Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 11, 2021

CLAIM NO. 201793898

MCCREADY MANOR PETITIONER

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

ADAM ABNEY AND
HON. JOHN MCCRACKEN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * * *

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

BORDERS, Member. McCready Manor ("McCready") appeals from the August 24, 2020 Opinion, Award, and Order and the September 24, 2020 Order on Petition for Reconsideration rendered by Hon. John McCracken, Administrative Law Judge ("ALJ"). The ALJ determined Adam Abney ("Abney") is entitled to additional temporary total disability ("TTD") benefits, permanent partial disability ("PPD")

benefits based on a 13% impairment rating, enhanced by the three multiplier contained in KRS 342.730(1)(c)1, medical benefits, and he awarded vocational rehabilitation benefits. McCready filed a Petition for Reconsideration arguing the ALJ erred in finding Abney was entitled to TTD benefits from January 9, 2019 through February 21, 2019 in relying upon the 13% impairment rating assessed by Dr. Ben Kibler, and in awarding vocational rehabilitation benefits. The ALJ denied the petition and set forth additional findings supporting his determination. For reasons set forth herein, we affirm in part, vacate in part, and remand for additional findings consistent with this Opinion.

Abney testified by deposition on February 27, 2019 and at the hearing held July 2, 2020. Abney completed an associate's degree in science he completed in 2011. Abney's prior work history includes working as a manager at pizza restaurant, assembly line work and cleaning through a temporary service, assembling wiring harnesses, installing satellite dishes, operating a machine to manufacture window frames, and performing general maintenance for a retirement community.

Abney injured his right shoulder on February 6, 2017 while helping lift a piano while working for McCready. He felt pressure in his right shoulder when he set the piano down. Approximately 10 to 15 minutes later, his arm became numb. Abney initially sought treatment at Baptist Health Urgent Care. He then treated with his primary care physician, Dr. George Schloemer, KORT physical therapy, Dr. Wallace Huff, and Dr. Kibler. Abney's current work restrictions include pushing, pulling, or lifting no more than 15 pounds. He has also been advised to

avoid engaging in activities requiring repetitive motion with his right arm, or raising the right arm above his head.

Regarding the period from January 9, 2019 to February 21, 2019, Abney stated he was frustrated with the denial of pain management and physical therapy recommended by Dr. Kibler. He asked Dr. Kibler to provide an impairment rating to see if he could negotiate a settlement. Abney explained, "I wanted to settle this case out and take the money and seek help from these doctors that could help me get the pain relief that I've been sitting there seeking." Abney believed pain management and restarting physical therapy would put him on the path of returning to work. He expressed a desire to participate in vocational rehabilitation, stating his goal is to reeducate himself into a new career, because he had always engaged in physical, manual labor. Due to his arm pain, he cannot perform that type of work. His pain also affects him mentally, as he is not able to focus. He believed he could not engage in any training until his pain is under control. He stated he is unable to perform his prior job at McCready due to his condition and restrictions. He stated he could not perform any of his prior jobs due to his shoulder limitations.

Dr. Kibler treated Abney beginning on May 1, 2017. Dr. Kibler received a history of the February 2017 incident lifting the piano at work and subsequent treatment. He diagnosed a glenoid labrum tear and recommended surgical repair. Dr. Kibler performed arthroscopic surgery on June 21, 2017. Abney continued to have shoulder complaints and eventually a second arthroscopic surgery was performed on March 14, 2018. On January 4, 2019, an injection has relieved Abney's symptoms for approximately a week. Dr. Kibler further noted Abney

worsening pain along with increased limitations, dystonia, guarding, and neuropathic type symptoms. Dr. Kibler stated, "He has talked with his lawyer and they need to perhaps have an MMI determination so they could perhaps do some type of a settlement."

On January 10, 2019, Dr. Kibler signed a work status form stating Abney is "unable to return" to work. Dr. Kibler also indicated Abney was not at maximum medical improvement ("MMI"). On January 21, 2019, Dr. Kibler stated he found Abney had reached MMI on January 4, 2019 was to help Abney create a basis for workers' compensation benefits. Abney continued to complain of symptoms and Dr. Kibler believed it appropriate to inject the shoulder. A February 22, 2019 office note states Abney "obtained some relief by the injection. I think this would indicate that we could do another injection." Dr. Kibler noted if Abney continues to have symptoms after the injection, he would discuss with him surgical treatment or pain management. On June 10, 2019, Dr. Kibler indicated Abney is unable to return to work and is not at MMI. Dr. Kibler allowed Abney to return to modified duty on July 19, 2019 with restrictions of no shoulder movement above shoulder height, no pushing, pulling, or lifting over 10 to 15 pounds, and no repetitive pushing or pulling. Dr. Kibler recommended continued pain management. Dr. Kibler projected that Abney would reach MMI on September 1, 2019. However, on September 12, 2019 and October 21, 2019, Dr. Kibler indicated Abney had not reached MMI. On October 21, 2019, Dr. Kibler assessed a 17% impairment rating pursuant to the 5th Edition of the American Medical Association Guides to the

Evaluation of Permanent Impairment, ("AMA Guides"). On March 23, 2020, Dr. Kibler provided the following explanation of Abney's impairment rating:

> Based on his range of motion criteria that is measured to the point of limitation by pain, he has a 17% impairment to the shoulder, which is a 10% impairment to the body as a whole. These were based on the 5th Edition Guidelines. If the pain is a separate issue, a 3% impairment rating could be added to that number based on the pain syndrome and the pain symptoms. At this point in time, I do not think there is any other treatment except the Botox and the trigger points. I do think that there could be some symptomatic improvement with these injections, but this would not allow him to return to his normal work. In the absence of further treatment, I do think that these impairment values based on range of motion are what he can functionally achieve.

Dr. Michael Best examined Abney on June 8, 2019 and diagnosed him as status post glenoid labrum tear of right shoulder, February 6, 2017; status post labral repair, June 21, 2017; and status post biceps tenodesis, March 14, 2018. Dr. Best felt Abney's prognosis was poor. He noted Abney had not returned to work in over two years. Further, his subjective complaints far outweighed objective findings and his exam was plagued by submaximal effort. Dr. Best felt Abney should return to work with appropriate limitations. He opined Abney can perform light to medium duty work activities with no work above mid-chest level. Dr. Best assigned a 7% impairment rating pursuant to the AMA Guides. Dr. Best criticized Dr. Kibler's impairment rating as inconsistent with the AMA Guides. Dr. Best noted Dr. Kibler provided a rating for loss of range of motion of the shoulder on January 3, 2019. However, Abney had a greater range of motion at the time of Dr. Kibler's March 21, 2019 examination. Additionally, the January calculation attributed a significant portion of the impairment to a strength deficit even though Abney had persistent

complaints of pain. Dr. Best noted the AMA Guides provides that decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts that prevent effective application of maximal force in the region being evaluated. In a February 19, 2020 supplemental report, Dr. Best stated a normal EMG study on July 20, 2019 further supports his opinion that Abney has no objective abnormality requiring care and treatment.

Dr. Christopher Brigham performed a records review on February 11, 2020. Dr. Brigham disagreed with Dr. Kibler's methodology in assessing his impairment rating. He noted it is inappropriate to combine range of motion deficits with strength loss. Further, the AMA Guides provide that decreased strength cannot be rated in the presence of decreased range of motion, painful conditions, deformities, or absence of parts that prevent effective application of maximal force in the region being evaluated. Dr. Brigham agreed with the rating assigned by Dr. Best and assigned a 7% impairment rating pursuant to the AMA Guides.

Dana Ward, MRC, CRC, CCM, CCP, CBIS performed a vocational evaluation and prepared a report on March 6, 2020. She reviewed Dr. Best's report and Abney's Form 101. Using the restrictions assessed by Dr. Best, she determined Abney is capable of performing medium to light work. She found Abney possesses numerous transferrable skills including using a computer. She noted his job at the time of injury was medium level work. She opined that Abney could not return to his prior work due to occasional overhead activities. She felt Abney could perform work including car detailer, retail sales, mail sorter, general clerk, security guard,

team assembly, and leasing agent. She noted Abney's prior work included team assembly, food service, and customer service.

At the Benefit Review Conference and Final Hearing, the parties stipulated the following issues remained for determination: Benefits per KRS 342.730, AWW, TTD benefits, ability to return to work, credit for TTD overpayment, vocational rehabilitation, unpaid or contested medical expenses, mileage reimbursements, and pending medical fee disputes.

Regarding the issues that are subject to this appeal, the ALJ made the following findings of facts and conclusions of law, *verbatim*:

> **Impairment.** The ALJ is more persuaded by Abney's treating physician, Dr. Kibler when examining Abney's physical condition, restrictions, and treatment. Dr. Kibler treated Abney for over two years. His records do not indicate that Abney exaggerated his symptoms or feigned his level of discomfort due to the shoulder injury. The ALJ believes that Dr. Kibler was in a better position to evaluate Abney, than either Dr. Best or Dr. Brigham, for purposes of an impairment rating. It is clear that Dr. Best thought Abney was exaggerating his symptoms. However, it is also clear that Abney thought Dr. Best was not going to treat him fairly in the examination. Dr. Brigham's report is not helpful. He did not examine Abney and simply agreed with Dr. Best. His criticism of Dr. Kibler is not relevant.
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> The ALJ relies on Abney and Dr. Kibler to find that Abney sustained a 13% impairment as a result of the February 6, 2017 work accident to his shoulder.
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> **Multipliers.** Permanent partial disability means the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work. . . KRS 342.0011(11)(b).
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> The ALJ must determine whether the provisions of KRS 342.730(1)(c)1 or 2 apply. Subparagraph 1 applies when the plaintiff lacks the physical capacity to

return to the type of work being performed at the time of the injury and has not returned to earning same or greater wages. Essentially, it must be determined whether the injury has permanently altered the worker's ability to earn an income. Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006). The ALJ must review the jobs that Abney's prior work with Defendant required. The ALJ believes Abney's version of what his job required as relates to lifting items and the frequency of lifting. Additionally, Abney stated, as did Ward, that the job required overhead reaching. His job required climbing ladders, painting, plumbing and electrical work. All of these jobs require some amount of working with hands over shoulder height.

Abney testified that he could not return to work for Defendant due to limitations of his shoulder. Dr. Kibler stated that Abney could not return to his prior work and assessed the permanent restrictions stated above. Ward also agreed that because of the overhead reach requirement, Abney could not return to work for Defendant. From reviewing Ward's report, the only medical information upon which she based this opinion was from Dr. Best.

Abney testified that he has not returned to work and is earning no money. The ALJ relies on Abney to find that he is earning less money than he was at the time of the work-injury.

The ALJ relies on Abney, Dr. Kibler, and Ward to find that Abney does not possess the physical capacity to return to the type of work he performed at the time of injury on February 6, 2017. The ALJ finds that Abney is entitled to a multiplier of three in accordance with KRS 342.730(1)(c)(1). The ALJ finds that Abney's shoulder injury has permanently altered his ability to earn income.

…. **Temporary Total Disability (TTD).** The parties' stipulated at the BRC that Defendant paid TTD at the weekly rate of $359.97 from February 7, 2017 to January 8, 2019 and from February 22, 2019 to July 10, 2019. Defendant seeks a credit for overpayment of TTD as to the rate paid and duration and Abney seeks an additional period of TTD from January 19, 2019 to

February 21, 2019. Defendant states that the TTD benefits paid from January 3, 2019 through January 8, 2019 were not proper as Abney as at MMI according to Dr. Kibler.

The ALJ reviewed the January 2019 records from Dr. Kibler regarding the discussion of MMI and an impairment rating. On January 4, 2019, Dr. Kibler stated that Abney was "probably" at MMI. Yet in the next sentence, he states that Abney would probably benefit from an additional MRI. He also stated that the reason he stated that Abney was probably at MMI was purely for purposes of a workers' compensation settlement. In the discussion notes section of this record, Dr. Kibler stated that he spent a long time discussing the problem Abney was experiencing and that Abney's pain appeared to be getting worse. The ALJ does not believe that this record reveals that Abney was at MMI.

Temporary total disability is 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 which would permit a return to employment. Magellan Health v. Helms, 140 SW 2d 579 (Ky. App. 2004). In W. L. Harper Const. Co., Inc., v. Baker, 858 S.W. 2d 202 (Ky. App 1993) the court explained that temporary total disability benefits are payable until medical evidence establishes that the recovery process, including any treatment reasonably rendered in an effort to improve claimant's condition is over, and the underlying condition is stabilized such that the workers' compensations claimant is capable of returning to his job, or to some other employment which he is capable, which is available in the local labor market.

In this case, the ALJ believes that on January 4, 2019, the evidence is clear that in spite of Dr. Kibler stating that for purposes of a workers' compensation settlement Abney was probably at MMI, Abney's condition was not stable and the notes directly indicate his condition was worse. The ALJ did not find any other records between January 3, 2019 and February 21, 2019, that place him in a stable condition or provide evidence that he was at MMI for this injury. Even Dr. Best placed him at MMI on June 11, 2019.

The ALJ relies on Abney and Dr. Kibler's records to find that Abney was temporarily totally disabled during the periods stipulated to by the parties at the BRC and to include January 3, 2019 through February 21, 2019.

The ALJ finds that the correct amount of weekly TTD payments is $345.80 ($518.70 x 66 2/3).

Credit for TTD. Defendant asserts that it is entitled to a credit for TTD both as to rate and duration. The ALJ has found that Abney was entitled to TTD during the period Defendant questions and therefore no credit is due for that period, except as to rate.

The parties stipulated that Defendant paid TTD at the weekly rate of $359.97. The ALJ finds that Defendant overpaid TTD Abney on the weekly rate by $14.17 per week. However, TTD has been ordered at $345.80 from January 19, 2019 through February 21, 2019 at the rate of $345.80. Defendant did not pay TTD during this period. The ALJ finds that Defendant paid TTD for 100 weeks during the period from February 7, 2017 through January 8, 2019 at the rate of $359.97 for a total of $35,997.00. Defendant paid $359.97 from February 22, 2019 to July 10, 2019, for a total of 19.71 weeks, at the rate of $359.97 for a total of $7,095.01. Total TTD paid voluntarily by Defendant totals $43,092.01. The total overpayment during the period of voluntary TTD payments equals $1,696.29. The total TTD owed during the period not paid, but ordered (January 19, 2019 through February 21, 2019) totals four weeks and five days (4.71 weeks). The additional TTD owed for the 4.71 weeks at the weekly rate of $345.80 totals $1,628.72. The ALJ finds that Defendant is entitled to a credit for the overpayment of TTD in the amount of $67.57.

Vocational Rehabilitation. Plaintiff seeks an order requiring Defendant to pay for 52 weeks of education at Eastern Kentucky University to allow him to advance towards a degree in computer science. Abney already has an associate's degree in science. He testified he wants to further this to a four-year degree. Defendant states that KRS 342.710 does not require them to pay for

education and training that may place Abney earning well above his AWW of $518.70. Defendant does not believe that Abney qualifies for vocational rehabilitation services and relies on Ward.

Ward provided an opinion that reveals that Abney is functioning at a 12th grade in every area she tested, except for spelling. She believed that he had transferable skills, including computer skills. Ward identified several jobs that were available that she believed Abney was capable of physically performing. However, Ward relied on the medical records and restrictions listed by Dr. Best, which place Abney in the light to medium work category. Dr. Kibler's restrictions include 1) no shoulder movement above shoulder height, 2) no pushing, pulling or lifting above 10-15 pounds, 3) no repetitive pushing or pulling and 4) limited use of the right hand. The ALJ saw Abney testify at the hearing, and believes that Dr. Kibler's restrictions are more accurate regarding Abney's current physical limitations.

Abney testified that he could not return to any of his prior work due to his shoulder. Abney testified that he possesses some computer skills. He can operate Word and Excel. He is able to perform some computer coding. Abney testified that he approached several factories and temporary agencies to find work. They all told him no. He knew he was not physically capable of performing some of these jobs, but he stated that he needs money to support his family. Abney testified that a computer science degree will allow him to pursue a job where he can function within his physical limitations. At the hearing, Abney stated that all of his prior work involved physical, manual labor that involved constant repetitive motion, back and forth, lifting, carrying, and pushing. Vocational rehabilitation of 52 weeks will put him closer to a four year degree.

The ALJ reviewed the potential jobs listed by Ward. Several of the 10 jobs listed by Ward appear to involve repetitive work. While Abney has some sales experience from working at Domino Pizza, this experience was several years ago and he appears to have been a deliverer and manager. Most of Abney's recent work life has involved physical labor.

The rehabilitation provisions of the Workers' Compensation Act are mandatory when requested by an injured employee and the statutory procedure must be followed in order to make factual findings of whether the employee is unable to perform work for which he has previous training or experience. Edwards v. Bluegrass Containers Division of Dura-Containers Inc., 594 S.W 2d 900 (Ky. 1980). Further, 342.710 provides that when as the result of an injury, an employee is unable to perform work for which he has previous training or experience; he shall be entitled to such vocational rehabilitation services, including re-training and job placement, as may be reasonably necessary to restore him to suitable employment.

Workers' compensation is developed not just to compensate a worker who has been injured on the job, but also to enable the worker to re-enter the job market and become employed again in a position as near as possible in pay and status to the one the claimant has been forced by injury to leave. Wilson v. SKW Alloys, Inc., 893 S.W. 2d 800 (Ky., 1995), citing Smith v. North Dakota Workers' Compensation Bureau, 447 N.W.2d 250, 260 (1989). Further, "suitable employment" means work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of injury, his age and education, his income level and earning capacity, his vocational aptitude, his mental and physical abilities and other relevant factors both at the time of the injury and after reaching his post-injury maximum level of medical improvement. An employee, who has suffered a compensable disabling injury, barring a reasonable basis to deny rehabilitation, is entitled to have the ability perform suitable work restored through an appropriate rehabilitation plan. Wilson v. SKW Alloys, Inc, Supra.

In Abney's case, the physical injury to his shoulder has forced him to leave his job as a maintenance worker. He testified that because of his physical restrictions brought about by the injury, he is unable to work the prior jobs he has held. Ward stated that Abney's educational level would allow him to participate in a retraining program since he has a high

> school diploma and an associate's degree. Ward stated again at page 10 of her report that vocational training was a possibility due to Abney's associate's degree. She noted that he expressed an interest in retraining but workers' comp would not agree to fund the program.
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> Abney filed estimated costs to attend Eastern Kentucky University for each semester. The approximate total cost per semester is $5,708. Online classes are estimated to cost $421 per credit hour. 12 credit hours of online education is approximately $5,052.00.
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> The ALJ understands Defendant's position that a computer science degree may take him above what is considered a return to suitable employment. However, there is no proof that will happen. Ward stated Abney's prior education makes it possible for him to retrain. The ALJ relies on Abney, Dr. Kibler, and Ward to find that vocational rehabilitation as requested by Abney to attend classes at Eastern Kentucky University within the parameters of 52 weeks as allowed by KRS 342.710 is appropriate in Abney's case. The ALJ orders Defendant to pay for the costs of the program at Eastern Kentucky University, not to exceed 52 weeks. The ALJ finds that Abney's prior degree in science, and some computer skills, is within his prior experience such to justify vocational rehabilitation in the field of computer science.

McCready filed a Petition for Reconsideration requesting the ALJ reconsider and/or set forth additional findings supporting his award of TTD benefits, his determination of the impairment rating, and entitlement to vocational rehabilitation benefits.

In response to McCready's Petition for Reconsideration, the ALJ entered the following Order denying the request, *verbatim*:

> Defendant filed a Petition for Reconsideration of the August 24, 2020 Opinion, Award and Order. Defendant

initially requests that the finding that Plaintiff was not at MMI from January 3, 2019 through February 21, 2019.

Maximum Medical Improvement.

Defendant asserts that the facts reveal that Plaintiff was at MMI as indicated by Dr. Kibler. The ALJ did not believe that Dr. Kibler's language used actually placed Plaintiff at MMI on January 3, 2019, due to him also stating that Plaintiff would probably benefit from an MRI. The ALJ stated that other than this statement by Dr. Kibler, no other records were found placing Plaintiff in a stable condition sufficient to place him at MMI during this period. Defendant asserts that the February 21, 2019 Kibler record clearly places Plaintiff at MMI during the period in question.

The ALJ did not believe that, on January 4, 2019, Dr. Kibler was actually placing Plaintiff at MMI for medical purposes. This record clearly states that Plaintiff and his lawyer needed Dr. Kibler to place Plaintiff at MMI so he could perhaps settle his case as Plaintiff was not getting any benefits from workers' compensation except "temporary impairment". This not also stated that Plaintiff had more limitation, more dystonia, more guarding and more neuropathic type symptoms that were compatible with central pain response that may benefit from pain management. On January 10, 2019, Dr. Kibler signed a work status form that stated Plaintiff is "unable to return" to work. Dr. Kibler also checked that Plaintiff was not at MMI on this form.

On January 21, 2019, Dr. Kibler stated that the reason for the January 4, 2019 MMI was to help him create a basis for workers' compensation. Plaintiff complained of symptoms on this date and Dr. Kibler believed it appropriate to inject the shoulder. The February 22, 2019 office notes stated that Plaintiff "obtained some relief by the injection. I think this would indicate that we could do another injection". The ALJ relies on these records to again find that Plaintiff was not at MMI between January 3, 2019 and February 21, 2019 and was still off work according to Dr. Kibler. The ALJ denies Defendant's Petition as relates to TTD.

Impairment.

Defendant's next issue relates to the impairment found by the ALJ. The ALJ found a 13% impairment based upon Dr. Kibler. Defendant asserts that none of the physicians assigned a 13% impairment. However, Dr. Kibler's March 23, 2020 record clearly states that he assessed a 10% impairment and an additional 3% for pain if that is a separate issue. These two impairment assessments total 13%. The ALJ relies on Plaintiff's testimony and Dr. Kibler's records of ongoing pain to find that pain is a separate issue and adopt Dr. Kibler's 3% pain impairment in addition to the 10% impairment that is represented by his assessment of 17% due to the shoulder. The ALJ finds that Plaintiff has a 13% impairment due to the injury.

Defendant's Petition as relates to impairment is denied.

Vocational Rehabilitation.

Defendant's last Petition issue relates to Vocational Rehabilitation pursuant to KRS 342.710. The ALJ relied in part on Defendant's vocational expert, Dana Ward. As stated in the Opinion and Award, Ward based her belief that Abney could work in a light to medium category was apparently based upon Dr. Best's recommended restrictions, not Dr. Kibler's. The ALJ believed that Dr. Kibler's assessment of restrictions was more appropriate in light of the fact that Dr. Kibler was his treating orthopedic surgeon. The ALJ is entitled to rely upon Abney's testimony that he is unable to perform his job prior to working for Defendant.

On July 19, 2019, Dr. Kibler recommended physical restrictions of no shoulder movement above shoulder height, no pushing, pulling or lifting over 10 to 15 pounds, no repetitive pushing or pulling and limited use of the right hand. He stated these restrictions are permanent. Ward listed Abney's prior work history as a maintenance man/subcontractor, extruder operator, one year work at an Auto Parts Manufacturer, Satellite installer, general laborer in commercial manufacturing, a production worker, two years as a manager at Domino's and one year as a line cook for Pizza Hut. The ALJ notes that Abney's Form 104 lists his work for Pizza Hut and Domino's to have occurred from 1995 through 1998. The Pizza Hut job was a job he held

while attending high school. His job at Domino's was full time; however, he did not start as a manager. Additionally, his job as a manager required him to prepare pizzas and stock.

Abney's job with Tokico and KI USA required him to work multiple areas including operating machines, sweeping and differing tasks. This job was through a temporary agency. His job at Tokico was a typical factory with machines running. His job required at times for him to bring a pallet of parts to place in a machine, press a button, and put another them in another box for someone else to pick up to go down the line. The other places he worked through the staffing agencies involved similar type work. All of these jobs required him to stand.

His work at Bluegrass Wire Harness, Inc. required him to perform general labor consisting of assembling different size wire to a specific pattern and connect ends on wires. Some days he would take wires and run an injection mold machine. Sometimes he would work in the braiding section to put a coating on the outside of the whole assembly so the wires would stay together. His work installing satellite dishes required him to assemble the satellite dishes. Installation tasks varied on every job. This required him to potentially install wire in a house, go through crawlspaces, attics, climb ladders and work on top of houses.

His work at RAPT involved making transmission gears. A forklift driver would bring raw metal parts to him that he would have to manually put the parts either in the machine and press a button for the lathe to cut the parts, or he would have to load the parts onto an auto loader and perform similar tasks.

These parts ranged in size from two to three inches up to six to eight inches. Each part could weigh up to two or three pounds.

At Quanex, Abney was an extruder operator. Large vats containing powder material were fed into an extruding machine that heated the material to between 300 to 400 degrees. The powder then turned to a liquid form. He next placed a die at the end of the extruder and the raw

material extruded through the die to whatever shape the part was to be in final form. The material would stretch to between 100 and 150 feet. At that point, the material was cut. At times, he would have to run multiple machines. The machines operated fast and required him to act quickly.

Abney's job at St. Andrews was as in maintenance. He fixed drywall, plumbing, electrical, crawl through attics, sprinkler systems, help move furniture and other tasks.

The ALJ relies on Abney's descriptions, provided in his testimony, and the physical restrictions recommended by Dr. Kibler, to find that, because of his injury, Abney was not capable of performing the prior work he described in his Form 104 and testimony. Additionally, his prior experience at Domino's as a manager required him to make pizzas and to stock. While he also performed paperwork and ordered product, this experience was over 20 years ago and does not appear to be separated from the requirements of making pizza and to stock. The ALJ infers that his job as a manager required him to do all of the tasks. Dr. Kibler's restrictions require limited use of the right hand, no repetitive pushing or pulling, and no shoulder movement above shoulder height. He also restricted Abney of no pushing, pulling or lifting over 10 to 15 pounds. The ALJ does not believe that Abney could perform those prior jobs given his current restrictions. His prior manager experience is over 20 years old and required him to also perform physical tasks that involve both hands (making pizza), and to put up stock.

The ALJ finds that Abney is entitled to vocational rehabilitation.

Defendant's last issue relates to the ALJ awarding vocational benefits as requested by Abney, instead of making a referral in accordance with KRS 342.710. The ALJ notes that KRS 342.710(3) states that once a plaintiff is found to be entitled to vocational rehabilitation benefits, the ALJ ""may" refer the employee to a qualified physician or facility for evaluation of the practicality of, need for, and the kind of services, treatment, or training necessary and appropriate to render him or her fit for a remunerative

> occupation. Upon receipt of such report, the administrative law judge "may" order that the services and treatment recommended in the report, or such other rehabilitation treatment or services likely to return the employee to suitable, gainful employment, be provided at the expense of the employer or its insurance carrier." KRS 342.710(3). The ALJ interprets the referral section of the statute as permissive and not compulsive. See also, Lancaster Colony vs. Stephanie Dunagan, claim number: 2009-95230, Workers' Compensation Board Opinion dated November 25, 2013.
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> Ward stated that Abney's prior work experience provided him with transferable skills in the areas of crucial thinking, complex problem solving and computer skills. She stated, "Mr. Abney's educational level would allow him to participate in a retraining program since he has a high school diploma and an associate's degree." She also stated that Abney had developed a plan of retraining but the insurance carrier would not agree to fund the program. Ward does not state that attending Eastern Kentucky University as requested by Abney, within the limitations of KRS 342.710, will place him at a much higher wage that would render employment from that education not "suitable". The issue of vocational rehabilitation was an issue before the ALJ and not accepted by Defendant.
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> Finally, as mentioned above, Ward used the physical restrictions as recommended by Dr. Best in discussing potential jobs he could work that may, or may not, be open and available. The ALJ used the restrictions recommended by Dr. Kibler. The ALJ does not know how Ward would respond to the current job openings she listed if she were to utilize Dr. Kibler's restrictions instead of Dr. Best.
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> The ALJ denies Defendant's Petition for Reconsideration as relates to the issue of vocational rehabilitation.

As the claimant in a workers' compensation proceeding, Abney had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Abney was successful in his burden

regarding this claim, we must determine whether substantial evidence of record supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise

could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

On appeal, McCready argues the ALJ committed reversible error by awarding TTD benefits from January 9, 2019 to February 21, 2019 based solely on speculation. It argues the ALJ incorrectly inferred Dr. Kibler believed Abney was not at MMI during time periods his medical records indicate he was, and therefore this inference is unreasonable and speculative at best. Next, it argues the ALJ erred in adopting the 13% impairment of Dr. Kibler as his assessment was based on possibility rather than within reasonable medical certainty. Lastly, McCready argues the ALJ erred in awarding vocational rehabilitation benefits. It argues Abney did not meet his burden of proving qualification for the benefits and that the type of vocational rehabilitation awarded by the ALJ is not feasible, practical, or justified.

In the Opinion, as well as in his Order on Petition for Reconsideration, the ALJ set forth the evidence he relied on in determining Abney was entitled to TTD benefits from January 9, 2019 to February 21, 2019. The ALJ did not believe Dr. Kibler actually placed Abney at MMI on January 4, 2019 for medical purposes. The ALJ believed Dr. Kibler attempted to assist Abney in securing a settlement of his claim, but his medical records clearly indicated Abney was not at MMI. The ALJ properly exercised his discretion as the fact-finder and decided to rely on the evidence from Dr. Kibler in awarding the TTD benefits in question. This finding is clearly supported by substantial evidence and will not be disturbed on appeal.

Next, McCready argues the ALJ erred in adopting the 13% impairment rating assessed by Dr. Kibler. McCready argues Dr. Kibler assessed a

10% impairment rating and an additional 3% for pain if it is a separate issue. It argues the ALJ should have adopted either the 7% impairment rating assessed by Dr. Best and Dr. Bingham, or the 10% impairment rating assessed by Dr. Kibler. The ALJ was confronted with conflicting medical evidence. As a result, the ALJ properly exercised his discretion as fact-finder and was persuaded by the opinions set forth by Dr. Kibler. The ALJ relied on Abney's testimony as well as that of Dr. Kibler, and found pain was a separate issue and accordingly adopted the additional 3% impairment assessed by Dr. Kibler. This was a proper exercise of discretion on the part of the ALJ, and the record indicates the finding is supported by substantial evidence from Abney and Dr. Kibler, and will not be disturbed on appeal, therefore, on this issue, we affirm.

Lastly, McCready argues the ALJ erred in awarding vocational rehabilitation benefits consisting of payment for enrollment in classes at EKU. It argues Abney did not meet his burden of proving that he is entitled to vocational rehabilitation as he is able to perform work for which he has previous training and experience, and, alternatively, if he is, the ALJ erred by ordering McCready to pay for Abney to attend classes at EKU. It argues the program is not feasible, practical, or justifiable.

KRS 342.710 states as follows:

> (1) One of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment, and preference shall be given to returning the employee to employment with the same employer or to the same or similar employment. . .
>
> (2) . . . When as a result of the injury he or she is unable to perform work for which he or she has previous

> training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment.
>
> (3) An employee who has suffered an injury covered by this chapter shall be entitled to prompt medical rehabilitation services for whatever period of time is necessary to accomplish physical rehabilitation goals which are feasible, practical, and justifiable. When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment. In all such instances, the administrative law judge shall inquire whether such services have been voluntarily offered and accepted. The administrative law judge on his or her own motion, or upon application of any party or carrier, after affording the parties an opportunity to be heard, may refer the employee to a qualified physician or facility for evaluation of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him or her fit for a remunerative occupation. Upon receipt of such report, the administrative law judge may order that the services and treatment recommended in the report, or such other rehabilitation treatment or service likely to return the employee to suitable, gainful employment, be provided at the expense of the employer or its insurance carrier. Vocational rehabilitation training, treatment, or service shall not extend for a period of more than fifty-two (52) weeks, except in unusual cases when by special order of the administrative law judge, after hearing and upon a finding, determined by sound medical evidence which indicates such further rehabilitation is feasible, practical, and justifiable, the period may be extended for additional periods.

In Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001), the Court noted, restoring a worker to "suitable employment" means "attempting to achieve a reasonable relationship between the worker's pre and post-injury earning

capacity." The ALJ found Abney cannot return to his pre-injury job and would have difficulty returning to any of his previous work. That finding is supported by substantial evidence, and therefore, the determination that Abney is entitled to a vocational rehabilitation evaluation will not be disturbed. He concluded additional education or training might enable Abney to secure suitable employment in the future. This is precisely the purpose of the vocational evaluation.

However, the finding that Abney was unable to perform work for which he has previous training or experience is only the first part of the analysis required to be performed by the ALJ. If the ALJ determines the injured worker has met the burden of proving this step, then the statute grants the ALJ the discretion to refer the injured worker for a vocational evaluation, at the cost of the employer, to determine what type of vocational rehabilitation would be reasonable and necessary to return the injured worker to sustainable, gainful employment. Thereafter, the parties can challenge the recommendations of the evaluator and a determination can then be made regarding the same.

We believe the ALJ performed the proper first step of the analysis in determining Abney was unable to perform work for which he has previous training or experience. The ALJ reviewed the evidence submitted by McCready consisting of a vocational evaluation, as well as the medical and lay evidence submitted addressing whether Abney was able to perform previous work for which he has training or experience and determined he did not. This finding is supported by substantial evidence in the record and will not be disturbed on appeal, therefore, on this issue, we affirm.

However, step two of the analysis requires the ALJ to determine if a referral for a vocational evaluation is indicated. Thereafter, an evaluation will be performed and the parties are allowed to challenge the vocational evaluator's recommendations for a proposed rehabilitation program. In this instance, the ALJ did not comply with the statutory mandates of KRS 342.710(3) and failed to order the appropriate vocational evaluation. Instead, he proceeded to ordering the implementation of the proposed rehabilitation program. While the program submitted by Abney may well be a viable option for his rehabilitation, the statute mandates the performance of a vocational evaluation be performed to determine the appropriate rehabilitation program. This step has not occurred. Therefore, on remand, since the ALJ apparently determined vocational rehabilitation may be viable, he must make the appropriate vocational rehabilitation referral. After this has been done, and the evaluation performed, the ALJ may adopt the findings and find the proposed plan compensable. We do not direct any particular result, however, we direct the ALJ to ensure the appropriate steps are followed.

Accordingly, the Opinion, Award, and Order rendered August 24, 2020, and the Order ruling on the Petition for Reconsideration issued September 24, 2020 by Hon. John M. McCracken, Administrative Law Judge, are hereby **AFFIRMED in part, VACATED in part** and this claim is **REMANDED** to the ALJ for additional proceedings pursuant to KRS 342.710(3), including a referral for a vocational rehabilitation evaluation, and if necessary, a determination regarding Abney's entitlement to such an award.

ALL CONCUR

DISTRIBUTION:

COUNSEL FOR PETITIONER: **LMS**

HON JAMES FOGLE
610 S 4TH ST., STE 701
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT: **LMS**

HON MICHAEL EUBANKS
225 W IRVINE ST.
RICHMOND, KY 40475

ADMINISTRATIVE LAW JUDGE: **LMS**

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