Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 26, 2015

CLAIM NO. 201200198

CONNIE Y. JONES — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. ROBERT L. SWISHER, CHIEF ADMINISTRATIVE LAW JUDGE**

FORD MOTOR COMPANY — RESPONDENT/ CROSS-PETITIONER
and
HON. ROBERT L. SWISHER, CHIEF ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Ford Motor Company ("Ford") cross-appeals from the May 23, 2014 Interlocutory Opinion and Award, the January 9, 2015, Final Opinion and Order and the February 11, 2015 Order on Petition for Reconsideration rendered by

Hon. Robert L. Swisher, Administrative Law Judge ("ALJ").[1] Connie Jones' ("Jones") motion to withdraw her appeal was granted by this Board on March 19, 2015.

In the May 23, 2014 interlocutory opinion, the ALJ determined Jones' work-related back condition has worsened since the August 2012 settlement and she is now permanently totally disabled. The ALJ granted additional proof time for the parties to submit evidence regarding Ford's entitlement to a credit for its disability plan. In the January 9, 2015 final opinion, the ALJ determined Ford is entitled to a credit and calculated Jones' permanent total disability ("PTD") benefits accordingly. This Board will not discuss the January 9, 2015 opinion or the evidence submitted regarding Ford's entitlement to a credit since it is no longer at issue.

Ford did not file a petition for reconsideration from the May 23, 2014 interlocutory opinion or the January 9, 2015, final opinion. The February 11, 2015 order on Jones' petition for reconsideration only addresses the credit.

On appeal, Ford argues the motion to reopen was granted for the limited purpose of conforming the award to

[1] Hon. Robert L. Swisher is now the Chief Administrative Law Judge.

KRS 342.730(1)(c)(2), and the ALJ exceeded his authority in analyzing whether Jones had sustained a worsening of her disability. Ford also argues Jones was permanently totally disabled at the time of the settlement, and therefore her physical condition has not worsened. For the reasons set forth below, we affirm.

I. SCOPE OF THE ALJ'S REVIEW ON THE MOTION TO REOPEN

Jones filed a Form 101 alleging she injured her low back and right leg on March 3, 2010 while working as a transfer case securer on Ford's assembly line. Her claim was later amended to reflect the correct date of injury as March 8, 2010. Surgeries were performed by Dr. Thomas Becherer on August 9, 2010 and November 1, 2010.

Following the submission of medical and lay evidence, a settlement agreement was approved by Hon. Chris Davis, Administrative Law Judge, on August 21, 2012. The settlement agreement listed Jones' diagnosis as "injury to the lumbar spine resulting in two discectomys (sic) at L4-L5 plus chronic pain," for which she continued to receive treatment. Both Drs. Warren Bilkey and Bart J. Goldman assessed 24% impairment ratings in the underlying claim. The settlement agreement indicated Jones was currently operating a charity store at Ford earning the same wages she

had earned at the time of her injury. The parties settled for a lump sum based upon a 24% impairment rating and an "approximate 2.5 factor." Jones neither waived her right to reopen, nor her entitlement to future medical benefits.

Jones filed a motion to reopen on August 12, 2013, alleging she is more disabled than she was at the time of the August 2012 settlement. She alleged as follow:

> More specifically, [Jones] initially was making the same or greater wages than at the time of her injury. She is now unemployed and is unable to perform the type of work she performed at the time of her injury as an outgrowth of her injury (KRS 342.730(1)(c)(1)) and may be totally disabled or entitled to additional permanent partial disability benefits.

Jones designated the Form 101 and the reports of Drs. Bilkey and Goldman as evidence. She also stated no medical report was attached to the motion because it was based upon economic issues set out in KRS 342.730. Jones also attached an affidavit to the motion.

Jones stated at the time of the March 8, 2010 injury she was a transfer case securer. She later returned to Ford operating a charity store where her rate of pay was the same as she earned at the time of the injury. Jones stated following approval of the settlement agreement, she was placed on a "no work available" status on April 4, 2013,

and requested her benefits be modified by the three multiplier. Jones asserted her situation represents a change of condition as outlined in KRS 342.125 and KRS 342.730. Additionally, because she was no longer gainfully employed, "she may be entitled to additional permanent partial disability or permanent total disability as proof may develop and therefore requests a reopening as to all issues."

Ford objected to Jones' motion to reopen asserting her change in economic situation does not fall into any of the four grounds enumerated in KRS 342.125 allowing for a reopening. Jones replied stating case law allows a finding of permanent total disability without a change in impairment and KRS 342.125 allows a claim to be reopened to conform an award to KRS 342.730(1)(c)2.

By order dated September 17, 2013, Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ")[2] stated as follows:

> This matter comes before the undersigned [CALJ] upon the Frankfort Motion Docket for consideration of a motion by the Plaintiff to reopen the above-styled claim alleging a worsening of physical condition and/or increase in occupational disability since the settlement of August 21, 2012.

[2] Hon. J. Landon Overfield has since retired, and Hon. Robert L. Swisher is now serving as Chief Administrative Law Judge.

Plaintiff supports this motion with an affidavit and all attachments required pursuant to 803 KAR 25:010 §4(6)(a). Defendant/Employer has responded, objecting to Plaintiff's motion to reopen.

Plaintiff candidly admits that her grounds for reopening are not related to a worsening in her medical/physical condition but rather to a change in her employment status. At the time of the settlement Plaintiff had returned to work at a wage equal to or greater than her wage at the time of her injury but in a different capacity requiring less physical labor. Plaintiff's employment with Defendant/Employer was terminated and she is now unemployed.

[Ford] argues the facts upon which Plaintiff relied are not set forth in KRS 342.125 as grounds for reopening. While [Ford's] position may be accurate concerning the grounds listed in KRS 342.125(1), a subsequent subsection, KRS 345.125(3) discusses reopening "for . . . conforming the award as set forth in KRS 342.730(1)(c)2." **The CALJ is of the opinion that, based on the facts set forth in [Jones's] affidavit, she is seeking to reopen her claim to conform the award in the settlement agreement to the provisions of KRS 342.730(1)(c)2.**

Upon being fully and sufficiently advised, the CALJ concludes that the Plaintiff has set forth a *prima facie* case for reopening pursuant to K.R.S. 342.125. *Stambaugh v. Cedar Creek Mining Co., Ky., 488 SW2d 681 (1972).*

Therefore, IT IS HEREBY ORDERED that Plaintiff's motion to reopen is SUSTAINED to the extent that this claim shall be assigned to an Administrative Law Judge for further adjudication. A

> **notice of assignment shall contain a proof schedule for the parties.** (emphasis added)

The February 12, 2014 benefit review conference ("BRC") order reflects the parties disputed whether Jones retains the physical capacity to return to the type of work performed at the time of her March 8, 2010 injury. The parties identified "benefits per KRS 342.730" as the contested issue. Under "Other," the BRC order reflects "Has there been an increase in impairment/disability since time of settlement; application statutory multipliers."

We are not persuaded by Ford's argument the ALJ was precluded from considering whether Jones is now permanently totally disabled because the September 17, 2013 order allegedly limited the reopening for the sole consideration of the applicability of KRS 342.730(1)(c)2. Most importantly, the scope of the ALJ's review on reopening was not listed as a contested issue at the BRC. 803 KAR 25.010 §13(14) provides as follows: "Only contested issues shall be the subject of further proceedings." Despite Ford's insistence to the contrary, the issue of whether there has been an increase in impairment/disability since the time of settlement, and application of the statutory multipliers was specifically identified and preserved as a contested issue.

Second, the ALJ addressed Ford's argument in the May 23, 2014 interlocutory opinion, stating as follows:

> While Ford has argued in its brief that this reopening is limited for the sole consideration of whether the multiplier of KRS 342.730(1)(c)(2) is applicable, the ALJ is not so persuaded. Although the [CALJ] indicated in the order on reopening that he considered plaintiff's motion to reopen to be a motion to conform pursuant to KRS 342.730(1)(c)(2), ultimately the motion was reopened and assigned to an administrative law judge without restriction or limitation. Further, no issue was preserved at the [BRC] to the effect that the ALJ was limited on reopening to considering only the application of conforming the award pursuant to KRS 342.730(1)(c)(2) and the issue of whether [sic] is now permanently and totally disabled was actually litigated by the parties.

Ford did not file a petition for reconsideration requesting additional findings of fact on this issue. When no petition for reconsideration is filed, the ALJ's award or order is conclusive and binding as to all questions of fact. KRS 342.285(1). The ALJ ultimately concluded the September 17, 2013 order did not restrict what he could consider on reopening. After review of the order, we agree and find no error in the ALJ's conclusion. However, we acknowledge the order appears to contain conflicting language.

In the body of the order, the CALJ stated Jones sought to reopen her claim to conform the award in the

settlement agreement to the provisions of KRS 342.730(1)(c)2. However, after finding Jones had set forth a *prima facie* case, the CALJ "**ORDERED** that Plaintiff's motion to reopen is **SUSTAINED** to the extent that this claim shall be assigned to an Administrative Law Judge for further adjudication." The order did not limit or restrict the issue(s) to be considered by the ALJ on reopening. In light of the conflicting language, the ALJ determined the order ultimately placed no limit or restrictions upon his consideration on reopening. We find the ALJ's interpretation reasonable, particularly in light of the absence of a petition for reconsideration seeking clarification. For the reasons set forth above, we find the ALJ neither abused his discretion nor exceeded the scope of his authority in the May 23, 2014 Interlocutory Opinion in considering whether Jones sustained an increase in impairment/disability since the time of settlement.

II. WORSENING OF DISABILITY/IMPAIRMENT SINCE SETTLEMENT

Ford next argues Jones was permanently totally disabled at the time of the settlement, and therefore her physical condition has not worsened. It asserts there is no evidence, other than Jones' testimony, supporting a finding of increased disability or impairment since August 2012. It

asserts impairment, restrictions, medical treatments, and diagnostic testing all have remained unchanged. It asserts the loss of her “makeshift job” at the charity shop is an insufficient basis for an award of PTD benefits.

Jones testified by deposition on April 17, 2012 and November 18, 2013, and at the final hearing held March 25, 2014. Jones was born on May 18, 1958 and completed high school. Prior to her employment with Ford, Jones worked as a mail carrier and inside clerk for the United States Postal Service for two years; as a supervisor over store cashiers and a customer service representative at Wal-Mart for one year; and as an assembly line worker for a manufacturer of car parts for three months.

Jones began working for Ford in August 1995, and worked in various positions on the assembly line at the truck plant. At the time of her March 8, 2010 injury, Jones was working as a transfer case securer. This required her to secure the transfer case, a part necessary for four-wheel drive, with several bolts using an electric gun which was suspended above her. On March 8, 2010, Jones twisted her back when she jumped back to avoid being hit by a swinging flange gun. She felt a pop and experienced immediate pain in her back.

Jones initially treated with Ford's in-house physician, Dr. Raymond Hart, who eventually referred her to Dr. Becherer who performed surgery on August 9, 2010. Jones suffered a recurrent herniation at the same level three weeks later. Dr. Becherer performed a second surgery on November 1, 2010, which provided no relief. Jones testified her back condition is worse now than it was prior to her first surgery. Dr. Becherer released Jones from his care when he could do nothing more for her.

Ford sent Jones for a second opinion with Dr. Nazar who agreed with the course of treatment rendered by Dr. Becherer and stated there were no surgical options available to help with her condition. Jones also treated with a pain management physician, Dr. Rodney Chou, who primarily prescribed medication. Dr. Chou released her to return to work with restrictions of no sitting, standing or walking for more than thirty minutes at a time, and no lifting over ten pounds. Jones completed a functional capacity evaluation ("FCE") at Dr. Chou's request, the report of which is not contained within the record. Dr. Chou subsequently released Jones from his care. Jones currently treats for her low back condition with her family physician, Dr. Julia Brown, who prescribes medication. Jones has never been released to full duty.

Jones continued to work as a transfer case securer until her first surgery in August 2010. Jones remained off work until February 25, 2011. Her restrictions precluded her from returning to her former position. For the first seven months, Jones was placed in a room doing nothing. Thereafter, Ford re-opened a previously closed store which sold merchandise to raise funds for various charity organizations. Jones began working at the charity store in September 2011, and was in this position at the time her claim was settled. Jones explained Ford used "medical employees" to work in the charity shop, i.e., those who were restricted from working full duty. At the charity store, Jones sold merchandise, ran the cash register, and stocked the items she could handle. At the time of her April 2012 deposition, Jones stated the charity store job fell within her restrictions. Jones worked full-time, and stated she was happy to be back at work. Jones continued to earn her regular wages at all times subsequent to her injury.

Following the settlement of her claim, Ford closed the charity shop. From October 2012 to April 3, 2013, Ford placed Jones in the training department inputting data into their computer system. Jones indicated this job was flexible, and she was allowed to lie down and change positions. Jones stated Ford placed her on a "no work

available" status on April 4, 2013. Jones was assigned a temporary job in September 2013, where she assisted in teaching a computer class. Jones stated she was unable to perform this temporary job which required kneeling, standing and bending over due to her pain. Dr. Hart sent her home. Other than the temporary job in September 2013, Jones has not worked since April 4, 2013.

At the November 18, 2013 deposition, Jones testified her medical condition has worsened. She indicated her physician "had to up all my medications because the pain was getting so severe," and "the pain is so intense now I'm very limited." Jones stated she now takes an anxiety medication, two blood pressure medications, a cholesterol medication, and medication to settle her stomach. The dosage for her Neurontin has been increased, and she continues to take Flexeril and Lortab. Jones related all of her prescription medications to her work injury. Jones indicated she was unaware of any job she could perform at Ford due to the restrictions imposed following the FCE. She did not believe she could perform the duties of the office job she held for several months after the charity store closed.

At the March 25, 2014 hearing, Jones testified her current condition prevented her from doing the "training

job" if it was still available[3] due to her severe back pain, and her inability to stand for long periods of time. Jones indicated she can sit, stand or walk for approximately ten minutes at a time, and can only lift a gallon of milk. Jones testified she takes more medication now than at the time of her settlement.

On cross-examination, Jones explained she was experiencing physical problems, including back pain, at the time of her settlement. Her physical problems have "continually gotten worse. I can't do the stuff I was doing while I was working. I was up more. I don't drive anymore." She likewise stated, "I had pain in my back, but it wasn't as severe as it is now." Jones does not believe she was permanently totally disabled at the time of her settlement because she was more mobile and capable of more activity at the time. Jones now believes she is totally disabled. Jones stated she could no longer work at the charity store in her current condition because she is unable to "stand on my feet for that amount of time." Jones stated she was busy all the time when she worked in the charity store, and is no longer able to do the job. Regarding when

[3] It is unclear whether Jones is referring to the September 2013 job or the October 2012 thru April 2013 position.

her condition worsened to the point she could not even do the charity job jones explained:

> "Probably about four months after I wasn't working anymore, because it was where - - and my doctor explained it to me that the less active you are, the worse it's going to deteriorate . . ."

She admitted it would be good for her to be active and she tries to do so, but she can no longer drive due to her pain.

Jones filed Dr. Bilkey's January 16, 2012 report in the original proceeding, and designated it as evidence in the motion to reopen. Dr. Bilkey diagnosed "3/8/10 work injury, lumbar strain, lumbar radiculopathy. [Jones] underwent L4-5 lumbar discectomy. She had a recurrent lumbar disc herniation at that level and underwent a second L4-5 lumbar discectomy procedure. There is myofascial pain . . . . Jones has acquired chronic low back pain and impairment." Dr. Bilkey noted Jones "has work restrictions of 16 lbs occasional lift according to the FCE." Dr. Bilkey found Jones had attained medical maximum improvement, and recommended continuing pain medication and home exercises. Dr. Bilkey assessed a 24% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Bilkey noted Jones appeared to tolerate the restrictions

assessed pursuant to the FCE, and “I concur with the FCE generated work restrictions that she is on.” Dr. Bilkey concluded the restrictions preclude Jones from resuming her regular work duties performed prior to March 8, 2010.

Jones also designated Dr. Goldman’s April 26, 2012 report as evidence. Dr. Goldman also assessed a 24% impairment rating for her work-related injury. He recommended restrictions of nothing more than medium duty which would include no lifting greater than 50 pounds, and no repetitive lifting greater than 25 pounds. He further stated, “I do not see her going back, at least at the present time, to continuous bending and stooping.”

The medical records from the Ford Motor Company OHSIM and Dr. Brown were introduced upon reopening. The medical records from Ford span the period from March 8, 2010 through September 9, 2013. Following the August 2012 settlement, Jones returned to the Ford’s medical department on December 17, 2012 to extend her permanent restrictions. The records listed her restrictions as no repetitive crawling, overhead reaching, walking, crouching, kneeling, stair climbing or dynamic pulling; no lifting over ten pounds; no sitting for over thirty minutes or standing over fifteen minutes at a time; and limited flexion/extension of the low back. The record also noted Jones was to be placed

on leave beginning April 5, 2013 due to “unable to place,” “NWA.” On September 9, 2013, Jones reported a future appointment with Dr. Brown and she had been brought back to work temporarily. On September 12, 2013, Jones requested ice for her low back, reported she could not stand on the job, and informed the nurse she had applied for Social Security disability. On the following day, Dr. Hart stated Jones should not be working since she had filed for Social Security disability. Her restrictions remained unchanged.

The records from Dr. Brown indicate Jones visited on September 17, 2013 and January 31, 2014. At the September 2013 visit, Dr. Brown noted Neurontin and Cymbalta were helpful for her pain and anxiety, and Jones had fallen a week prior due to back spasms. She listed Jones’ medications as Benicar, Cymbalta, Flexeril, Lortab, Neurontin, Norvasc, Pravastatin, and Ranitidine. Dr. Brown diagnosed low back pain, chronic pain syndrome, benign hypertension, obesity, hyperlipidemia, hypercholesterolemia, hyperglycemia, depression, gastritis and displacement of intervertebral disc. No testing was ordered and no prescriptions were written. Jones returned on January 31, 2014 for a follow-up for her work-related chronic low back pain. The same diagnoses and medications were listed as in the September 2013 visit. Dr. Brown ordered no additional

testing and did not write prescriptions during this encounter.

In the May 23, 2014 opinion, the ALJ summarized the lay and medical evidence. He noted the essential determination is whether Jones is entitled to an award of increased benefits as a result of the March 8, 2010 work injury, greater than those payable as of the August 21, 2012 settlement. The ALJ began his analysis by noting he must compare Jones' condition at the time of reopening to her condition at the time of the original settlement to determine if she had sustained a worsening of her condition.

The ALJ determined at the time of the August 2012 settlement, Jones' work injury warranted a 24% impairment rating based upon the opinions of Drs. Bilkey and Goldman. The ALJ also determined Jones was partially, and not totally, disabled. In support of his determination, the ALJ noted Jones was working full-time at the charity store, which consisted of light work duties and fell within her restrictions referenced by Drs. Bilkey and Goldman. Therefore, at the time of the August 21, 2012 settlement, Jones was not permanently totally disabled in light of her vocational and occupational status. The ALJ additionally found Jones did not retain the physical capacity to return to all aspects of the work she was performing on the

assembly line at the time of her injury based upon her testimony, and the reports of Drs. Bilkey and Goldman. The ALJ then performed an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) since both the two and three multiplier were potentially applicable, and determined the three multiplier was most appropriate.

The ALJ then found as follows in determining Jones is now permanently totally disabled:

> Having determined that plaintiff was permanently partially disabled as of the date of the underlying settlement herein based on a 24% impairment rating with the application of the triple multiplier, the ALJ further finds that if plaintiff is still only permanently partially disabled, she would not be entitled to any additional permanent partial disability benefits on reopening. There is no evidence in the record that plaintiff has sustained any increase in her permanent impairment rating subsequent to the date of settlement. In three separate unpublished appellate decisions[4] the Supreme Court and Court of Appeals have consistently held that a claim cannot be reopened pursuant to KRS 342.125(1)(d) solely for the application of the triple multiplier of KRS 342.730(1)(c)(1) in the absence of an increase in impairment rating. Accordingly, plaintiff is only entitled to increased income benefits on reopening if she is now permanently and

[4] *Phillips Tree Experts, Inc. v. Travis,* 2006-SC-00633-WC (Ky. 2007); *Pepsi-Cola General Bottlers, Inc. v. Murrell,* 2009-SA-002044-WC (Ky. App. 2010); and *Shaw v. Jane Todd Crawford Hospital,* 2007-CA-000981-WC (Ky. App. 2007).

totally occupationally disabled. *Colwell v. Dresser Instrument Division,* 217 S.W.3d 213 (Ky. 2006).

Having carefully and thoroughly considered the evidence in the record including the medical records submitted by the parties and plaintiff's testimony, and having considered that evidence in conjunction with the analysis required pursuant to *Ira A. Watson Department Store v. Hamilton, supra,* the ALJ finds that plaintiff is presently and permanently totally occupationally disabled. In so finding, the ALJ notes that plaintiff's testimony establishes that since she was sent home by Ford in April of 2013, she has been far less active than she was when she was working the charity store and office assignments, and that as a result, her symptoms have significantly increased to the point where she now no longer drives and requires increased dosages of the medication that she was taking at the time the claim was settled as well as requiring new medications, Neurontin and psychotropic medication, which she was not being prescribed at the time of settlement. Specifically, plaintiff testified that since settlement she has been prescribed Neurontin, medication for anxiety, blood pressure medication and medication for stomach issues. Having had the opportunity to observe plaintiff testify at the Formal Hearing, the ALJ found her to be a very credible witness and her testimony with respect to her present level of symptoms and resulting functional limitations is accepted as true and accurate. In addition, it is clear to the ALJ, having reviewed plaintiff's deposition testimony from the original proceeding and the testimony that she provided on reopening both at

deposition and at the Formal Hearing, that plaintiff enjoyed her work and would prefer to be working as opposed to sitting at home focusing on her pain. In this regard, plaintiff's total disability is not solely the result of "economic changes" in terms of the employer no longer being able to accommodate her work restrictions, but rather, as a consequence of being taken off work, plaintiff has become less active, more symptomatic and, therefore, more disabled than prior to being sent home. While the ALJ found above that plaintiff was capable of performing retail-type work such as she performed in the charity store for many months before it was ultimately closed, the ALJ finds, based on plaintiff's very credible testimony, that she is no longer capable of sustaining that level of activity on a consistent basis. Her testimony that her walking, standing and sitting are all extremely limited establishes that she is severely vocationally impaired and her testimony that she has to lay down during the course of the day now persuades the ALJ that she is incapable of performing regular and sustained employment in a competitive economy. Although she was able to lay down at least on occasion when she ran the charity store and perhaps more frequently when she worked in the training office, that was a privilege granted by Ford as a specific accommodation to its injured worker. The ALJ finds it highly unlikely that a "new" employer would be willing to accommodate plaintiff in the form of allowing her to sit, stand, walk and lay down as needed frequently during the course of a regular eight hour work shift. In addition, the ALJ notes that, unlike at the time of settlement, plaintiff's testimony establishes that she has developed an adverse

> psychological response to being unable to work. While it is true that plaintiff returned to work, at Ford's request, for a brief period in September of 2013, the ALJ is persuaded that even though the work assignment was very light in nature, she was unable to perform it without significant increase in her symptoms and ultimately only worked for 27 hours. Considering the totality of the evidence including plaintiff's age (56), limited education, limited vocational background, and the severity of her current symptoms significantly restricting her activities of daily living, the ALJ is ultimately persuaded that plaintiff is permanently and totally occupationally disabled.

The burden of proof in a motion to reopen based on a worsening condition falls on the party seeking to increase the award. Griffith v. Blair, 430 S.W.2d 337 (Ky. 1968); Jude v. Cubbage, 251 S.W.2d 584 (Ky. 1952). Since Jones was successful before the ALJ in sustaining her burden, the sole issue is whether substantial evidence supported the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). Although a party may note evidence supporting a conclusion contrary to the ALJ's decision, such

evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46, 47 (Ky. 1974). As with the first issue, we note Ford failed to file a petition for reconsideration. When no petition for reconsideration is filed, the ALJ's award or order is conclusive and binding as to all questions of fact. KRS 342.285(1). Absent a petition for reconsideration, the issue is narrowed to whether the ALJ's decision is supported by substantial evidence in the record. Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

We begin by noting a settled award is a product of compromise; therefore, the disability or permanent impairment rating it states may or may not be accurate. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). The ALJ properly began his analysis by determining Jones' actual disability at the time of settlement, without consideration of the terms agreed upon in the settlement agreement. *See* Newberg v. Davis, 841 S.W.2d 164 (Ky. 1992). This required a retrospective analysis of Jones' disability and award in August 2012.

Based upon the evidence before him, the ALJ determined Jones was only partially disabled at the time of the settlement, warranting an assessment of disability based upon a 24% impairment rating. The ALJ engaged in a detailed

and thoughtful analysis, and his determination is supported by substantial evidence.

Regardless of how Ford now characterizes the charity job held by Jones at the time of the settlement, it appears undisputed she was working full-time at a job which fell within her restrictions. The parties stipulated at the February 12, 2014 BRC that Jones' average weekly wage was $1,288.43, and she returned to work following her injury on May 25, 2010 and again on February 25, 2011 earning the same average weekly wage. Specifically, Jones' testimony, as well as the reports of Drs. Bilkey and Goldman, constitute the necessary requisite substantial evidence to support the ALJ's determination. Although Ford is able to point to certain portions of Jones' testimony in support of its argument she was totally disabled at the time of settlement, this is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Although not directly challenged by Ford on appeal, we similarly find the ALJ's Fawbush analysis and his application of the three multiplier is supported by substantial evidence, consisting of Jones' testimony, and the reports of Drs. Bilkey and Goldman.

Pursuant to KRS 342.125(1)(d), in a motion to reopen alleging a worsening in disability, the worsening

must be shown by "objective medical evidence of worsening . . . of impairment due to a condition caused by the injury since the date of the award or order." In Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 217-218 (Ky. 2006), the Kentucky Supreme Court noted KRS 342.125(1)(d) does not refer to the AMA Guides, permanent impairment rating or permanent disability rating. Therefore, a greater impairment rating is not the only objective medical evidence "by which the statute permits a worsening of impairment to be shown." Id. at 218. To show a worsening of impairment, a claimant must put forth objective medical evidence that demonstrates he or she has suffered "a greater loss, loss of use, or derangement of a body part, organ system, or organ function due to a condition caused by the injury." Id. The Kentucky Supreme Court further stated, on reopening, an increased impairment rating is required when alleging an increase in permanent partial disability, but it is not a requirement when alleging permanent total disability. Id.

Pursuant to KRS 342.0011(11)(c), “permanent total disability” is defined in pertinent part as “the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an

injury. . .” The determination of whether the claimant is totally disabled, as articulated by the Supreme Court of Kentucky in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000), requires a weighing of the evidence concerning whether the worker "will be able to earn an income by providing services on a regular and sustained basis in a competitive economy." The Kentucky Supreme Court articulated the factors an ALJ must consider in making this determination stating as follows:

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with Osborne v. Johnson, supra, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of “work” clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. *See*, *Osborne v. Johnson, supra*, at 803.
> Id.

Authority has long acknowledged an ALJ has wide ranging discretion in making a determination granting or denying an award of PTD. Colwell v. Dresser Instrument Div., supra; Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968). It is also well-settled a claimant's own testimony as to his capabilities and limitations may be relied upon by the fact-finder in making a determination as to his physical capacity to return to work following an injury. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Ruby Construction Company v. Curling, 451 S.W.2d 610 (Ky. 1970). So long as permanent impairment results from a work-related traumatic event, a claimant's testimony alone concerning his inability to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy qualifies as substantial evidence sufficient to support a finding by an ALJ of PTD. *See* KRS 342.0011(11)(c) *and* (34); Transportation Cabinet v. Poe, 69 S.W.3d 60 (Ky. 2001); Commonwealth of Kentucky, Transportation Cabinet v. Guffey, 42 S.W.3d 618 (Ky. 2001).

Considering the standards for demonstrating a worsening of a condition to a point of total disability as outlined in Colwell v. Dresser Instrument Div., supra, and

Ira A. Watson Department Store v. Hamilton, supra; we find the ALJ performed a thorough and complete analysis. The ALJ clearly found Jones a credible witness, who firmly testified her condition and symptoms have worsened since she stopped working in April 2013 to the point where her medications have increased and is no longer capable of driving without assistance of her husband. As noted above, Jones' own testimony as to her capabilities and limitations may be relied upon by the ALJ in making a determination as to her physical capacity to return to work following an injury. Hush v. Abrams, supra; Ruby Construction Company v. Curling, supra.

Here ALJ provided a detailed explanation stating why Jones' total disability is not solely the result of economic changes, i.e., the change in her employment status with Ford. Rather, the ALJ found as a consequence of being taken off work, Jones became less active, more symptomatic and, therefore, more disabled. The ALJ then discussed Jones' testimony regarding her physical limitations due to her increased symptoms, and his disbelief Jones would be able to find a new employer willing to accommodate her restrictions. The ALJ also cited to Jones' age, limited education and limited vocational background. The ALJ applied the appropriate legal standard for determining

whether Jones' worsened condition has now rendered her permanently and totally disabled in accordance with Ira A. Watson Department Store v. Hamilton, supra, and made sufficient findings of fact supporting his conclusion. Therefore, his decision will not be disturbed on appeal.

Accordingly, the May 23, 2014 Interlocutory Opinion and Award, the January 9, 2015, Final Opinion and Order and the February 11, 2015 Order on Petition for Reconsideration by Hon. Robert L. Swisher, Chief Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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