Commonwealth of Kentucky
Workers' Compensation Board

OPINION ORIGINALLY ENTERED: June 15, 2015
OPINION WITHDRAWN: JUNE 19, 2015
OPINION RE-ENTERED: JUNE 19, 2015

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
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. Ginger Dublin ("Dublin") appeals from the November 21, 2014, Opinion, Award, and Order and the January 13, 2015, Order on Petition for Reconsideration of Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"). The ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits,

and medical benefits. On appeal, Dublin asserts the medical restrictions relied upon by the ALJ compel a finding of permanent total disability. Dublin further argues the ALJ failed to set forth sufficient findings of fact informing the parties of the basis for his determination Dublin is not permanently totally disabled.

The Form 101 alleges on January 26, 2012, Dublin was injured while working as a teacher for Graves County Board of Education ("Graves County"). Dublin alleged the following injuries: "Brain injury, vision, psychological, and any other condition identified as work-related in the medical records filed into evidence." Dublin sustained the injuries in the following manner: "Fell backwards and a child fell on top of me causing my head to hit the gym floor with force." The Form 104 attached to the Form 101 indicates Dublin had worked as a teacher at Graves County since July 20, 1990.

The Benefit Review Conference Order and Memorandum, dated September 9, 2014, reveals the parties stipulated Dublin sustained a work-related injury on January 26, 2012. Contested issues included: benefits per KRS 342.730; unpaid or contested medical expenses; TTD [handwritten: "duration"]; and vocational rehabilitation.

Under "other" is: "extent and duration w/multi pliers; PTD v. PPD."

Dublin’s July 2, 2014, deposition was introduced. Dublin obtained a Bachelor’s Degree in Elementary Education and a Master's Degree in Early Childhood Education from Murray State University. Before her injury she planned to obtain a Ph.D.

At the time of her work accident, she was teaching the sixth grade. The work accident occurred during a basketball game with students. She testified as follows:

> A: I was guarding one of my sixth grade girls, and, you know, she was driving the ball down the court.
>
> Q: Uh-huh.
>
> A: I was running backwards in front of her, and our feet got tangled up.
>
> Q: Yeah.
>
> A: And I knew we were going to fall.
>
> Q: Yeah.
>
> A: So I put my hands up to keep her off the floor. The last thing I remember thinking was I can't let her get hurt. She has three ball games this weekend.
>
> Q: Oh, boy.
>
> A: So we fell, and I took her weight and my weight, and my head slammed back on the floor.

Dublin testified regarding her symptoms immediately after her fall.

> Q: Okay. Were you rendered unconscious, or do you know?
>
> A: I don't have a clear memory of everything that happened after that.
>
> Q: All right. Did it hurt?
>
> A: Yes.
>
> Q: Okay. Did it immediately raise a bump on the back of your head?
>
> A: Yes.
>
> Q: And did you see stars?
>
> A: Yes.
>
> Q: Okay. Did you lay on the court for a while, kind of trying to gather yourself together again?
>
> A: I don't think so.
>
> Q: Okay. Were you able, Ginger, to get up by yourself, or did the people come help you to get back up?
>
> A: Someone helped me up.
>
> Q: Okay. And when you got back up, were you dizzy?
>
> A: Yes.
>
> Q: All right. Other than your head hurting, which is enough, what other symptoms? Dizziness?
>
> A: Everything was very blurry.
>
> Q: Blurry? Okay. Blurry and dizzy?

> A: Yes.
>
> Q: All right.
>
> A: Sounds weren't- like the noise of the kids, it was like it was coming from a very long distance.
>
> Q: All right. So your hearing has been affected, as well?
>
> A: Just for that short while.

Dublin has no recollection of anything occurring after the fall until the next day at school. People have told her what she did, but she is unable to remember the events.

The day after her fall, her head was hurting. On a scale of one to ten, she rated her head pain as fifteen. She was also dizzy and heard a ringing sound. The accident occurred on a Thursday and by the next Tuesday she began losing time from work. She explained:

> Q: Okay. You went back- accident happened on Thursday, you went back to school on Friday in severe pain. How did you do that weekend? Do you remember?
>
> A: My head hurt, and I started having more symptoms.
>
> Q: All right.
>
> A: Besides the dizziness, I was sick to my stomach at some points. I couldn't remember things.

> Q: Yes, ma'am.
>
> A: Confusion.
>
> Q: Yeah. You went back to school on Monday?
>
> A: We had professional development.
>
> Q: Okay. The kids were back in session on Tuesday?
>
> A: And that's when you said I can't do it?
>
> A: Yes.

The week after her fall, Dublin recognized her brain was not functioning properly. She had a lot of confusion and was unable to work the pre-algebra math problems she had been teaching. She testified as follows:

> Q: But you'd been teaching the sixth graders pre-algebra, and you weren't able to work the problems that you were trying to teach your kids?
>
> A: I couldn't.
>
> Q: Couldn't do it? Okay. Were there other aspects of your teaching profession that you were having difficulty with, then, with the few days after the accident?
>
> A: I primarily taught math, so it was all math-related.
>
> Q: Okay. Has your math ability come back, or are you still diminished or--
>
> A: I struggle.

Dublin went to see Dr. Patricia Williams, a general practitioner, who took her off work. Dublin did not return to work the remainder of the semester. Dr. Williams eventually referred Dublin to a specialist, Dr. Ashraf Nassef. Dublin testified Dr. Nassef agreed with Dr. Williams that Dublin sustained a traumatic brain injury. Dr. Williams also referred Dublin to Dr. Christopher King, a neurologist, who also diagnosed a traumatic brain injury.

After Dr. King, Dublin saw Dr. Merle Diamond, a headache specialist, who diagnosed a traumatic brain injury. She was admitted to St. Joseph Hospital for ten days and given the drug “DHE” in order to break her headache cycle. While there, she underwent memory testing and sessions with biofeedback to help her relax and alleviate the pain from the headaches. She said the biofeedback does not help with the pain. At the time of her deposition, Dublin was still seeing Dr. Diamond who is her primary treating physician.

Dublin also sees Dr. John Sallee, a physiatrist, who prescribed Concerta for attention deficit. Dublin sees Dr. Sallee every three months.

Dr. Diamond believes Dublin is at maximum medical improvement and will not improve further. Dr. Diamond's treatment regimen includes daily medication and brain

games. At the time of the deposition, Dublin was taking Protriptyline, Celexa, Lisinopril, and Concerta.

Dublin did not work during the semester after her fall. When she returned to work for the 2012-2013 school year, she had to miss work for bladder surgery which was unrelated to the head injury. She was off from October until January 2. When she returned, she missed an occasional day due to her traumatic brain injury when her headaches reached the point where she was unable to function.

Dublin returned to full-time employment teaching the sixth grade during the 2013-2014 school year, missing approximately twelve days due to her traumatic brain injury. At the time of her deposition, she planned to teach the third grade during the upcoming school year. She explained why her limitations due to her traumatic brain injury impact her ability to teach the sixth grade.

> Q: Third grade? And why did they shift you to third grade?
>
> A: I requested to be moved last year due to my brain injury.
>
> Q: Okay.
>
> A: And my principal is moving me this year.
>
> Q: This year? Will it still be at Farmington?

A: Yes.

Q: And you requested younger kids because of the brain injury?

A: Yes.

Q: And why?

A: The math will be much less difficult.

Q: Okay. I personally might be able to do third grade math, although I wouldn't bet on it.

How has your brain injury impacted your ability to do your job as a teacher? You told me earlier it's hard to do the math.

A: I struggle with teaching math.

Q: Okay.

A: I am not an effective teacher due to the memory problems that I have.

Q: Okay.

A: And becoming easily confused.

Q: Okay.

A: Some days I'm not effective just because my headache is so bad I keep a trash can beside where I stand so I can throw up.

Q: How often do you do that, you reckon?

A: Three days a week.

Q: Three days a week? Wow. The portions of your job that are problematic for you now are the math. You get confused.

As a result of your diminished math teaching ability and your confusion, you feel that you're not as effective a teacher as you were before the accident?

A: Yes.

Q: Okay. And certainly that's enough, but are there other aspects that you feel diminished in as far as being a teacher?

A: My reading comprehension is terrible.

Q: Okay. Can you describe how that manifests itself? You can't remember what you just read?

A: I can't remember things that I've read.

Q: Okay. How often does that happen to you?

A: Anytime I read. I read a book last week. I could not tell you one thing about it.

Q: Do you remember the title even?

A: No.

Q: Wow. What else as far as teaching has been impacted?

A: Those are the main things.

Q: The main things?

A: My ability to do math effectively.

Q: Yeah. Okay. In the third grade, will you be teaching other subjects besides math?

> A: Math and science.
>
> Q: Math and science? And do you know or can you tell how your science teaching ability will be impacted?
>
> A: I know it will be impacted by the fact that my reading comprehension is terrible.
>
> Q: Okay. What are you going to do?
>
> A: I don't know.

At the time of her deposition, she experienced headaches daily. During her deposition, she had a headache which she rated as an eight on a scale of one to ten. She takes Protriptyline for her headaches three times daily. Some days the headaches are worse than others. She experiences a headache that registers an eight on the scale of one to ten about three times weekly.

Dublin also has trouble sleeping as she usually sleeps five to six hours a night.

At the September 22, 2014, hearing, Dublin provided the symptoms she experiences due to her traumatic brain injury.

> A: Yes. I have daily headaches. I haven't been without a headache since the day of the accident. They get to the point of making me throw up fairly often. When I'm working, I throw up probably three to five times a week due to the severity of my headaches. When I'm not working, maybe once or twice

every one to two weeks. It's not as bad when I'm not working.

My lifestyle has totally changed. I don't do very many of the things that I used to enjoy. I used to read books frequently and often. I don't read very much anymore because I can't remember what I've read. I have lots of memory issues. I can't remember how to go places, so I have an OnStar in my car now because of that.

Q: And let me interrupt you just for a second there. Have you had difficulty getting lost even going from your home to the Farmington Elementary School where you did work for over 20 years?

A: Yes.

Q: And I know that occurred shortly after the injury occurred, as testified to by some other people in depositions. Did that difficulty with knowing your route to get to the Farmington Elementary School continue even into the last school year that you worked?

A: Yes.

Q: How long have you been a resident of Mayfield, Kentucky?

A: My entire life, 49 years.

Q: Have you had difficulty just getting around Mayfield, Kentucky to places that you've gone to numerous times throughout your life?

A: Yes.

Q: All right. Do you have to use the OnStar on your vehicle just to get around Mayfield at times?

A: At times, yes.

She testified to what triggers her headaches:

A: Noise. PA systems are terrible. I don't attend church, go to the movies, sporting events, anything like that anymore.

Q: Did you do all of those activities before?

A: Yes.

Q: Okay.

A: Sometimes smells, but not all the time.

Q: Okay.

A: Fluorescent lights.

Q: And do you have periods of time that you don't have a headache?

A: Not since the day of the accident.

Q: Okay. So it's just that the intensity of the headache varies?

A: Yes.

Q: And these things that you've talked about- the noise, occasionally smells, fluorescent lights- just make it more painful?

A: Yes.

Dublin testified stress increases the severity of her headaches.

Dublin related the cognitive difficulties she experiences since her fall:

> A: Yes. I was a math teacher, and everyday during my planning, I would work my students' homework problems so that we could go over them in class. And I couldn't always remember how to work problems that should have been easy for me. And when I was teaching, sometimes I would not remember how to explain a problem or how to work it to teach my children how to do it. And I have taught them the wrong way to do problems and had to spend the next couple of class periods straightening out the mess I made.

Although Dublin taught in the 2012-2013 and 2013-2014 school years, she expressed concern to her principal and superintendent she was ineffective teaching. Dublin eventually asked her principal to move her from sixth grade to a lower grade where she "would not do as much damage." Dublin applied for disability through the teacher's retirement system, and was found to be disabled. She testified as follows:

> Q: So they have found you disabled from teaching at this point?
>
> A: Yes, they have.
>
> Q: And because of that, have you let the school system know that you were not returning this school year?
>
> A: Yes.

> Q: And just so we're clear, the school system had intended to let you teach this school year?
>
> A: Yes, in a different grade level.
>
> Q: What grade level were you going to be teaching if you had stayed with the school system?
>
> A: If I had gone back in August, I would have been teaching third grade.

At the time of the hearing, Dublin was still taking Protriptinol [sic] three times a day for headaches. Dublin also takes Norflex, Baclofen, and Imitrex as needed for her headaches so they do not "reach the throw-up level." Dublin also takes Doxepin to help her sleep because her sleeping pattern has not been good since her fall. She has taken Concerta since the fall to improve her concentration. She has taken Celexa for anxiety for fifteen years; however, her dosage increased after the fall at work.

When she returned to teaching after her fall, two special education teachers came to her classroom every day for approximately thirty to forty-five minutes. On bad days, they would teach for her.

The April 14, 2014, Neuropsychological Evaluation report of Dr. Shannon Voor was introduced by Dublin. Dr. Voor diagnosed the following:

> 1. Mild Neurocognitive Disorder Due To Traumatic Brain Injury (331.83)
>
> 2. Major Depression, Recurrent, Mild, Without Psychotic Features (296.31)
>
> 3. Unspecified Anxiety Disorder (300.00)

Pursuant the 2nd Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides, 2nd Ed."), Dr. Voor assessed a 10% whole body impairment for her psychiatric symptoms resulting from the brain injury sustained from her January 26, 2012, work-related fall. Dr. Voor opined Dublin does not have the physical capacity to return to the type of work she was performing at the time of the injury. Further, Dublin will need to take unscheduled breaks during an eight-hour work day due to headaches and concentration difficulties.

Dublin introduced the July 29, 2014, note of Dr. Diamond in which he stated:

> I have reviewed the neuropsychological evaluation report of Dr. Shannon Voor. Based on my review of Dr. Voor's report and my treatment of Ms. Ginger Dublin, I agree completely with what is contained in this report, including the opinions and restrictions that Dr. Voor has placed on Ms. Dublin.

In the November 21, 2014, Opinion, Award, and Order, the ALJ provided, in relevant part, the following analysis:

> Ms. Dublin sustained a work-related injury on January 26, 2012, which included a closed head injury. The parties agree that Ms. Dublin was off work for several months as a result of the injury. The parties agree that Ms. Dublin did return to work at the same or greater wage for a period of time. The parties agree that Ms. Dublin is not working at the same or greater wage at this time. The Parties agree that Ms. Dublin still experiences headaches as a result of her work injury.
>
> The parties disagree concerning the permanency of Ms. Dublin's injury.
>
> Prior to the date of her accident at school, Ms. Dublin was considered to be an outstanding teacher. Her testimony demonstrates her pride in accomplishment and distress in not being able to meet her own high expectations of teaching performance. I was able to observe her closely during the formal hearing and have closely reviewed the lengthy record herein. I found her to be convincing and sincere. A claimant's own testimony is competent and of some probative value. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977). My personal observations are buttressed by the deposed testimony of other teachers and staff from the school who know her well and observed her on a daily basis.
>
> Ms. Dublin began experiencing symptoms immediately after the fall. She had no memory of completing the game in which she was injured. Ms. Dublin continued

to work for a brief period of time after the injury

The next day was a Friday. She awoke with a bump on her head, dizziness, ringing in her ears and had the worst headache she has ever had in her life. She went to work and worked all day.

Over the weekend her headache and dizziness got so bad that it started making her stomach upset. By Monday she was having trouble remembering things and had a lot of confusion.

Ms. Dublin had worked for the Farmington School System for more than 20 years but shortly after the injury, Ms. Dublin could not remember the way to the Farmington School and had to call the office secretary to be told how to get to the school. She was not able to keep track of the fundraising money. She could not stay on task in the classroom. Five days after the injury, on January 31, 2012, she went to her family practitioner, Dr. Williams, with complaints of severe headaches. She was having a lot of confusion and couldn’t work the pre-algebra problems she was giving her students. She also had complaints of disorientation, loss of analytical function, loss of memory and inability to concentrate. While it was hoped that time and rehabilitation of her thought processes through mental exercise would bring her back to normal, a lot of those symptoms appear to have become permanent.

Unfortunately, the problems with mental functioning for Ms. Dublin have continued since the injury until the present date. Ms. Dublin still experiences problems with remembering how to get from place to place. Ms.

Dublin has purchased a vehicle that has OnStar, which she subscribes to so that she can get turn-by-turn directions even when she is traveling to places she has been to multiple times throughout her life.

Ms. Dublin continued with problems with her teaching. Ms. Dublin had difficulties remembering and processing things. Ms. Dublin was a math teacher, but was having difficulty doing simple subtraction. Ms. Dublin's co-workers have testified to these problems, which they all said have continued until the present time. Ms. Dublin had difficulty counting fundraiser money and would always get it wrong according to the school secretary, Julie Riley. Ms. Dublin had difficulty in the class remembering the lesson plan and had difficulty teaching mathematical equations to the students according to Danielle Johnson. Ms. Dublin had difficulty with just simple math. An example given was when she complained that the students had a difficult time understanding that 8 minus 6 was 4, the other teacher having to explain to Ms. Dublin that 8 minus 6 is 2, which is the reason the students had difficulty with Ms. Dublin teaching them 8 minus 6 was 4.

Ms. Dublin was very concerned about the children she was teaching. She talked with her principal about the difficulties she had with teaching and that she did not feel she was an effective teacher. Before the end of the 2013-2014 school year, Ms. Dublin, her principal, and the superintendent sat down to discuss these problems and completed paperwork for Ms. Dublin to apply for disability benefits through the Kentucky Teacher's Retirement System. The Kentucky Teacher's

Retirement System has found Ms. Dublin to be totally disabled and awarded her disability benefits solely due to the effects of the work-related injury on Ms. Dublin's mental processing. While that determination is not binding on this tribunal, it does have an effect on the claimant as she will not likely ever teach again.

Ms. Dublin continues to have headaches to the extent that they cause her to vomit. The headaches are made worse with stress, such as in a work setting. The evidence shows that Ms. Dublin rarely sought medical treatment for any condition prior to the work injury but has regularly sought medical treatment for migraine-type headaches and the effects of her concussion and post-concussive syndrome ever since the work injury.

The doctors all seem to agree that improvement at this point is not likely to occur and Ms. Dublin's problems are permanent. All of Ms. Dublin's Treating physicians and all but one evaluating physician agree that Ms. Dublin has always given her best effort and that she is not malingering.

The difficulty in analyzing this case is that we are dealing not with the ability to lift, bend, stoop or perform other tasks of manual labor, but rather the ability of one individual to organize, articulate and present in a logical, understandable manner information in such a way as to cause students to be able to comprehend, retain and apply that information in the future.

As I am constrained to consider the standards contained in the AMA *Guides to the Evaluation of Permanent*

Impairment, 2d and 5th editions, KRS 342.0011 (35) and KRS 342.730 (1) (b), I must consider the medical evidence.

Whole person impairment (WPI)

After reviewing the relevant medical evidence (and specifically the reports of those physicians who assigned permanent impairment ratings), I find the opinion of Dr. Shannon Voor, a treating Neuropsychologist practicing in Louisville, to be the most complete, compelling, and persuasive evidence in the record as relates to the issue of Ms. Durbin's disability.

First, Dr. Voor administered her own testing of Ms. Dublin, which consisted of a comprehensive cross-section of tests enumerated by Plaintiff in her brief.

Based on this testing, Dr. Voor diagnosed Ms. Dublin with:

1. Mild Neurocognitive Disorder Due To Traumatic Brain Injury;

2. Major Depression, without Psychotic Features; and,

3. Anxiety Disorder.

Dr. Voor indicated that Ms. Dublin could not be a teacher and had significant difficulties with stress and post-concussive headaches which would make it difficult for Ms. Dublin to perform any job. Dr. Voor also was of the opinion that Ms. Dublin had a 10 % impairment rating under the 5th Edition of the AMA Guides.

I 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. 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 student's ability to learn in her classroom. Considering that it had been approximately 27 months since Ms. Dublin's injury at the time of Dr. Voor's IME, it was opined that therapeutic outcome may be limited but not necessarily ineffective.

I am also persuaded by the fact that Dr. Merle L. Diamond, M.D., who followed Ms. Durbin in the hospital for ten (10) days, stated that he agreed completely with Dr. Voor's neuropsychological evaluation report including Dr. Voor's opinions and restrictions for Ms. Dublin.

Even Dr. Timothy Allen, Defendant's IME psychiatrist found Ms. Durbin to have a 5% whole body impairment due to pre-existing psychiatric symptoms by the injury of 1/26/12. Dr. Allen relies on a misinterpretation of the law however, as there are no indications that Ms. Durbin was suffering from an active, disabling and ratable psychiatric condition immediately prior to the event of 1/26/2012. To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA *Guidelines* immediately prior to the occurrence of the work related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer. *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App., 2007). So, when work related trauma causes a dormant degenerative condition

to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change. Hence, the harmful change comes within the definition of injury. *McNutt Construction v. Scott*, 40 S.W.3d 854 (Ky., 2001). There was no persuasive evidence that Ms. Durbin had an active, disabling, ratable psychological condition immediately prior to the 1/26/2012 event. So, accepting Dr. Allen's rating, I would have to award the Plaintiff at least a 5% permanent impairment rating.

Thus, I conclude that based on the medical evidence which I find to be the most persuasive in the record as I have outlined herein above, I find Ms. Durbin to have a 10% permanent partial disability to the whole person.

PPD vs. PTD

The next issue that must be determined is whether Ms. Dublin is permanently and totally occupationally disabled as a result of her work-related injury.

"Permanent total disability" is defined under KRS 342.0011(11) (a) which states that:

> "Permanent total disability" means 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….

"Permanent partial disability" is defined under KRS 342.0011 (11) (b) which states that:

> "Permanent partial disability" means the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work.

In making the determination of permanent total disability, the Administrative Law Judge must take into consideration the definition of "work." KRS 342.0011(34) defines "work" as follows:

> "Work" means providing services to another in return for remuneration on a regular and sustained basis in a competitive economy.

So. [sic] Does the evidence support a finding that Ms. Durbin can never work again? Or does it rather support a conclusion that while she may never again teach at the 6th grade level, she remains capable of doing some "work" as that term is defined.

On the one hand is the fact that she has voluntarily applied for, been approved, and is now receiving disability retirement under the Kentucky Teacher's Retirement System. While I am not bound by the decision of that agency, it is at least indicative of Ms. Durbin's belief that she is unable to teach in the future. This election on her part is buttressed by the opinion of Dr. Voor, who as noted above, performed 12 different tests on Ms. Dublin.

Dr. Voor noted that Ms.. Dublin's test results indicated no malingering or reduced effort on her part. Further, that the results were consistent with

frontal and temporal lobe brain dysfunction as evidenced by decreased executive functioning, below average auditory memory, decreased ability to focus attention when multitasking or shifting back and forth between tasks. Dr. Voor noted as follows:

> "[sic] Ms. 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 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."[sic]

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.

Dr. Merle L. Diamond, M.D., a headache specialist in Chicago, has treated Ms. Dublin for one and a half years. He has impeccable medical credentials in the field of headache relief treatment. Dr. Diamond saw Ms. Dublin in April of 2014 when Ms. Dublin was still working. He noted that Ms. Dublin was having severe headaches 1-2 times per week with the duration of 3-4 hours at a time. She was having milder headaches every day that ranged in pain level from 3-6 on a scale of 1-10. Dr. Diamond noted that with the headaches Ms. Dublin experiences nausea and vomiting, as well as blurred vision. Dr. Diamond noted that stress plays a huge impact on Ms. Dublin and also noted that Ms. Dublin had significant difficulties with directions as a result of the headaches.

Dr. Diamond reviewed the medical report of Dr. Voor. Dr. Diamond indicated that he agreed with the restrictions that Dr. Voor had outlined for Ms. Dublin, as well as agreed with the 10% impairment rating that Dr. Voor had indicated.

Dr. Sallee, a treating psychiatrist, has indicated that Ms. Dublin has a moderate to severe work related post concussive traumatic brain injury

causing concentration difficulties and worsening anxiety.

Dr. King, a treating neurologist, has indicated a work related concussion with post traumatic headaches and memory loss.

Dr. Williams, a treating family physician, has repeatedly documented post-concussion syndrome with difficulty with short term memory and migraine type headaches causing her to vomit 3 times a week. Dr. Williams repeatedly notes that Ms. Dublin was having trouble performing her job duties as a teacher and that Ms. Dublin was depressed because of her difficulties.

Dr. Nichols is a treating neuropsychologist. He noted that Ms. Dublin put forth her best effort on his testing. Dr. Nichols noted his testing was consistent with an individual that suffered a significant concussive event. Dr. Nichols noted significant difficulty with memory, Moderate impairment with her ability to maintain attention, and he noted odd behavior that is consistent with her injury.

As noted by the Plaintiff in her brief, Dr. Diamond and Dr. Voor indicate that Ms. Dublin would miss from 1/5th to 1/6th of a work day and be off task. Obviously, if an employee is off task between 1 hour and 20 minutes to 1 hour and 40 minutes every day, then the individual is arguably not capable of working on a regular and sustained basis in a competitive economy.

On the other hand, 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, above, 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 is capable of doing her job for 2014-15.

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.

Dr. Allen opined that she 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.

Dr. Stephen Graham, neurologist, conducted a defense IME on May 15, 2012, four months after plaintiff's accident. He diagnosed plaintiff as having suffered a grade 1 concussion. He placed Ms. Dublin at MMI as of May 15, 2012 and does not recommend any further medical treatment. Dr. Graham assigned Ms. Dublin a 0% permanent impairment rating and further opined that Ms. Dublin was capable of performing each aspect of her job without restrictions. He recommended her to be restored to full duty work as of 05/15/12.

There was no functional capacity evaluation (FCV). The observations by Ms. Dublin's co-workers and supervisors were equally mixed. Some thought she had difficulties with performing work tasks and being off task during the work day. Others noted few problems.

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).

Statutory "3" multiplier

For many of the same reasons I found the Plaintiff not to be permanently and totally disabled, I do find her to qualify for the "3" multiplier. Notwithstanding eloquent argument by Defendant's counsel, I think the medical evidence I have relied upon herein does support a conclusion that she does not retain the physical capacity to return to the type of work that she performed at the time of the injury.

Her "physical" limitations are well documented herein above, including, but not limited to the inability to function at the same intellectual level, forgetfulness, uncontrollable headaches, the need for unscheduled breaks and a diminution of her mathematical reasoning.

For the same reasons that an assembly line worker may not be able to go back to performing the physical functions on the line at which he or she worked prior to an injury, but can work on a line with less physical intensity, Ms. Durbin could no longer perform the physical functions of a 6th grade teacher. However, she was perceived by her employer as being able to function as a 3rd grade teacher. Yes, just like the assembler, she is still a grade school teacher, but also like the assembler, she 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 the work-related injury. Round Mountain Coal Co. v. Tackett, 433 S.W.2d 128 (Ky. 1968).

I therefore find her qualified for the statutory "3" multiplier. KRS 342.730 (1) (c) 1.

The ALJ entered the following Findings of Fact and Conclusions of Law:

1. Findings of Fact and Conclusions of Law as stipulated by the Parties and set out herein above.

2. Findings of Fact and Conclusions of Law as contained in the foregoing ALJ's Analysis and set out herein above.

3. As to the issue of benefits per KRS 342.730, the Plaintiff suffered a work related injury, timely reported same and actively sought relief from her symptoms. I find that the Claimant, **GINGER DUBLIN**, suffered a work-related injury on January 26, 2012 while in the employ of the Defendant/Employer, **GRAVES COUNTY BOARD OF EDUCATION**. In making this finding, I have relied upon the opinions of Dr. Shannon L. Voor, Ph.D. and Dr. Merle L. Diamond, M.D., as well as Plaintiff's testimony which, concerning the work causation of Plaintiff's injury, I find to be the most credible and convincing evidence in the record.

4. As a result of her January 26, 2012 work-related injury, the Plaintiff has a whole person impairment (WPI) rating of 10% according to the *AMA Guides to the Evaluation of Permanent Impairment, 5th ed. and 2d ed.* In making this finding, I have relied upon the opinions of Dr. Shannon L. Voor, Ph.D. and Dr. Merle L. Diamond, M.D., which, concerning Plaintiff's functional impairment rating as a result of the subject injury, I find to be the most credible and convincing evidence in the record. KRS 342.0011 (35); KRS 342.730 (1) (b).

5. As opined by Dr. Voor, and agreed by Dr. Diamond, the Plaintiff does not retain the physical capacity to return to the type of work performed at the time of the injury. Further, Dr. Voor recommended work restrictions that would materially impair the Plaintiff's ability to return to her former position as a 6th grade elementary school teacher. The Plaintiff is therefore entitled to the statutory enhancement of a "3" multiplier pursuant to KRS 342.730 (1) (c) 1.

6. As to future medical expenses, the Plaintiff should be entitled to the cost of reasonable and necessary treatment for the cure and relief from the effects of her work related injury. KRS 342.020.

Dublin filed a petition for reconsideration noting the length of the November 21, 2014, Opinion, Award, and Order, but asserting the decision still lacked essential findings of fact as to whether she is permanently totally disabled. Consequently, Dublin requested additional findings of fact in conformity with the criteria set forth in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). She also requested the ALJ provide the restrictions he found Dublin retained due to the work injury and the doctors he relied upon in determining her restrictions. By order dated January 13, 2015, the ALJ denied Dublin's petition for reconsideration and failed to enter any additional findings.

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.

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. 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):

> 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 dependable and whether his physiological restrictions prohibit him from using the skills

> which are within his individual 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.

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.

This Board's determination renders Dublin's first argument on appeal moot.

Accordingly, the determination Dublin is permanently partially disabled and the award of PPD benefits in the November 21, 2014, Opinion, Award, and Order and the January 13, 2015, Order on Petition for Reconsideration are **VACATED**. This claim is **REMANDED** for additional analysis and findings of fact regarding Dublin’s claim of permanent total disability consistent with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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