OPINION ENTERED: May 17, 2013

CLAIM NO. 200487459

DEAN MILK CO., INC. PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

JAMES CLARKSON
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. Dean Milk Co. Inc. ("Dean Milk") seeks review of the Opinion and Order rendered December 17, 2012 by Hon. Grant S. Roark, Administrative Law Judge ("ALJ") finding James Clarkson ("Clarkson") permanently and totally disabled due to the worsening of a right knee injury sustained on September 6, 2003. As a result of the

worsening, the ALJ awarded temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits and medical benefits. Dean Milk also seeks review of the January 18, 2013 order denying its petition for reconsideration.

On appeal, Dean Milk argues the ALJ's award of PTD benefits is clearly erroneous since Clarkson did not testify he was unable to return to work and because all physicians opined he is capable of returning to sedentary to light levels of work. Because the ALJ's determination is supported by substantial evidence, we affirm.

A brief review of the procedural history is necessary. It is undisputed Clarkson injured his right knee in a forklift accident on September 6, 2003. On May 17, 2004, Clarkson's treating physician, Dr. Thomas Loeb, performed a right partial medial meniscectomy and debridement chondroplasty of the medial femoral condyle. The claim was settled by agreement approved on March 9, 2005. The agreement reflects Clarkson earned $792.75 per week at the time of his injury. He subsequently returned to his usual work earning the same or greater wages on July 8, 2004. The lump sum compromise settlement of $6,421.86 was inclusive of TTD benefits and permanent partial disability ("PPD") benefits based on a 4% impairment rating pursuant to

the American Medical Association, Guides to Evaluation of Permanent Impairment, Fifth Edition ("AMA Guides") assessed by Dr. Thomas Loeb on November 4, 2004. The settlement did not include a waiver or buyout of past or future medical expenses.

Administrative Law Judge R. Scott Borders approved a second Form 110 settlement agreement on October 9, 2009, for a worsening of Clarkson's right knee condition requiring a partial right knee replacement procedure on September 25, 2008. The agreement reflects Dr. Loeb assigned a 15% impairment rating for Clarkson's right knee in 2009, for the worsened condition. The agreement noted TTD benefits had been paid from September 25, 2008 until Clarkson reached maximum medical improvement ("MMI"). Clarkson received a compromised lump sum payment of $11,112.00 to settle his claim for additional PPD benefits based upon the 15% impairment rating, less the prior 4% impairment rating utilized in the March 9, 2005 settlement. Clarkson retained his right to future medical benefits and to reopen his claim.

On March 5, 2012, Clarkson filed a motion to reopen for "increased impairment/worsening of condition and change in occupational disability." Clarkson asserted he has not worked since an August 2010 right knee procedure, is

receiving Social Security disability benefits, and is now totally and permanently disabled. In support of the motion, Clarkson attached the March 2005 and October 2009 settlement agreements. He also attached treatment records subsequent to the October 2009 settlement from Drs. Raymond Shea and Arthur Malkani of the Shea Orthopaedic Group, various Jewish Hospital operative notes and the pain management records from Dr. Dean Collis.

On April 14, 2010, Dr. Shea diagnosed aseptic loosening of the right partial knee replacement, which was confirmed by a three phase bone scan performed May 17, 2010. The August 27, 2010 Jewish Hospital operative report reflects Dr. Malkani performed a "revision of right total knee arthroplasty." On October 13, 2010, Dr. Malkani diagnosed right total knee arthroplasty with infection following complaints of worsening swelling, redness and pain. The October 18, 2010 Jewish Hospital operative report reflects Dr. Malkani removed the infected implant and inserted an antibiotics spacer. The December 20, 2010 Jewish Hospital operative report reflects Dr. Malkani performed a revision of the right knee arthroplasty. In a follow-up visit on April 13, 2011, Dr. Malkani noted although Clarkson had improved and ambulates without assistive devices, he continues to experience right knee

pain. Dr. Malkani prescribed Neurontin, Hydrocodone and Mobic, and recommended continued physical therapy. Dr. Malkani subsequently referred him to Dr. Collis. In a December 7, 2011 letter, Dr. Malkani opined Clarkson had reached MMI "and has significant restrictions." He assigned a 30% impairment rating pursuant to the AMA Guides.

Dr. Collis treated Clarkson from June 2011 through November 2011. He ordered physical therapy; prescribed Neurontin, Lortab, Topamax and Ambien; and administered right lumbar sympathetic injections on August 8, 2011, August 15, 2011 and September 1, 2011.

By order dated April 5, 2012, the motion to reopen was sustained and the claim was ordered to be assigned to an ALJ[1] for further adjudication. The parties submitted additional records from Dr. Malkani and Dr. Rodney Chou, a pain management physician. On December 21, 2011, Dr. Malkani stated Clarkson had reached MMI, but was continuing to treat with Dr. Collis. He opined Clarkson does not need additional surgery and recommended a follow-up in one year. On June 8, 2011, Dr. Malkani returned Clarkson to light duty work with the following restrictions: no heavy lifting

[1] The claim was originally assigned to Hon. Richard Joiner, Administrative Law Judge, and subsequently reassigned to the ALJ by order dated May 29, 2012.

greater than twenty pounds, no stairs, no crawling and avoid long standing.

Dr. Chou initially saw Clarkson on January 25, 2012. He noted the prior treatment history, and diagnosed limb pain and chronic pain syndrome. He treated Clarkson with prescription medication on a monthly basis. On July 5, 2012, Dr. Chou noted Clarkson was prescribed Nucynta and had reached MMI. Dr. Chou stated he would continue to treat Clarkson every three months and opined "he may return to work at a sedentary-type position."

Clarkson testified by deposition on May 16, 2012 and at the hearing held October 17, 2012. Clarkson, a resident of Louisville, Kentucky, was born August 17, 1958 and graduated from high school in 1976. Clarkson testified he attended Jefferson Community College for approximately a year and a half, but did not earn a degree. He completed basic classes, with aspirations of becoming a pediatrician. Clarkson has no additional vocational or specialized training. He has no computer skills.

Clarkson testified he worked for Frito Lay for approximately twenty-six years after leaving college where he operated a forklift, performed sanitation duties and worked in receiving and packaging. He was required to lift and stack boxes weighing twenty to twenty-five pounds,

climb, perform general cleaning tasks, and unload trucks with dollies and forklifts. He also used a shovel to unload trucks full of uncontained potatoes. Clarkson began working at Dean Milk in 2001 where he operated a forklift and performed sanitation duties. He also stacked milk crates, each containing four gallons, either by forklift or hand. During this time, he also intermittently worked part-time at a men's clothing store. At the hearing, the parties stipulated Clarkson does not retain the physical capacity to return to his pre-injury position with Dean Milk.

Clarkson testified on September 6, 2003, he injured his right knee in a forklift accident, and has been treated by Drs. Loeb, Shea and Malkani. Clarkson testified he has undergone several surgeries since his September 2003 injury, including an August 2010 right knee replacement performed by Dr. Malkani. He subsequently developed a staph infection, which required the removal of his right knee implant. Thereafter, on December 20, 2010, Dr. Malkani performed another knee replacement surgery. Clarkson testified he was then referred to Dr. Collis for pain management, who he last saw in December 2011. He now treats with Dr. Chou for pain management consisting of treatment with medication.

Since the December 2010 surgery, Clarkson testified he experiences daily throbbing, aching pain in his back, and swelling from the top of his foot to his shin. He is able to walk only a couple of blocks and cannot traverse stairs without a handrail. Clarkson testified he cannot stand for longer than twenty minutes at a time, and he has trouble sleeping due to pain. Clarkson testified he neither has trouble sitting, nor requires use of a cane or crutches.

Clarkson testified he returned to his usual job at Dean Milk following the September 2008 procedure. Clarkson testified he stopped working for Dean Milk in July 2009 or 2010 due to his knee symptoms. At the hearing, Dean Milk introduced a letter dated July 15, 2009 notifying Clarkson of his termination due to a positive breath alcohol test. Clarkson denied he was fired, stating he could have returned to work following thirty days of alcohol rehabilitation. However, "it was my choice not to go back because even though that incident happened (sic) my knee still – all the way up to then was throbbing. I mean, I was aching real bad. In the cooler, my pain was very, very bad."

Clarkson testified he receives Social Security disability benefits and resumed working part-time at the men's clothing store in May 2012. He explained the business owner is a long-time friend and lets him "come in a few

hours a week to make gas change." He works approximately fifteen hours a week, earning $8.00 per hour. Clarkson greets customers, assists in sales and folds clothes. Clarkson testified his employer provides him a chair and stool, allowing him to sit down when needed. Clarkson testified he is unable to work or is sent home two or three times a month due to his knee symptoms.

Clarkson testified he primarily stays home and can no longer participate in hobbies he previously enjoyed. Clarkson attends church three or four times a week. He testified he is able to drive with his left foot. At the hearing, he testified his daughter brings him food and performs the majority of the house cleaning, and a friend mows his grass. When needed, he goes to the store.

In his June 23, 2009 report, Dr. Loeb performed a right knee arthroscopy and a unicompartmental knee replacement due to the September 16, 2003 right knee injury. He released Clarkson to return to work in December 2008 and noted he reached MMI on January 13, 2009. He opined Clarkson's current condition requires an increased impairment rating since he last assigned a 4% in 2004. He assigned a 15% impairment rating based on the AMA Guides.

Dr. Loeb also testified by deposition on August 14, 2012, and his June 12, 2012 report was attached as an

exhibit. In the report, Dr. Loeb reviewed Clarkson's treatment history, which included two surgeries performed by him, and three additional procedures performed by physicians with the Shea Orthopaedic Group. Dr. Loeb reviewed the medical records and performed an examination. He assigned a 20% impairment rating pursuant to the AMA Guides. He opined Clarkson can return to light levels of work. "This would mostly be sit-down with occasional standing and walking. Certainly, he could fall into the light category, lifting no more than 20-25 pounds at a time."

Dr. Loeb confirmed he examined Clarkson on June 12, 2012 and verified the findings in his report. Dr. Loeb testified as follows regarding Clarkson's ability to return to work:

> Q: At the time you saw Mr. Clarkson, do you think he was physically capable of returning to some type of work?
>
> A: Some type, yes.
>
> Q: Tell me, what type of work and what type of restrictions or limitations you think he might be under if he could --
>
> A: Well, he could do I think some sit-down work and occasional walking. No climbing, no stooping, no bending. I wouldn't lift and carry more than fifteen, twenty pounds at a time, just because I think he'd have some fatigue, weakness in the knee. But he can get around. Sitting would be ideal.

> Q: Sitting would be ideal?
>
> A: I think so. I mean I'm not sure he could work the foot pedals on a forklift or not. If he underwent a FCE, functional capacity evaluation, that might allow us to get a better handle on what his particular problems would be.
>
> Q: Okay. And obviously you didn't do that at the time that you examined him back in June?
>
> A: No.
>
> Q: Could he work in a kind of occupation where he was both seated and standing for some periods of time?
>
> A: I think so.
>
> Q: And again, your lifting restriction on him was what, Doctor?
>
> A: Well, I said twenty to 25 pounds on my report, so that's a ballpark.

Dean Milk submitted the May 25, 2012 report of Dr. Collis, who noted he began treating Clarkson in 2011 upon referral by Dr. Malkani. In documenting Clarkson's care, Dr. Collis noted inconsistent complaints, and observed he was a difficult historian. Dr. Collis determined Clarkson does not have reflex sympathetic dystrophy. Dr. Collis noted he had to dismiss Clarkson from his care due to violations of their drug policy because he obtained narcotic medications from two prescribing sources. He further stated:

> It is my opinion that Mr. Clarkson would not be suitable to return to vigorous physical activity involving his right leg. However, I believe he is very suited to return to numerous forms of employment that would fall into the sedentary to even light labor categories. Sedentary work to me means work that involves sitting most of the time but may involve some brief periods of standing or walking. I would include jobs as sedentary if walking or standing are required only occasionally. I think he can do that type of work.
>
> Some of the jobs that I believe Mr. Clarkson could perform would include, but not limited to, such jobs as a telephone operator, a receptionist, a dispatcher, a driver, parking lot attendant, and other jobs that would fall into a sedentary category. A functional capacity exam could be useful to further define his ability to do jobs beyond the sedentary level such as light work.

Dean Milk also submitted the July 25, 2012 report of Dr. Gregory Gleis, an orthopedic surgeon, who also testified by deposition on September 11, 2012. In his report, Dr. Gleis assigned a 30% impairment rating pursuant to the AMA Guides for the total knee replacement. He noted Clarkson attained MMI as of December 20, 2011. After reviewing the definitions of sedentary, light, medium and heavy work levels found in the Code of Federal Regulations, Dr. Gleis opined Clarkson "is certainly capable of a Sedentary Work." He stated Clarkson is restricted from

lifting no more than ten pounds at a time, can occasionally lift and carry, and occasionally walk and stand for a certain amount of time. He further noted Clarkson should be capable of lifting and carrying a maximum of ten pounds. He recommended a home exercise program and to discontinue the narcotic regimen.

Dr. Gleis testified he examined Clarkson on July 25, 2012. With regard to the knee examination, Dr. Gleis outlined inconsistencies between the examination results versus his visual observations. Dr. Gleis concluded Clarkson guarded and self-limited throughout the examination. Dr. Gleis also noted inconsistent findings between the right knee examination he performed, and those of Dr. Malkani on August 8, 2012 and Dr. Chou on January 25, 2012. Dr. Gleis reiterated Clarkson is capable of lifting up to twenty pounds, which would place him in the light work category. He testified Clarkson is capable of lifting and carrying ten pounds, again placing him in the light work category. Regarding Clarkson's standing and walking abilities, Dr. Gleis opined he "certainly qualifies" for sedentary work level, and "could" qualify for light work level. Dr. Gleis agreed Clarkson's restrictions do not eliminate him from sedentary work. Dr. Gleis also testified no future medical treatment is necessary.

Clarkson submitted the June 14, 2012 report of Robert Tiell, M.A., who performed a vocational evaluation on May 26, 2012 and June 8, 2012. Mr. Tiell administered three tests, one of which reflected Clarkson performs at a sixth grade reading level. Mr. Tiell concluded:

> Clarkson has sustained an occupational loss by virtue of his work related injury, and, despite the fact that he is working this part time, near minimum wage job, I estimate that occupational loss for all practical purposes to be 100% as it relates to the labor market as a whole."

He noted the "collective medical information and opinions outlined above, confirm that Mr. Clarkson sustained this work related injury to his right knee thereby rendering him in my opinion 100% unemployable." Mr. Tiell found the overall medical restrictions preclude Clarkson from performing any regular, sustained, gainful and competitive employment. He further concluded Clarkson is precluded from even sedentary work in light of Dr. Malkani's "strong restrictions," Clarkson's residual problems and poor vocational test performances, his inability to sustain full time employment since 2009 even in a retail sales capacity and his limited potential in retraining for other work. Mr. Tiell also stated he considered the current weak economy,

the local unemployment rate, Clarkson's work history and "near advanced age."

Clarkson submitted Mr. Tiell's October 10, 2012 supplemental report wherein he disagreed with several aspects of Dr. Luca Conte's findings and conclusions. He opined Drs. Loeb's and Collis' opinions were outside their expertise level since they are not qualified vocational experts. He also responded to several critiques offered by Dr. Conte. Mr. Tiell noted Dr. Conte's report fails to consider qualitative factors such as age, employer attitude, labor market demand, unemployment rates and industrial trends in forming his vocational opinion. Mr. Tiell reiterated Clarkson has a 100% occupational loss, particularly when viewed in terms of gainful, competitive employment.

Dr. Conte, PH.D., C.R.C., testified by deposition on September 11, 2012. Dean Milk attached his September 7, 2012 vocational report. He evaluated Clarkson on September 5, 2012. Dr. Conte stated Clarkson scored at the high school level in both reading and math in vocational tests indicating he is capable of learning and performing tasks in the semi-skilled and unskilled sectors of the labor department. Dr. Conte emphasized neither Drs. Malkani, Loeb, Gleis, Collis nor Chou indicated Clarkson is totally

disabled, or incapable of returning to some type of competitive gainful employment. He opined Clarkson is capable of performing multiple jobs in the local labor market. Dr. Conte listed several examples of jobs Clarkson is capable of performing in the paraprofessional, marketing and sales, administrative support, production, craft and operations, service, and transportation and material moving areas. Dr. Conte also noted his disagreement with Mr. Tiell's report.

Dr. Conte testified he is a vocational rehabilitation counselor, and holds both a master's degree and a Ph.D. He noted Mr. Tiell is not a doctor. Dr. Conte emphasized Clarkson's educational level and his strong work history. He also confirmed Clarkson's part-time work status as a retail sales representative. Dr. Conte testified Clarkson maintains a tenth or eleventh grade reading level and critiqued Mr. Tiell's test results indicating a sixth grade reading level. He again emphasized the general unanimity among the physicians concerning Clarkson's ability to work at the sedentary to light work levels, and concluded he has the capacity to perform competitive employment. Dr. Conte provided examples of jobs Clarkson could obtain in light of the physicians' restrictions, as well as statistical data of the labor market. Sedentary and light

job levels account for 60-70% of the existing positions in the labor market. He estimated 700,000 sedentary jobs exist in Kentucky and 200,000 in the Louisville metropolitan area.

In the December 17, 2012 Opinion and Order, after summarizing the evidence, the ALJ stated as follows:

> **ANALYSIS,**
> **FINDINGS OF FACT,**
> **AND CONCLUSIONS OF LAW**
>
> **Extent & Duration**
>
> In this reopening, there is no dispute plaintiff's impairment rating has increased since his previous settlement. The real issue is whether plaintiff is now totally disabled. Plaintiff relies on the opinion of Robert Tiell and upon his own testimony to argue he is not capable of returning to gainful employment on a regular and sustained basis. Conversely, the defendant argues none of the physicians of record have opined plaintiff cannot return to work and that, instead, plaintiff remains only partially disabled, albeit with a higher impairment rating.
>
> Having considered the totality of evidence available, the Administrative Law Judge is ultimately persuaded plaintiff is now totally disabled. In reaching this conclusion, it is noted that although plaintiff has some college education and is even currently working part-time, giving him experience in sales, the vast majority of his working career has been as a forklift driver, to which he cannot return. Moreover, although no physician has completely restricted plaintiff from all work and Luca Conte

has concluded there are sedentary jobs available within the restrictions assigned, the Administrative Law Judge does not believe plaintiff's work history or abilities are conducive to purely sedentary type positions. In reaching this conclusion, the Administrative Law Judge fully acknowledged the defendant's contention that plaintiff did not present as a strong witness at the final hearing.

However, the fact remains plaintiff has a legitimate injury which prevents him from returning to most of the work he has ever performed and all experts assign restrictions that are compatible with only sedentary type positions and positions that allow frequent changes of position and primarily sitting. In addition, plaintiff's current part-time work is considered *de minimus* and possible only because of a sympathetic friend/employer. Considering the entirety of plaintiff's situation and abilities, the Administrative Law Judge is nevertheless persuaded that it is not likely plaintiff could obtain and maintain such a sedentary position. Accordingly, it is determined plaintiff is now totally disabled. His award of benefits is calculated as follows:

$792.75 x 2/3 = $528.50 per week.

In addition, because this is a reopening of a prior settlement, it must be determined what plaintiff's award of benefits would have been at the time of the last settlement to determine the amount of credit to which the defendant is entitled from the date of plaintiff's motion to reopen. In this regard, it is noted plaintiff last reopened and settled his claim in 2009. Based on the evidence from Dr. Loeb, the Administrative Law Judge is

> persuaded plaintiff had a 15% impairment rating at that time and was not able to return to the kind of job he held at the time of his injury. Even though plaintiff continued to work until his surgery in 2010, the Administrative Law Judge is persuaded plaintiff had significant knee problems with his work at the time of his 2009 settlement and that, in fact, plaintiff was not capable of performing the duties of his job as he did at the time of his injury in 2003. As such, plaintiff would have been entitled to application of the 3x multiplier in KRS 342.730(1)(c)1. His award of benefits at the time of his last settlement would therefore have been:
>
> $792.75 x 2/3 = $528.50 → $428.57 x .15 x 1 x 3 = 192.86 per week.
>
> Accordingly, the employer is entitled to a credit of $192.86 per week against its obligation for income benefits beginning March 5, 2012 and continuing for the remainder of plaintiff's award of permanent income benefits.
>
> **TTD Overpayment**
>
> The defendant also seeks a credit for an overpayment of TTD. On this issue, the Administrative Law Judge is persuaded plaintiff reached MMI according to Dr. Malkani as of December 7, 2011. Accordingly, the defendant is entitled to a credit for all amounts paid above $192.86 per week from December 7, 2011 up to February 23, 2012, to be applied against its liability for past due PTD benefits.

The ALJ awarded TTD benefits from June 11, 2004 to July 10, 2004; from September 25, 2008 through December 28, 2008;

and from August 27, 2010 through December 6, 2011. He awarded Dean Milk a credit for all TTD paid to date and for any overpayment of such benefits. He awarded PTD benefits beginning March 5, 2012 and continuing until Clarkson qualifies for retirement.

Dean Milk filed a petition for reconsideration, raising the arguments it asserts now on appeal. The ALJ summarily denied the petition by order dated January 18, 2013.

On appeal, Dean Milk argues the ALJ's finding of total disability is clearly erroneous. It asserts Clarkson did not testify he could not return to sedentary level work. It also argues "there is absolutely no evidence from any physician suggesting he could not return to numerous types of work." Therefore, it is unrebutted Clarkson can return to work. Dean Milk also argues the vocational opinion of Mr. Tiell should not be given weight since it is based on an improper factor, the current unemployment rate. It also argues Mr. Tiell used improper test results indicating only a sixth grade level of reading.

As noted by the ALJ, the crux of this appeal is whether Clarkson is now permanently and totally disabled due to a worsening right knee condition since the October 9, 2009 settlement. 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, Ky., 251 S.W.2d 584 (Ky. 1952). Since Clarkson was successful before the ALJ in sustaining his 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).

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, 218 S.W.3d 213 (Ky. 2007), the 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 Court further stated, on reopening, an increased impairment rating is required when alleging an increase in PPD, but it is not a requirement when alleging PTD. 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 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).

After reviewing the evidence of record, we believe the ALJ applied the appropriate legal standard for determining whether Clarkson's worsened knee condition has now rendered him permanently totally disabled in accordance with Ira A. Watson Department Store v. Hamilton, supra. Taking into account Clarkson's age, education and past work experience, in conjunction with his post-injury physical status, the ALJ was persuaded due to the effects of the work-related injury, he is now totally disabled. The ALJ noted the vast majority of Clarkson's working career has been as a forklift driver, to which he cannot return. The

ALJ also determined, despite conflicting evidence, Clarkson's work history and abilities are not conducive to purely sedentary type positions. This is supported by both the opinion of Mr. Tiell and Clarkson's testimony. The ALJ also considered Clarkson's current part-time job, and determined it is *de minimus* and possible only because of a sympathetic friend/employer.

The ALJ made sufficient findings supporting his conclusion Clarkson is now permanently totally disabled, which is supported by substantial evidence in the record, and will not be disturbed.

Accordingly, the decision rendered December 17, 2012, and the order on reconsideration issued January 18, 2013 by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED.**

STIVERS, MEMBER, CONCURS.

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