

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 11, 2021

CLAIM NO. 201801768, 201772355 & 201593846

LARRY DIXIE

PETITIONER/
CROSS-RESPONDENT

VS.

APPEAL FROM HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

FORD MOTOR COMPANY,
DR. MARK SMITH,
AND
HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS/
CROSS-PETITIONERS

RESPONDENT

OPINION AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * *

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

ALVEY, Chairman. Larry Dixie (“Dixie”) appeals and Ford Motor Company (“Ford”) cross-appeals from the Opinion, Award and Order rendered October 27, 2020 by Hon. W. Greg Harvey, Administrative Law Judge (“ALJ”). The ALJ determined Dixie sustained a work-related right shoulder injury on September 9, 2014, for which he awarded temporary total disability (“TTD”) benefits, permanent

partial disability (“PPD”) benefits, and medical benefits. The ALJ also determined Dixie sustained a work-related left shoulder injury on July 14, 2017, for which he awarded TTD benefits, PPD benefits, and medical benefits. The ALJ dismissed Dixie’s claim for an alleged cervical injury, finding his condition was not caused by a June 14, 2018 work incident. Dixie and Ford also appeal from the November 25, 2020 Order ruling on their respective Petitions for Reconsideration.

On appeal, Dixie argues the ALJ erred in dismissing his alleged cervical injury claim. Dixie also argues the ALJ erred by failing to find him permanently totally disabled. Dixie additionally argues the ALJ erred by failing to strike the surveillance video from the record. Finally, Dixie argues the ALJ erred in finding Ford did not commit a safety violation pursuant to KRS 342.165(1). Because substantial evidence supports the ALJ determination regarding Dixie’s alleged cervical injury, whether he was permanently totally disabled, and the alleged safety violation, and a contrary result is not compelled, we affirm. We also find the ALJ did not err by allowing the surveillance video as evidence.

On cross-appeal, Ford argues the ALJ erred in finding the July 14, 2017 left shoulder injury is work-related, and he should have afforded more weight to Dr. William Daniels’ opinion regarding causation. Ford argues the ALJ erred in finding the three multiplier contained in KRS 342.730(1)(c)1 is applicable to both the right and left shoulder injuries. It also argues the ALJ erred in adopting the 9% impairment rating for the right shoulder assessed by Dr. Thomas Loeb, since his treating physician assessed an 8% impairment rating for the same condition. Ford also contends the ALJ erred in awarding TTD benefits for the right shoulder injury

through September 26, 2017 and during the periods Dixie returned to light duty work. Similarly, Ford argues the ALJ erred in awarding TTD benefits for the alleged left shoulder injury beyond April 8, 2018, since he had returned to light duty work. Because substantial evidence supports the ALJ's determination regarding the work-relatedness of the left shoulder injury, the application of the three multiplier, and the assessment of impairment for the right shoulder injury, we affirm. However, we vacate the ALJ's analysis regarding entitlement to TTD benefits for the right and left shoulder injuries, and remand for a more detailed analysis pursuant to Livingood v. Transfreight, LLC, et. al., 467 S.W.3d 249 (Ky. 2015) and Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016).

Dixie filed a Form 101 on May 20, 2015 alleging he injured his right shoulder on September 9, 2014 while lifting parts in the course of his job duties on the Ford assembly line. Dixie alleged a safety violation for the right shoulder injury. Dixie filed a second Form 101 on August 18, 2017 alleging he injured his left shoulder on July 14, 2017 while grabbing a wheel in the course of his job duties at Ford. Ford filed a medical dispute challenging the left shoulder surgery. Dixie filed a third Form 101 on December 21, 2018 alleging he injured his neck on June 14, 2018 "while using a hand drill, felt onset of pain in neck with radiation into shoulders." The three injury claims were ultimately consolidated by the ALJ.

Dixie testified by deposition on August 31, 2015 and March 4, 2020, and at the final hearing held August 28, 2020. Dixie was born in January 1972 and he resides in Eminence, Kentucky. He graduated from high school and attended Tri-City Barber College from November 2019 to April 2020, but he did not complete the

program. Dixie's work history includes operating a forklift, selecting automotive parts, assembly line work, packing ribs for Purnell's, and as a sales representative for Coit Cleaning. Dixie is right-hand dominant.

Dixie began working on the assembly line at Ford on April 28, 2014, in the "rear end build up" section. Dixie's job entailed repetitively lifting and carrying assembled rotors from the table to a rack. Each assembled rotor weighed 45 to 55 pounds. When loading the back of the top rack, Dixie extended his arms and leaned over while holding the assembled part at shoulder level.

Dixie testified he injured his right shoulder while loading an assembled rotor onto the top of the rack on September 9, 2014. He initially received conservative treatment from Ford's medical facility and U.S. Healthworks, and then treated with Dr. Mark Smith, who performed right shoulder surgeries on January 29, 2015, October 26, 2015, and September 8, 2016.

At the hearing, Dixie testified he was off work for approximately six weeks after each surgery, and afterward he returned to work with light duty restrictions until his first surgery, receiving his regular wages. Dixie was again off work from January 29, 2015 through July 14, 2015 following his first right shoulder surgery and received TTD benefits. After his first right shoulder surgery, Dixie estimated he spent 60% of his work time sitting at a picnic bench waiting for jobs he could perform within his restrictions and 40% of his time working various light duty jobs. One of the light duty jobs entailed quality control of headlights and windshield wipers. He continued to earn his regular wages performing the light duty work until

his second surgery. He returned to light duty work after a period of recovery from his second and third surgeries. He remained on light duty through July 14, 2017.

Dixie was inspecting wheels/rims, and removing those that were defective to a pallet on the floor on July 14, 2017. Each rim/wheel weighed approximately 30 to 40 pounds. Dixie experienced a pop in his left shoulder while pulling on a wheel. He treated at the on-site Ford medical facility after the incident. He then treated with Dr. Smith, who diagnosed a torn left rotator cuff and restricted him to light duty. Dr. Smith performed left shoulder surgery on September 26, 2017 and restricted Dixie from work for approximately six weeks. Dr. Smith then released him to return to work with light duty restrictions. Dixie testified that given the nature of both shoulder injuries and restrictions, Ford struggled to find jobs he could perform. Dixie testified he “spent a lot of time sitting at the table waiting for them to find me a job. And there really wasn’t no jobs available at the time.” He occasionally swept floors or installed screws on small parts. He was often sent home due to lack of jobs within his restrictions; however, Ford continued to pay his regular earnings.

Dixie was assigned a job requiring him to repetitively operate a pneumatic drill to insert bolts into the right and left side of a part on June 14, 2018. He experienced jolts or jerks when operating the drill. At the March 2020 deposition, Dixie indicated, “It got to the point . . . to where I had notified the supervisor that I couldn’t do this job . . . In that time frame of me doing that job, I felt a burning sensation go from my shoulder to my neck. And when it did, it caused excruciating pain that I just had to stop.” At the August 2020 hearing, Dixie

testified, "I felt like a big - - it was like a jolt - - like a jerk it was - - and my neck just like had a pop to it. And it gave me a deaf tone in my ears, when I heard that. . . . As soon as that - - as soon as that joint popped my neck, well, my whole arm, I had spasms going down from my - - from the back of my neck all the way down to the back of my arm, my right arm." Dixie sought treatment at Ford medical and with Dr. Smith. Dr. Smith referred Dixie to Dr. Aaron Compton, who prescribed medication and administered injections. He was then referred to Dr. Venu Vemuri, a neurosurgeon, who performed a cervical fusion on April 15, 2019. Dixie testified a specific event occurred on June 14, 2018, his first day on the drilling job, causing him to seek medical attention. Dixie denied experiencing any cervical injuries or symptoms requiring medical attention prior to June 14, 2018.

Dixie testified he is now permanently restricted from repetitive work above shoulder level, lifting over five to ten pounds above shoulder level, and repetitively using his arms. Dixie last physically worked at Ford on June 18, 2019. Dixie described his ongoing symptoms and limitations affecting his bilateral shoulders and neck. He continues to treat with Drs. Vemuri and Compton for his ongoing cervical symptoms. Based upon his limitations and restrictions, Dixie testified he is unable to return to his pre-injury job, or any other position available at Ford. Dixie testified he believes he is permanently totally disabled. He received workers' compensation benefits for his right shoulder injury, but not for either his left shoulder or cervical injuries. Dixie received short-term disability benefits and unemployment benefits.

Dixie attended barber college from November 2019 to April 2020, six days a week, from 8:00 a.m. to 4:30 p.m. He was in a classroom setting for the first part of the day, and then performed haircuts and trims in the afternoon. The college temporarily closed due to Covid-19, and he declined to return to the program due to the risk of exposure to the virus. He did not believe he could work as a barber due to his ongoing bilateral shoulder and cervical conditions.

Dixie alleged Ford committed a safety violation regarding the September 2014 work injury. At the August 2015 deposition, he testified Ford had hoists in his section at the time of his injury, which were neither installed nor functional, and they had never been used. Dixie provided similar testimony at his March 2020 deposition. At the hearing, Dixie alleged he could not use the hoist because it was unassembled and unusable, and he had to manually perform his job duties. Dixie also alleged he and other co-workers complained to the supervisor about the unavailability of the hoist prior to his 2014 work injury. Sometime after the first work injury, the hoists were installed and are now utilized. No other evidence was submitted regarding the alleged safety violation.

Both parties submitted medical records from Dr. Smith for treatment Dixie received from July and August 2015, and March, June, July and December 2016. The majority of these records are work status documents indicating he was allowed to return to work with lifting and usage restrictions to the right arm.

Ford filed Dr. Andrew DeGruccio's September 29, 2015 report. Dr. DeGruccio examined Dixie following the first right shoulder surgery. He diagnosed a full thickness rotator cuff tear due entirely to the September 9, 2014 work event.

He noted a recent MRI confirmed a failed rotator cuff repair. He recommended a revision repair of the rotator cuff.

Dr. DeGruccio re-examined Dixie on February 8, 2017 following the October 2015 and September 2016 right shoulder revision surgeries. He diagnosed right shoulder pain due to continued rotator cuff pathology and recurring tear. He noted Dixie's prognosis is guarded despite exhaustive care and treatment for his right shoulder. He opined the rotator cuff tearing and subsequent treatment is directly related to the September 2014 injury. Dr. DeGruccio estimated Dixie attained maximum medical improvement ("MMI") in September 2017. Dr. DeGruccio opined Dixie will likely require permanent restrictions, including no lifting over the shoulder height and no lifting/pushing/pulling over 30 pounds. Dr. DeGruccio found it unlikely Dixie retains the physical capacity to return to his pre-injury work.

Dixie filed Dr. James Farrage's May 18, 2016 report. Dr. Farrage examined Dixie before his third right shoulder surgery. He diagnosed status post right shoulder arthroscopic rotator cuff repair, subacromial decompression, Mumford procedure with AC joint resection, and second arthroscopic rotator cuff repair for development of recurrent tear. Dr. Farrage opined Dixie had attained MMI. He assessed a 12% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He assigned restrictions and opined Dixie does not retain the physical capacity to return to his previous job.

Ford filed the OHSIM records from July 14, 2017 through September 2017 regarding his alleged left shoulder injury. On July 14, 2017, Dixie reported left

shoulder and bicep pain and numbness as he was pulling on a wheel to put on the slide. Dixie treated conservatively, and was restricted from lifting over 10 pounds and from overhead work with his left shoulder. A July 27, 2017 left shoulder MRI demonstrated a partial thickness tear of the supraspinatus tendon; mild blunting of the superior to posterosuperior labrum; rotator cuff tendinosis; mild subacromial/subdeltoid bursitis; and severe AC joint arthrosis. Dixie returned to Dr. Smith who restricted him from work beginning August 21, 2017 until 4 to 6 months following the September 26, 2017 left shoulder surgery.

In support of its medical dispute, Ford submitted Dr. Daniels' October 11, 2017 medical record review report. In addition to the medical records, he reviewed an undated 11-second video demonstrating a person performing the same job functions that Dixie was assigned to on July 14, 2017. Dr. Daniels opined the movements demonstrated in the video, consisting of reaching and limited force push/pull, would not cause a rotator cuff tear, AC joint arthrosis, or biceps tendinitis. Dr. Daniels opined the left shoulder rotator cuff tear was not caused by Dixie's job functions on July 14, 2017, and the requested left shoulder surgery is due to pre-existing health conditions.

Dixie filed Dr. Smith's May 7, 2018, May 25, 2018, and February 12, 2020 letters. The May 7, 2018 and February 12, 2020 letters are essentially identical, noting Dixie originally sustained a right rotator cuff tear and strain on September 9, 2014. Dr. Smith found Dixie reached MMI for the right shoulder injury on May 9, 2017. Dr. Smith noted Dixie suffered a work-related left shoulder injury on July 14, 2017 consisting of a left rotator cuff strain and tear. He opined Dixie reached MMI

for his left shoulder condition on May 9, 2018. Dr. Smith assessed 8% impairment ratings for each shoulder pursuant to the AMA Guides. He restricted Dixie from working above shoulder level and from lifting or carrying over 10 pounds due to each shoulder injury. Using the Combined Values Chart, Dr. Smith assessed a 14% impairment rating related to both shoulder injuries. When considering both shoulders, Dr. Smith noted Dixie's combined restrictions prevented him from working above shoulder level or lifting greater than 20 pounds. In the May 25, 2018 letter, Dr. Smith clarified Dixie's restrictions consist of no work above shoulder level and no lifting greater than 25 pounds occasionally. He also limited Dixie from repetitive lifting over 10 pounds with both arms or over 5 pounds with either arm.

Ford filed Dr. Loeb's May 19, 2020 report. Dr. Loeb also testified by deposition on July 14, 2020. Dr. Loeb diagnosed a right rotator cuff tear and AC joint arthropathy due to the September 2014 work injury. He stated Dixie reached MMI for his right shoulder condition on May 9, 2018. He assessed a 9% impairment rating pursuant to the AMA Guides for the right shoulder attributable to the September 2014 work injury.

Concerning the July 14, 2017 work injury, Dr. Loeb reviewed the medical records, including Dr. Daniels' opinion that the mechanism of injury was not consistent with a rotator cuff tear. Dr. Loeb opined the July 14, 2017 mechanism of injury is consistent with Dixie's left shoulder symptoms and condition. He opined Dixie's left shoulder condition is related to the July 14, 2017 work injury. Dr. Loeb diagnosed a left rotator cuff tear with aggravation of dormant underlying AC arthritic changes. Dr. Loeb stated Dixie reached MMI for the left shoulder condition

on May 9, 2018. Dr. Loeb assessed an 8% impairment rating pursuant to the AMA Guides for the left shoulder condition, attributable to the July 14, 2017 work injury. Dr. Loeb restricted Dixie to minimal lifting above shoulder level and no lifting over five pounds on a repetitive basis over chest level. At his deposition, Dr. Loeb clarified the restrictions apply separately to each shoulder. He also opined that based upon his restrictions and limitations, Dixie is medically disqualified from performing most of the work duties at Ford on the assembly line.

Ford filed the records from OHSIM and Dr. Smith regarding Dixie's alleged June 14, 2018 cervical injury. On June 8, 2018, six days prior to the alleged work injury, Dr. Smith ordered a cervical MRI noting a diagnosis of radiculopathy. The June 9, 2018 MRI demonstrated shallow left paracentral disc protrusion at C6-7 and moderate left and right foramen stenosis; a central disc osteophyte complex at C4-5; a broad based disc osteophyte at C5-6 and mild to moderate right foramen stenosis; moderate left foramen stenosis C3-4 and evidence of muscle spasm at C5-6 and C6-7. Dixie returned to Dr. Smith on June 13, 2018, the day prior to the alleged June 14, 2018 work accident, for a follow-up on the cervical MRI. The physician's assistant noted Dixie "reports at this time and unfortunately he does continue to have quite a bit of pain about the cervical spine . . . He states he continues to have pain in both the right and left shoulders and arms and states that he feels at this point that the right may be worse than left. He denies any new injuries to his arms and shoulders at this time and again, is very anxious for the results of his MRI." Dixie reported, "his neck is about the same since his last visit. Patient rates the pain in his neck as a 6 out of 10." Dixie was diagnosed with cervical degenerative disc disease.

Cervical epidural injections and physical therapy for his neck and shoulders were recommended. Dixie was restricted from overhead lifting with both arms.

On June 14, 2018, Dixie visited OHSIM. The following was noted by the registered nurse: “EE presents to medical to drop off paperwork regarding restrictions. Ee was seen by Erin Bash, PA on 6/13/18. . . . Paperwork notes diagnosis: cervical radiculopathy. Restrictions of no overhead lifting bilateral arms. Restrictions do not have a duration.” The record is silent as to a work incident on June 14, 2018. On June 18, 2018, it was noted by Michelle Crumbie, RN, “This is a personal condition. There is no medical documentation provided to show his current cervical radiculopathy is an occupational injury/illness.”

The parties filed records from Drs. Compton and Vemuri for Dixie’s cervical treatment from June 27, 2018 through June 2020 noting a June 14, 2018 work injury, which involved the onset of neck pain radiating into his shoulders while using a handrail at work. Dixie was diagnosed with cervical radiculitis, spondylosis, and stenosis. Dr. Compton recommended physical therapy, administered cervical steroid injections, and ordered medication. Dr. Vemuri ultimately performed a fusion at C5-6 and C6-7 on April 15, 2019. Diagnostic studies in June 2020 demonstrated an incomplete fusion from C5-7, evidence of pseudoarthritis, and moderate stenosis at C6-7. Dr. Vemuri stated Dixie is unlikely to return to his job at Ford due his cervical condition.

In support of his claim, Dixie filed Dr. Jules Barefoot’s May 6, 2019 and January 1, 2020 reports. In the May 2019 report, Dr. Barefoot noted he had previously evaluated Dixie on April 4, 2019. That report is not in the record. Dixie

complained of chronic cervical pain related to repetitive workplace activities on April 4, 2019. He was diagnosed with multi-level cervical disease with ongoing radicular complaints, and was scheduled for a cervical fusion. Dr. Barefoot opined Dixie's work duties at Ford, consisting of repetitive use of his upper extremities while holding his upper extremities and his head/neck in awkward positions, led to the progressively severe shoulder and neck pain. Dr. Barefoot opined Dixie's work activities "accelerated the degenerative processes and aggravated the naturally-occurring degenerative process such that his cervical spine condition became symptomatic sooner than would have been expected, solely due to his workplace activities."

Dr. Barefoot re-examined Dixie on January 14, 2020. He noted Dixie reported progressively severe shoulder and neck pain, which he attributed to his repetitive workplace activities. Dr. Barefoot diagnosed the April 15, 2019 C5-C6-C7 anterior cervical fusion with instrumentation. He assessed a 28% impairment rating pursuant to the AMA Guides for the cervical condition, attributable to his workplace activities with Ford.

Ford filed Dr. Loeb's May 19, 2020 report. Dr. Loeb noted the alleged June 14, 2018 work injury. After reviewing the medical records and performing an examination, Dr. Loeb opined Dixie has longstanding pre-existing active degenerative changes in his cervical spine and had a transient aggravation or soft tissue injury, which was very mild at the workplace and contributed nothing to his eventual regression resulting in a fusion at C5-6 in April 2019. Dr. Loeb opined Dixie reached MMI in April 2020. He assessed a 15% impairment rating for the

cervical condition, and he attributed the entire rating to Dixie's pre-existing condition. Dr. Loeb emphasized the mechanism of injury as described by Dixie is consistent with a transient sprain, but not with a worsening of his underlying pre-existing condition or any change in structural anatomy. Dr. Loeb assigned restrictions for the cervical condition, none of which are work-related.

Dr. Loeb's deposition testimony is consistent with the May 19, 2020 report. He acknowledged the records are devoid of any cervical symptoms or treatment prior to June 14, 2018. He amended his assessment of impairment to 25% due to the cervical fusion. His causation opinion remained unchanged.

Dr. Loeb prepared an addendum on August 27, 2020 after reviewing the treatment records from the week prior to June 14, 2018. He noted Dixie alleged a June 14, 2018 cervical injury with radicular pain. He also noted Dixie denied any prior problems with his neck. Based on his review of the additional records, Dr. Loeb concluded as follows:

This is clearly a false statement based on Dr. Mark Smith's records of 6/8/18, only six days prior to his alleged cervical spine injury. He complained of neck and radicular pain in both arms to Dr. Smith on 6/8/18 and an MRI was performed on the same date revealing multi-level degenerative disc disease of the cervical spine, longstanding, pre-existing and obviously active. When Mr. Dixie was seen back by Dr. Smith on 6/13/18, the results of the MRI were discussed and he was referred to Dr. Compton and Dr. Vemuri for ongoing management. This re-enforces my original opinion . . . that the cervical spine pathology was active, pre-existing, and unaffected by the alleged injury of 6/14/18.

Dr. Loeb opined Dixie was symptomatic and had a 5% impairment rating for the cervical spine prior to June 14, 2018. He again opined all of the

pathology found at C5-6 is due to a longstanding, active pre-existing condition with no relationship to the alleged June 14, 2018 work injury or to any alleged cumulative or repetitive trauma.

Ford filed Dr. Ralph Crystal's August 10, 2020 vocational report from an evaluation he performed on July 23, 2020. He determined Dixie can perform a wide range of jobs and qualifies for retraining in a technical or community college. Based upon Dr. Barefoot's restrictions, he stated Dixie can perform a range of limited light duty work. Based upon Dr. Loeb's restrictions, he stated Dixie can perform a broader range of jobs. Dr. Crystal found no indication Dixie is unable to perform a typical eight-hour workday or forty-hour workweek on a sustained basis, and is able to perform gainful activity. Dr. Crystal determined Dixie is not disabled from employment.

Ryan Malanoski ("Malanoski") testified by deposition on August 25, 2020. He is a private investigator with Georgantas Claims and performs surveillance primarily for workers' compensation claims. He testified, "I was also employed and I'm currently employed under an investigator in Kentucky. And I work under his license, and that's how I do some of the Georgantas Claim's is under that Kentucky license." Malanoski testified it is acceptable to work as a private investigator as an employee of a licensed investigator in Kentucky. Malanoski investigated Dixie on February 18, 2020, February 28, 2020, June 5, 2020, August 16, 2020 and August 17, 2020. Malanoski set up surveillance on March 17, 2020, June 3, 2020, June 4, 2020, June 6, 2020 and August 18, 2020, but no activity was observed. The video surveillance and correlating report were attached as exhibits. In a response to a

motion by Dixie to strike Malanoski's testimony, video, and report, Ford filed copies of the employee registration completed by Tracy Leonard, on behalf of his employee, Malanoski; Tracy Leonard's license issued by the Kentucky Board of Licensure for Private Investigators, and Malanoski's Employee ID card.

The ALJ rendered his opinion on October 27, 2020. He first noted Ford filed a motion to exclude or strike the reports and testimony of Malanoski, arguing he is not a licensed private investigator within Kentucky. The ALJ rejected this argument finding, "Malanoski's testimony and report may be filed as evidence and considered to the extent his report is factual in nature. The video and report has been the subject of cross-examination and his observations and the ALJ can consider them for what they are worth."

The ALJ determined the 2014 right shoulder is compensable and warranted a 9% impairment rating assessed by Dr. Loeb. After considering the restrictions imposed by Drs. DeGruccio, Loeb, and Smith, the ALJ determined Dixie is unable to return to his pre-injury work. The ALJ also noted both Drs. DeGruccio and Loeb opined Dixie was unable to return to the work he was performing at the time of his right shoulder injury, and found the three multiplier pursuant to KRS 342.730(1)(c)1 applicable. The ALJ determined Dixie's pre-injury average weekly wage ("AWW") was \$648.62. The ALJ also determined Ford did not violate a safety regulation or statute pursuant to KRS 342.165(1). The ALJ noted Dixie alleged Ford violated its duty pursuant to KRS 338.031(1)(a) by having a hoist available to assist with lifting, but not yet operational when he injured his shoulder. The ALJ stated as follows:

The ALJ understands Dixie's contention. However, simply because the hoists were not yet operational is not sufficient for the ALJ to find Ford acted with intent to cause injury. Furthermore, there is no statute or regulation that required the hoists which were being installed, presumably, for the benefit of the employees to avoid lifting. That was a safety effort that had not yet come to fruition. Timing alone is not sufficient for the ALJ to find Ford acted with any intent that disregarded Dixie's safety or any statute or regulation.

The ALJ determined the July 14, 2017 left shoulder injury is work-related relying upon the opinions of Drs. Smith, DeGruccio, and Loeb. The ALJ determined the treatment rendered by Dr. Smith has been reasonable and necessary. The ALJ adopted the 8% impairment rating assessed by Drs. Loeb and Smith. The ALJ determined Dixie is unable to return to his pre-injury work at Ford due to his left shoulder injury based upon Dr. Loeb's opinion and found the three multiplier applicable. The ALJ determined Dixie's pre-injury AWW for the left shoulder injury was \$656.74. The ALJ resolved Ford's medical dispute, finding the left shoulder surgery compensable.

The ALJ determined Dixie did not sustain a cervical injury due to the alleged June 14, 2018 work incident. The ALJ relied upon the medical records from June 8, 2018 through June 13, 2018, as well as Dr. Loeb's causation opinion. The ALJ also noted the next treatment note by Dr. Smith, dated July 18, 2018, does not document an injury or incident at work. The ALJ did not find Dr. Barefoot's opinion persuasive, noting he attributed Dixie's cervical condition to cumulative trauma and he did not discuss the cervical treatment rendered in the week prior to June 14, 2018.

The ALJ next determined Dixie is not permanently and totally disabled due to his right and left shoulder injuries. The ALJ reviewed the guidance set forth by the Kentucky Supreme Court in City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015) and Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2002). The ALJ determined Dixie sustained a work-related right shoulder injury warranting a 9% impairment rating and a work-related left shoulder injury warranting an 8% impairment rating. In determining Dixie is not permanently totally disabled, the ALJ noted Dixie's young age of 48 and the fact he is a high school graduate. He noted Dixie's work history includes work as a sales representative and he recently attended barber college from November 2019 through April 2020. He noted Dixie was able to attend classes in the morning and perform haircuts in the afternoon until the college temporarily ceased due to Covid-19. He also relied upon Dr. Crystal's report, who opined Dixie is capable of a wide range of work given his restrictions.

The ALJ also noted the parties stipulated Dixie was paid TTD for the 2014 injury from January 4, 2016 through March 27, 2016 and again from July 20, 2016 to April 10, 2017. The ALJ cited to the direction provided in Magellan Health v. Helms, 140 S.W.2d 579 (Ky. App. 2004).

The ALJ awarded TTD benefits from January 25, 2015 through September 26, 2017 for the right shoulder injury, and gave Ford credit for any benefits paid and wages paid pursuant to KRS 342.730(7). The ALJ awarded PPD benefits increased by the three multiplier pursuant to KRS 342.730(1)(c)1 and medical expenses for the right shoulder. The ALJ awarded TTD benefits for the left

shoulder injury from September 26, 2017 through May 9, 2018, and gave Ford a credit for benefits paid and wages paid pursuant to KRS 342.730(7). The ALJ awarded PPD benefits increased by the three multiplier pursuant to KRS 342.730(1)(c)1 and medical expenses for the left shoulder. The ALJ found the left shoulder surgery compensable.

Both Ford and Dixie filed Petitions for Reconsideration raising the same arguments they now make on appeal. Ford also requested the ALJ amend his Order to include a dismissal of the alleged cervical injury, a dismissal of the alleged safety violation, and to specifically state Ford is entitled to a credit for TTD benefits already paid as reflected in the stipulations. Ford also requested the ALJ to correct a typographical error and to make a specific finding that Malanoski was properly licensed to perform investigative work in Kentucky and that his deposition, reports, and video be admitted into evidence. Ford additionally requested the ALJ to specify it is entitled to a credit against any TTD benefits awarded for both unemployment benefits and wages received by Dixie.

The ALJ issued an order addressing both petitions on November 25, 2020. The ALJ overruled Dixie's petition, but made additional findings of fact supporting his dismissal of the alleged cervical injury. He noted Dixie alleged a neck injury on June 14, 2018 when he was using a pneumatic drill. He noted Dixie testified that he felt a pop and pain in his neck and arm while performing this job for the first time. He noted Dixie denied having any prior cervical injuries or symptoms requiring medical attention. Dixie testified something specific happened on June 14, 2018 while using the drill prompting him to seek medical treatment. The ALJ

further emphasized the medical records demonstrated Dixie treated for neck pain with Dr. Smith on June 8, 2018 and had a cervical MRI performed that day. On June 13, 2018, Dixie followed up with Dr. Smith regarding the MRI and reported he was experiencing cervical pain. Finally, the ALJ noted Dr. Smith did not mention a work injury on July 18, 2018. The ALJ did not find persuasive Dr. Barefoot's opinion that Dixie's cervical condition was due to cumulative trauma. He noted Dixie alleged he was injured the first day he performed the drilling job, and he had remained on light duty for an extended period following the initial shoulder injury and surgeries. The ALJ noted Dr. Barefoot did not persuasively explain what tasks Dixie performed in the time leading up to the alleged injury date that constitute cumulative trauma and did not reconcile Dixie's testimony that he had an acute onset on June 14, 2018.

The ALJ found no patent errors in his analysis regarding total disability, and noted he did not associate any negativity to the fact Dixie attended barber college or sought retraining. In addressing Dixie's argument regarding a safety violation, the ALJ stated as follows:

Plaintiff asserts the ALJ committed patent error in failing to find Ford committed a safety violation by failing to install a hoist that was present but not yet installed. Dixie states the fact the hoist was on site means Ford a hoist was necessary. He then argues the fact that the hoist was there but not installed makes Ford's failure to install the hoist "intentional" within the meaning of KRS 342.165. After noting the ALJ seems impressed with the word "intentional" Dixie summarily concludes the decision not to install the hoist was intentional. First, the General Assembly included the work intentional in KRS 342.165. Pursuant to that inclusion, it is an essential part of any evaluation of an alleged safety violation. The evidence in this case is that

the hoist was present but not installed. There was no evidence introduced on why the installation had not yet occurred. The ALJ was not willing to infer an intentional act or omission on Ford's part in the face of no competent testimony or documentary evidence on the question of why the hoist had not yet been installed. That finding remains unchanged.

The ALJ overruled Ford's petition, in part, without providing additional findings of fact regarding the right shoulder impairment rating, the determination the left shoulder injury is work-related, the award of the three multiplier for both shoulder injuries, and entitlement to TTD. The ALJ sustained, in part, Ford's petition and amended the Order to reflect the alleged cervical injury and alleged safety violation is dismissed. He amended the Order to reflect Ford is entitled to a credit for TTD paid against all past due benefits awarded and for all wages paid and unemployment benefits Dixie received. He also corrected a typographical error.

As the claimant in a workers' compensation proceeding, Dixie 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 Dixie was unsuccessful regarding the alleged cervical injury, permanent total disability, and the alleged safety violation by Ford, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling Evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings are so unreasonable under the evidence they

must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, supra.

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 with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

Dixie argues the ALJ erred in dismissing his cervical injury claim. He asserts the evidence establishes he sustained a cervical injury due to cumulative

trauma. We disagree, and find substantial evidence supports the ALJ's determination and a contrary result is not compelled. The ALJ relied upon Dixie's hearing testimony, the prior medical records from June 8, 2018 to June 13, 2018, and Dr. Loeb's causation opinion.

In his Form 101, Dixie alleged he injured his neck on June 14, 2018 "while using a hand drill, felt onset of pain in neck with radiation into shoulders." At the hearing, Dixie testified he was assigned to a job requiring the use of a pneumatic drill on June 14, 2018, and that it was his first day working the drilling job. Dixie testified that while using the drill on June 14, 2018, he heard a pop in his neck and experienced spasms down into his right arm. Dixie argued a specific event occurred on June 14, 2018, causing him to seek medical attention. Dixie denied experiencing any cervical injuries or symptoms requiring medical attention prior to June 14, 2018. However, Dr. Smith rendered treatment for continued cervical complaints in the week prior to June 14, 2018. He ordered a cervical MRI, and recommended injections and physical therapy for continued cervical pain. Dr. Loeb opined in both the May 19, 2020 report and August 27, 2020 addendum that Dixie's cervical condition was not caused by the alleged June 14, 2018 event, but rather was a pre-existing active degenerative condition unaffected by the alleged work event.

The ALJ provided a thorough analysis and explanation in the opinion and order on reconsideration in dismissing the cervical injury and further outlined his reasoning for finding Dr. Barefoot's causation opinion unpersuasive. He rejected Dixie's assertion his cervical condition was caused by cumulative trauma and explained his reasoning for doing so. He found Dr. Loeb's opinion most persuasive

in conjunction with Dixie's testimony and the prior treatment records. Because substantial evidence supports the ALJ's determination, and a contrary result is not compelled, we affirm on this issue.

Dixie next argues the ALJ erred by failing to award permanent total disability benefits, asserting the ALJ treated his efforts to attend barber college as a "negative measurement" in his analysis. Permanent total disability is defined 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 because of an injury. KRS 342.0011(11)(c). "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In determining whether Dixie is permanently totally disabled, the ALJ was required to perform an analysis pursuant to City of Ashland v. Taylor Stumbo, supra, and Ira A. Watson Department Store v. Hamilton, supra.

The ALJ performed the appropriate analysis and considered the required factors in finding Dixie is not permanently totally disabled. The ALJ explained the five-step process required to support a determination of permanent total disability. The ALJ found Dixie sustained compensable work-related injuries to his right and left shoulders. He next determined Dixie's right shoulder injury warranted a 9% impairment rating and his left shoulder warranted an 8% impairment rating. The ALJ considered Dixie's age, the fact he is a high school graduate, and his past work experience. The ALJ noted Dixie had attended barber college from November 2019 through April 2020, and was able to attend classes in the morning and perform haircuts in the afternoon until the college temporarily closed due to

Covid-19. The ALJ also considered Dr. Crystal's vocational evaluation, opining Dixie was not occupationally disabled, and could perform a variety of jobs within his restrictions. Because the ALJ performed the appropriate analysis, and substantial evidence supports his determination and a contrary result is not compelled, we affirm on this issue.

Dixie next argues the ALJ erred by failing to find Ford committed a safety violation, asserting the presence of the uninstalled hoist at his work area establishes an intentional violation. KRS 342.165(1) provides in pertinent part as follows:

If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment.

The purpose of KRS 342.165 is to reduce the frequency of industrial accidents by penalizing those who intentionally failed to comply with known safety regulations. Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996). The burden is on the claimant to demonstrate an employer's intentional violation of a safety statute or regulation. Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997). The application of the safety penalty requires proof of two elements. Apex Mining v. Blankenship, *supra*. The record must contain evidence of the existence of a violation of a specific safety provision, whether state or federal. The record must also contain evidence of the "intent" to violate a specific safety

provision. Enhanced benefits do not automatically flow from a showing of a violation of a specific safety regulation followed by a compensable injury. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002).

The ALJ determined Dixie failed to prove Ford intentionally violated the general duty clause. Dixie does not cite to any specific safety statute or regulation that Ford allegedly violated. However, he noted Dixie alleged Ford violated its duty pursuant to KRS 338.031(1)(a) by having a hoist to assist with lifting available but not operational at the time of his 2014 injury. A violation of the “general duty” clause contained in KRS 338.031(1)(a) can satisfy the requirement set out in KRS 342.165 that a “specific statute” was intentionally ignored. That said, not all violations of KRS 338.031(1)(a) automatically rise to a violation egregious enough to justify granting an enhancement under KRS 342.165. Cabinet for Workforce Development v. Cummins, 950 S.W.2d at 836. See Apex Mining v. Blankenship, *supra*. In order for a violation of the general duty provision to warrant enhancement pursuant to KRS 342.165(1), the employer must be found to have intentionally disregarded a safety hazard that even a lay person would obviously recognize as likely to cause death or serious physical harm. Hornback v. Hardin Memorial Hospital, 411 S.W.3d 220, 226 (Ky. 2013).

The ALJ determined Ford did not intentionally violate the statute. The only evidence addressing Ford’s alleged violation comes from Dixie’s testimony. He testified a hoist meant to assist in lifting was present in his work area, but had yet to be installed or was functional at the time of his injury. The ALJ also determined the fact the hoist was not yet operational alone does not establish an intentional

violation of the general duty statute. He also noted there is no statute or regulation requiring installation of the hoist. In the Order on Petition for Reconsideration, the ALJ stated he was unwilling to infer an intentional act or omission by Ford without any evidence addressing why the hoist had not yet been installed. In this instance, the ALJ performed the appropriate analysis, and substantial evidence supports his determination that Dixie failed to prove Ford intentionally violated a safety statute or regulation, and a contrary result is not compelled.

Finally, Dixie argues the ALJ erred by failing to strike the surveillance video, reports, and Malanoski's deposition since he was not licensed as a private investigator. We disagree. Although the ALJ found the challenged evidence admissible, Malanoski's video surveillance and report bore no weight in his ultimate determinations.

Malanoski testified he is licensed as a private investigator in Kentucky at the time he investigated Dixie. KRS Chapter 329A governs private investigators and specifically requires a person to hold a license to practice private investigating issued under the laws of the Commonwealth of Kentucky. However, KRS 329A.070(9) provides the provisions of KRS 329A.010-329A.090 do not apply to "An employee of a private investigator or a private investigating firm who works under the direction of the private investigator or the private investigating firm for less than two hundred forty (240) hours per year... ." Ford filed the employee registration completed by Tracy Leonard, on behalf of his employee, Malanoski; the license of Tracy Leonard issued by the Kentucky Board of Licensure for Private Investigators, and Malanoski's Employee ID card. We conclude the ALJ properly

exercised his discretion in finding the challenged evidence admissible, and affirm on this issue.

Because Dixie was successful in his burden of proving a compensable left shoulder injury, the application of the three multiplier, his right shoulder injury warranted a 9% impairment rating, and entitlement to TTD benefits, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, *supra*. "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).

Ford asserts the ALJ erred in finding the alleged July 14, 2017 injury work-related, arguing Dr. Daniels is in the best position to issue a causation opinion since he is the only physician who reviewed a video of the work performed by Dixie at the time of the claimed injury. We disagree.

In finding the left shoulder condition work-related and compensable, the ALJ relied upon the causation opinions of Drs. Smith, DeGruccio, and Loeb. In the May 7, 2018 and February 12, 2020 letters, Dr. Smith opinion Dixie suffered a work-related left shoulder injury on July 14, 2017 consisting of a left rotator cuff strain with a rotator cuff tear. Likewise, in his May 19, 2020 report, Dr. Loeb opined the alleged July 14, 2017 mechanism of injury is consistent with Dixie's left shoulder symptoms and condition. Therefore, the left shoulder condition is work related. Dr. Loeb reviewed the medical records, including Dr. Daniels' causation opinion. The fact Dr. Daniels reviewed an 11-second video demonstrating the job tasks Dixie was performing at the time of the work injury goes to the weight of the evidence, and

does not compel a contrary result. Our review of Dr. DeGruccio's opinion reveals no causation opinion as to the left shoulder condition, but the ALJ's stated reliance on his opinion amounts to harmless error. Because the opinions of Drs. Smith and Loeb constitute substantial evidence supporting the ALJ's determination the left shoulder injury is work-related, we affirm.

Ford next argues the ALJ erred in finding the three multiplier applicable for both the right and left shoulder injuries, emphasizing the fact he attended barber college and the surveillance video. We disagree. KRS 342.730(1)(c)1 states as follows:

If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments.

Concerning the right shoulder injury, the ALJ relied upon the opinions and restrictions provided by Drs. DeGruccio, Loeb, and Smith. For the left shoulder injury, the ALJ relied upon Dr. Loeb's opinion. In his February 8, 2017 report, Dr. DeGruccio restricted Dixie to no over-the-shoulder height activities and from lifting/pushing/pulling over 30 pounds with his right upper extremity. Dr. DeGruccio found it highly unlikely Dixie retains the physical capacity the return to his pre-injury work. In the May 7, 2018 and February 12, 2020 letters, Dr. Smith restricted Dixie from working above shoulder level and from lifting or carrying over 10 pounds with his right arm or 20 pounds combined. He further opined Dixie's ability to return to work for Ford was predicated on the ability to accommodate his restrictions. In the

May 19, 2020 report, concerning both shoulders, Dr. Loeb restricted Dixie to minimal lifting above shoulder level and no lifting over five pounds above chest level on a repetitive basis. Dr. Loeb clarified his restrictions applied separately to each shoulder.

Dr. Smith imposed the same restrictions of no working above the left shoulder level and no lifting or carrying over 10 pounds or 20 pounds combined for both shoulders. He further opined Dixie's ability to return to work for Ford is based upon accommodation of his restrictions. Dr. Loeb likewise imposed the same restrictions of minimal lifting above shoulder level and no lifting over five pounds above chest level on a repetitive basis. Dr. Loeb further testified Dixie is currently medically disqualified from working on Ford's assembly line due to his bilateral shoulder condition.

Dixie testified that based upon his limitations and restrictions, he does not believe he is able to return to his pre-injury job, or any other position available at Ford. The restrictions and opinions of Drs. DeGruccio, Smith, and Loeb constitute substantial evidence supporting the ALJ's application of the three multiplier to both the right and left shoulder injuries, and we affirm on this issue.

Ford next argues the ALJ should have adopted the 8% impairment rating for the right shoulder condition assessed by Dr. Smith since he is Dixie's treating physician, rather than the 9% impairment rating assessed by Dr. Loeb. We disagree. The AMA Guides state: "impairment evaluations are performed by a licensed physician." Clearly, Dr. Loeb is a licensed physician. Dr. Loeb also testified he assessed a 9% impairment for the right shoulder condition pursuant to the

AMA Guides, and there is no evidence disputing this testimony. The ALJ is not required to afford Dr. Smith's opinion more weight because he is a treating, rather than an evaluating, physician. Sweeney v. King's Daughters Medical Center, 260 S.W.3d 829 (Ky. 2008). It was the ALJ's prerogative to rely upon Dr. Loeb's assessment of impairment for the right shoulder condition, and because his assessment constitutes substantial evidence, we affirm on this issue.

Finally, Ford argues the ALJ erred in awarding TTD benefits for the right shoulder injury from January 25, 2015 through September 26, 2017. Ford notes Dixie returned to work following each of his three right shoulder surgeries, and should only be awarded TTD benefits for the periods he was off work. Ford argues the TTD benefits should terminate on June 23, 2017, the date Dr. Smith testified Dixie reached MMI.¹ Likewise, Ford argues Dixie is not entitled to TTD benefits for the left shoulder injury beyond April 8, 2018, the date wage records indicate he returned to light duty work following his left shoulder surgery. For the following reasons, we vacate the ALJ's determination regarding entitlement to TTD benefits for both the right and left shoulder conditions, and remand for additional findings of fact.

TTD is statutorily defined in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement permitting a return to employment[.]" In Magellan Behavioral Health v. Helms, supra, the Court of Appeals instructed that

¹ Although Ford cites to "Dr. Mark Smith Depo", we find no such deposition testimony in the record. Rather, Dr. Smith opined Dixie attained MMI from the 2014 right shoulder injury on May 9, 2017 in his letters dated May 7, 2018 and February 12, 2020.

until MMI is achieved, an employee is entitled to TTD benefits as long as he remains disabled from his customary work or the work he was performing at the time of the injury. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court explained, “It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury.” Thus, a release “to perform minimal work” does not constitute a “return to work” for purposes of KRS 342.0011(11)(a).

In Livingood v. Transfreight, LLC, et. al., supra, the Supreme Court declined to hold a claimant is entitled to TTD benefits as long as he or she is unable to perform the work performed at the time of the injury. The Court stated, “... we reiterate today, Wise does not ‘stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.’” Id. at 254. In Trane Commercial Systems v. Tipton, supra, the Supreme Court clarified when TTD benefits are appropriate in cases where the employee returns to modified duty. The Court stated:

We take this opportunity to further delineate our holding in *Livingood*, and to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents." *Double L Const., Inc.*, 182 S.W.3d at 514. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD benefits. Therefore, the following only applies to those employees who have not reached MMI but who

have reached a level of improvement sufficient to permit a return to employment.

As we have previously held, “[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury.” Central Kentucky Steel v. Wise, 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.

Id. at 807

The ALJ did not provide an adequate analysis concerning entitlement to TTD benefits for either the right or left shoulder injuries. Regarding the right shoulder, the ALJ found Dixie “entitled to TTD benefits from January 25, 2015 through the date of the left shoulder surgery on September 26, 2017. This is based on Dr. Loeb’s assessment of reaching MMI on May 9, 2018 and Dixie’s testimony that he had not returned to his regular and customary work.” The evidence establishes that Dixie returned to work at Ford on light duty restriction after his September 2014 injury and up through his first surgery. Dixie testified he returned to light duty work

following a period of recovery after each of his three surgeries. Ford introduced wage records indicating Dixie was paid wages at various times following the 2014 injury. Therefore, on remand, the ALJ is directed to perform an analysis pursuant to Trane Commercial Systems v. Tipton, *supra*, in determining whether Dixie is entitled to TTD benefits for the right shoulder injury during the periods he returned to light duty work. We also note the ALJ terminated Dixie's TTD benefits on the day of his right shoulder surgery, not the day he attained MMI from his right shoulder injury as opined by Dr. Loeb.

Regarding the left shoulder, the ALJ found Dixie entitled to TTD benefits "from the date he went off work for surgery, September 26, 2017 until he was placed at MMI by Dr. Loeb on May 9, 2018." However, Dixie testified he returned to light duty work after a period of recovery from his left shoulder surgery. Ford introduced wage records indicating Dixie was paid wages following the left shoulder injury. On remand, the ALJ is directed to perform an analysis pursuant to Trane Commercial Systems v. Tipton, *supra*, to determine whether Dixie was entitled to TTD benefits during the period he returned to light duty work following his left shoulder surgery. We direct no particular result, and the ALJ may make any determination based upon the evidence.

Accordingly, the October 27, 2020 Opinion, Award and Order and the November 25, 2020 Order on Petitions for Reconsideration rendered by Hon. W. Greg Harvey, Administrative Law Judge, are hereby **AFFIRMED IN PART** and **VACATED IN PART**. This claim is **REMANDED** to the ALJ for a determination

on entitlement to TTD benefits for the right and left shoulder injuries in accordance with the directions set forth above.

ALL CONCUR.

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