Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 26, 2021

CLAIM NO. 201781434

COLOR CRAFT PAINTING PETITIONER

VS. **APPEAL FROM HON. PETER J. NAAKE, ADMINISTRATIVE LAW JUDGE**

JOHN BAKER
and HON. PETER J. NAAKE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. Color Craft Painting ("Color Craft") seeks review of the October 30, 2020, Opinion, Award, and Order of Hon. Peter J. Naake, Administrative Law Judge ("ALJ") finding John Baker ("Baker") sustained a May 16, 2017, left leg and ankle injury resulting in total occupational disability. The ALJ awarded income and medical benefits. Color Craft also appeals from the November 27, 2020, Order overruling its Petition for Reconsideration.

On appeal, Color Craft argues the finding of permanent total disability is not supported by substantial evidence.

BACKGROUND

Baker was injured on May 16, 2017, when he fell from a barn roof severely fracturing his left leg and ankle. Baker was transported to Baptist Hospital in Louisville where surgery was performed that evening by Dr. Madhusudhan R. Yakkanti. The procedure performed was an "ankle external fixator application using a Stryker external fixator and the close reduction of the pilon fracture." The post-operative diagnosis was "left ankle Pilon tibia fibula fracture, closed, comminuted." On May 26, 2016, Dr. John S. Lewis, Jr.,[1] performed a second surgery consisting of the following: 1) Open reduction internal fixation, left pilon fracture; 2) Open reduction internal fixation, left tibial diaphyseal fracture; 3) Open reduction internal fixation, left medial malleolus fracture; 4) Open reduction internal fixation, left fibular fracture; and 5) Removal of external fixator, left ankle. Dr. Lewis' diagnosis was severe left tibial pilon/diaphyseal fracture with associated fibular fracture. On July 27, 2018, Dr. Lewis performed a third surgery consisting of the following: 1) Left open ankle arthrodesis; 2) Removal of hardware, left ankle; 3) Calcaneal bone graft, large, separate incision; and 4) Bone marrow aspiration, left pelvis. Dr. Lewis' May 2, 2019, letter reveals he assessed a 4% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to Evaluation of Permanent Impairment. Dr. Lewis released Baker from his care on an as-needed basis on April

[1] The records of Dr. Lewis and Louisville Orthopedic Clinic span the period from May 16, 2017, through April 1, 2019.

24, 2019, at which point he was considered to be at maximum medical improvement "following left ankle arthrodesis following severe intra-articular fracture of the left ankle and distal tibia."

Baker introduced the medical records of Dr. Jeffrey Sharpe who treated infection at the surgical site after the first surgery. He also introduced the December 17 2019, Independent Medical Evaluation report of Dr. Michael Heilig who assessed an 18% impairment rating as a result of the injury. Dr. Heilig opined Baker, "was a painter of 32 years and obviously cannot do that ever again due to his ankle fusion with persistent pain."

Baker testified at a November 25, 2019, deposition and at the September 1, 2020, hearing. His deposition testimony establishes Baker, born October 21, 1962, is a high school graduate with a high school certificate in welding. However, he has not worked as a welder. He has no other vocational training and has been a painter most of his life. Baker testified he received no specialized training as a painter. Of the 30 years working as a painter, Baker estimated 90% involved painting inside and outside of a residence. Baker had also engaged in "Wallpaper hanging, drywall, that sort of thing." He denied having any prior injuries.

Baker was last employed by Color Craft in 2018 working only a couple of months. Although he occasionally climbed the bottom steps of a ladder, his return to work involved very little use of a ladder. He did not engage in any wallpapering or drywalling. Dr. Lewis limited the number of hours he painted from three to five hours a day. Baker testified he painted no more than five hours a day. He explained why he quit:

> Q: Okay. What happened at the end of the two-month period or the period that you were there? Why did you quit working for them?
>
> A: I didn't feel comfortable doing what I was doing.
>
> Q: What exactly did you not feel comfortable about?
>
> A: Just my surroundings. I didn't – I didn't feel safe with my – with my, you know, ability what I could do and my – you know, what my injury and such.
>
> Q: Did you quit?
>
> A: Yes, pretty – yes, I did.

Baker did not apply for unemployment benefits nor attempt to work somewhere else. However, he painted for family and friends for which he was paid cash. Those jobs entailed painting the interior of residences. Due to a lack of income, Baker moved to his parents' home. His last painting job was for the parents of his sister-in-law approximately one month before his deposition. The job spanned approximately two or three days and he was paid close to $500.00. He obtained jobs by word of mouth, as he told his family he was willing to perform these type of jobs.

Baker had worked for Color Craft for approximately two months earning almost $18.00 an hour when he was injured. Before that, he worked for Highland Contracting from October 2016 to February 2017 primarily engaging in commercial painting. He quit because he wanted to return to residential painting. Prior to that, he worked for Chuck Rader Painting as a foreman from September 2012 to sometime in 2015 which almost exclusively entailed painting residences. Between the time he was employed by Highland Contracting and Chuck Rader Painting, he was self-employed as a residential painter. Prior to working for Chuck

Rader Painting, he worked for Cruise House Construction as a painter and drywaller for approximately seven or eight years.

When he last saw Dr. Lewis a couple of months prior to his deposition, he was restricted from using ladders and going upon roofs. Baker testified whenever he uses a ladder, he only uses the first step. Baker's home activities include watching TV and helping his mother with household activities such as doing the laundry, dusting, and vacuuming. He had no scheduled painting jobs. He is able to drive a vehicle.

The August 12, 2020, Benefit Review Conference Order and Memorandum reflects the parties stipulated Baker sustained a May 16, 2017, work injury and Color Craft received due and timely notice. Temporary total disability benefits were paid from May 17, 2017, through April 25, 2019, totaling $29,855.42 and medical expenses of $138,932.73 were paid. Although the average weekly wage ("AWW") was listed as a contested issue, the parties later stipulated Baker's AWW is $532.47.

At the hearing, Baker testified he had painted for 36 years. Prior to that, he had worked a short time in a factory and at "sheet metal iron work." He has primarily worked as a "painter and paper hanger." He estimated that 10% of his painting career entailed commercial painting and the rest involved residential painting. He estimated that of the time spent painting residences, 70% was spent inside and 30% spent outside. Concerning the frequency of his wallpaper hanging activities, Baker testified as follows:

> Q: Now, the other thing that you mentioned was the wallpaper hanging?

A: Yes, sir.

Q: How frequent was that?

A: Back in the day probably 40 percent of the time. That's been years ago, though.

Q: Over the last 20 years, have you done any wallpapering?

A: Hanging some wall murals for U.S.A. Image, but that's – it's been a while. It's been – I haven't hung any wallpaper in many years, so ….

Baker described his job at Color Craft:

Q: -- can you just tell us in a nutshell, what did that involve?

A: It was all basic painting from prep work to spray painting to brush work to interior and exterior.

Q: Was it all residential?

A: Yes, sir.

Q: What's the heaviest thing that you might lift on a residential job, excluding ladders?

A: Thirty, 40 pounds.

Q: And what do some of the ladders weigh?

A: It would vary. There again, depending on the size, but no more than probably, again, 30 or 40 pounds, you know, about 30 pounds.

Concerning his current physical problems, Baker testified as follows:

Q: Tell me at what times you have those difficulties?

A: It depends if I do a lot of walking. Say I go to Kroger's, and I walk around for a while, yes, it does bother me. If I walk up steps, yes. It's an achy pain in my ankle, mostly. You know, that's where the most pain is. Other than that, you know, that's pretty much it.

Q: What do you do when it's bothering you to try to make it better?

A: Tylenol, Advil, that's it. I don't take any pain medicine. I don't – that's the only pain medicine I take.

Baker takes Advil approximately twice daily. Regarding the extent and nature of his post-injury painting, he provided the following:

A: Just family and friends, little odd jobs here and there, you know, just little things.

Q: And can you give us a little example of the most money you've made painting?

A: Probably, maybe at the most, maybe 500 bucks.

Q: And that's the least?

A: A couple hundred.

Q: And has it been for any other employer?

A: No.

Q: Has it been for anyone who is not a family or a friend?

A: No, sir.

Baker believed he is incapable of returning to his job at Color Craft or any type of work:

A: The physical labor.

Q: And can you be a little bit more specific as to what parts would be difficult for you?

A: Up and – well, climbing from 32 foot to 40 foot up in the air on an extension ladder, carrying heavy amounts of weight, walking around job sites for an extended amount of hours, you know, back and forth, I mean, I just – I don't see it.

Q: Expanding that a little bit, do you see yourself being able to work for any employer at all at present, other

> than you doing a job for yourself; do you feel physically capable of promising someone you're going to be there five days a week, eight hours a day to do any type of work?
>
> A: Not with my – no, not with the only ability I know is painting, so no.

Baker elaborated further regarding the nature of the painting jobs he has performed since the injury:

> A: Interior, small things like bathroom or living room, maybe a kitchen. That's it, sir.
>
> Q: And that's painting?
>
> A: Yes, sir.
>
> Q: Painting jobs?
>
> A: Yes, sir.
>
> Q: Are you doing any other jobs besides painting?
>
> A: No, sir.

Baker has not performed any other type of work. He engaged in four to six post-injury painting jobs. The last one occurred approximately two months prior to the hearing. He had no future scheduled jobs. In all of these jobs, the person for whom he had painted provided the materials and he brought the tools. He uses a two-foot ladder when he paints.

The ALJ relied upon Dr. Lewis' impairment rating in finding Baker had a 4% impairment rating due to the ankle and leg injury. The ALJ concluded Baker does not retain the ability to perform the work he was performing at the time of the injury reasoning as follows:

> The Administrative Law Judge must consider whether the plaintiff can perform the type of work he was

> performing at the time of the injury. This means that the plaintiff must be able to perform all of the functions he was performing at the time of injury, not just the general job description. *Ford Motor Co. v. Forman*, 142 S.W.3d 141 (Ky. 2004). The Plaintiff was performing exterior painting, on a high roof, when he was injured.
>
> The Plaintiff's treating physician kept him on restrictions for several years, but referred him to an FCE for permanent restrictions. The FCE results show frequent loss of balance through ladder climbing, and positional tolerance which involved overhead reaching of cones for three minutes. He shifted his weight off of his left ankle onto his right foot. His gait was noted to have worsened significantly during the testing. Stiffness and swelling was noted in the left ankle. He could stand on his left leg for only three seconds. The conclusion of the FCE was that he could perform medium work, but it shows that he could not do so standing for very long, and positional tolerance was stated to require modification in most instances, or was not tested.
>
> The Plaintiff himself felt that he could not perform painting. He attempted to return to work, at reduced hours, and did not feel that he was safe at a job site, given his injury and surroundings. A worker's own testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after his injury. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000); *Ruby Construction Company v. Curling*, 451 S.W.2d 610 (Ky. 1970); *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979). This assessment is supported by the FCE findings. The report of Dr. Heilig, while not credible as to impairment rating, is believable in his assessment that Mr. Baker should never be a painter again given his ankle fusion, and persistent pain. Relying on the Plaintiff's testimony, the FCE report, and the report of Dr. Heilig, the Administrative Law Judge finds that the Plaintiff is unable to return to the type of work he was performing at the time of his injury.

In finding Baker permanently totally disabled, the ALJ provided the following analysis:

PERMANENT TOTAL DISABILITY

The parties have preserved the issue of permanent total disability for decision. The Plaintiff argues that the injury prevents him from climbing ladders and performing the type of work he was doing at the time of injury, and that his age, his experience primarily as a painter, and injury prevent him from finding other types of work. The Defendant argues that the Plaintiff cannot be totally disabled because he is performing work of the same type that he was doing prior to his injury.

In *City of Ashland v. Stumbo*, 461 S.W.3d 392, 397 (Ky. 2015), the Kentucky Supreme Court outlined a five-step analysis for determining whether a person has a permanent total disability under KRS 342.0011(11)(c). That analysis can be summarized as follows:

> First, the ALJ must determine if the claimant suffered a work-related injury. Second, the ALJ must determine if the claimant does or does not have an impairment rating. Third, based on the impairment rating, the ALJ then must determine the claimant's permanent disability rating. Fourth, the ALJ must determine whether the claimant is unable to perform any type of work. Finally, it must be determined that the claimant's total disability is a result of the work-related injury. In determining whether a claimant is able to perform any type of work [under step four], the ALJ must consider "factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact."

The Administrative Law Judge determines, and the parties stipulated, that the Plaintiff suffered a work-related injury by a fall from height, fracturing his left ankle. The Plaintiff does have an impairment rating for the ankle fusion, of a 4% impairment to the body as a whole, based on Dr. Lewis report. A permanent disability rating is defined by KRS 342.0011(36) as the impairment rating multiplied by the applicable factor in

KRS 342.730(1)(b), which is .65 in this case. Therefore the Plaintiff has a 2.6 permanent disability rating.

Next, the Administrative Law Judge must determine if the Plaintiff is unable to perform any type of work. This element of the *City of Ashland v. Stumbo* test is derived from the definition of permanent total disability in KRS 342.0011(11)(c), meaning "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. The term "work" is also defined in the statute as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." KRS 342.0011(34).

An analysis of the factors set forth in KRS 342.0011(11)(b), which defines permanent partial disability, and (11)(c), defining permanent total disability, and the definition of the term "work" under KRS 342.0011(34) clearly requires an individualized determination of what an injured worker is and is not able to do after recovering from the work injury. *Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000).

The medical evidence of Mr. Baker's abilities show that he is limited to lifting no more than 30 pounds, and that he has some difficulty walking. Mr. Baker testified that his ankle aches if he walks a lot. He did not believe that he could perform work on a full-time basis if he had to climb ladders, walk around a job site for extended hours, and also testified that he did not believe he could do other work, with painting being the only kind of work he knew. The FCE report shows that the plaintiff cannot stand on his left foot for more than a few seconds.

Records from Dr. Lewis in May 2019, show that the Plaintiff has pain at the end of the day or with prolonged activity. The note also mentions some emotional issues, depression, shortness of breath, and skin problems. A CT Scan taken in April 2019, the month before his MMI date, listed a history of chronic ankle pain which radiates up the leg, and showed a complex reconstruction and fusion of the left ankle, with fixation plates and screws in place. Edema was present. Fusion was 50% - 75% across the ankle joint. Dr. Heilig noted

that the Plaintiff has pain with activity, gait disturbance, inability to climb ladders and a tendency to catch his toe when he climbs stairs.

The medical evidence from a KORT Functional Capacity Evaluation performed in November 2019 identified poor balance, impaired gait, and general deconditioning as deficits. The report concluded that Mr. Baker could perform work in the medium duty category. However, the report showed balance problems occurred throughout the positional tolerance testing and caused worsening gait, and observed that he was taking his weigh off of the left leg and using his right leg to stand. This supports Mr. Baker's own assessment of being unable to climb ladders more than a step or two, and pain after being on his feet too long. That type of position is one which would have to be maintained while performing overhead painting.

The Plaintiff's testimony shows that he can do some painting jobs, because he testified that he was doing small jobs for family members. Clearly, however he can do work at his own pace within the parameters of interior painting that does not require climbing ladders more than one or two steps. The Administrative Law Judge finds the Plaintiff to be credible as to the work he is doing, because he is admitting a fact against his own interest. Also corroborating the fact that Mr. Baker does not work doing painting jobs often or for very much money is the fact that he has had to move in with his parents. He has had financial pressure to do more work since April 2019, and has attempted to do so, but stopped because he felt this was unsafe. The Administrative Law Judge finds this testimony credible because the KORT records of the FCE show that he has poor balance, which is a significant factor when climbing ladders or painting overhead, or climbing stairs at a construction site. Dr. Heilig reports that his toe catches when going up stairs, as would be expected when the ankle is fused in one position and cannot flex. These factors, related to the injury, would make a worksite which had painting equipment, tools, supplies, and cables on the floor, especially dangerous and difficult for the Plaintiff. He was working shortened hours when he stopped working, and it can reasonably

be inferred from that attempt that he could not perform full time work.

The Plaintiff testified that he had occasionally done some painting jobs for family and friends. He testified he performed indoor painting, including some climbing of ladders, of only one or two steps. The Administrative Law Judge must address whether Mr. Baker meets the definition of total disability, when he performs these tasks for pay. In order to properly analyze this question, the Administrative Law Judge must look to the statutory definition of 'work' under KRS 342 0011(34), as it is used in the context of the definition of permanent total occupational disability.

Performing indoor painting work is not the type the type of work that the Plaintiff was performing at the time of the injury, because he was injured working outside on a barn roof at that time, without fall protection. That work involved climbing ladders at height, outdoors, apparently on a barn. The Administrative Law Judge has found that Mr. Baker cannot perform the work he was doing at the time of the injury.

The Administrative Law Judge finds Dr. Heilig's restriction persuasive and finds that Mr. Baker should not do painting ever again persuasive, due to his ankle fusion and persistent pain. However, Mr. Baker was performing jobs as an interior residential painter, so if he is capable of work, as it is defined, in that narrowed field of painting despite his restrictions, he would not be totally disabled.

The Plaintiff testified that he returned to work for his employer for a two month period in 2018, during which time he painted but did not climb ladders, and worked from 3 to 5 hours per day, but ceased working voluntarily because he felt uncomfortable doing it. Mr. Baker also testified that he has done small, interior painting jobs for family and friends since this injury, receiving up to $500 in cash per job. At the final Hearing on September 1st, 2020 he testified that he had done five or six such jobs since January, 2020. He uses his personal vehicle, supplies his own hand tools and a small ladder, and the customer supplies the material.

KRS 342.0011(34) states: 'Work' means providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. Because the word 'work' has been given a specific definition by statute, it must be construed according to that meaning. KRS 446.080(4). The Administrative Law Judge must determine if Mr. Baker can perform any type of work as that term is defined.

The undisputed fact is that Mr. Baker is capable of providing services to others for remuneration, the first part of the definition of work. He has proven that he is capable of doing so by taking money from friends and relatives for small interior painting jobs. The question is then narrowed to whether he can do so on a regular and sustained basis in a competitive economy.

"Regular and sustained" must mean more than just occasional work, and agrees with the long-standing law in Kentucky that a person does not need to be homebound in order to be considered totally disabled. *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51-52, (Ky. 2000), citing *Osborne v. Johnson*, 432 S.W.2d 800 (Ky. 1968). The inclusion of the requirement that work must be considered in the context of a competitive economy recognizes that age, lack of modern education and training, and the disadvantages of having a disability are factors in considering whether a worker is totally occupationally disabled.

The Administrative Law Judge finds that the fact that the Plaintiff performs a job for cash on an infrequent basis, calculated to approximately one every five weeks, does not qualify as providing services on a regular and sustained basis. Because Mr. Baker fatigues easily and has pain in his ankle, understandably, because of his fusion and multiple surgeries, he cannot be on a job site for eight hours per day, five days per week. This is corroborated by the findings on the functional capacity evaluation, Dr. Heilig's report, and Mr. Baker's own testimony. While he had attempted to return to work on a short-term basis, he was successful. This is further corroborated by Dr. Lewis' reports that he has pain at the end of the day and pain increases with activity. The FCE report also referenced Mr. Baker's limitations of prolonged standing, which showed that he began bearing weight on his right foot and shifted weight off of

his injured ankle, after a short period, causing him to lose his balance. He cannot stand on his left leg only for more than three seconds. All of these factors together persuade the Administrative Law Judge that, because of the work-related injury, Mr. Baker has lost the ability to perform even minor jobs on a regular and sustained basis.

The further qualification that "work" must be performed in a competitive economy recognizes that the injured worker is competing against other workers for the same opportunity to receive remuneration for services; workers who are younger, healthier, and who do not have the limitations of an injured worker. In this case, other workers would be younger and more physically capable of performing the work of a painter than Mr. Baker. These other workers would be available to perform outdoor work, on high ladders, whereas Mr. Baker would not. An employer, viewing the risks of a job site where there are stairs and ladders and trip hazards constantly present, would probably wish to avoid having a worker in his employ who had balance problems, a limp, and a previously fractured ankle. In a competitive economy, an employer would prefer to hire a worker who did not have restrictions as to climbing and balancing, and could perform interior or exterior work at height without limitation, for a full 8-hour day and occasionally overtime. The Administrative Law Judge finds that Mr. Baker is at a serious disadvantage when competing with others in a competitive economy due to his injury.

The Administrative Law Judge relies on Mr. Baker's testimony that he only provides services to family members and friends to find that he is not engaging in selling his services in a competitive economy. Instead, he is participating in a sheltered economy, one where he is being given a job because of the sympathy of family and friends. In *Gunderson v. City of Ashland*, 701 S.W.2d 135, 136 (Ky. 1985), the Court quoted Larson's *Workers' Compensation* in stating:

> ". . . the essence of the test is the probable dependability with which the claimant can sell his services in a competitive labor market, undistorted by such factors as business boom, sympathy of a particular

> employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps. Larson's, Workers' Compensation, Vol. II, §57.51"

Taking into consideration the type of work Mr. Baker has performed for most of his life, his age, nearly 58 years old at the time of the Hearing, and his education, Mr. Baker's opportunity to retrain to a lighter occupation are very limited. He has a high school education, which was completed many years ago, and which is unlikely to be useful for job retraining now. He has been a painter for most of his work life, and he is unable to do that on a regular and sustained basis. His physical limitations are that he walks with a limp and cannot stay on his feet for very long, limitations which would preclude physical labor on a regular and sustained basis. He would have to retrain to a position that would require only occasional walking, and no prolonged standing. He has no past experience performing that type of work. Based on observations of the testimony of the plaintiff, and relying on his work history and educational history, the Administrative Law Judge finds that the plaintiff does not have the emotional and intellectual capability to retrain after being unable to return to his previous type of work for more than three years. He does not speak clearly or deliberately, and misunderstands or does not follow questions. His employment history indicates that he is limited to painting, and that he did not acquire any transferable skills which could be used in other work which did not require climbing, extensive walking and prolonged standing. His high school education is so remote that it does not qualify him for any job except unskilled work. In order to retrain for a job in today's economy, he would most likely have to be able to learn to use modern technology. The plaintiff himself testified that, having been a painter for most of his life, he does not believe he can do any job, because painting is all he knows.

Consistent with *Osborne v. Johnson*, 432 S.W.2d 800 (Ky. 1968), the Administrative Law Judge must consider factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how

those factors interact. In doing so, it is clear that Mr. Baker will not find other work that will accommodate his disability. He has been without substantial income since April 2019, and instead of retraining to other work, he has attempted to return to painting, a profession which he cannot perform on a sustained and regular basis in a competitive economy, and one in which he might be endangering himself. He has moved into his parents' home, and borrowed money for support. He has filed for Social Security Disability, and did not file for unemployment, which would require a statement that he was ready, willing and able to work. While another individual may have been creative and resourceful enough to find a job which would accommodate his disabilities and which would pay enough to support him, the plaintiff does not have those intellectual and emotional attributes. His education, prior work experience and his physical and emotional condition after his injury, have combined to render him totally disabled. The Administrative Law Judge finds that the Plaintiff is totally and permanently occupationally disabled.

Finally, the Administrative Law Judge must make a finding as to whether the Plaintiff is totally occupationally disabled because of his injury. Mr. Baker was working full-time for the Defendant/Employer before his injury. He testified that he worked for Highland Contracting before working for the Defendant/Employer, and has worked for other painting companies throughout his lifetime. Although he testified that he had received cortisone injections in his knees at some time in the past, there is no proof of a pre-existing condition that may have contributed to his disability.

In considering a total disability and whether pre-existing medical or psychiatric issues are an independent cause of disability, the Administrative Law Judge must consider whether the Plaintiff had pre-existing disability, and not whether he had pre-existing impairment. The terms "impairment" and "disability" are not synonymous. Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181, 183 (Ky. 2003). KRS 342.730(1)(a) requires the ALJ to determine the worker's disability, while KRS 342.730 (1)(b) requires the ALJ to determine the

> worker's impairment. For that reason, if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a). Mr. Baker was working regularly prior to his injury, without restrictions, according to his testimony. He has not worked on a full-time, regular and sustained basis since his injury. The Administrative Law Judge finds that the total disability is due to Mr. Baker's work-related injury. Accordingly, under the guidelines described by the Kentucky Supreme Court in *City of Ashland v. Stumbo*, *supra*, the Administrative Law Judge finds that the Plaintiff is permanently and totally occupationally disabled, by reason of his injury at work for Color Craft Painting on May 16, 2017, and will enter an award of permanent total disability.

Color Craft timely filed a Petition for Reconsideration taking issue with the ALJ's finding of total occupational disability. Color Craft requested the ALJ provide additional findings regarding Baker's work restrictions, whether Baker's post-injury painting jobs constituted work as defined by the statute, the finding concerning Baker's intellectual faculties, and the finding Baker was permanently totally disabled.[2] In the November 27, 2020, Order denying the Petition for Reconsideration, the ALJ stated as follows:

> The Defendant, Color Craft Painting, petitions for reconsideration of the October 30, 2020 Opinion and Award, challenging the finding that the plaintiff is totally and permanently occupationally disabled. In paragraphs 1 and 2 of its Petition, the Defendant asks the ALJ to reconsider his decision as to whether the plaintiff can be considered totally occupationally disabled because he performs occasional interior painting jobs for family and friends for $200 - $500 each, at the rate of one every month and a half. The ALJ determined that this was not "work" within the

[2] Color Craft also requested further findings addressing the ALJ's conclusion Baker would not be able to retrain or find other work which would accommodate his disability.

definition of KRS 342.0011(34), because it was not performed on a regular and sustained basis in a competitive economy. Therefore the Defendant's Petition in that regard is overruled. On the issue of total occupational disability, the Defendant argues that a finding of total occupational disability requires evidence showing the plaintiff cannot physically perform any type of work. That is not the standard for total occupational disability, as defined in *Osborne v. Johnson* 432 S.W.2d 800 (Ky. 1968); *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51-52 (Ky. 2000), and *City of Ashland v. Stumbo*, 461 S.W.3d 392 (Ky. 2015). That definition includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. A requirement that the plaintiff be physically unable to perform any type of work is not necessary to find that the plaintiff is totally occupationally disabled, because other factors, as listed above, must be considered. In his prior decision, the Administrative Law Judge discussed how, because the plaintiff has been a painter for most of his life, and cannot perform that profession now on a regular and sustained basis in a competitive economy, he would have to retrain to find other work. The ALJ's decision explained that it is unlikely that he will be able to do so because of his age, his physical limitations which prevent him from being a painter on a regular and sustained basis in a competitive economy, his educational level and his emotional and intellectual status and how those factors interact. These are the inferences that the ALJ is allowed, and in fact required, to make. There does not need to be direct vocational evidence to support this finding of fact. *Eaton Axle Corp. v. Nally*, 688 S.W.2d 334 (Ky. 1985);

KRS 342.281 provides that in considering a petition for reconsideration, "[t]he administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or

decision." This language plainly precludes an ALJ from reconsidering the case on the merits or changing the findings of fact previously made. *Garrett Mining Co. v. Nye*, 122 S.W.3d 513 (Ky. 2003); *Wells v. Ford*, 714 S.W.2d 481 (Ky. 1986). Therefore, the Defendant's Petition for Reconsideration is overruled.

The Defendant requests further findings of fact as to what evidence supports the ALJ's conclusion that Mr. Baker will not find other work that will accommodate his disability, and that he does not have the emotional or intellectual ability to retrain. Exercising his prerogative to make reasonable inferences from the evidence, the ALJ based this statement on the fact that Mr. Baker has been without substantial income since April 2019, and instead of retraining to other work, he has attempted to return to painting, a profession which he cannot perform on a sustained and regular basis in a competitive economy, and one in which he might be endangering himself. He attempted to return to work on a limited basis, working up to five hours a day, for the Defendant. He was not able to do so and felt unsafe in his surroundings. Instead, he has moved into his aging parents' home, and borrowed money for support. He has filed for Social Security Disability, which legally means that he believes he is unable to perform substantial gainful employment. His inability to find work in a competitive economy, despite financial pressure to do so, is evidence of substance from which the ALJ infers that Mr. Baker cannot do so.

The Defendant request further findings of fact regarding the ALJ's findings concerning the demeanor of the plaintiff, that he misunderstood questions or did not answer clearly, as one of the bases for his findings concerning the intellectual and emotional status of the plaintiff. The Administrative Law Judge relied on questions in the plaintiff's deposition when he was asked whether he had filed for disability, and he answered negatively, then explained that he had filed for Social Security; being mistaken as to whether he was represented by an attorney in that case; multiple instances where he failed to remember even approximate dates, and mistakenly recalled that he worked in the same year as the deposition, then was corrected by his attorney; and being unsure of his plans

for returning to the work force. The Administrative Law Judge conducts a Hearing because he is entitled to judge the credibility and demeanor of the witness. Based on the plaintiff's responses and his lack of a plan to retrain, the ALJ found that the following response was credible and relied upon it in making his decision:

Q "The job you had for Color Craft Painting, with the problems that you're having with your left leg and ankle, do you feel like you're able to return or could you do the job you had there?

A No, sir.

Q What about that job would keep you from doing it?

A The physical labor.

Q And can you be a little bit more specific as to what parts would be difficult for you?

A Up and -- well, climbing from 32 foot to 40 foot up in the air on an extension ladder, carrying heavy amounts of weight, walking around job sites for an extended amount of hours, you know, back and forth, I mean, I just –- I don't see it.

Q Expanding that a little bit, do you see yourself being able to work for any employer at all at present, other than you doing a job for yourself; do you feel physically capable of promising someone you're going to be there five days a week, eight hours a day to do any type of work?

A Not with my –- no, not with the only ability I know is painting, so no.

(TH, pp. 16-17).

A worker's own testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after his injury. *Commonwealth of Kentucky, Transportation Cabinet v. Guffy*, 42 S.W.3d 618 (Ky. 2001). Assessing all of this evidence together led that Administrative Law Judge to conclude that because of his physical limitations as a result of the injury, and his vocational history of being primarily a

> painter for most of his life, the plaintiff would have to retrain in order re-enter the work force. Because of his age, 58 at the time of his hearing, combined with his basic educational level without college or other specialized training, and his intellectual and emotional factors, he was not likely to retrain. Thus he was found to be totally occupationally disabled. The plaintiff's own testimony about his abilities to perform work dependably on a sustained basis also supports this finding. Finally, the fact that he has tried and failed to reenter the work force on a regular and sustained basis, and is being supported by his aged parents and Social Security benefits, are factual bases for a finding that the plaintiff is totally occupationally disabled. The facts that the plaintiff fell from a high roof while working for the defendant, has undergone several surgeries to his ankle as a result, and has never returned to work on a regular and sustained basis since that time, convinced the Administrative Law Judge that the plaintiff's total occupational disability is the responsibility of the Defendant.

In arguing the ALJ erroneously found Baker totally occupationally disabled, Color Craft first complains Baker's condition does not meet the definition of permanent total disability since he worked as a painter following his injury. Color Craft maintains the ALJ equated Dr. Heilig's opinion that Baker cannot return to work as a painter as support for the finding that he is unable to return to any type of work. It asserts KORT's Functional Capacity Evaluation ("FCE") report does not support multiple findings by the ALJ. It takes issue with the ALJ's conclusory statements Baker is not able to return to any type of work, cannot retrain to a lighter occupation, only provided services to family members and friends, and is participating in a sheltered economy where he is being given a job because of the sympathy of family and friends.

Color Craft also maintains the ALJ's statement Baker does not have the emotional or intellectual capability to retrain is not supported by vocational or psychological evidence. Color Craft asserts the conclusions drawn by the ALJ based upon his observations of Baker at the hearing, particularly the statement that Baker does not speak clearly or deliberately and misunderstands or does not follow questions is unsupported by the record. It observes that although the ALJ saw Baker once during a Zoom hearing, nothing else in the record supports the ALJ's conclusion regarding Baker's mental capabilities.

In Color Craft's view, the only substantial evidence in the record is the FCE report revealing Baker falls within the medium physical demand level and his return to work in some capacity as a painter. Thus, it insists the record is devoid of evidence indicating Baker remains incapable of any type of work. Consequently, the ALJ's finding lacks sufficient legal basis and must be reversed. As substantial evidence supports the ALJ's decision, we affirm.

ANALYSIS

As an initial matter, we note Color Craft does not assert the ALJ failed to conduct the five-step analysis required by City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015). Rather, it complains there is insufficient evidence to support a finding of permanent total disability, since Baker's sporadic painting and the FCE report establish he is not totally occupationally disabled. Color Craft only briefly mentions Dr. Heilig's opinion that Baker "cannot ever work as a painter again due to the ankle fusion with persistent pain." Without question, Dr. Heilig's opinions constitute substantial evidence supporting the finding Baker does not retain the

capacity to return to the job he was performing at the time of the injury. No other physician offered a contradictory opinion.

Baker, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including entitlement to permanent total disability benefits. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Baker was successful in that burden, the question on appeal is whether substantial evidence of record supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). 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). Rather, it must be shown there was

no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Baker testified he did not believe he is capable of returning to painting or to any type of work since painting "is the only ability I know" and he cannot return to that occupation. That testimony is supported by Dr. Heilig's opinion. Baker's testimony firmly establishes that most of his work life was spent as a painter primarily painting residences. Baker's testimony, standing alone, comprises substantial evidence supportive of a finding of total occupational disability.

Dr. Lewis' April 24, 2019, report reflects Baker experienced stiffness and some expected activity-related pain at the end of the day or after prolonged activity. He also experienced decreased motion, depression, easy bruisability, emotional disturbances, insomnia, joint pain, night sweats, poor balance, persistent cough, shortness of breath, skin problems, and weakness. This led Dr. Lewis to state that in order to determine Baker's permanent work restrictions an

FCE was necessary. The KORT FCE placed Baker in the medium physical demand category. The FCE report states Medium is defined as follows:

> Exerting 20 lbs. to 50 lbs. of force **occasionally**, and/or 10 lbs. to 25 lbs. of **force frequently**, and/or greater than negligible up to 10 lbs. of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work. [Emphasis added].

However, the report also reflects deficits during the testing which included "decreased left ankle ROM and strength, poor balance, and impaired gait." Importantly, the report observes Baker demonstrated consistent performance throughout the test indicating "the results of this evaluation can be considered to be an accurate representation of [his] functional abilities." Although the FCE revealed Baker could stand and walk frequently, modification was required for each. Baker could occasionally climb ladders with modification required. He could balance and stoop frequently with modification required for those activities. His symptoms included "shooting pain in the ankle when walking greater than 30 minutes or being physically active which is greatest on the medial side." He reported numbness in the ankle/foot and occasional pain in the left knee and hip. Baker's perceived abilities included "sitting for 60 minutes, standing for 5 minutes, walking for 30 minutes, driving for 60 minutes, and lifting 50 pounds."

The FCE also noted there was "antalgic gait with decreased stance time and decreased step length on the right." Additional testing revealed "single leg stance on the left was 3 seconds." Concerning Baker's ability to perform the Carry Testing, the FCE report notes as follows: "During frequent carry patient experienced loss of balance and this coupled with worsening antalgic gait test was terminated."

Similarly, the FEC noted that "[w]ith push testing client initiated the motion with right foot only. Significant difficulty with pull due to walking backwards demonstrating poor mechanics and balance." With respect to positional tolerance, the following was noted:

> Standing - Frequent - Abnormal movement pattern observed. Frequent shifting of weight off the left leg and took small steps around testing area rather than standing in one position.
>
> Walking - Frequent - Abnormal movement pattern observed. Worsening gait throughout evaluation.
>
> Climb Ladders - Occasional - Abnormal movement pattern observed. Unable to lead with left leg. Concern present regarding balance.
>
> Balance - Frequent - Abnormal movement pattern observed. Multiple loss of balance throughout testing.
>
> Stoop - Frequent - Abnormal movement pattern observed. Shifting of weight off left leg observed.

The FCE also noted that throughout the positional tolerance testing circuit, Baker "had multiple loss of balance and demonstrated worsening gait." He frequently shifted weight off the left leg and initiated all movements with the right leg. Under the heading "musculoskeleton screening post-test summary," the FCE notes "significant worsening of gait with amplified deviations."

The opinions of Dr. Heilig that Baker can never return to painting, the results of the FCE report as recited herein and by the ALJ, and Baker's testimony that he is unable to perform any type of work constitute substantial evidence supporting the ALJ's finding Baker is totally occupationally disabled.

In conducting his analysis pursuant to the City of Ashland, supra, the ALJ noted the parties stipulated Baker suffered a work injury. He found Dr.

Lewis' report establishes Baker has an impairment rating yielding a disability rating as defined by KRS 342.0011(36). Concerning the remaining elements of the analysis, relying upon portions of the FCE and Baker's testimony, the ALJ found Baker unable to return to painting because he had attempted to return to work at reduced hours and did not feel safe at a job site given his injury and surroundings. The ALJ concluded Baker's assessment of his ability was supported by the FCE findings and the opinion of Dr. Heilig. Relying upon Dr. Heilig's restriction, the FCE report, and Baker's testimony, the ALJ was persuaded Baker's age, education, and work experience resulted in a loss of ability to perform even minor jobs on a regular and sustained basis. The ALJ accurately cited the portions of the FCE report upon which he relied. The ALJ also accepted Baker's testimony that he only provided services to family members and friends in finding he was not engaging in selling his services in a competitive economy. Nothing in the record refutes this finding. Taking into consideration the type of work Baker performed during his life, his age, and education, the ALJ concluded Baker's opportunity to retrain for a lighter economy was very limited. Based upon Baker's vocational and educational history, and observations of Baker during the testimony, the ALJ concluded Baker does not have the emotional and intellectual capacity to retrain after being unable to return to any type of work for more than three years. The ALJ found Baker's vocational capacity is limited to painting since he has not acquired any transferrable skills which do not relate to climbing, extensive walking, or prolonged standing. Similarly, Baker's high school education was so remote that it did not qualify him for anything other than unskilled work. Consequently, Baker's education, prior work experience, and

physical and emotional condition after the injury rendered him totally occupationally disabled. We are unable to conclude the ALJ's findings are unsupported by the record.

In considering permanent total disability, the ALJ is required to make an "individualized determination of what the worker is and is not able to do after recovering from the work injury." McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 860 (Ky. 2001). The analysis includes "consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact." Ira A. Watson Dept. Store, supra, at 52. Furthermore, as in all workers' compensation cases, the ALJ must provide findings of fact sufficient to inform the parties of the basis of his decision and to permit meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988).

The ALJ has sufficiently articulated the basis of his decision. The ALJ stated his reliance upon Dr. Heilig's opinion as to Baker's physical capacity to return to work as a painter, portions of the FCE results, and Baker's testimony concerning his ongoing pain and ability to return to painting. The ALJ considered Baker's age, education, and prior work history in performing his analysis. Thus, we cannot conclude the ALJ has failed to sufficiently articulate the basis of his decision, or failed to conduct the requisite analysis pursuant to Ira A. Watson Dept. Store, supra.

In determining whether a particular worker is partially or totally occupationally disabled as defined by KRS 342.0011, in Ira A. Watson Dept. Store, supra, the Kentucky Supreme Court explained the analysis "requires a weighing of

the evidence concerning whether the worker will be able to earn an income by providing services on a **regular and sustained** basis in a competitive economy." (Emphasis ours). The Supreme Court explained further:

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson, supra,* it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. *See, Osborne v. Johnson, supra,* at 803.
>
> …
>
> A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. *Hush v. Abrams,* Ky., 584 S.W.2d 48 (1979).

Id. at 51-52.

The Supreme Court reaffirmed this holding the next year in McNutt, supra, stating:

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson, supra,* it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and

> vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work **consistently** under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be **dependable** and whether his physiological restrictions prohibit him from using the skills which are **within his individual vocational capabilities**. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. *See, Osborne v. Johnson, supra,* at 803. (Emphasis ours).
>
> …
>
> It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability. Although the ALJ must necessarily consider the worker's medical condition when determining the extent of his occupational disability at a particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. *See, Eaton Axle Corp. v. Nally,* Ky., 688 S.W.2d 334 (1985); *Seventh Street Road Tobacco Warehouse v. Stillwell,* Ky., 550 S.W.2d 469 (1976). A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. *Hush v. Abrams,* Ky., 584 S.W.2d 48 (1979).

Id. at 860.

The ALJ stated he considered Baker's age, education, and the fact that in the last 30 plus years he had worked solely as a painter. These factors caused the ALJ to conclude Baker is incapable of any type of employment in another field. Consequently, because of his advanced age, limited education (high school diploma), and previous work experience, the ALJ concluded Baker is not able to obtain physically suitable employment in a competitive economy. Those findings are

supported by Dr. Heilig's opinion, Baker's testimony, and portions of the FCE report.

As noted by the Supreme Court, the facts of each claim involve an individualized determination of whether an injured worker will be able to earn income on a regular and sustained basis in a competitive economy. Here, the ALJ was presented with a worker who had engaged in one occupation for over 30 years. Dr. Heilig's opinion that Baker could never return to work as a painter is uncontradicted. Thus, the ALJ's findings are supported by the record and we may not disturb them.

Further, Baker's ability to perform limited painting jobs did not prohibit a finding Baker is totally occupationally disabled. As noted in McNutt, supra, the definition of work contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. Id. at 803. Thus, the fact Baker performed a few painting jobs for family members and friends for nominal amounts did not prohibit the ALJ from finding him totally occupationally disabled.

The crux of Color Craft's argument concerns the ALJ's weighing of the evidence. It argues the finding of permanent total disability is not supported by substantial evidence. It complains about the ALJ's conclusion regarding Baker's intellectual capabilities after observing him at the hearing. Color Craft emphasizes there was no vocational testimony supporting the conclusions drawn by the ALJ concerning Baker's opportunity to retrain in modern technology.

Color Craft's protestations to the contrary, as the fact-finder, the ALJ is in a superior position to evaluate the intellectual and emotional capabilities of any witness and the conclusions drawn by the ALJ after observing the witness will not be disturbed. This Board has consistently held the ALJ has the duty, obligation, and right to base his/her decision-making process on his/her observations at the final hearing. Part of the rationale that prevents public tribunals from substituting their own fact-findings for those of an ALJ is that the fact-finder sees the witness and is in a superior position to evaluate the conduct or demeanor of the witness as he/she testifies and to consider the credibility of the witness. Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298 (Ky. 1972). Simply because a party or witness may make a statement under oath does not mean the ALJ is bound to rely on that statement as fact, even if that testimony is uncontradicted by other evidence. An ALJ may weigh such statements against a witness' overall potential for veracity. If, given the witness' demeanor, the ALJ believes such testimony, he/she may rely upon it.

Upon a thorough review of the evidence, we cannot conclude the ALJ's decision is so unreasonable it must be reversed as a matter of law. The opinion of Dr. Heilig, the results of the FCE as recited here, and Dr. Lewis' notation in the April 24, 2019, report were accurately recited by the ALJ. Further, Baker's testimony regarding his physical condition and ability to perform activities is competent evidence upon which the ALJ may rely. Hush v. Abrams, 584 S.W.2d 48 (1979). Though Color Craft has presented evidence indicating Baker is not permanently totally disabled, this alone is not a basis for reversal of the award. McCloud v. Beth-

Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Upon review of the record, we cannot say the ALJ's decision is devoid of evidentiary basis. Special Fund v. Francis, supra. Therefore, we must affirm.

For the foregoing reasons, the October 30, 2020, Opinion, Award, and Order and the November 27, 2020, Order ruling on the Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON IAN GODFREY **LMS**
771 CORPORATE DR STE 101
LEXINGTON KY 40503

COUNSEL FOR RESPONDENT:

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

ADMINISTRATIVE LAW JUDGE:

HON PETER J NAAKE **LMS**
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601