Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 5, 2016

CLAIM NO. 201285553

GINGER DUBLIN PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

GRAVES COUNTY BOARD OF EDUCATION and
HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
AND ORDER
* * * * * *

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

ALVEY, Chairman. Ginger Dublin ("Dublin") appeals from the Order on Remand rendered August 7, 2015 by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ") finding she is not permanently totally disabled from the effects of her January 26, 2012 work injury. Dublin also appeals from the

September 9, 2015 order denying her petition for reconsideration.

On appeal, Dublin argues Bowerman v. Black Equipment Company, 297 S.W.3d 858 (Ky. App. 2009) precluded the ALJ from relying upon Dr. Timothy Allen's opinion on remand since he had previously determined Dr. Shannon Voor rendered the most compelling and credible opinion regarding her disability. Since the ALJ followed the directives of this Board on remand, substantial evidence supports his determination, and no contrary result is compelled, we affirm.

On January 26, 2012, Dublin fell backward and a child fell on top of her, causing her to strike her head on the floor while working as a sixth grade teacher for the Graves County Board of Education ("Graves County"). She alleged the following injuries in the Form 101: "Brain injury, vision, psychological, and any other condition identified as work-related in the medical records filed into evidence."

Multiple medical records and reports were filed into evidence, including the April 14, 2014 neuropsychological evaluation by Dr. Voor and the August 18, 2014 psychiatric evaluation by Dr. Allen. In addition, Kim West ("West"), Julie Riley ("Riley"), Danielle Johnson

("Johnson"), Dublin's co-workers, and Melissa Paul ("Paul"), her principal, testified by deposition. Dublin also testified by deposition on July 2, 2014 and at the final hearing held September 22, 2014. The lay and medical evidence were extensively summarized by this Board in the June 19, 2015 Opinion Vacating in Part and Remanding. Only the evidence pertinent to this appeal will be discussed.

In her report, Dr. Voor diagnosed a mild neurocognitive disorder due to traumatic brain injury ("TBI"), an unspecified anxiety disorder, and major depression, recurrent, mild and without psychotic features. Dr. Voor assessed a 10% impairment rating pursuant to the 2nd and 5th Editions of the American Medical Association, Guides to the Evaluation of Permanent Impairment due to psychiatric causes related to her TBI sustained from her January 26, 2012 work-related accident. Dr. Voor recommended restrictions on Dublin's work activities and opined she does not retain the physical capacity to return to the type of work performed at the time of injury. Dr. Voor specifically stated:

> . . . Dublin has suffered a mild traumatic brain injury with frontal and temporal lobe involvement. As a result of her mild traumatic brain injury, she is suffering from chronic severe headaches, memory problems, impaired ability to multitask, visual

> difficulties, as well as mild anxiety and severe depression These brain injury-related problems are causing Ms. Dublin great difficulty performing her job as a 6th grade teacher. She has difficulty keeping up with her workload as well as managing students in a busy classroom setting. This could not only jeopardize Ms. Dublin's work performance and employment position, but also negatively affect her students' ability to learn in her classroom.

Dr. Voor indicated Dublin required daily, fluctuating, unscheduled breaks during the work day due to her headaches and concentration difficulties. Dr. Voor stated Dublin will be seriously limited in her ability to maintain regular attendance and punctuality within customary tolerances. He also stated she would have difficulty completing a normal workday or workweek without interruptions from her psychological based symptoms. He additionally stated she would have moderate difficulty in maintaining concentration, persistence or pace.

In his report, Dr. Allen concluded Dublin suffered a mild TBI on January 26, 2012. He diagnosed moderate pre-existing major depression and chronic headaches. Dr. Allen stated Dublin may have sustained an exacerbation of major depression due to the headache pain and initial cognitive effects related to her brain injury. Dr. Allen found no evidence suggesting a permanent

cognitive impairment due to a TBI. He assessed a 5% impairment due to pre-existing psychiatric symptoms, and a 0% impairment rating due to mental status changes related to the January 26, 2012 injury. He stated as follows regarding her ability to return to work and restrictions:

> Her ability to work for the 2012-2013 and 2013-14 school years belies the belief that she is incapable of doing her job for 2014-15. Headaches were reported to be a major contributor to her complaints from last year. As treatment has improved her headaches so should her ability to work. There was no indication her headaches were worse on 8/4/14 compared to when she was hospitalizations [sic] for headaches in April 2013 and March 2014. She quickly returned to work after the latter, therefore she should be able to work in Fall 2014 and into the future.

Dr. Allen stated Dublin required no psychiatric work restrictions, and she has attained maximum medical improvement ("MMI") for cognitive impairment and worsened mood symptoms from the TBI.

In the November 21, 2014 Opinion, Award, and Order, the ALJ provided a thorough summary of the medical and lay evidence. Under the subsection, "Whole person impairment (WPI)," the ALJ found Dr. Voor's opinion most persuasive, "as it relates to the issue of Ms. Dublin's disability." The ALJ noted Dr. Voor administered her own testing, and stated he was "particularly impressed with Dr.

Voor's analysis that these brain injury-related problems are causing Ms. Dublin great difficulty performing her job as a 6th grade teacher." The ALJ was also persuaded by Dr. Merle Diamond, who agreed with Dr. Voor's opinions and restrictions. After explaining why he found the impairment assessed by Dr. Allen unpersuasive, the ALJ concluded Dublin was entitled to an award of 10% permanent partial disability ("PPD") benefits based on Dr. Voor's opinion.

Under the subsection entitled, "PPD vs. PTD" the ALJ first reviewed the statutory definitions of permanent total disability ("PTD"), PPD, and work contained in KRS 342.0011(11). The ALJ reviewed the differing medical opinions of Drs. Voor, Diamond, John Sallee, Christopher King, Patricia Williams, Michael Nichols, Allen, and Stephen Graham. He also noted no functional capacity evaluation had been performed, and testimony by the lay witnesses is mixed. In the last paragraph of the subsection, the ALJ stated as follows:

> Finally, I note that a claimant bears the burden of proof for every element of a workers compensation claim. Young v. Burgett, 483 S.W.2d 450 (Ky. 1972). Based upon the totality of the evidence, including the fact that the Plaintiff did teach for two years without blemish on her record and had been re-hired to teach 3rd grade for the 2014-2015 school year, she has not borne her burden of proof to show that

> she is permanently and totally disabled from performing all labor. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). (original emphasis).

Under the subsection entitled, "statutory "3" multiplier," the ALJ found Dublin does not retain the physical capacity to return to the type of work she was performing at the time of the injury, and is therefore entitled to the three multiplier. The ALJ found Dublin can no longer perform the physical functions of a 6th grade teacher based on her limitations documented within the opinion. The ALJ noted Dublin is not returning to the same job duties and likely never will because she has lost some of her vocational skills due to the effects of her work injury. The ALJ later indicated he relied upon the opinion and restrictions of Dr. Voor in finding enhancing the award pursuant to KRS 342.730(1)(c)1. As a result, the ALJ awarded Dublin TTD, PPD and medical benefits.

Dublin filed a petition for reconsideration requesting the ALJ reconsider his analysis regarding PTD, and specifically requested additional findings addressing what restrictions Dublin has as a result of her work injury. The ALJ denied her petition on January 13, 2015.

Dublin appealed to this Board. In the Opinion Vacating in Part and Remanding rendered June 19, 2015[1], the Board stated in relevant part as follows:

> We agree the ALJ failed to provide the requisite analysis and sufficient findings of fact regarding the issue of permanent total disability. Thus, we vacate the ALJ's determination Dublin is permanently partially disabled and remand for a complete analysis and additional findings of fact regarding the issue of permanent total disability.
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> Before the ALJ, Dublin clearly asserted entitlement to permanent total disability benefits. The November 21, 2014, Opinion, Award, and Order, contains five pages of definitions and a summary of the medical evidence in the section entitled "PPD vs. PTD." However, in one sentence the ALJ provided his rationale for concluding Dublin failed to meet her burden of proving she is permanently totally disabled. That sentence reads as follows:
>
>> Based upon the totality of the evidence, including the fact that the Plaintiff did teach for two years without blemish on her record and had been re-hired to teach 3rd grade for the 2014-2015 school year, she has not borne her burden of proof to show that she is permanently and totally disabled from performing all labor. Paramount Foods, Inc. v.

[1] The Board opinion was originally entered June 15, 2015, but withdrawn and re-entered on June 19, 2015.

Burkhardt, 695 S.W.2d 418 (Ky. 1985).

The above sentence is deficient as a matter of law. The ALJ is required to apprise the parties of the basis of his determination, and he has not done so. Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Cmty. Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). Significantly, despite Dublin's request for additional findings in her petition for reconsideration, the ALJ declined to enter additional findings of fact in the January 13, 2015, Order.

The one-sentence analysis ostensibly resolving the issue of permanent total disability is deficient for several reasons. First, the ALJ failed to offer any analysis consistent with the criteria enumerated by the Supreme Court in Kentucky in McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 860 (Ky. 2001)(citation omitted).

On remand, the ALJ must analyze the issue of permanent total disability utilizing the factors enunciated in McNutt Construction/First General Services v. Scott, supra.

Next, in the November 21, 2014, Opinion, Award, and Order, the ALJ made a conclusory statement indicating that "[b]ased upon the totality of the evidence," Dublin has not met her burden of proving she is permanently totally disabled from performing all labor. However, a conclusory statement regarding "the totality of the evidence" is wholly insufficient when analyzing the issue of entitlement to permanent total disability benefits. While we acknowledge the ALJ is not

required to set forth the minute details of his reasoning, he must provide a sufficient basis to support his determination Dublin is not permanently totally disabled using the factors set forth in McNutt Construction/First General Services v. Scott, supra. *See* Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). The phrase "totality of the evidence" does not advise the parties and this Board of the specific evidence upon which the ALJ relied in determining Dublin is not totally disabled. The phrase is ambiguous and uninformative.

Finally, the ALJ was seemingly persuaded Dublin is not permanently totally disabled by the fact she continued to teach "for two years without blemish" following the January 26, 2012, incident and was "re-hired to teach 3rd grade for the 2014-2015 school year." The record indicates that at the time of the work injury and for two years following the incident, Dublin worked as a sixth grade teacher. However, the ALJ concluded Dublin does not retain the physical capacity to return to sixth grade teaching. The ALJ's determination Dublin is not permanently totally disabled based on the fact that she was able to teach sixth grade for two years following the January 26, 2012, incident while simultaneously determining she is no longer able to continue teaching the sixth grade cannot be harmonized. Additionally, a blanket statement that Dublin was re-hired to teach the third grade without any additional analysis of her post-injury capacity to work, particularly in light of the fact Dublin is no longer teaching, is inadequate.

> In sum, the ALJ's findings regarding permanent total disability are inadequate as a matter of law. The ALJ has failed to set forth an analysis of Dublin's post-injury capacity to work on a regular and sustained basis in a competitive economy as required by McNutt Construction/First General Services v. Scott, supra. KRS 342.0011(34). Recognizing this deficiency, Dublin asked for additional findings in her petition for reconsideration, and the ALJ erroneously failed to provide additional findings. Thus, the determination Dublin is permanently partially disabled and the award of PPD benefits shall be vacated. On remand, the ALJ shall provide additional analysis and findings of fact on the issue of permanent total disability based on the factors set forth in McNutt Construction/First General Services v. Scott, supra, and the views expressed herein.

In the August 7, 2015 Order on Remand, the ALJ again found Dublin does not qualify for an award of PTD benefits. The ALJ made additional findings of fact and conclusions of law, "all of which are addressed solely to the issue of permanent partial disability (PPD) vs. permanent total disability (PTD)." The ALJ first noted Dublin, 49 years of age, suffered a TBI when she fell and struck the back of her head. He also noted her educational level and teaching certifications.

The ALJ summarized Dublin's July 2, 2014 deposition, and extensively reviewed her testimony regarding her problems and limitations resulting from her TBI. He also noted at the time of her deposition, Dublin was still employed by Graves County as a teacher and had a valid driver's license. Although Dublin has no physical handicaps, she experiences vision problems, is unable to work the pre-algebra problems she uses in her sixth grade class, and additionally experiences memory problems, diminished reading comprehension and confusion. Dublin testified at the deposition she also experiences daily severe headaches for which she takes medication. She stated the medication makes her nauseous. Dublin is able to drive. Following her work accident, Dublin returned to teaching the sixth grade for the 2012-2013 and 2013-2014 school year. She missed 12 to 14 days during the latter term. She requested to be moved to the third grade for the 2014-2015 year because she thought her TBI interfered with her ability to teach math and her reading comprehension was diminished. Her request was granted.

The ALJ noted at the time of the deposition, Dublin was in the process of filing for disability retirement through the Teacher's Retirement System, for which she was subsequently approved. The ALJ noted

findings of other agencies are irrelevant to evidentiary issues in consideration of a Kentucky workers' compensation claim.

The ALJ reviewed Dublin's hearing testimony and stated she, "testified at the final hearing to problems much more extensive than those she testified to at her deposition." He noted the following symptoms: Dublin's memory is so bad she utilizes her OnStar to navigate even to places she is familiar with, she cannot be around noise, and does not attend public events because they cause headaches. She additionally stated her daily headaches are triggered by noise, smells, fluorescent lights and stress. She reiterated her problems with math. The ALJ noted although Dublin testified she thought she was not being an effective teacher, "evidently she thought she could be an effective teacher at the 3rd grade level, although she characterized it as doing less harm," when she requested to be moved from the sixth to third grade. At the time of the hearing, Dublin lived with her retired husband at their home in Gulf Shores, Alabama.

After reviewing Dublin's deposition and hearing testimony, the ALJ found the following:

> 36. Based solely on the foregoing, I find that while Ms. Dublin clearly has some significant residual problems from

> her accident, her expressed problems were noticeably worse after she was awarded disability retirement than they were before. That is only natural. She has no incentive to return to work. She has much incentive to retire to Gulf Shores with her husband. There is nothing blameworthy about that, but the only change of record between the two dates of sworn testimony was the awarding of KSTR disability retirement. I therefore find her deposition testimony to be more reliable and credible than her testimony at the final hearing, not because she was consciously being untruthful, but because her focus had changed.
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> 37. I also note that in her deposed testimony she offered that she was certified to teach pre-school. I did not find that she provided any probative evidence that she could not teach at the 3rd grade level (for which she had present employment if she so desired) or pre-school where the only math related skill presumably necessary was the ability to teach pre-K children how to identify their numbers and do basic counting.

The ALJ reviewed the depositions of Paul, Johnson, and West. He particularly found Paul's testimony, the school principal, persuasive and credible. Although Paul did not observe Dublin in the classroom before the injury, she sat in the classroom and watched her teach after the accident. Paul stated Dublin was always on task, did a good job, and did not observe any personality changes. Paul agreed to allow Dublin to teach third grade for the 2014-2015 school

year. Paul testified she was devastated to later learn Dublin was going to take disability retirement instead. Paul was satisfied with Dublin's job performance both before and after the accident, and never questioned her ability to teach.

After reviewing the remaining lay witnesses' testimony, the ALJ found, "the weight of the lay testimony, all of which I have reviewed, persuades me that from a lay perspective, Ms. Dublin clearly has residual problems stemming from her injuries, but they are not of such severity as to prevent her from teaching at some level of which she is qualified." The ALJ stated Dublin could find work consistently under normal employment conditions noting, 1) she already had work for which she was qualified and had been hired for the 2014-15 school year by Graves County and tenure as a Rank I teacher; 2) there was no formal action reported to suspend or revoke her teacher's certification; 3) although she could no longer teach the sixth grade level, Dublin articulated no compelling reason(s) as to why she could not teach at the third grade level or even pre-school and; 4) she made the voluntary election to take retirement rather than continued employment.

In reviewing the medical evidence from Drs. Voor, Diamond, and Allen, the ALJ stated as follows:

> 44. As to the expert testimony, plaintiff's IME psychologist, Dr. Shannon S. Voor, Ph.D. opined that "as a result of her mild traumatic brain injury, she is suffering from chronic severe headaches, memory problems, impaired ability to multitask, visual difficulties as well as mild anxiety and severe depression. These brain injury-related problems are causing Ms. Dublin great difficulty performing her job as a 6th grade teacher. She has difficulty keeping up with her workload as well as managing students in a busy classroom environment. This could not only jeopardize Ms. Dublin's work performance and employment position, but also negatively affect her students' ability to learn in her classroom."
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> 45. I found Dr. Voor's opinion to be persuasive as to Ms. Dublin's vocational disabilities as a 6th grade teacher. She rated Ms. Dublin at 10%, which is what I awarded in my original Opinion, Order and Award. I relied upon her opinion in making that award.
>
> 46. However, Dr. Voor did not discuss the effects of Ms. Dublin's perceived disabilities at other levels, nor did she opine that Ms. Dublin could not do any work.
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> 47. Dr. Voor also assessed permanent restrictions on Ms. Dublin. Dr. Voor specifically noted that Ms. Dublin could not return back to the same physical capacity she was performing at the time of the injury because of her brain injury. Dr. Voor noted that Ms. Dublin would need to take unscheduled

breaks during the day because of her headaches. Dr. Voor noted that Ms. Dublin was seriously limited in her ability to maintain regular attendance and be punctual. Dr. Voor noted that Ms. Dublin was seriously limited in her ability to complete a normal work day or work week due to her work-related injury. Dr. Voor noted that Ms. Dublin is moderately limited in her ability to maintain attention, concentration and pace. Further, between 1/5th and 1/6th of every work day Ms. Dublin would be off task or not at her work site because of the difficulties from her brain injury.

48. The proof shows that the actual work performance by Ms. Dublin during her last active school year exceeded Dr. Voor's predictions significantly. Absences were significantly fewer than predicted and, according to Ms. Dublin's supervisor, she was able to attend class and function. While she may not have retained the capability to teach at the 6th grade level, I find that Dr. Voor's restrictions were not predictive of, nor were they applied to other levels of teaching available to Ms. Dublin such as 3rd grade or pre-school.

49. Dr. Merle M. Diamond, M.D. is a treating physician specializing in headaches who attended Ms. Dublin for severe headaches caused by the work injury of 01/26/2012. Dr. Diamond opined that because of her headaches, Ms. Durbin does not retain the capacity to return to the type of work performed at the time of injury. Dr. Diamond further opined that at the times of her migraines Ms. Dublin is totally incapacitated and unable to function. These migraines would cause her to miss more than 4 days per month of work. Yet, by the evidence, Dr. Diamond was

wrong in her predictions of the extent of Ms. Dublin’s disability. Ms. Dublin only missed 12 days during the first full year she taught after the injury. As well, Dr. Diamond stated that she concurred with restrictions placed on Ms. Dublin, but articulated no basis for that concurrence, simply deferring to Dr. Voor’s opinion.

50. Dr. Timothy Allen, who performed an “Independent Psychiatric Evaluation” of plaintiff at the request of defendant, concluded upon his review of the medical records that plaintiff had sustained a mild traumatic brain injury. Dr. Allen concurred that the medical imaging referenced by Dr. Voor showed no brain abnormalities. Ms. Dublin's variable effort on testing, ability to work for two entire school years (2012-13 and 2013-14), and independent home functioning did not suggest to Dr. Allen permanent cognitive impairment due to a traumatic brain injury. He opined that she may have some cognitive inefficiency due to headaches and depression but she was capable of doing her job for 2014-15.

51. Dr. Allen observed that headaches were reported to be a major contributor to her complaints from the previous year. As treatment has improved her headaches so it should her ability to work. There was no indication her headaches were worse on 8/4/14 compared to when she was hospitalized for headache in April, 2013 and March, 2014. She quickly returned to work after the latter, therefore he felt she should be able to work in the fall of 2014 and into the future.

52. Dr. Allen opined that Ms. Dublin has no psychiatric work restrictions and is at MMI for cognitive impairment

and worsened mood symptoms from the traumatic brain injury. He did recognize that Ms. Dublin currently has a Class I impairment of Mental Disorders. He noted that the AMA *Guides to the Evaluation of Permanent Impairment 5th Ed*, Chapter 14, does not provide percentages to apply to mental disorders. According to the AMA *Guides 2nd edition* criteria he diagnosed her with a 5% whole body impairment due to pre-existing psychiatric symptoms aroused by the injury of 1/26/12. I have previously discussed that rating and its lack of effect on any award to Ms. Dublin.

53. Despite my rejection of his rating on legal grounds, I found the medical opinion of Dr. Allen to be persuasive regarding Ms. Dublin's medical/ psychiatric condition as it relates to her ability to return to work. As a psychiatrist, he is also required to hold the M.D. degree, unlike Dr. Voor, who holds a Ph.D. in psychology. I therefore rely on Dr. Allen's medical opinion that the plaintiff is not under work restrictions that would impair her ability to teach in the general sense.

54. I find Dr. Allen's opinion with this regard to be more compelling than Dr. Voor's because while I believe that Ms. Dublin has cognitive and processing problems that impede her ability to teach at a 6th grade level, she did not prove that she could not teach at all, especially at a lower grade as she was evidently prepared to do.

55. I also note and rely upon the treatment records of Ms. Dublin's treating neurosurgeon, Dr. Christopher M. King, M.D., who assigned no restrictions on her and in fact prescribed that she "would do well to

> maintain a relatively active lifestyle and continue her treatment for any neuromuscular sequelae…of his (*sic*) injury.

The ALJ noted Dublin's relatively young age with advanced educational qualifications who, based upon her testimony at the hearing, had only two years remaining to retire under normal circumstances. Dublin and Paul testified she had a guaranteed position with Graves County since she was viewed as an effective Rank I teacher.

In addition to reviewing the statutory definitions of PTD, PPD and work, as well as the factors enumerated in McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001), the ALJ stated as follows:

> 65. As to whether Ms. Dublin can consistently find work under normal employment conditions, the question may be moot because of her retirement, but the answer is yes. She is highly educated, has Rank 1 tenure and has not proven that she cannot physically or mentally function at all levels for which she is certified. Further, prior to her decision to retire, she had been hired for the 2014-2015 school year at the 3rd grade level.
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> 66. As to whether Ms. Dublin will be dependable, the answer is also yes. Ms. Dublin is and was a dedicated teacher. Based on her post-traumatic history, despite all of her problems, she missed few days from work once she came back from the injury. By record she only missed 12 days her last year of

teaching and her principal had no complaints with her performance.

67. As to whether her physiological restrictions prohibit her from using the skills which are within her individual vocational capabilities, the answer is again yes because the evidence does not support a conclusion that such physiological restrictions as she has would prevent her from using her professional skills at all levels of teaching as has been much discussed herein above.

68. As to Ms. Dublin's post-injury physical, emotional, intellectual, and vocational status and how those factors interact, from an intellectual/ emotional/vocational standpoint Ms. Dublin has clearly moved into retirement. While that is her alternative of choice, I do believe that she retains the ability to teach at lower grade levels at the elementary or pre-school level based upon the findings of fact I have enumerated herein above. Her intellectual limitations would not be as significant at a lower level, nor would her math limitations as expressed by her. Intellectually, she remains functional with some comprehension difficulty that should not be a significant problem. As to her physical health, her headaches tend to relate to stress according to her own testimony. Less stress should lead to fewer headaches.

69. The primary differences in her capabilities both before and after her injury (based on her deposed testimony, which I find to be more credible) were her problems with math at the 6th grade level, some reading comprehension and memory problems, but primarily her migraine headaches from which she did

> not suffer prior to the injury. However, her own testimony and the record of her actual performance and attendance proves to me that although the headaches are a problem, they are not as debilitating as the plaintiff asserts. She testified that the intensity of the headaches varied according to whether she was at work, with the intensity being greater at work and significantly less when she was not working. Thus, I find that the headaches do not prohibit her from performing all work because there is no explanation as to why they should be more severe when she is teaching than when she is not except for a lower level of stress. In making this finding I rely on the testimony of the plaintiff and the medical opinion of Dr. Allen, by which I am persuaded.
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> 70. Further, by the record before me, for two years post-injury she was dependable in her attendance and generated no complaints as to her professional performance from any third party.
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> 71. A claimant bears the burden of proof for every element of a workers compensation claim. Young v. Burgett, 483 S.W.2d 450 (Ky. 1972). Based upon the foregoing enumerated findings of fact, I conclude that she has not borne her burden of proof to show that she is permanently and totally disabled from performing all labor. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

Dublin filed a petition for reconsideration asserting the ALJ impermissibly re-weighed the evidence to justify his finding she was not permanently totally

disabiled. Dublin points out in the original opinion, the ALJ found Dr. Voor's opinion the most compelling and credible regarding her disability. However, in the opinion on remand, he found Dr. Allen's opinion to be most persuasive regarding her ability to return to work and restrictions in his analysis regarding permanent total disability. Dublin asserts the ALJ's original finding that Dr. Voor's opinion concerning her disability was the most compelling and credible evidence is binding on remand since it is the law of the case, and he was obligated to adopt her work restrictions.

In the September 9, 2015 order denying her petition for reconsideration, the ALJ provided the following additional analysis and findings of fact:

> . . . Plaintiff's allegations of error patently appearing on the face of Opinion, Award and Order are that the findings of fact made by me in my Order on Remand of August 7, 2015 are inconsistent with previous findings on the issue that are "the law of the case." Since we are solely concerned here with the issue of permanent total disability and the Board has ruled that I had made no findings of fact in the original Opinion, Award and Order of November 21, 2014 to support my ruling, there can be no "law of the case."
>
> Plaintiff next argues that I have modified my ruling with regard to Dr. Voor's opinion. I have not. I relied on Dr. Voor's opinion with regard to the

issue of permanent total disability or I would not have ruled as I did with regard to that issue in the Opinion, Award and Order of November 21, 2014. In the Order on Remand, I have made specific findings with regard to Dr. Voor's opinion that explain why I relied on her opinion as it regarded Ms. Dublin's inability to return to work as a 6th grade teacher. However, I did not, and do not believe that Ms. Dublin carried her burden of proof to show that she was disabled from all employment, even in the teaching profession.

As I pointed out a number of time[sic] in the Order on Remand, Ms. Dublin was (and still is to my knowledge, unless that status was changed by her retirement) certified to teach all levels of elementary education to include pre-school. Obviously, the skills needed to teach 6th grade would be substantially different from those needed to teach pre-school. I did not find any probative evidence that she could not teach at a pre-school level. In fact, she herself had requested a transfer to 3rd grade, which indicated to me that she herself felt competent to teach at that level. The school had approved that request for the 2014-2015 school year, but her assignment was pre-empted by her retirement.

With regard to Plaintiff's argument that I am limited to Dr. Voor's restrictions for all future teaching assignments, I would respectfully point out that in Finding of Fact No. 46, I found that Dr. Voor did not discuss the effects of Ms. Dublin's perceived disabilities at other levels, nor did she opine that Ms. Dublin could not do any work. I would also point out that at Finding of Fact No. 48, I noted that

> the actual work performance by Ms. Dublin during her last school year exceeded Dr. Voor's predictions of work restrictions significantly and that Dr. Voor's restrictions were not predictive of, nor were they applied to other levels of teaching available to Ms. Dublin such as 3rd grade or pre-school.
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> Thus, Plaintiff's argument is with my findings of fact and not my legal conclusions. I have nothing but the greatest respect for Ms. Dublin, who was obviously a devoted, dedicated teacher of the highest caliber. There is nothing personal in my opinion. I have no stake in the outcome of this or any other case, but I cannot find permanent total disability where I do not find it supported by the proof.

On appeal, Dublin argues Bowerman v. Black Equipment Company, 297 S.W.3d 858 (Ky. App. 2009) precludes the ALJ from altering his findings of fact as to the credibility of the witnesses in his order on remand. Dublin states in the original opinion, the ALJ found Dr. Voor's opinion to be most credible and compelling as it relates to the issue of her disability. She further points out the ALJ did not rely upon Dr. Allen's opinion in any way in his original opinion. However, in the order on remand, the ALJ found Dr. Allen's opinion the most persuasive regarding her ability to return to work and restrictions. Dublin asserts this represents a complete change in his factual findings "as to the credibility of

witnesses," and also asserts this is exactly what occurred in Bowerman v. Black Equipment Company, supra. Absent new or additional evidence, Dublin asserts, "his re-determining the credibility between Dr. Voor, Dr. Diamond, and Dr. Allen is inappropriate. His re-determining the credibility assessment of the Plaintiff and the lay witnesses is inappropriate."

Dublin argues the ALJ is bound by his previous determination Dr. Voor's opinion is the most persuasive and credible concerning her disability, including the opinion regarding restrictions. Dublin argues Dr. Voor's restrictions render her permanently totally disabled. Therefore, the ALJ's contrary finding is not supported by the restrictions he found to be most credible as it relates to Dublin's disability and also he did not explain how she could work on a regular and sustained basis.

As the claimant in a workers' compensation proceeding, Dublin had the burden of proving each of the essential elements of her cause of action, including extent and duration of her disability. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Dublin was unsuccessful on this issue of permanent total disability, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.

App. 1984). “Compelling evidence” is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party’s total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ’s decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). The Board, as an appellate tribunal, may not usurp the ALJ’s role as fact-finder by superimposing its own appraisals as to the weight and

credibility to be afforded the evidence or by noting reasonable inferences could otherwise have been drawn from the record. Whittaker v. Rowland, supra. So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

Bowerman v. Black Equipment Company, supra, is inapplicable to the case *sub judice*. In that case, the Court determined an ALJ as fact-finder may not reverse a dispositive interlocutory factual finding on the merits in a subsequent final opinion, absent a showing of new evidence, fraud or mistake. Id. at 867. The ALJ had rendered a November 2005 interlocutory opinion finding Bowerman had not reached MMI from an October 2004 work injury, but had improved enough to return to some sort of work, based upon Dr. Theodore Davies' opinion. The ALJ awarded medical benefits and placed the claim in abeyance pending MMI. The claim was subsequently removed from abeyance and no new evidence was introduced. In the final August 20, 2007 opinion the ALJ abandoned her factual finding regarding MMI reached in the interlocutory opinion, and found she reached MMI on September 6, 2005 based upon a different physician's opinion. Id. at 861-865. The Court of Appeals concluded the ALJ's reversal of her prior

dispositive factual finding in an interlocutory opinion, absent new evidence, fraud, or mistake is arbitrary, unreasonable, unfair and unsupported by sound legal principles. Id. at 867-868.

Here, the alleged reversal of factual findings does not stem from an interlocutory opinion or order. Rather, the ALJ entered a final and appealable opinion and order on reconsideration which the Board then vacated in part and remanded for a clearer and more thorough analysis regarding PTD.

More importantly, we disagree with Dublin's assertion the ALJ "re-determined the credibility" of witnesses. Rather, we believe the ALJ acted within his discretion since he may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, supra; Whittaker v. Rowland, supra.

Here the ALJ relied upon portions of Dr. Voor's opinion in determining the percentage of impairment and in finding she was incapable of returning to teaching the sixth grade. However, within his discretion, the ALJ rejected Dr. Voor's opinion regarding Dublin's ability to perform work in his assessment of permanent and total

disability since, “Dr. Voor did not discuss the effects of Ms. Dublin’s perceived disabilities at other levels, nor did she opine that Ms. Dublin could not do any work.” The ALJ also noted the actual proof in the record “shows that the actual work performance by Ms. Dublin during her last active school year exceeded Dr. Voor’s predictions significantly.” Rather the ALJ adopted Dr. Allen’s opinion regarding Dublin’s ability to return to work. The ALJ acted well within his discretion in accepting only portions of Dr. Voor’s and Dr. Allen’s opinion. The same is true for the ALJ finding Dublin’s deposition testimony is more persuasive than her hearing testimony.

Upon review of the record, we find substantial evidence supports the ALJ’s determination Dublin is not permanently totally disabled due to the January 26, 2012 work injury, and no contrary result is compelled. The Workers' Compensation Act defines permanent total disability 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.” KRS 342.0011(11)(c).

The factors an ALJ must consider in determining whether an individual claimant is permanently totally occupationally disabled are set forth in Ira A. Watson

Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Those factors include the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact; a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions; whether the individual will be able to work dependably; and whether the worker's physical restrictions will interfere with vocational capabilities. Id. "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." McNutt Construction/First General Services v. Scott, supra. It is within the ALJ's prerogative to translate the lay and medical evidence into findings of occupational disability. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d at 52. Although the ALJ must consider the worker's medical condition when determining the extent of occupational disability at a particular point in time, he is not required to rely upon vocational opinions of either the medical experts or vocational experts. Id. In addition, a worker's testimony is competent evidence of his physical condition and of his ability to perform various

activities both before and after the injury. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

In the case *sub judice*, the ALJ's analysis in the August 7, 2015 order on remand and the September 9, 2015 order denying her petition for reconsideration fully complies with the directives of this Board and the requirements of Ira A. Watson Dept. Store v. Hamilton, supra, and McNutt Construction/First General Services v. Scott, supra. The ALJ considered and discussed all of the lay and medical evidence, and outlined that which he found most persuasive in determining Dublin is not permanently totally disabled. The opinions of Drs. Allen and King, and the lay testimony provided by Dublin and Paul, constitute substantial evidence supporting of the ALJ's determination she is not totally disabled, and no contrary result is compelled. In accordance with the Supreme Court's directive in Ira A. Watson Dept. Store v. Hamilton, supra, the ALJ considered Dublin's physical, emotional, intellectual, and vocational status and how those factors interacted post-injury. Although Graves County is able to point to other evidence in the record supporting a contrary finding, this is not grounds for reversal on appeal. Whittaker v. Rowland, supra.

Accordingly, the August 7, 2015 Order on Remand and the September 9, 2015 Order on Petition for Reconsideration by Hon. Steven G. Bolton, Administrative Law Judge, are hereby **AFFIRMED.**

Dublin requested oral argument. Having reviewed the record, we conclude oral argument is unnecessary. Consequently, **IT IS HEREBY ORDERED** the request is **DENIED.**

ALL CONCUR.

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MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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