

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 19, 2021

CLAIM NO. 201771184

KEMI

PETITIONER/
CROSS-RESPONDENT

VS. **APPEAL FROM HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE**

JUSTIN THELE;
DESIGNED ELECTRICAL INTEGRATORS;
METHODIST HOSPITAL;
MIDWEST SURGERY CENTER, LLC;
ST. FRANCIS MEDICAL CENTER;
MIDWEST NEUROSURGEONS;
SOUTHEAST MISSOURI ANESTHESIA; AND
HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS/
CROSS-PETITIONERS

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

* * * * *

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

BORDERS, Member. Kentucky Employers Mutual Insurance Company
("KEMI"), the insurer for Designed Electrical Integrators ("DEI"), appeals and

Justin Thele (“Thele”) cross-appeals from the March 21, 2019 Interlocutory Opinion and Award, the April 15, 2019 Order on Petition for Reconsideration, the October 20, 2020 Opinion, Award, and Order, and the November 4, 2020 Order on Petition for Reconsideration rendered by Hon. John McCracken, Administrative Law Judge (“ALJ”).

Thele filed a Form 101 alleging he was involved in a work-related accident on August 10, 2017. Thele was working for DEI in Indiana on a scissor lift 20 feet high. The lift was stuck by a forklift, causing him to fall, suffering a L1 Chance fracture and allegedly a pelvic fracture.

In the Interlocutory Opinion of March 21, 2019, the ALJ determined Kentucky has jurisdiction over Thele’s claim, and he awarded temporary total disability (“TTD”) benefits and medical benefits. The ALJ denied KEMI’s Petition for Reconsideration. The parties thereafter proceeded to introduce evidence on the remaining issues.

The ALJ rendered his final Opinion, Award, and Order on October 20, 2020. The ALJ reiterated his initial finding that Kentucky had jurisdiction of this claim pursuant to KRS 342.670(1)(b), and further determined Thele suffered a work-related L1 Chance fracture. He determined Thele’s L5-S1 annular tear and the resulting surgery were not work-related. He determined Thele retained a permanent partial disability (“PPD”) based on the 27% impairment rating assessed by Dr. Timothy Kriss, enhanced by the three-multiplier, and determined Thele is not permanently totally disabled. He dismissed DEI’s claim for subrogation and ordered Thele undergo a vocational rehabilitation evaluation. The ALJ also determined

which medical expenses were compensable. However, the ALJ did not rule on Thele's request for the imposition of sanctions.

KEMI argues the ALJ erred in determining Kentucky has jurisdiction of this claim. It argues the contract for hire between DEI and Thele was entered into while Thele was located in Mississippi, thereby depriving Kentucky of jurisdiction. Thele argues the Opinion is interlocutory as the ALJ did not address the motion for sanctions. Thele further argues the ALJ erred in choosing the 27% impairment rating as opposed to the 52% impairment rating assessed by Dr. Joseph B. Zehner and Dr. Sonjay Fonn, as the 27% rating does not include a rating for a thoracic spine condition. Thele also argues the ALJ erred in not finding him permanently totally disabled. For the reason set forth herein, we affirm in part, vacate in part, and remand.

At the Benefit Review Conference, the parties agreed to waive their right to a final hearing and to submit this claim on the record with the following issues to be determined: jurisdiction under the Act, work relatedness/causation, benefits per KRS 342.730, TTD benefits, wages upon return to work, ability to return to work, credit for subrogation, vocational rehabilitation, unpaid or contested medicals, maximum medical improvement ("MMI"), proper use of the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides"), all medical fee disputes raised by the Employer, timeliness of medical disputes, and sanctions for failure to pay medical bills previously ordered paid.

Thele testified by deposition on August 9, 2018 and April 3, 2020, and at the hearing held January 22, 2019. Thele is twenty-six years old and is a high school graduate. He took some vocational classes in welding, but he holds no welding certifications. Thele was in an electrical apprenticeship with DEI. He worked for DEI for a few months in 2014 and then again in 2016 and 2017. He worked for DEI continuously from March 2016 until his injury on August 10, 2017. Thele performed electrical installations, primarily on material handling systems. While working at DEI, he obtained forklift and scissor lift certifications. He worked on the Zulily project in Bethlehem, Pennsylvania and the Home Goods project in Indiana, where he was injured. While working in Pennsylvania, he shared a room with his father. When he worked in Indiana, he rented a camper with his father. His residence is in Jackson, Missouri.

Thele was not undergoing medical treatment or taking prescription medication prior to the August 10, 2017 accident. He was under no physical restrictions. Thele broke his left arm when he was 13 years old and underwent surgery. At age 14, he broke his left wrist and underwent surgery. He received no treatment after follow-up for that surgery. At age 14, he was thrown by a horse and was hospitalized for a concussion, but suffered no lingering effects from the injury.

On August 10, 2017, Thele was working from a platform that fell over after a forklift struck it. Thele landed on his back, and his head bounced off the concrete. He lost consciousness as a result of the accident. He remembers waking up with a co-worker telling him to get up and grabbing his arm. Following the accident, Thele treated at Indiana University Methodist Hospital from August 10 to

August 14, 2017. Dr. John J. DePowell performed back surgery. Thele went home to Missouri and continued to treat with Dr. DePowell for a while. On November 6, 2017, he was released from care for his left wrist and elbow conditions. No surgery was performed on the left arm or wrist, and he has had no further treatment for those injuries. He has no restrictions for the arm or wrist. Thele next treated with Dr. Fonn for his back and broken pelvis.

As of January 2018, Dr. Fonn no longer assigned work restrictions. After his release by Dr. Fonn in January 2018, Thele received unemployment benefits for three weeks. He returned to work for DEI in January or February 2018. On February 18, 2018, Thele asked DEI to lay him off temporarily so he could return home for his sister's wedding. At the time of his deposition, Thele worked for Davis Glass installing wood and steel doors, windows, and building frames.

Thele was involved in a motor vehicle accident ("MVA") on June 2, 2018, when he swerved to miss a deer. His truck went into a ditch and he struck a tree on the driver side. He did not seek treatment, but bruised his left leg and sustained a scratch on his arm from broken glass.

Thele's testimony at the hearing on January 22, 2019 was consistent with his deposition testimony. Thele confirmed he initially contacted DEI concerning employment. The last detail of his phone conversation concerned his hourly wage. Thele asked for a wage of \$16.00 per hour and DEI accepted. Thele testified he considered himself to be an employee at the end of the call.

At his April 3, 2020 deposition, Thele testified he worked for Davis Glass from May 2018 through February 28, 2019. He left that job to undergo

surgery by Dr. Fonn. Thele had stopped treating with Dr. DePowell due to the distance from his office. As of April 3, 2020, Thele was not taking any medication for his injury. On March 9, 2020, Dr. Fonn stated Thele is disabled and directed him to call back as needed. Dr. Fonn planned to refer Thele for physical therapy, but it was not approved. Dr. Fonn placed Thele under restrictions. He has filed for Social Security disability benefits.

Thele stated that, after his 2018 deposition, he treated at the emergency room at the St. Francis Medical Center in Cape Girardeau on one occasion for an unrelated fall prior to the surgery performed by Dr. Fonn. Thele still experiences constant fluctuating low back pain. He also experiences right leg pain that goes to the back of his knee. He occasionally has pain in his feet and sharp pain shooting down his left leg. He additionally experiences occasional leg tingling. Thele stated he had a prior pelvis injury, and he was not sure if his leg pain is from the pelvis injury or his back injury. He stated his only exercise is walking. He mows his yard with a push mower. He is not currently looking for work.

Thele had a trial implantation of a spinal cord stimulator, but it did not provide sufficient relief to have one permanently placed in his back. The trial occurred prior to surgery by Dr. Fonn. Thele stated Dr. Fonn had scheduled the surgery prior to the slip and fall on ice. That fall had nothing to do with the surgery. Thele stated his left leg pain varies. On some days, he has sharp pain into both legs and feet. Mowing his yard increases his pain. He has to rest for 15 minutes after mowing for 5 minutes. Likewise, he has to rest after walking approximately the length of a city block. He sits in a recliner as much as possible. He performs

stretching exercises. The only other treatment that helps his pain is the use of medical marijuana, which is legal in Missouri. Dr. Fonn issued a 20-pound lifting restriction. Thele did not believe he could return to his job with DEI.

Braxton Gaither (“Gaither”), President of DEI, testified by deposition on August 9, 2018, and at the January 22, 2019 hearing. Gaither testified a pre-employment phone call occurred including himself, Thele, and Doug Goens (“Goens”). Gaither could not remember who initiated the call. At the time of the call, Gaither was located in Lancaster, Kentucky, DEI’s headquarters. Gaither testified that at the end of the call, he understood Thele was employed by DEI, starting within the coming weeks. Gaither denied knowing where Thele was located at the time the call occurred. Gaither “absolutely, unequivocally” believed the employment contract between Thele and DEI was entered into within the state of Kentucky. Gaither testified orders are given to employees from Lancaster, Kentucky. Gaither testified that due to DEI performing work in every state within the continental United States, Thele would not be working strictly in any individual state. Gaither asserted DEI did not maintain a physical location outside of Lancaster, Kentucky. Thele’s father communicated with management and informed them where Thele would be working.

On August 10, 2017, Thele sustained an injury during the course of his employment while working at a Home Goods in Indiana. Gaither testified that one of the employees of Home Goods came through the area with a “high mast” without permission and “waylaid” Thele.

KEMI has been the workers' compensation insurer for DEI since the inception of the company. Gaither testified he thought KEMI provided coverage everywhere DEI worked. Since Thele's injury, Gaither now understands KEMI has taken the position that it only provides coverage for injuries occurring in Kentucky. Gaither testified that another individual, Matt, sustained an injury while working at Zulily in Indiana prior to Thele's injury. Matt lived in Florida, and his hiring process was the same as Thele's. Gaither asserted that KEMI covered the claim and never questioned the localization of the employment. Gaither stated the majority of DEI's work is performed outside of Kentucky.

Gaither acknowledged Thele lived in Missouri and was working in Indiana at the time of the injury. From the time of the conference call until Thele began actual work for DEI, he never visited the headquarters in Kentucky. At the hearing, Gaither acknowledged he was in DEI's headquarters in Lancaster, Kentucky while the conference call occurred. Goens was also present at the conference call. Gaither acknowledged the call was held to determine Thele's wage rate and an agreement was reached to hire Thele as an electrical apprentice. Thele's employment was performed in multiple states. Gaither testified Thele's payroll was initiated in Kentucky. Gaither understood the employment contract was initiated within the state of Kentucky.

Dr. DePowell treated Thele from August 10, 2017 through November 14, 2017. Dr. DePowell diagnosed an unstable L1 Chance fracture. He performed posterior fixation and fusion from T11 to L3 on August 11, 2017. On November 14,

2017, Dr. DePowell cleared Thele to return to some light duty work. He planned to refer Thele to spine and pain management specialists closer to his home in Missouri.

Thele filed medical records from Dr. Fonn documenting his treatment. A December 4, 2017 lumbar CT scan revealed a mild compression fracture at L1. There was no spinal stenosis. Thele complained of left and right mid-to-low back pain radiating to the tailbone area. Thele denied any radiation down the lower extremities. Thele stated his pain caused extreme difficulty with sitting, standing, walking, lying down, bending, and twisting. There were no work restrictions given. On December 21, 2017, X-rays and a CT scan of the pelvis were normal. Thele continued to complain of low back pain radiating into his low back and hips. On December 21, 2017, Dr. Fonn ordered low back imaging of the S1. He diagnosed lumbar facet arthropathy and administered a facet block at L5/S1. The lumbar MRI revealed a broad based disc bulge at the L5/S1 level. He administered lumbar facet blocks that Thele stated relieved his pain for two days. By the fourth day, his pain returned.

On September 18, 2018, Thele complained of increased leg pain with lower back pain radiating into the buttocks and hips and down the lower extremities to the posterior knee, right greater than left. He experienced occasional bilateral thigh paresthesia. Dr. Fonn recommended a discogram at L3/4, L4/5 and L5/S1. On November 27, 2018, Dr. Fonn proposed a lumbar laminotomy at L5/S1 on the right. On February 19, 2019, Dr. Fonn noted Thele was waiting for surgery at L5/S1 to alleviate compression of the exiting nerve root. Thele asked to be taken off work due to pain. He noted a severe aggravation of the pain radiating into his right

leg and denied any recent fall or trauma. In February 2019, Thele underwent epidural injections at L5/S1, which provided short-term relief. On February 28, 2019, Thele underwent a lumbar laminotomy at L5/S1 level. On March 6, 2019, Thele reported doing well with a slight change in the pain in the right lower extremity; however, he was unsure of how much better he was. On April 28, 2020, Dr. Fonn assessed a 52% impairment rating based upon the AMA Guides. He stated this was consistent with Dr. Zehner's rating.

A February 21, 2019 record from the emergency room at Saint Francis Medical Center documents Thele's treatment after he reportedly slipped on ice a week earlier, causing him to twist and have back pain. He denied falling to the ground. Lumbar and thoracic CT scans revealed no acute abnormality.

Dr. Zehner evaluated Thele on January 31, 2020. Dr. Zehner discussed the DRE and range of motion methods for assessing a permanent impairment. Using the DRE method, he assessed a 20% impairment rating for DRE thoracic Category IV. He stated table 15-7 could not be applied to the thoracic region because the necessary surgical fusion is not associated with a diagnosis or injury to the thoracic region. The Chance fracture line running through the spine involved all three columns, injuring the lamina, pedicles and vertebral body. Utilizing tables 15-7, 15-8 and 15-9, Dr. Zehner combined these values and assessed a 33% impairment rating. Using the DRE method from Table 15-3, lumbar spine, he assessed a DRE Category III impairment rating of 13%. From the T11 to L3 fusion, there is a 46% impairment rating without considering Thele's current symptoms. Dr. Zehner stated that, after the lumbar fracture surgery, the lumbar MRI would not be

able to detect the L5-S1 annular tear. He stated Thele did not have a spinal cord neurologic deficit and the treating physicians did not suspect an L5-S1 annular tear. In his months of back bracing, Thele could not be aware of his L5-S1 annular tear injury. Eventually, Thele was released to normal activity.

The L5-S1 annular tear was not found until September 21, 2018, when a discogram clearly found the tear. Dr. Zehner, quoting Dr. Fletcher Munter, stated that annular tears do not heal, are a common false negative on routine MRIs, and can remain asymptomatic for long periods. Dr. Zehner concluded the annular tear caused by the fall could not be diagnosed as long as Thele wore a brace or had restricted activities. Dr. Zehner opined the symptoms of an annular tear evolve from the response to a leak of disc material onto the nerves in the lumbar spinal canal in the normal young healthy disc. He stated this is different from disc herniation and degenerative disc disease of aging. Dr. Zehner felt Thele reached MMI as of January 16, 2020. Dr. Zehner assessed a total 52% impairment rating pursuant to the AMA Guides. He recommended permanent restrictions of no lifting, bending or squatting. He recommended driving no more than one hour in an eight-hour day. He also recommended wearing a lumbar brace when performing normal activities. He stated Thele does not retain the physical capacity to return to the work he performed at the time of his injury. He did not believe Thele could perform any work in the sedentary, light, medium or higher categories. Dr. Zehner did not believe Thele had any pre-existing impairment

Dr. Timothy Kriss evaluated Thele on December 19, 2019. He noted a September 17, 2018 lumbar spine CT myelogram revealed L5/S1 normal alignment,

normal foramina, no disc bulge and no spinal stenosis. Dr. Kriss discussed the December 4, 2017 lumbar CT report revealing the remaining lumbar spine showed normal alignment, normal exit foramina, no disc bulge or disc herniation and no spinal stenosis. A September 21, 2018 post discogram lumbar spine CT report interpreted at L5/S1 an extravasation consistent with annular tear. Dr. Kriss stated a December 25, 2018 lumbar spine myelogram interpreted by Dr. Fonn showed poor filling of the L5 nerve root on the right. Dr. Kriss diagnosed 1) unstable L1 Chance fracture with 30% anterior vertebral body compression as a result of the August 10, 2017 work injury treated with surgery; 2) non-displaced fracture of the left inferior pubic ramus of the pelvis, fully healed by x-ray and CT scan, caused by the work injury; 3) status post right L5/S1 foraminotomy, hemilaminotomy, non-instrument posterior lateral fusion for presumptive treatment of right S1 foraminal stenosis and right S1 radiculopathy; 4) contusion to the left elbow, resolved; 5) mild concussion, fully resolved; and 6) chronic multifactorial low back pain, persistent lumbar sacral muscle strain/contusion from August 10, 2017, mild osteoarthritis and spondylosis at L5/S1, post-operative scarring at L5/S1, and deconditioning. Dr. Kriss was unable to explain the intermittent leg numbness and tingling. He stated it was not neurogenic claudication. The foraminal stenosis and radiculopathy on the right at L5/S1 do not explain intermittent numbness. He stated There did not have peripheral neuropathy. Dr. Kriss stated the deep pelvic pain most likely represented some type of residual soft tissue strain/pain from the work injury. He noted There was a very straightforward medical historian.

Dr. Kriss believed Thele had a right S1 radiculopathy with right S1 nerve root compression that resolved with the decompression surgery on February 28, 2019. He believed that the L5/S1 issues were not causally related to the August 10, 2017 fall. Dr. Kriss placed Thele at MMI for the pelvis condition on November 6, 2017 when Dr. DePowell released him from treatment. He placed Thele at MMI with respect to the left elbow and wrist within a few months of August 10, 2017. He placed Thele at MMI for the concussion on the date of the accident. Thele reached MMI with respect to the L1 fracture on August 10, 2018. Dr. Kriss placed Thele in DRE category IV because of the fusion. Dr. Kriss assigned a 27% impairment rating pursuant to the AMA Guides. Dr. Kriss assessed no impairment rating for the pelvis condition. He opined Thele could not return to his prior job duties as they are too physically demanding and would worsen his symptoms. Dr. Kriss felt Thele would have permanent limitations of performing modest physical activities that require standing/ambulation, and any sedentary duties, but he should not lift more than 30 pounds and should avoid unusually repetitive bending or twisting of the low back.

In a March 29, 2020 supplemental report, Dr. Kriss indicated he reviewed Dr. Zehne's report. Dr. Kriss stated Dr. Zehner improperly added the DRE and range of motion methods in two different spine segments to arrive at his impairment assessment. Dr. Kriss stated Dr. Zehner's use of a 50% compression value was incorrect because Thele's compression fracture was not greater than 50%. Dr. Kriss assessed a 30% compression fracture. Dr. Kriss stated Dr. Zehner's use of a 20% whole person impairment rating on the basis of a thoracic fusion was incorrect since Thele's fusion was based upon a lumbar injury that required fusion into the

thoracic region. Dr. Kriss stated Dr. Zehner's opinions were flawed regarding causation of the L4/5 and L5/S1 condition. Dr. Kriss stated there is no medical evidence or complaints from Thele in the medical records related to his symptoms and imaging studies for a year prior to the work place fall suggesting he has a medical issue within that region. Dr. Kriss discounted Dr. Zehner's discussion of Thele's use of a back brace preventing him from knowing he had symptoms from the L4/5 and L5/S1 region.

On March 21, 2019, the ALJ entered the following Findings of Facts and Conclusions of Law concerning the issue of extraterritorial coverage, *verbatim*:

The dispositive facts relating to this issue are:

1. Mr. Thele was a resident of Missouri at the time he was hired by Defendant and the accident on August 10, 2017.
2. Mr. Thele was physically located in Mississippi when he participated in the telephone call with Mr. Gaither and Mr. Goen. Mr. Gaither and Mr. Goen were physically located in Lancaster, Kentucky at the time of this call. During this telephone call the parties agreed that Mr. Thele would earn \$16.00 per hour working for Defendant. The first job Mr. Thele would work on would be in Pennsylvania. The ALJ notes Mr. Thele did not testify that his employment was located in Pennsylvania. He testified in his deposition that he completed his I9, W2 and W4 while in Pennsylvania.
3. Both Mr. Gaither and Mr. Thele testified that each believed a contract of employment was made to hire Mr. Thele within the state of Kentucky.
4. Mr. Thele's first job for Defendant was in Pennsylvania.
5. Defendant's principal place of business at all times relevant was Lancaster, Ky. All job instructions

for Defendant's employees originated from Defendant's headquarters located in Lancaster, Ky.

6. Mr. Thele participated in employment OSHA training via computer while he was in Mississippi.

7. Mr. Thele worked job sites in multiple states as an electrician for Defendant.

8. On August 10, 2017, Mr. Thele was working a job in Indiana when the subject accident occurred.

9. Mr. Gaither did not believe that Mr. Thele's employment was principally located in one state as they conducted business in many states.

10. Mr. Gaither testified that Designed Electrical Integrators did not have a physical business location outside of Kentucky.

11. Mr. Gaither testified that Mr. Thele's August 10, 2017 work accident was within the course and scope of Mr. Thele's employment.

“If an employee, while working outside the territorial limits of this state, suffers an injury on account of which the employee...would have been entitled to the benefits provided by this chapter had the injury occurred within the state, that employee...shall be entitled to the benefits provided by this chapter, if at the time of injury:

(b) He or she is working under a contract of hire made in this state in employment not principally localized in any state.”

The only proof of record regarding the formation of an employment contract between Mr. Thele and Defendant is the testimony of Mr. Thele and Mr. Gaither. Both men stated their belief that the contract of employment between Mr. Thele and Defendant was entered into in Kentucky. Counsel for Kemi argues that the contract was entered into when Mr. Thele completed the paperwork in Pennsylvania. The ALJ is not convinced by this argument. The ALJ relies on the testimony of Mr. Thele and Mr. Gaither to find that the contract of hire between Mr. Thele and Designed

Electrical Integrators was entered into within Kentucky during the telephone conversation between Mr. Gaither and Mr. Thele. Mr. Gaither was in Kentucky during this conversation. They discussed the terms of employment and rate of pay. Mr. Thele knew that his first “job” was in Pennsylvania. However, that does not equate with an employment contract being entered into in Pennsylvania. Mr. Thele began OSHA training via computer before he went to Pennsylvania. See Peabody Painting & Waterproofing, Inc. v. Kentucky Employer’s Mutual Insurance, 329 S.W.3d 684, 689 (Ky. App. 2010); Trinity Universal Ins. Co v. Mills, 169 S.W.2d 311 (Ky. 1943); Graham v. TSL, Ltd, 350 S.W.3d 430 (Ky. 2011).

Both Mr. Gaither and Mr. Thele testified that Mr. Thele would perform work in different states. Mr. Gaither stated that Mr. Thele did not have a principal state of where he worked. The ALJ relies on Mr. Gaither to find that all orders to traveling employees, including Mr. Thele, came from the principal office of Defendant located in Lancaster, Kentucky. The ALJ relies on Mr. Gaither to find that Defendant’s principal office was located in Lancaster, Kentucky and that Defendant did not have physical offices located outside Kentucky.

The testimony established that Mr. Thele worked for Defendant in several states. The ALJ relies on Mr. Thele and Mr. Gaither to find that on August 10, 2017, Mr. Thele sustained a work-related injury while working on a scissor lift. The ALJ relies on Mr. Thele to find that the injury occurred in Indiana.

The ALJ relies on Mr. Thele and Mr. Gaither to find that both elements of KRS 342.670(1)(b) have been met and that Kentucky has jurisdiction over Mr. Thele’s August 10, 2017 claim.

KEMI filed a Petition for Reconsideration from the Interlocutory Opinion requesting additional findings of fact on the issue of jurisdiction. The ALJ denied the Petition, stating the following, *verbatim*:

Kemi, insurance carrier for the employer, Designed Electrical Integrators, (DEI) filed a Petition for Reconsideration alleging that the ALJ committed error in his decision and requested additional findings of fact. The primary argument made by Kemi is that it believes a contract to hire Mr. Thele was entered into in Mississippi, not Kentucky. Kemi claims that it is undisputed that because Mr. Thele was present in Mississippi when the telephone call occurred between Mr. Thele and the owners of DEI, that the contract was entered into in Mississippi, not Kentucky. Therefore, KEMI asserts that KRS 342.670 requires a finding that Kentucky does not have jurisdiction over Mr. Thele's claim.

Kemi is correct that Mr. Thele was in Mississippi, working for another employer, when he and Mr. Gaither held their telephone conversation that resulted in an agreement by Mr. Thele to work for DEI. However, Kemi's argument overlooks the fact that both Mr. Gaither, on behalf of DEI, and Mr. Thele, testified that each believed that the employment contract was entered into in Kentucky. Mr. Thele specifically stated that he believed his employment contract was entered into in the state of Kentucky. H.T. 9-10. Mr. Gaither testified that DEI was headquartered in Lancaster, Kentucky. He testified that the purpose of the call with Mr. Thele was to determine Mr. Thele's wages and requirements to complete OSHA requirements. He stated DEI would need another copy of his driver's license and he would need to fill out a W-4 and an I-9. However, he stated that DEI gave Mr. Thele a job that day. H.T. at 22. Although Mr. Thele's work would be in multiple states, payroll would issue from Kentucky. Mr. Thele stated that he believed his contract of employment was entered into in Kentucky. H.T. 10. Mr. Thele completed his OSHA training while in Mississippi.

Mr. Thele asserts that the acceptor in the employment contract was Mr. Gaither, representative for DEI. He states that Mr. Gaither and Mr. Goens were both in Lancaster, Kentucky when DEI accepted Mr. Thele as an employee of DEI. Mr. Thele additionally asserts that his employment was principally localized in Kentucky as all job instructions and work orders for DEI's employees came from Kentucky. Mr. Thele asserts that

DEI controlled all work orders from Kentucky and that fact alone provides jurisdiction for Kentucky, regardless of where the contract of hire was made.

The ALJ notes that the only parties to this agreement were Mr. Thele and Mr. Gaither and Mr. Goens, on behalf of DEI. KEMI was not present during this conversation. Neither the claimant, nor the employer, dispute that a contract hiring Mr. Thele as a DEI employee was entered into in Kentucky. If one of the parties that entered into this employment agreement disagreed that a contract of employment was entered into in Kentucky, a different result may occur with regards to where Mr. Thele's contract of employment was entered into. This would require rules of construction of contracts to resolve the dispute. However, that is not the case. Both Mr. Thele and DEI agree that a contract of employment was entered into in Kentucky. The ALJ is not being asked to rule on an insurance contract issue. KEMI is challenging the facts relating to the making of the employment agreement between Mr. Thele and DEI. The ALJ is faced with facts between two parties to an agreement, Mr. Thele and representatives from DEI, where both are in agreement that a contract of employment relative to Mr. Thele was entered into in the State of Kentucky.

The cases the ALJ reviewed dealing with the issue of where a contract occurred involved disputes between the parties to the agreement, as to where the contract was formed. See Traugott v. Virginia Transportation, 341 S.W.3d 115 (Ky. 2011); Graham v TSL, 350 S.W.3d 430 (Ky. 2011). The parties in Trinity Universal Ins. Co. v. Mills, 169 S.W.2d 311 (Ky. 1943) could not agree where a contract was entered into. The parties were not in agreement as to whether a contract was entered into in Harlan or Knox county. The Court cited the principal that in contracts made by telephone, the place where the acceptor speaks his acceptance is the place where the contract is made. *Id.* at 314. However, the parties were in dispute. KEMI has a dispute with the interpretation of the facts relating to jurisdiction. However, KEMI was not a party to the employment contract.

Additionally, Mr. Thele testified that he was the person who initiated the contact with DEI offering his services

and to become employed with DEI. Mr. Thele testified at the hearing that during the call he requested \$16.00 per hour which was accepted by DEI. The ALJ relies on Mr. Thele to find that the acceptor to the employment contract, during this telephone call was DEI.

The ALJ finds that this fact places the employment contract in Kentucky. However, the ALJ believes the primary fact that distinguishes this case from others is that the parties (Mr. Thele and DEI) agreed that Kentucky is where the employment contract was entered into. The ALJ notes that none of the parties, KEMI included, are claiming fraud between Mr. Thele and DEI. The ALJ did not detect any impropriety between the parties. The ALJ finds that no additional facts are necessary to resolve this issue.

The ALJ finds that Kentucky has jurisdiction over Mr. Thele's claim. The ALJ denies KEMI's Petition for Reconsideration.

The ALJ ordered KEMI to pay medical benefits and TTD benefits.

Thereafter, the parties completed proof and the case was submitted to the ALJ for a decision. In the Opinion, Award, and Order of October 20, 2020, the ALJ determined there were no new facts suggesting fraud, error or mistake introduced into the evidence that alter the original decision regarding jurisdiction, and reiterated Kentucky has jurisdiction of this claim. The ALJ thereafter proceeded to determine, as follows, regarding the issues appealed by Thele, *verbatim*:

L5/S1 injury/surgery. The ALJ is not convinced that the August 10, 2017 workplace fall caused annular tear at L5/S1 and the resulting February 28, 2019 surgery. Dr. Zehner's causation analysis of how the annular tear and subsequent L5/S1 surgery relate to the workplace fall appear plausible. However, Dr. Kriss' explanation and discussion of Dr. Zehner's analysis appears more credible to the ALJ than that of Dr. Zehner. The ALJ is concerned with Dr. Zehner's statements as to how the multiple lumbar diagnostic studies performed on Thele's lumbar spine prior to September 2018 did not reveal the

annular tear and stenosis. Likewise, after reading Dr. Kriss' analysis of Dr. Fonn's treatment and diagnosis at L5/S1, the ALJ has concerns regarding the treatment rendered.

The issues relating to the L5/S1 annular tear and subsequent surgery in February 2019 are complex. The ALJ is more persuaded by Dr. Kriss' analysis than that of Dr. Zehner or Dr. Fonn. The ALJ relies on Dr. Kriss to find that the L5/S1 annular tear and subsequent February 2019 surgery are not related to the August 10, 2017 workplace fall.

Impairment/AMA Guide Usage. Dr. Zehner and Dr. Kriss assessed permanent impairment for Thele. Dr. Zehner assessed a total of 52% permanent impairment. Dr. Kriss assessed a total of 27% permanent impairment. The ALJ reviewed both Dr. Zehner's and Dr. Kriss' analysis of how each calculated his final impairment assessment. While it is obvious that Thele sustained a significant injury as a result of this fall, the ALJ is not persuaded by Dr. Zehner's analysis. In one section, he states that there was no diagnosis due to any injury to the thoracic spine, and then he assesses an impairment due to a fusion of the thoracic region. Dr. Kriss criticized Dr. Zehner's combining of the DRE and range of motion methods to reach a final impairment. Finally, it appears as though Dr. Zehner used a table for compression fractures greater than 50%. Thele did not have a greater than 50% compression fracture.

Dr. Fonn initially assessed 46% impairment according to the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition. He provided an analysis of how he arrived at that impairment. Dr. Fonn also added in an impairment to the thoracic spine of 20% in arriving at his final impairment. Dr. Fonn also provided in his disability calculations that he used tables referencing compression fractures greater than 50%. He supplied a supplemental report to provide a revised impairment assessment based upon the Fifth Edition and simply stated that he agreed with Dr. Zehner's 52%. The ALJ is more persuaded by Dr. Kriss analysis of Thele's impairment than either the impairment by Dr. Zehner or Dr. Fonn.

The ALJ relies on Dr. Kriss to find that Thele sustained a 27% impairment as a result of the August 10, 2017 workplace accident.

Permanent partial/total disability (PPD/PTD).

Permanent total disability is defined in KRS 342.0011(11)c as 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. Work is defined as meaning providing service to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In City of Ashland v. Stumbo, 461 S.W. 3d 392 (Ky. 2015) the Kentucky Supreme Court laid out a five-step analysis which the ALJ must utilize in determining entitlement to permanent total disability. Initially, the ALJ must determine if the claimant suffered a work related injury. Next, the ALJ must determine what, if any, impairment rating the claimant has. Third, the ALJ must determine what permanent disability rating the claimant has. Then the ALJ must make a determination that the claimant is unable to perform any type of work. Finally, the ALJ must determine that the total disability is the result of the work injury.

In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker's age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Thele is 26 years old, a high school graduate with some vocational training from classes in high school. He has experience in electrical work and carpentry. His prior work consisted of carpentry, electrical and some limited experience in welding.

Dr. Fonn has not stated what physical restrictions Thele will retain. However, Dr. Fonn has not returned Thele to work. Dr. Zehner recommended restrictions of no lifting, bending or squatting. He recommended no driving more than one hour in an eight hour day and to

wear a lumbosacral brace for normal activities. He stated that Thele not retain the physical capacity to return to his prior work. The question posed to Dr. Zehner was “Does Mr. Thele retain the capacity to return to his previous employment? No. What job classification do they fall into (sedentary, light, medium, etc.)? None.” The ALJ is not certain whether Dr. Zehner was stating that Thele was unemployable in any job classification; however, for purposes of analysis, the ALJ assumes that is what Dr. Zehner was conveying.

Dr. Kriss agreed that Thele is unable to physically return to his former job duties as they are too physically demanding. He believes that Thele’s current symptoms would worsen if he tried to engage in those work activities. Dr. Kriss stated that Thele was physically capable of performing any activities that are modestly demanding, activities that require standing/ambulation and any sedentary duties. However, he recommended that Thele not lift over 30 pounds and should avoid repetitive bending or twisting of the low back. He stated that Thele is capable of twisting and bending, just not excessively.

The ALJ found a work injury and assigned a permanent impairment of 27%. Thele’s disability rating is $27\% \times 1.35$, which equals 36.4. The ALJ believes that Thele’s young age plays a vital role in determining whether he is permanently, totally disabled. While it is obvious that Thele sustained a serious low back injury, the ALJ does not believe that he is permanently totally disabled. He has a high school education with some vocational training and is young. He is interested in retraining. The ALJ relies on Thele’s testimony and Dr. Kriss to find that Thele is not permanently totally disabled.

All physicians agree that Thele is not capable of returning to his prior employment. The ALJ relies on Thele, Dr. Fonn, Dr. Zehner and Dr. Kriss to find that Thele lacks the physical capacity to return to the job he worked at the time of injury. KRS 342.730(1)(c)(1).

Thele testified that he was not working at the time of his last testimony. There is no evidence to contradict his work status in the record. The ALJ finds

that Thele is currently earning less than his preinjury AWW. The ALJ finds that Thele is entitled to a three factor in accordance with KRS 342.730.

As reflected in the January 22, 2019 order, the parties stipulated that Thele's preinjury AWW was \$1,563.88. Because the ALJ has awarded a three factor, Thele's post injury AWW is not relevant as a two factor is not appropriate."

The ALJ made the following determination regarding sanctions:

Sanctions for failure to pay medical expenses. The ALJ is unable to determine whether or not any of the medical expenses covered by the March 21, 2019 Interlocutory Opinion have been paid. Defendants stipulated at the August 5, 2020 BRC that only \$2,055.69 in medical expenses had been paid. The ALJ orders the Defendants DEI and KEMI, within 20 days of this Order, to provide a statement as to what medical bills have been paid as represented by the December 12, 2018 filing by Thele. If these providers were not paid, the ALJ orders Defendant's to state why they were not paid as ordered by the March 21, 2019 Interlocutory Opinion.

Both Thele and KEMI filed Petitions for Reconsideration. The ALJ entered the following Order on Petitions for Reconsideration, *verbatim*:

Plaintiff and Defendant KEMI filed Petitions for Reconsideration regarding several issues relating to the Opinion, Award and Order dated October 4, 2020. The ALJ will address each request separately. KRS 324.281 only allows an ALJ to correct patent errors in an order or award.

Subrogation. Plaintiff requests an order dismissing Defendant's subrogation claim as the ALJ made findings that there was no proof put forth by Defendant relating to the subrogation credit defense. Plaintiff asserts that Defendant chose to bring the defense at this time and did not provide any proof on the issue. In the alternative, Plaintiff requests the ALJ to consider

whether Defendant failed to meet the statute of limitations by not timely intervening in the civil action. Defendant DEI deferred to KEMI's response on this issue.

KEMI states that it agrees with Plaintiff that there was no proof for the ALJ to decide the subrogation issue as there has been no settlement or jury verdict filed of record. KEMI disagrees with Plaintiff that it did not preserve its rights to intervene in the Federal civil suit apparently filed in Indiana.

The ALJ did not have any proof regarding the claims for subrogation other than Plaintiff stating he had filed a suit. There was no evidence for this ALJ to decide anything relative to a subrogation credit. The omission of an order dismissing the subrogation credit as a defense was a patent error. The ALJ sustains Plaintiff's Petition on this issue and amends the Order section of the Opinion, Award and Order to provide that Defendant DEI and KEMI's claims for a subrogation credit are dismissed as no proof being submitted that would allow for a calculation of any potential credit.

Medical disputes. Plaintiff requests the ALJ to find, for those bills deemed untimely filed by the provider, that Plaintiff is not responsible for the payment of those medical expenses. KEMI does not object to Plaintiff's requests as relates to the medical expenses found untimely.

The ALJ agrees with Plaintiff's request and finds that this is a patent error that must be corrected. Paragraph 5 of the Award and Order section of the October 4, 2020 Opinion, Award and Order is amended to include the following: Plaintiff is not responsible for the payment of medical expenses from medical disputes dated 11/27/2019, 8/8/2019, 8/28/2019, and 9/23/2019 as they have been found untimely filed.

Plaintiff requests that the ALJ make additional findings that the December 2019 dorsal column stimulator and

L5/S1 surgery were unreasonable and unnecessary. The ALJ noted that the issues were complex relating to the L5/ S1 surgery and dorsal column stimulator. The ALJ had concern regarding the treatment; however, the ALJ did not make a finding that the treatment was medically unreasonable and unnecessary. The ALJ found the treatment was not caused by the work accident. While the ALJ may have had concerns about the treatment, the ALJ is unable to make findings that the treatment was medically unreasonable and unnecessary. This issue is overruled.

Permanent Total Disability. Plaintiff requests the ALJ to make additional findings of fact in regard to the factors set forth in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Plaintiff seeks findings of fact relating to whether he is able to work on a sustained, competitive basis. He believes that a finding of vocational rehabilitation is inconsistent with a finding that Plaintiff is able to work, just not at his prior work. Defendant states that the ALJ provided sufficient findings to support the denial of a permanent total disability. Defendant also states that KRS 342.710 is not restricted to a finding of permanent total disability.

The ALJ discussed at pages 21-21 of the Opinion, Award and Order the various physician opinions relating to Plaintiff's physical restrictions that may impede his ability to work. Dr. Fonn did not state what physical restrictions Plaintiff would retain, he simply had not returned him to work. However, he did not state that Plaintiff was permanently physically disabled from work. The ALJ discussed the differences between Dr. Zehner and Dr. Kriss regarding Thele's restrictions and ability to work. The ALJ was not persuaded by Dr. Zehner and relied on Dr. Kriss regarding Plaintiff's physical ability to work. While all doctors agreed that Plaintiff could not return to his prior work, the ALJ noted, and relied on Dr. Kriss' statements that Plaintiff was physically capable of performing any activities that were modestly demanding such as standing/ambulation and any sedentary duties. He stated that Plaintiff was

capable of twisting and bending, just not excessively. Plaintiff should avoid lifting over 30 pounds and avoid repetitive bending or twisting of the low back.

The parties' are entitled to sufficient findings to inform them of the basis of the ALJ's decision for a meaningful review. Kentland Elkhorn Coal, Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988). The ALJ believes that he adequately stated findings and his reasons for not finding Plaintiff permanently totally disabled. The ALJ disagrees with Plaintiff that a finding of a permanent partial disability is inconsistent with a finding of vocational rehabilitation. Plaintiff appears motivated to be retrained and because the ALJ found he could not return to his prior work, the ALJ believes that an award of vocational rehabilitation was appropriate. Additionally, the ALJ does not find a patent error in the award of a permanent partial disability as opposed to a permanent total disability. This portion of Plaintiff's petition is denied.

Compensability of the L5/S1 work-relatedness of the L5/S1 surgery. The ALJ reviewed Plaintiff's concern with the findings that the L5/S1 surgery was not related. However, this appears to be a re-argument of case and a not a matter of a patent error. The ALJ denies this portion of the petition.

Impairment Ratings. Plaintiff states that the ALJ erred in assessing an impairment rating of 27% as opined by Dr. Kriss. Dr. Zehner, Dr. Fonn and Dr. Kriss presented conflicting opinions on Plaintiff's permanent impairment. The ALJ discussed the varying opinions, including the fact that Dr. Zehner used a table for compression fractures greater than 50% when Plaintiff did not have a compression fracture meeting that description.

Plaintiff does not assert a patent error as relates to the assignment of a permanent impairment. The ALJ finds that Plaintiff appears to be re-arguing its case. The ALJ denies this issue of the petition.

KEMI filed a petition for reconsideration asserting that the ALJ made patent errors in finding that Plaintiff's employment was subject to Kentucky jurisdiction for purposes of this workers' compensation claim. Plaintiff disputes several facts asserted by KEMI in its petition for reconsideration. The ALJ reviewed the petition and believes that KEMI is making a reargument of its case for why Kentucky does not have jurisdiction. The ALJ denies KEMI's petition.

As the claimant in a workers' compensation proceeding, Thele had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Thele was successful in part in his burden, the question on appeal is whether substantial evidence 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Thele was unsuccessful in proving he was PTD and alleges the ALJ erred in adopting the incorrect impairment rating. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Thele was not successful in this burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, supra. "Compelling evidence" is defined as evidence that is so

overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

KEMI argues the ALJ erred in determining Kentucky has jurisdiction over this claim. It argues that the contract for hire was entered into while There was

physically located in Mississippi and therefore the claim falls outside the jurisdiction of the Kentucky Workers' Compensation Act. We disagree and affirm on this issue.

This Board, on review, can only reverse the ALJ "by determining his findings to be clearly erroneous, and holding the evidence was so overwhelming, upon consideration of the record as a whole, that it compels a finding in [KEMI's] favor." Wolf Creek Collieries v. Crum, *supra*; KRS 342.285(2)(d); Eck Miller Transportation Corporation v. Wagers, 833 S.W.2d 854 (Ky. 1992).

We initially note the relevant portions of KRS 342.670 read as follows:

Extraterritorial coverage

(1) If an employee, while working outside the territorial limits of this state, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this chapter had that injury occurred within this state, that employee, or in the event of his death resulting from that injury, his dependents, shall be entitled to the benefits provided by this chapter, if at the time of the injury:

(a) His employment is principally localized in this state, or

(b) He is working under a contract of hire made in this state in employment not principally localized in any state, or

(c) He is working under a contract of hire made in this state in employment principally localized in another state whose workers' compensation law is not applicable to his employer, or

In the March 21, 2019 interlocutory Opinion and Order on Petition for Reconsideration dated April 15, 2019, the ALJ determined that DEI, pursuant to KRS 342.670(1)(b), was a company whose work/employment is not localized in any state based on the testimony of record indicating DEI provided their services on a nationwide basis, and as indicated by Thele working in different states during his tenure with DEI. The ALJ further determined the contract for hire was entered into in Kentucky as the party accepting the offer for employment, in this instance DEI, was physically located in Kentucky when the acceptance occurred. In addition, both Thele and DEI believed the contract for hire was entered into in Kentucky. Therefore, we believe the ALJ's determination that Kentucky has jurisdiction over this claim is supported by substantial evidence and we affirm.

Thele argues the October 4, 2020 decision is interlocutory in nature as it did not address the issue of sanctions, and therefore, is not final and appealable. Thele is correct that the ALJ did not address this issue in his Opinion. We therefore remand for the ALJ to determine whether sanctions are applicable.

Thele asserts three additional arguments on appeal. He argues the ALJ erred in not finding the L5-S1 surgery compensable, by applying an impairment rating inconsistent with the AMA Guides, and in failing to perform the proper analysis concerning the issue of permanent total disability.

We will first address Thele's arguments that the ALJ erred by finding the L5-S1 surgery non-compensable. The ALJ was confronted with conflicting medical evidence regarding the cause of Thele's L5-S1 annular tear and the resulting February 28, 2019 surgery. While the ALJ noted Dr. Zehner's causation analysis

appeared plausible, he believed Dr. Kriss's explanation and discussion appeared more credible. While the ALJ noted the issues surrounding the annular tear at L5-S1 are complex, he was simply persuaded by Dr. Kriss's opinions and determined the L5-S1 annular tear and subsequent surgery were not causally related to the August 10, 2017 accident. This was clearly within the ALJ's discretion as the finder of fact. Dr. Kriss' opinion constitutes substantial evidence upon which the ALJ could rely, and finding no error in doing so, we affirm.

Next, Thele argues the ALJ erred in applying an impairment rating that was not consistent with the AMA Guides. The ALJ was confronted with two different assessments of impairment. Dr. Kriss assessed a 27% impairment rating for Thele's lumbar condition only since he believed Thele suffered a lumbar injury extending into the thoracic region, but not an injury to the thoracic spine itself. Dr. Zehner and Dr. Fonn opined Thele retained a 52% impairment rating as a result of his work related injuries, with 20% assessed for his thoracic condition and 33% assessed for the lumbar condition. Thele argues the AMA Guides specifically states "if there are impairments in different spinal regions, rate each spinal region separately using the DRE Method; then combine the ratings using the combined value chart." He argues the T11-T12 should have been added to the lumbar spinal fusion impairment rating. We agree.

There is no question that the incident in question caused a L1 Chance fracture requiring fusion from T11- L3, causing impairment to both the lumbar and thoracic spine. Therefore, the ALJ erred in relying solely on the impairment rating assessed by Dr. Kriss who clearly misapplied the AMA Guides in his assessment of

impairment, as he failed to consider the appropriate impairment for the thoracic spine. We therefore vacate this portion of the ALJ's opinion and remand for additional findings, specifically regarding what level of impairment Thele retains as a result of his fusion surgery, including to his thoracic spine. We do not direct a specific result regarding a level of impairment incurred for the thoracic spine surgery.

Lastly, Thele argues the ALJ erred in failing to conduct the appropriate analysis in determining whether Thele is permanently totally disabled. We disagree. In order to award permanent total disability, the Administrative Law Judge must follow the guidance of the Kentucky Supreme Court in City of Ashland v. Stumbo, 461 S.W.3d 392, 396-97 (Ky. 2015). 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." Ira Watson Dept. Store v Hamilton, supra

The ALJ found that a work-related injury occurred, and Thele has a permanent impairment rating and therefore a permanent disability rating applies. The ALJ thereafter decided Thele was not permanently and totally disabled, which is defined as a "complete and total inability to perform any type of work as a result of

an injury.” The determination of complete and total inability to perform work includes factors such as “the worker’s post-injury physical, emotional, intellectual, and vocational status and how those factors interact, [and] the likelihood that the particular worker would be able to find work consistently over normal employment conditions,” which “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. McNutt Const. Co. v. Scott, 40 S.W.3d 854 (Ky. 2001).

The ALJ performed the appropriate analysis and determined Thele is 26 years old, is a high school graduate, and has experience in electrical work and carpentry with limited experience in welding. The ALJ considered Thele’s age, his restrictions, and the seriousness of his injury as well as the other factors required and determined Thele is not permanently totally disabled. This was clearly in his discretion to decide, is supported by the evidence, and will not be disturbed on appeal.

Accordingly, the Opinion, Award, and Order of October 20, 2020, as well as the Order on Petition for Reconsideration rendered on November 4, 2020, are **AFFIRMED** in part and **VACATED** in part. This claim is **REMANDED** to the ALJ for him to address the pending motion for sanctions against DEI and address what impairment rating is appropriate for Thele’s thoracic spine condition. We do not direct any specific outcome.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON LYN POWERS
1315 HERR LANE, STE 210
LOUISVILLE, KY 40222

COUNSEL FOR RESPONDENT:

LMS

HON CHRISTION HUTSON
300 BROADWAY
PADUCHA, KY 42001

HON JEFFERY ROBERTS
509 MAIN ST
MURRAY, KY 42071

LMS

RESPONDENTS:

METHODIST HOSPITAL
2201 RELIABLE PARKWAY
CHICAGO, IL 60686

USPS

MIDWEST NEUROSURGEONS
65 DOCTORS PARK, STE A
CAPE GIRARDEAU, MO 63703

USPS

MIDWEST SURGERY CENTER, LLC
65 DOCTORS PARK, STE B
CAPE GIRARDEAU, MO 63703

USPS

SOUTHEAST MISSOURI ANESTHESIA SERVICES LLC
65 DOCTORS PARK
CAPE GIRARDEAU, MO 63703

USPS

ST. FRANCIS MEDICAL CENTER
211 ST. FRANCIS DRIVE
CAPE GIRARDEAU, MO 63703

USPS

ADMINISTRATIVE LAW JUDGE:

LMS

HON JOHN H. MCCRACKEN
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601

