational rehabilitation evaluation. The record indicates Wohner's over-the-shoulder limitations, as noted by Dr. Owen and testified to by Wohner, are currently being accommodated by Wohner Builders. The ALJ determined Wohner "is not capable of working above shoulder level and he is not capable of all of the physical activities required by his employment for his uncle." This finding is supported by substantial evidence and will not be disturbed. Additionally, the record does not compel a finding that Wohner would be able to continue to work in the construction industry outside of the context of his uncle's business.

That said, we vacate that part of the ALJ's award which directs Wohner is "entitled to the benefits enumerated." This portion of the ALJ's award is premature, and we remand the claim to the ALJ for entry of an award of vocational rehabilitation benefits, if appropriate, after he has had an opportunity to review and consider the vocational rehabilitation evaluation report. This is consistent with directive of the statute which states that after reviewing the report, the ALJ "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 his insurance carrier." KRS 342.710(3).

Accordingly, the December 14, 2012, "Opinion, Award and Order" and February 4, 2013, order denying Wausau's petition for reconsideration are **AFFIRMED** in part, **VACATED** in part, and **REMANDED** for entry of an award regarding vocational rehabilitation benefits consistent with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

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