

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: October 4, 2019

CLAIM NO. 201799840

CARLYE P. HARPER

PETITIONER

VS.

APPEAL FROM HON. DOUGLAS W. GOTT,  
CHIEF ADMINISTRATIVE LAW JUDGE

KINDRED HEALTHCARE  
SEDGWICK CLAIMS MGMT SERVICES INC.  
and HON. DOUGLAS W. GOTT,  
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING & REMANDING  
\*\*\*\*\*

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

**STIVERS, Member.** Carlye P. Harper (“Harper”) seeks review of the April 24, 2019, Order of Hon. Douglas W. Gott, Chief Administrative Law Judge (“CALJ”) overruling her motion to reopen to seek vocational rehabilitation benefits. Harper also appeals from the May 30, 2019, Order denying her petition for reconsideration.

On appeal, Harper contends the CALJ misconstrued the statute concerning when an application for vocational evaluation can be made. Harper

contends she is not limited to seeking vocational rehabilitation benefits during the pendency of her claim and may seek those benefits after the decision/award is final.

### **BACKGROUND**

In a November 27, 2017, Opinion, Order, and Award, Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ Rice-Smith”), found Harper incurred low back and left hip conditions arising from a work injury on December 27, 2016, while in the employ of Kindred Healthcare (“Kindred”). Relying upon the opinion of Dr. Monte Rommelman, ALJ Rice-Smith found Harper retained an 8% impairment rating as a result of the injury. Based upon Harper’s testimony and the opinions and restrictions of Dr. Rommelman, she also found KRS 342.730(1)(c)1 applicable since Harper did not retain the capacity to return to the type of work she was performing as a certified occupational therapy assistant at the time of injury.<sup>1</sup> Harper’s permanent partial disability benefits were enhanced by the three multiplier.

With respect to vocational rehabilitation, ALJ Rice-Smith stated as follows: “Plaintiff in her brief request [sic] vocational rehabilitation. The issue of vocational rehabilitation is not before the ALJ at this time, as it was not preserved as a contested issue at the BRC or Hearing.” Only Kindred filed a petition for reconsideration which ALJ Rice-Smith overruled by order dated January 11, 2018. That opinion was not appealed and became final.

On March 20, 2019, Harper filed a motion to reopen and a motion for vocational rehabilitation. Harper attached her affidavit, a copy of ALJ Rice-Smith’s

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<sup>1</sup> As reflected in ALJ Rice-Smith’s opinion, Dr. Rommelman provided the following restrictions: “No repetitive squatting, twisting or stooping; no ladder or stair climbing; no lifting over 25 pounds frequently and 35 pounds occasionally; no direct patient transfers or lifts, and alternating positions between standing, sitting, and walking every 20 to 30 minutes as needed.”

opinion and award, the vocational evaluation of Sherell Sparks (“Sparks”), MS, CRC, a vocational specialist with Envision Counseling and Vocational Services, and a medical waiver and consent form signed by Harper. In her motion for vocational rehabilitation, Harper stated she was earning \$900.00 per week at the time of her work injury. Her primary treating physician has imposed permanent restrictions precluding her from performing her customary work. Since ALJ Rice-Smith’s decision, Harper avowed she had little success obtaining employment and had “earned virtually nothing.” She contacted the Kentucky Office of Vocational Rehabilitation and underwent a vocational evaluation which concluded she was a good candidate for several lighter type jobs. Harper seeks to become a social worker which requires two more years of college.

In her affidavit, Harper discussed the restrictions imposed by Dr. Rommelman due to the injury. As a result of those restrictions, Harper was unable to return to the type of work she was performing at the time of the injury. Since her injury, Harper has tried to find an easier job she can perform with very little success. During Christmas 2018, she worked as a part-time sales associate at Goody’s and on an as-needed basis creating social media advertising for a boutique in Eddyville, Kentucky. Due to Dr. Rommelman’s restrictions, other than performing those two jobs, Harper has been unemployed. Harper contacted the Kentucky Office of Vocational Rehabilitation and underwent an evaluation in March 2018. Harper avowed the vocational evaluation specialist stated she would be well-suited for careers in “skilled science, professional technology, skilled technology, consumer economics, outdoor

occupations, skilled business, clerical jobs, communication jobs, skilled arts, professional service, and skilled service jobs.”

Harper expressed an interest in obtaining a four-year degree in social work. Since she already has an associate degree in applied science, specializing in occupational therapy, she understands that to obtain a four-year degree in social work she needs only two more years of college. She can obtain this degree either at Murray State University or through Sullivan University in Louisville. Harper asserted she has gone from earning \$900.00 per week pre-injury to earning virtually nothing post-injury.

The report of Sparks, the vocational specialist, indicates Harper has the ability to work in a number of fields. The vocational evaluation report concluded as follows:

Caryle’s [sic] academic history, cognitive estimation, and academic scores suggests she would be a viable candidate to return to school. Given her test scores, prior work history and her performance during the evaluation there was no indication she would have difficulty working in her expressed career interest in the Mental Health Profession. Caryle’s [sic] CAPS Profile also indicated a high probability of success for the skilled professional occupations which encompasses the counseling field.

...

During the short evaluation period Caryle [sic] was observed to have the needed personality to work in the social service field. Caryle [sic] demonstrated patience and dependability during the testing period which suggests the same traits would be demonstrated within the job. Caryle [sic] was observed to have effective communication skills; as well as listening and following directions. Caryle [sic] was found to be insightful of her

own needs which will assist her in forming rapport with clients.

Caryle's [sic] career option was:

Mental Health and Substance Abuse Social Workers 21-1023.00.

The text of the CALJ's April 24, 2019, Order overruling Harper's motion to reopen reads as follows:

This claim is on the Frankfort motion docket on Plaintiff Harper's motion to reopen. She does not assert a medical dispute, nor allege entitlement to reopen under any of the grounds allowed by KRS 342.125(1). Instead, she says, "This is an application for vocational rehabilitation benefits. It is not a motion to reopen as provided in KRS 342.125, but it is the closest option available on LMS."

Harper's efforts at rehabilitation and retraining are admirable. However, her motion must be overruled because an attempt to obtain vocational rehabilitation benefits is not a cause to reopen under KRS 342.125(1), and because she waived a claim to those benefits in the original litigation. The history of this claim is a low back and left hip injury Harper suffered while moving a patient while working as a therapy assistant for the Defendant on December 27, 2016. On January 11, 2018, an administrative law judge issued an opinion in her favor, awarding permanent partial disability benefits based on 8% impairment and the three-multiplier for lacking the capacity to return to pre-injury work. The last entries in this claim prior to the pending motion are orders approving attorneys' fees on February 8, 2018; i.e., the claim has long been final.

Particularly relevant from review of the underlying proceedings, vocational rehabilitation was not preserved as an issue on the BRC Order of September 12, 2017. Harper attempted to insert the issue afterward, prompting the ALJ to reject it in her Opinion by saying, "Plaintiff in her brief requested vocational rehabilitation. The issue of vocational rehabilitation is not before the ALJ at this time, as it was not preserved as a contested issue at the BRC or Hearing." (p. 14)

Harper filed a petition for reconsideration explaining she did not request vocational rehabilitation in her brief to ALJ Rice-Smith but requested a vocational evaluation. Harper represented her efforts to obtain work since the injury have been unsuccessful. As a result, she wishes to pursue retraining and a vocational evaluation. Harper contended the CALJ's reasoning for overruling her motion was unclear and requested clarification for purposes of appellate review. The rest of Harper's petition for reconsideration made the same arguments she now makes on appeal.

In the May 30, 2019, Order denying the petition for reconsideration, the CALJ stated:

Plaintiff Harper has petitioned for reconsideration of an Order overruling her motion to reopen for vocational rehabilitation benefits ("voc rehab"). KRS 342.281. The CALJ overruled the motion because an independent claim for voc rehab is not grounds for reopening under KRS 342.125(1); and because Harper failed to preserve the issue during the original litigation of the claim. For the same reasons, the petition is denied.

Harper argues there is no time constraint on presenting a claim for voc rehab because KRS 342.710 compels an award for it at any time by virtue of its statement that a claimant "shall be entitled" to such benefits. The CALJ rejects this argument. Harper can only be entitled to voc rehab by having sought it in the original litigation (which she did not preserve); or possibly proving entitled to it within a reopening under one of the grounds permitted by KRS 342.125 (which she has not sought to do). As an example of the latter, if she made a prima facie case for a "change of disability" under subsection "d," the parties or ALJ might be able to consider voc rehab as a benefit to which she was entitled in addition to increased income benefits. As far as what Harper argued for in her brief to the ALJ in 2017, her effort to distinguish a specific request for a vocational evaluation from voc rehab benefits in general is not persuasive.

(The reference in the recent Order to the date of the prior ALJ's Opinion is a patent error that is corrected here. The Opinion was issued November 27, 2017; the date mentioned, January 11, 2018, is the date of the Order on reconsideration.)

On appeal, Harper argues KRS 342.710 does not mandate the request for vocational rehabilitation be memorialized in a Benefit Review Conference ("BRC") Order. Further, the statute contains no limiting language concerning when a disabled employee may seek vocational retraining benefits. Rather, the statute says when an injured employee is unable to return to work "for which she has previous training or experience," she "shall be entitled to vocational rehabilitation services." Thus, once the ALJ makes a finding the injured worker does not have the physical capacity to return to her customary work, the injured employee is entitled to vocational retraining benefits. Harper interprets the statute to mean when the injured employee is unable to return to his or her usual work, "the ALJ shall inquire whether such services have been voluntarily offered and accepted." Harper notes ALJ Rice-Smith made no such inquiry. Harper explains she filed a motion to reopen because the Department of Workers' Claims ("DWC") in adopting the Litigation Management System ("LMS") in 2017, did not provide for an application discussed in KRS 342.710(3).<sup>2</sup> Since use of LMS for all pleadings is now required, Harper chose the closest applicable form provided, a motion to reopen.

Harper notes the CALJ denied her application because KRS 342.125 does not list seeking vocational rehabilitation as a ground to reopen a claim. In her

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<sup>2</sup> The application to which Harper is referring is an application for a referral of the employee for a vocational evaluation.

view, the terms of KRS 342.125 and the failure of the DWC to provide an application for vocational rehabilitation benefits as one of the LMS forms does not negate her right to vocational rehabilitation benefits. Stated another way, the form provided in LMS cannot trump the plain language of a statute enacted by the General Assembly. Harper asserts the goal of KRS 342.710 to retrain disabled employees for work should be effectuated by the CALJ. Harper represents she took it upon herself to contact the Kentucky Vocational Rehabilitation Department and undergo testing. She is now ready, willing, and able to be trained in order to support her and her child. Harper posits common sense dictates she become a productive member of society rather than a burden on the taxpayers. Harper seeks reversal of the CALJ's order.

### ANALYSIS

KRS 342.710 reads in relevant part as follows:

- (1) One of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment, and preference shall be given to returning the employee to employment with the same employer or to the same or similar employment.
- (2) The commissioner shall continuously study the problems of rehabilitation, both physical and vocational, and shall investigate and maintain a directory of all rehabilitation facilities, both private and public.
- (3) An employee who has suffered an injury covered by this chapter shall be entitled to prompt medical rehabilitation services for whatever period of time is necessary to accomplish physical rehabilitation goals which are feasible, practical, and justifiable. **When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her 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 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. (emphasis added).

Significantly, the first sentence of subsection 3 states an injured worker is entitled to prompt medical services for the necessary period to accomplish feasible, practical, and justifiable physical rehabilitation goals. However, there is no requirement of prompt or immediate rehabilitation services in the second sentence, the sentence relevant to our inquiry. Thus, we conclude there is no enumerated time frame within which to seek vocational rehabilitation. We concede that, in most cases, entitlement to vocational rehabilitation is raised during the pendency of the claim. However, the statute does not explicitly require the claimant to seek vocational rehabilitation during the pendency of the original claim seeking income and medical benefits. Consequently, vocational rehabilitation may be invoked by a party by seeking a referral from an ALJ for an “evaluation of the practicability of” and “need for” vocational rehabilitation after the claim has been resolved.

KRS 342.710(3) directs that when an ALJ determines the injured worker is unable to perform work for which he or she has previous training or experience, the ALJ may inquire whether such services have been voluntarily offered and accepted. The ALJ may upon his or her motion or upon motion of any party or carrier, after allowing the parties to be heard, order a vocational evaluation. After receiving the report, the ALJ then determines whether vocational rehabilitation is appropriate and the mode “likely to return the employee to suitable, gainful employment” at the employer’s expense. However, subsection 3 imposes no time period within which a claimant must seek vocational benefits pursuant to KRS 342.710. Significantly, section 3 does not require the application of a party or the carrier to be made during the pendency of the original claim. Thus, the statute does not mandate the employee must seek vocational rehabilitation during the pendency of the original claim or be barred from forever seeking vocational rehabilitation.

We note the CALJ was faced with a difficult situation as there is little or no authority construing KRS 342.710 in conjunction with KRS 342.125. The CALJ concluded an injured worker might possibly seek vocational rehabilitation after reopening based upon one of the grounds permitted by KRS 342.125; specifically, subsection (1)(d) a change of disability. We decline to read KRS 342.710 that narrowly. One can conceive of situations wherein the injured worker does not perceive vocational rehabilitation is necessary or underestimates the need for vocational rehabilitation during the pendency of the claim. Instead, only after the claim has concluded does the claimant realize that, without some form of vocational rehabilitation, he or she is unable to return to suitable employment. In those cases, the

worker is not precluded from seeking rehabilitation to secure suitable employment.

Suitable employment was defined by the Court of Appeals in Wilson v. SKW Alloys,

Inc., 893 S.W.2d 800, 802 (Ky. App. 1995) as:

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. It would be unreasonable and unconscionable to force an injured worker who had, by working conscientiously over the years, advanced to a responsible, well-paying, albeit unskilled position to start over at an unskilled job paying the minimum wage by denying him the rehabilitation benefits needed to qualify him for a skilled job with earnings comparable to his prior employment.

In Dairy Queen of Frankfort, Inc. v. Surrutt, 2009-SC-000303-WC, rendered June 17, 2010, Designated Not To Be Published, the Kentucky Supreme Court declared:

KRS 342.710(1) indicates that a primary purpose of Chapter 342 is to restore injured workers to gainful employment and expresses a preference for returning such workers to work with the same employer or to the same or similar work. *Wilson* [footnote omitted] concerned whether a 27-year-old worker who had advanced to a well-paying but unskilled job when injured was entitled to vocational retraining. The court determined in *Wilson* that the term “suitable employment” means work that restores the injured worker to earnings comparable to the individual's pre-injury earnings.

Slip Op. at 5.

We hold that a motion to reopen seeking vocational rehabilitation need not be pigeon-holed into one of the grounds set forth in KRS 342.125(1) – i.e. fraud,

newly-discovered evidence which could not have been discovered with the exercise of due diligence, mistake, and change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order. Rather, KRS 342.710 contemplates other grounds for reopening other than those set forth within KRS 342.125(1).

We recognize that when the need for vocational evaluation is not listed as a contested issue at the BRC or is not raised prior to the hearing, the claimant waived his or her right to seek that relief during the proceedings. This issue was directly addressed in Carnes v. Parton Bros. Contracting, Inc., 171 S.W.3d 60 (Ky. App. 2005). Further, a petition for reconsideration is not the proper vehicle to request a vocational rehabilitation evaluation, nor is an appeal to the Workers' Compensation Board.

We rely upon two cases in concluding a motion to reopen seeking vocational rehabilitation is available to either party absent one of the grounds set forth in KRS 342.125(1). In Pinkston v. Teletronics, Inc., 4 S.W.3d 130 (Ky. 1999), the claimant, Pinkston, had been found to have 60% permanent partial occupational disability. Pinkston indicated he wished to pursue a vocational rehabilitation program and it appears all or most of the doctors testifying in the case indicated Pinkston was an excellent candidate for vocational rehabilitation. The ALJ found vocational rehabilitation was appropriate. Pinkston underwent the required evaluation and enrolled in a 22-month full-time program in major appliance repair. There was evidence the program had a 94% placement rate and the graduates were offered starting salaries approximating Pinkston's pre-injury average weekly wage. Participation in the program necessitated a 97-mile round trip from his home in

Springfield to the Kentucky Vocational School in Elizabethtown five days each week. The employer voluntarily paid the registration fees, tuition, and cost of books but refused to reimburse Pinkston's mileage or to pay additional rehabilitation benefits. Consequently, Pinkston moved to reopen the award to seek those benefits. He asserted he was entitled to reimbursement for mileage necessary to attend the vocational rehabilitation program. He also asserted he was entitled to rehabilitation benefits pursuant to KRS 342.715 for 22 months participation in the vocational rehabilitation program in addition to his permanent partial disability award. Pinkston also contended the award should be suspended during the period of vocational rehabilitation with the balance of the award becoming payable after termination of rehabilitation benefits. The employer asserted vocational rehabilitation benefits were limited to 52 weeks.

On reopening, the ALJ awarded rehabilitation benefits pursuant to KRS 342.715 for the 22 months and mileage for the days Pinkston actually attended class. Payment of the partial disability benefits was suspended during the 22-month period. Both parties appealed and this Board affirmed the order of rehabilitation benefits pursuant to KRS 342.715 but determined they were only authorized from the date of the motion to reopen was filed. The Board also determined rehabilitation benefits were paid in lieu of partial disability benefits during the weeks the two awards overlapped, and reversed the award in that respect. The Court of Appeals held sound medical evidence did not support extension of the 52-week rehabilitation period authorized by KRS 342.715. It affirmed the Board's decision in all other respects. Pinkston appealed and Teletronics cross-appealed. The Supreme Court reversed the Court of Appeals and held the medical evidence was sufficient to support the ALJ's extension of the

rehabilitation program to 22 months. The Supreme Court also affirmed the award of mileage expenses for the days Pinkston attended class. However, the Supreme Court held KRS 342.715 did not apply to the claim because Pinkston was not totally disabled.

Significant to this appeal is the fact the Court of Appeals and the Supreme Court allowed the reopening in order for Pinkston to seek mileage and the extension of rehabilitation benefits for a 22-month period. We note the reopening was not considered a medical fee dispute, as there was no issue concerning medical treatment upon reopening. More importantly, the grounds set forth in KRS 342.125(1) were not implicated.

In Neighbors v. River City Interiors, 187 S.W.3d 319 (Ky. 2006), the ALJ had determined the claimant, Neighbors, was totally disabled relying upon the treating physician and another doctor. The treating physician believed Neighbors would benefit from a comprehensive rehabilitation program. The Supreme Court described the procedural facts as follows:

Although nothing in the benefits review conference memorandum or the claimant's brief mentioned a request for rehabilitation benefits, the ALJ stated that he had requested vocational rehabilitation, that he had an eighth-grade education with no specialized or vocational training, and that his injury left him unable to perform work for which he had previous training or experience. The ALJ ordered him to be referred for a vocational rehabilitation evaluation, stating:

The vocational evaluation shall be at the expense of the Defendant–Employer and a determination as to the propriety of recommended retraining for the Plaintiff shall be in accordance with the provisions of KRS 342.710.

A copy of the claimant's petition for reconsideration is not to be found in the record before us. The employer's response, which is of record, complained that the claimant was attempting to avoid the order of rehabilitation. It also stated that rehabilitation was a crucial goal of the Workers' Compensation Act regardless of whether the claimant requested it. On September 4, 2002, the ALJ overruled the petition adding, "even though the Plaintiff did not request it."

Id. at 320.

Later, a specialist with the Office of Workers' Claims informed Neighbors when to report to Elizabethtown Technical College for an evaluation to measure his vocational interests, aptitudes, and academic abilities. The report generated after the evaluation concluded Neighbors was functioning at grade level 7.8 in reading and 5.4 in math. An interest inventory and interview indicated he was interested in mechanics as well as working in construction. A letter from the specialist to Neighbors reviewed the test results and requested him to call within 15 days to discuss the results of the assessment as well as resources for various services. Another letter from the same specialist to Neighbors stated it included a copy of the prior letter to which he had failed to respond. It requested a response within 15 days. A subsequent letter indicated Neighbors responded to the second request and there was a discussion of possible retraining benefits, but Neighbors indicated retraining was impossible due to continuing medical problems. The Supreme Court noted the letter concluded: "Unless any party of record informs me otherwise within 30 days, I will assume there is mutual agreement to close your rehabilitation file subject to reopening if your medical condition improves." Id. at 321.

Thereafter, a February 2003 letter from the specialist to the employer indicated Neighbors' file remained open per the employer's request and reiterated the Department's readiness to assist with vocational development and retraining. Within a month of that letter, the employer filed a motion to reopen citing KRS 342.125(1)(b) and KRS 342.710(5) requesting a 50% reduction in Neighbors' income benefits based on his failure to follow through with the vocational rehabilitation process. Neighbors objected and asserted KRS 342.125 did not permit reopening under the circumstances. He also argued KRS 342.710 is silent regarding the mechanism to be used for considering a request to reduce an award, and the circuit court had jurisdiction. Neighbors asserted he had complied with the order to undergo a rehabilitation evaluation, but the ALJ had not received the vocational report to which KRS 342.710(3) refers and had not ordered any recommended services or treatment. He contended his present physical condition precluded any type of education or retraining program. Noting the process anticipated by KRS 342.710(3) had not occurred, the CALJ ordered the matter be reopened and assigned to another ALJ for further proceedings.

In deciding the case, the ALJ noted there was no rehabilitation report other than the letters from Elizabethtown Technical College and the specialist. The letters indicated Neighbors did not think he was able to retrain due to his physical condition. However, the ALJ determined "his physical condition did not prevent him from participating in a retraining program, that such a program would be practical, and that with his willing participation would be likely to return him to suitable gainful employment." Id. at 322. The ALJ ordered Neighbors to be referred to the Department

again to receive the rehabilitation services that were recommended previously and overruled the motion to reduce his benefits at that time. Neighbors filed a petition for reconsideration requesting the ALJ's decision be set aside. The petition for reconsideration was overruled and Neighbors appealed. This Board and the Court of Appeals affirmed the ALJ. In affirming, the Supreme Court noted as follows:

The claimant states that he continues to be totally disabled and has not worked since his injury. He asserts that the ALJ's order was premature under KRS 342.710(3) because the Department had not submitted a report that recommended necessary treatment and services. He argues that, absent such a report, it was impossible for him to know the physical demands of the rehabilitation program or the career that the Department had in mind for him, to know the academic/intellectual demands, or to know the length of time or amount of travel involved. Therefore, it was also impossible for him or the employer to know whether the program was appropriate. He concludes that the ALJ erred in considering the matter before receiving a formal rehabilitation plan from the Department, that the error was not harmless, and that he must be given an opportunity to present evidence regarding his physical and mental ability to engage in vocational rehabilitation after the evaluation process has been completed and a program recommended.

The employer agrees that the rehabilitation evaluation process was not complete and that the ALJ did not receive a formal, written report.

Id. at 322.

The Supreme Court held as follows:

Consistent with KRS 342.710's stated goal, KRS 342.710(7) permits income benefits to be accelerated, and KRS 342.715 provides an enhanced income benefit during any period that a worker who is eligible for permanent total disability benefits actively participates in physical or vocational rehabilitation.

KRS 342.710(3) entitles an injured worker who is unable to perform work for which he has previous training or experience to receive reasonable vocational rehabilitation services at the worker's request. It also permits an ALJ to order a rehabilitation evaluation at the employer's request or upon the ALJ's own motion. The Department's procedure for implementing KRS 342.710(3) appears to be informal and to involve a subsequent ALJ order only in instances where the parties disagree. We infer this based on Mr. Mahin's letter of December 6, 2002; on 803 KAR 101, § 4(1), which indicates that a Department employee will assist an injured worker in implementing rehabilitation services; and on 803 KAR 25:101, § 4(6), which provides:

Upon receipt of the vocational evaluation report, the employee and employer or insurance carrier shall cooperate in the implementation of services designed to restore the employee to suitable employment.

KRS 342.710(3) and 803 KAR 25:101, § 4 anticipate that a Department representative will present the results of the evaluation and the available options for physical and/or vocational rehabilitation to the parties. They also anticipate that the parties will cooperate in devising and implementing a reasonable plan for the injured worker's rehabilitation. KRS 342.710(5) and (6) help to ensure their cooperation.

**Post-award disputes concerning vocational rehabilitation under KRS 342.710(3) and requests for a reduction in benefits under KRS 342.710(5) are matters that arise under Chapter 342; therefore, KRS 342.325 grants an ALJ jurisdiction to decide them. A worker seeking to resist rehabilitation has the burden to show that the evaluator's recommendations or the available options are impractical or inappropriate. An employer seeking a reduction in benefits has the burden to show that the worker has refused to accept rehabilitation pursuant to an ALJ order. (emphasis added).**

In the present case, the ALJ who considered the initial claim ordered a vocational evaluation and “a determination as to the propriety of recommended

retraining ... in accordance with the provisions of KRS 342.710.” The claimant participated in a vocational evaluation. Elizabethtown Technical College's Client Assessment Report recommended services to improve his academic skills followed by retraining. Mr. Mahin then contacted him to discuss his options, but the process stopped when he asserted that his physical condition precluded any type of education or rehabilitation program. Having made reasonable findings that the claimant's present physical condition did not prevent him from engaging in such a program, that retraining would be practical, and that it would be likely return him to employment, the ALJ properly referred him to the Department again to receive the services that had been recommended.

Id. at 323-324.

Abundantly clear from Neighbors is the fact the employer's motion, although citing KRS 342.125(1)(b), also sought a 50% reduction in vocational rehabilitation benefits pursuant to KRS 342.710(5) due to Neighbors' failure to follow through the rehabilitation process. The employer did not seek to compel him to go to vocational rehabilitation. However, the ALJ, on his own, ordered rehabilitation benefits. We note the posturing and motions occurred post-award. Further, the employer was successful in keeping Neighbors' file open in order to assist him with vocational development and retraining, none of which was recommended by the ALJ in the initial proceedings. As noted by the Supreme Court, post-award disputes concerning vocational rehabilitation under KRS 342.710(3) and requests for a reduction in benefits under KRS 342.710(5) are matters that arise under Chapter 342; thus, KRS 342.325 grants an ALJ jurisdiction to decide them. Importantly, the Supreme Court did not hold that jurisdiction to decide disputes relating to vocational rehabilitation must be invoked through KRS 342.125(1). Thus, we conclude KRS

342.125(1) is not the sole vehicle by which reopening can be achieved in order to obtain vocational rehabilitation. Rather, we conclude KRS 342.710 contemplates motions to reopen based on grounds set forth exclusively within this statute.

We find no merit in Kindred's argument that improper service barred the motion to reopen as it clearly received the motion to reopen and filed a response in LMS within seven days after Harper's motion to reopen was filed. We have already addressed Kindred's other two arguments claiming the statute does not permit reopening to claim vocational rehabilitation benefits and Harper's failure to preserve it as an issue before the ALJ resulted in her waiver of the claim to vocational rehabilitation benefits. The last argument, i.e. Harper is already highly educated and has requested benefits outside those allowed by the statute, will have to be addressed by the CALJ, or an ALJ, on remand.

Accordingly, the April 24, 2019, Order overruling the motion to reopen and the May 30, 2019, Order denying Harper's petition for reconsideration are **VACATED**. This matter is **REMANDED** to the CALJ, or an ALJ as designated by the CALJ, for a determination of whether Harper is entitled to vocational rehabilitation in accordance with the provisions of KRS 342.710(3).

ALL CONCUR.

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