Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 6, 2013

CLAIM NO. 201282062

MASCO BUILDING CABINET GROUP PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

JANICE RICHMOND
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Masco Building Cabinet Group ("Masco") seeks review of the April 30, 2013, opinion and order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding Janice Richmond ("Richmond") to be totally occupationally disabled and awarding temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits. Masco also appeals

from the May 22, 2013, order overruling its petition for reconsideration.

On appeal, Masco challenges the ALJ's opinion and award on two grounds. First, it asserts substantial evidence does not support the ALJ's decision Richmond is permanently totally disabled. Second, Masco argues the ALJ violated its right to due process by refusing to reschedule the final hearing and to grant an extension of proof time.

Because of the issue raised on appeal, a recitation of the procedural history is necessary.

Richmond filed her Form 101 on July 2, 2012, alleging she sustained a left knee injury while working for Masco. Contained within the attachments to the Form 101 is the operative report of Dr. G. Jason Hunt with Kentucky Surgery Center relative to the January 19, 2012, surgery consisting of left knee arthroscopy with chondroplasty of the medial femoral condyle and debridement of ACL stump.

On August 6, 2012, Richmond filed a one page medical record of Dr. Travis Hunt.

On August 9, 2012, Masco's counsel filed a letter of representation.

On August 14, 2012, a scheduling order was issued stating a benefit review conference ("BRC") will be conducted on December 4, 2012, and the defendant had forty-

five days from the date of the letter to file a Form 111-notice of claim denial or acceptance. It also provided proof-taking for all parties shall commence on August 14, 2012, and extend for sixty days followed by thirty days for the defendant only and fifteen days thereafter for rebuttal by the plaintiff. It also stated that ten days prior to the BRC, the parties were to file a witness list and copies of all known exhibits, proposed stipulations, and notice of contested issues. Further, if necessary, a hearing would be scheduled by the ALJ following the BRC.

On August 22, 2012, the ALJ ordered the parties to file position statements at the final hearing.

On September 5, 2012, Masco filed its Form 111 accepting the claim as compensable but indicating there was a dispute concerning the amount of compensation. On that same date, Masco filed a motion to place the claim in abeyance stating Richmond had undergone surgery on August 8, 2012, and is recovering. Masco represented it was paying TTD benefits. It requested the matter be placed in abeyance until Richmond reached maximum medical improvement ("MMI").

On September 12, 2012, Richmond filed a response stating it joined in the motion to hold the claim in

abeyance and that she was receiving TTD benefits, had recently had surgery, and was not at MMI.

By order dated September 17, 2012, the ALJ sustained Masco's motion and ordered the claim placed in abeyance stating the matter would be in abeyance until Richmond was found to be at MMI by a "competent medical practitioner." The parties were directed to file status reports every ninety days.

On October 8, 2012, Richmond filed two work notes of Dr. Hunt dated August 20, 2012, and September 24, 2012, and the Form 107 completed by Dr. James C. Owen. In the August 20, 2012, work note, Dr. Hunt set out the surgery performed and stated Richmond was not to work until she was reevaluated on September 24, 2012. In the September 24, 2012, work note, Dr. Hunt stated Richmond could return to work on September 24, 2012, with certain restrictions. However, if Masco was unable to accommodate her restrictions, Richmond was to remain off work until her next appointment. In Dr. Owen's Form 107, he set forth Richmond's work history and his diagnosis and opinions regarding causation. However, Dr. Owen declined to assess an impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") because an assessment

was premature since Richmond was to undergo another surgery in the near future. Dr. Owen recommended waiting and obtaining "those records prior to assessing an impairment rating." Dr. Owen opined Richmond had not reached MMI. He believed Richmond did not retain the physical capacity to return to the type of work she previously performed. However, he indicated imposition of work restrictions was premature.

On November 21, 2012, Richmond filed the October 29, 2012, work note of Dr. Hunt in which he stated Richmond could return to work under the restrictions of no squatting, climbing, crawling, and kneeling. However, if Masco was unable to accommodate those restrictions, she was to remain off work until the next appointment or the accommodations are made at work. Richmond's next appointment was December 3, 2012.

On December 14, 2012, Richmond filed a status report indicating she continues to be treated by Dr. Hunt and was last seen on December 3, 2012. She represented Dr. Hunt stated she should remain off work and believed she needed cortisone injections to determine whether the injections would appropriately treat her in order to avoid surgery. Richmond went on to state Dr. Owen believes she needs additional surgery and it appeared Dr. Hunt is trying

conservative measures prior to recommending another surgery.

On December 26, 2012, Masco filed a status report indicating it continues to pay TTD benefits and Richmond had refused injection therapy recommended by Dr. Hunt and Dr. Rick Lyon but she was proceeding with physical therapy recommended by both physicians. It stated Richmond had resigned her position with Masco on September 14, 2012, and Masco was unaware if Richmond was employed. Further, Masco was unaware of any additional surgical recommendations but expected Richmond to attain MMI in mid-January.

On December 26, 2012, Masco filed the November 15, 2012, medical report of Dr. Lyon generated after his independent medical examination ("IME"). After conducting a records review and an examination, Dr. Lyon set out his findings and stated Richmond had not reached MMI. His assessment was:

> 1. Chondromalacia patella preexisting the alleged work injury.
>
> 2. Partial thickness ACL tear.
>
> 3. Chondromalacia medial femoral condyle preexisting the work injury.
>
> 4. Posterior horn lateral meniscus tear with parameniscal cyst status post partial lateral meniscectomy.

He agreed she needed continued rehabilitation and recommended two visits per week for six weeks followed by a home exercise program. He also recommended a steroid injection prior to the therapy in order to enable more aggressive rehabilitation. Even though Dr. Lyon noted Richmond was not at MMI, he estimated, based on the AMA Guides, she would have an impairment of 1% as a result of the injury.

On February 8, 2013, Masco filed a supplement to Dr. Lyon's November 15, 2012, report dated January 31, 2013. In the supplement, Dr. Lyon noted he had again seen Richmond and she had undergone two arthroscopic procedures. He also noted she had completed physical therapy and was advised additional therapy would not be beneficial. He stated Richmond was last seen by Dr. Hunt on January 7, 2013, and she assumed she was at MMI. He also stated Dr. Hunt provided Richmond with restrictions of no climbing, crawling, kneeling, or squatting. Richmond continued to complain of pain and swelling in the interior aspect of the knee, was unable to kneel or squat, and had difficulty going up and down stairs. In addition, her leg had been "giving way." Dr. Lyon provided his assessment of Richmond's condition and opined she had reached MMI. Accordingly, he assessed an impairment rating for the work

injury of 5%. He believed Richmond should avoid crawling, bending, stooping, and/or squatting.

On February 13, 2013, Richmond filed a motion to remove the claim from abeyance and requested an order re-docketing the claim and scheduling a “BRC/Formal Hearing.” Richmond stated TTD benefits had been paid through January 7, 2013, and Dr. Hunt stated he had done everything for her and released her from his care. She stated she was unable to work and has significant restrictions. She stated she had attended a “follow-up IME” appointment with Dr. Lyon. Richmond represented she will be ready for a hearing as soon as the ALJ sets one. Significantly, she represented “the plaintiff has been scheduled to return to her physician for IME. That should be ready within two weeks.” Richmond did not request a proof schedule be set.

One day later, on February 14, 2013, Masco filed a motion to remove the claim from abeyance “for discovery and final adjudication.” Masco stated Drs. Hunt and Lyon had found Richmond was at MMI and the matter was ripe for final adjudication.

On February 19, 2013, the ALJ signed Richmond’s fill-in-the-blank order sustaining her motion to re-docket, ordering proof to be left open for both parties until the

BRC/Formal Hearing, and setting a BRC/Formal Hearing, at 9:30 a.m., on April 25, 2013, at Louisville.[1]

On April 8, 2013, Masco filed a Form 112 medical fee dispute contesting the narcotic medication which had been prescribed for Richmond's knee condition.

Also on April 8, 2013, Masco filed a motion for an extension of proof time and to reschedule the BRC/Formal Hearing. Masco stated that as of April 4, 2013, it had not received "Richmond's IME" which, as represented in Richmond's motion to remove from abeyance, would be completed by the end of February. Masco asserted it had a right to cross-examine Richmond's medical expert and Richmond based upon her medical expert's conclusions. Masco stated it appeared it was not possible to schedule either cross-examination prior to April 25, 2013.

On that same date, Masco filed Dr. Lyon's February 24, 2013, letter stating that when he saw Richmond on January 13, 2013, she made no mention of utilizing narcotic pain medication. Dr. Lyon opined if Richmond is taking pain medication she should stop as there is no indication for the chronic use of narcotics.

[1] On the order, the ALJ filled in the day, month, place of hearing, and time.

On April 10, 2013, Richmond filed the Form 107 completed by Dr. Owen dated March 18, 2013, which reveals he conducted an examination of Richmond on March 13, 2013. Dr. Owen again provided his diagnosis and stated Richmond's injury was the cause of her complaints. Dr. Owen opined Richmond had reached MMI and assessed an impairment rating of 8% due to the work injury. He again stated Richmond did not retain the physical capacity to return to the work she was performing at the time of the injury and she had permanent restrictions of no bending, squatting, or stooping. Further, Richmond should not engage in prolonged walking greater than approximately a half an hour or prolonged standing or walking on uneven ground.

On April 11, 2013, Richmond filed a response and objection to Masco's motion for extension of proof time and rescheduling of BRC/hearing. Richmond stated the February 19, 2013, order indicated proof time was to be left open for both parties until the BRC/Formal Hearing. She represented she had filed Dr. Owen's report on April 8, 2013, which was within the proof time allotted. Accordingly, she objected to the rescheduling of the BRC/Final Hearing as her benefits had been terminated on January 7, 2013, she has no income, and is still unable to return to work. Richmond stated a prolonged delay in

resolving this claim would be financially detrimental to her. However, she indicated she had no objection to allowing Masco reasonable additional time to respond to the report of Dr. Owen, if necessary, but requested the BRC/Formal Hearing remain as scheduled.

By order dated April 16, 2013, the ALJ again directed the case was set for a BRC and Hearing on April 25, 2013, and granted both parties extensions of time up to and including the final hearing in which to file proof.

On April 23, 2013, Masco filed a reply to Richmond's response stating it had received Dr. Owen's report which had been filed on April 8, 2013. Further, it was willing to withdraw its motion for an extension of proof time so long as Richmond will stipulate she is not seeking a permanent total disability award. However, if Richmond cannot so stipulate, it requested the final hearing scheduled for April 25, 2013, be canceled and additional proof time be allowed to address the permanent total disability allegation with vocational proof.

Both parties filed position statements.

On April 26, 2013, Masco filed Dr. Lyon's April 23, 2012, unsigned letter.[2] Dr. Lyon indicated he had reviewed Dr. Owen's March 13, 2013, IME report, critiqued Dr. Owen's report, and again indicated Richmond had a 5% impairment.

The April 25, 2013, BRC order reveals the parties' stipulations and the contested issues were: "benefits per KRS 342.730, unpaid or contested medical expenses, and TTD." Handwritten under "Other" is "permanent total disability." The hearing order of the same date lists the proof submitted by the parties in the record.

On April 30, 2013, the ALJ entered his opinion and order providing a very brief summary of Richmond's testimony, and summarizing the Forms 107 of Dr. Owen and the reports of Dr. Lyon. Relevant to this appeal, the ALJ entered the following findings of fact and conclusions of law:

SECTION V – FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Benefits per KRS 342.730; permanent total disability.

[2] It appears the letter may have been filed on the date of the hearing as a copy of this same letter is contained in the record without any pleading attached to it along with each party's position statement.

In rendering a decision, KRS 342.285 grants the Administrative Law Judge as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008). In this case I find most persuasive the medical opinions of Dr. Owen and find that the plaintiff will sustain an 8% permanent impairment to the body as a whole under the AMA Guides, Fifth Edition.

"'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 . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination, "the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

> In the present case, I considered the severity of the plaintiff's work injury, her age, her work history, her education, her sworn testimony at the Final Hearing and Dr. Owen's specific opinions regarding her permanent impairment and her occupational disability. Based on all of those factors, I make the factual determination that the plaintiff Mrs. Richmond cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that she is permanently and totally disabled.

On May 8, 2013, the transcript of the April 25, 2013, hearing was filed in the record.

On May 14, 2013, Masco filed a petition for reconsideration making many of the same arguments it makes on appeal. Significantly, Masco stated "alternatively" if the ALJ is still inclined to award "permanent total disability" it requested the ALJ render specific findings of fact sufficient to apprise the parties of the basis for his decision pursuant to Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). It asserted the parties are entitled to reasonable assurance the ALJ had a thorough and adequate understanding of the evidence. It noted the ALJ simply stated he found Richmond's testimony and Dr. Owen's opinions credible but offered no explanation, analysis, or discussion. Noting the ALJ's summary of Richmond's testimony only spanned four

sentences, Masco stated it was unclear what was so persuasive about her testimony.

In the May 22, 2013, order overruling the petition for reconsideration, after stating the opinion and order had discussed all the contested issues raised by the parties at the BRC and the original opinion and order was reaffirmed, the ALJ stated, in relevant part, as follows:

> 5. The original Opinion and Order states that the plaintiff testified at the Final Hearing, that the plaintiff filed records from Dr. Hunt and reports from Dr. Owen, and that the defendant filed reports from Dr. Lyon. The Opinion and Order further states that the Administrative Law Judge has carefully reviewed and considered all of the above evidence and the complete and entire record in this case. At the Final Hearing Ms. Richmond testified that her job with the defendant required strenuous physical labor, that her work injuries required two knee surgeries and that even after the second surgery her knee pops, she has difficulty getting up and down steps, has difficulty standing and walking and has to use a cane to walk. I personally saw and heard the plaintiff testify at the Final Hearing and made and again make the factual determination that she was a credible and convincing witness.
>
> 6. For some reason the defendant never took the plaintiff's discovery deposition nor did the defendant have a vocational evaluation of the plaintiff conducted. On February 10, 2013 the defendant filed a Motion to remove the claim from abeyance for discovery and

final adjudication. The defendant stated that the plaintiff had reached maximum medical improvement and that the matter was ripe for final adjudication. The plaintiff also filed a Motion to remove the claim from abeyance, which Motion was dated February 11, 2013. The plaintiff noted that the plaintiff's treating physician, Dr. Hunt, had stated that he had done everything he could for her and released her from his care and that she was unable to work and continued to have significant restrictions. The plaintiff noted that the defendant had scheduled another examination of the plaintiff by Dr. Lyon. Pursuant to the agreement of the parties, the case was set for a combination Benefit Review Conference and Hearing on April 25, 2013 at 9:30 a.m. ET in Louisville, Kentucky. The Order entered pursuant to agreement of the parties was dated February 19, 2013, which is well over two months before the combination Benefit Review Conference and Hearing.

7. I note that the defendant filed four medical reports from Dr. Lyon dated November 15, 2012, January 31, 2013, February 24, 2013 and April 23, 2013. The record shows that no vocational reports were filed by either party.

8. The record reveals that pursuant to agreement of the parties on April 16, 2013, the case was set for a Benefit Review Conference and a Hearing on April 25, 2013 at 9:30 a.m. ET in Louisville, Kentucky and that both parties were granted an extension of time to and including the Final Hearing to file proof.

9. In light of the state of the record as recited hereinabove, I made

> at the Final Hearing and again make the factual determination that the defendant [sic] more than ample time to conduct a proper defense in this case and further that the defendant was, therefore, afforded due process.

In arguing Richmond did not qualify for an award of permanent total disability, Masco asserts the ALJ found Richmond to be totally disabled based on her testimony she cannot return to her former jobs, her educational background, her vocational history, her age, and severity of her injury. It contends this is an abuse of discretion and in direct conflict with the evidence. With regard to the severity of the work injury, Masco contends although the injury resulted in two subsequent surgeries, it did not result in a complete and permanent inability to perform any kind of work within the meaning of KRS 342.0011(11)(c).

Regarding Richmond's age, Masco points out she is only forty-six years old and her youth is inconsistent with the finding of total disability.

Concerning her work history, it maintains Richmond owned her own business and has the ability and skill to engage in commerce, communication, accounting, scheduling, and various administrative tasks. It notes she acted in a supervisory role. Masco asserts Richmond was employed as a deputy jailer which required her to read and

understand laws and regulations. It maintains Richmond was responsible for "booking the inmates into a computer, cataloging fingerprints, and searching for background information." It insists her vocational experience is proof she has the aptitude and ability to complete specialized training and function capably in a variety of fields. Thus, her work history establishes she has transferable work skills and aptitude for many lighter forms of regular employment.

Regarding her education, Masco points out Richmond has a GED, can read, write, speak, and count in addition to all her practical business experience. Masco argues her education was not shown to have had a negative impact.

Masco also contends the ALJ's mere reference to the fact he considered Richmond's hearing testimony is insufficient, as it is unclear what testimony the ALJ is referring to in his opinion as there is not an adequate summary of her testimony. Assuming the ALJ is relying upon his statement in his summary of evidence that Richmond is not physically able to return to her former job, it contends this statement is inconsistent with the work restrictions imposed by the physicians. Further, it argues this restriction does not totally disqualify her from all

employment. It notes Richmond has skills and adaptability which would allow her to perform sedentary type employment, and there are other numerous jobs she could do on a regular sustained basis in the competitive job market.

Masco argues the medical evidence does not establish Richmond is so physically impaired she is incapable of performing any type of regular employment as found by the ALJ. Masco further contends the physicians agree her only limitations are no climbing, kneeling, bending, squatting, or stooping. It concedes Dr. Owen offers additional restrictions of no prolonged walking for thirty minutes and no prolonged standing on uneven ground. However, it argues these restrictions do not prohibit her from performing jobs for which she would "realistically qualify." Masco asserts Dr. Owen's report does not support a finding of permanent total disability. Dr. Owen stated she could not return to the work she was performing at the time of the injury, but did not state Richmond could not return to gainful employment.

Masco also insists that in the order ruling on its petition for reconsideration, the ALJ "apparently incorrectly" relied upon Dr. Hunt's opinion that she is unable to work due to continued restrictions. Rather, it asserts Dr. Hunt stated in his October 29, 2012, record

that Richmond could return to work with the restrictions of no climbing, squatting, crawling, or kneeling. It notes in the record of September 24, 2012, Dr. Hunt offered restrictions of sit down work only and the requisite use of a cane in addition to no squatting, climbing, or kneeling. However, in the follow-up visit, Dr. Hunt removed the cane requirement and the sit down work only restrictions. Masco argues "considering the rationale offered in the opinion," the evidence does not support a finding of permanent total disability. It requests reversal of the award.

In its second argument, Masco contends its due process rights were violated since Dr. Owen's March 13, 2013, report was not released until April 9, 2013, long after the ten day rule illustrated in 803 KAR 25:010§8(3). Masco contends it was not afforded the appropriate time to procure a response pursuant to 803 KAR 25:010§8(b).[3] It contends this regulation allows the employer thirty days after the claimant's case in chief. Masco asserts its motion to reschedule the final hearing and extend the proof time was arbitrarily overruled and a final hearing conducted. Thus, it was allowed only two weeks to defend against Richmond's claim of total disability.

[3] Masco appears to be referring to 803 KAR 25:010 Section 8 (2)(b).

Regarding the ALJ's statement that for some reason Masco did not take Richmond's discovery deposition or seek a vocational evaluation, it asserts the obvious reason it never took these steps is because there was no issue for it to dispute until April 8, 2013, when it was provided Dr. Owen's report. Upon receipt of that report, Masco asserts it took the appropriate action of scheduling Richmond's deposition, locating a vocational expert, filing a motion for an extension of time, and motion to reschedule BRC/Final Hearing. Masco asserts none of this would have been required if Richmond has released the IME report within the required time frame. Masco posits had it received the report in a timely manner, it would have had over a month to obtain a vocational expert and depose Dr. Owen and/or Richmond.

Finally, Masco asserts the ALJ's suggestion in the order ruling on its petition for reconsideration that it waived any right to an extension of time or rescheduling due to an April 16, 2013, agreement scheduling the final hearing for April 25, 2013, is "patently incorrect." Masco asserts there was never any communication between the parties on April 16, 2013, as it relates to the final hearing. It points out the ALJ's order setting the BRC/Final Hearing was issued on February 19, 2013, long

before Richmond presented any proof which it had to rebut and long before this alleged agreement. Masco concludes the ALJ's unreasonable and unwarranted refusal to permit an extension of time is not supported by any "sound legal principle, and was in direct conflict with the Administrative Regulations." It requests the decision of the ALJ be reversed and remanded for a proof schedule in accordance with the administrative regulations.

We begin by taking up the second issue raised by Masco. 803 KAR 25:010 Section 8 states as follows:

> Section 8. Discovery, Evidence, and Exchange of Records. (1) Proof taking and discovery for all parties shall begin from the date of issuance by the executive director of the scheduling order.
>
> (2)(a) Plaintiff and defendants shall take proof for a period of sixty (60) days from the date of the scheduling order;
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> (b) After the sixty (60) day period, defendants shall take proof for an additional thirty (30) days; and
>
> (c) After the defendant's thirty (30) day period, the plaintiff shall take rebuttal proof for an additional fifteen (15) days.

Here, the scheduling order was issued on August 14, 2012. Masco's motion to place the claim in abeyance was filed on September 5, 2012, roughly three weeks after

the scheduling order was issued. On September 17, 2012, the claim was held in abeyance. The reports of Drs. Owen and Lyon filed thereafter reflect their agreement Richmond had not attained MMI.[4] When both parties filed motions to remove the claim from abeyance because the doctors agreed she had reached MMI, in his February 19, 2013, order, the ALJ gave the parties two months to submit proof and set a BRC and a formal hearing on the same date. Contrary to the regulations, Masco was not given any additional time after Richmond's proof time to submit proof, and Richmond received no rebuttal time. Although Masco did not object to the February 19, 2013, order and does not directly address this issue in its appeal brief, we believe the ALJ's order constitutes error as a matter of law, an abuse of discretion, and a violation of Masco's right to procedural due process.[5]

The failure of the ALJ to structure the proof taking schedule is highlighted by the fact that in Richmond's motion to remove the claim from abeyance, she represented she had been scheduled to "return to a physician for an IME," and "that should be ready within two

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[4] Although Dr. Lyon expressed this opinion, he assessed an impairment rating of 1%.

[5] However, Masco sufficiently preserved this error for review by filing a motion seeking relief from the terms of the February 19, 2013, order.

weeks." Contrary to that assertion, Richmond was seen by Dr. Owen a month later on March 13, 2013, and the report was not signed until March 18, 2013. The report was not filed in the record until three weeks later on April 10, 2013, two days after Masco filed a motion to continue the BRC and hearing and for an extension of proof time.

Absent an agreement of the parties, the ALJ was required to set a proof schedule which substantially complies with 803 KAR 25:010 Section 8. Although the parties were permitted time to submit proof prior to the claim being placed in abeyance, the ALJ should have set a proof schedule consistent with the 60-30-15 format set forth in Section 8.

Although not raised by Masco, without the agreement of both parties, the ALJ erroneously set a BRC and a hearing date on the same date, in contravention of 803 KAR 25:010 Section 13.[6] Section 13 sets out the purpose of the BRC, who is to attend, and the documents and pleadings to be filed prior to and at the BRC. The BRC is informal and its purpose is to aid in settling the claim or at least narrowing the issues to be decided at the hearing. Section 13 directs the BRC shall not be held on the same

[6] This issue was sufficiently preserved for review by Masco's motion seeking relief from the terms of the February 19, 2013, order.

date as the hearing, as it specifically states if the parties are unable to settle the claim they are to prepare a summary of the stipulations of all contested and uncontested issues. The ALJ shall then schedule a final hearing to resolve only the identified contested issues. This is consistent with the scheduling order which states, if necessary, a hearing will be scheduled by the ALJ following the BRC. Here, by ordering the BRC to be conducted on the same date as the hearing, the ALJ defeated its fundamental purpose.

The basic requirement of due process of law is the opportunity to be heard at a meaningful time and in a meaningful manner. *See* U.S.C.A. Const. Amends. 5, 14; Const. § 2. Cross-examination is an aspect of that due process requirement, even in trial-type adjudicatory proceedings before administrative agencies including proceedings under KRS Chapter 342 before an ALJ. Union Underwear Co., Inc. v. Scearce, 896 S.W.2d 7 (Ky. 1995); Kaelin v. City of Louisville, 643 S.W.2d 590, 592 (Ky. 1982). Where administrative decisions turn on questions of fact, due process requires an opportunity to fully confront and cross-examine adverse witnesses. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Kaelin v. City of Louisville at 591-592. Parties to administrative

proceedings must be afforded a reasonable time in which to demonstrate the incompleteness, the untruth, the partiality or any other weakness or defect in the testimony of a witness. Kaelin v. City of Louisville at 592.

In the case *sub judice*, the proof schedule initially set by the ALJ in the February 19, 2013, order and his failure to continue the hearing and grant Masco additional time to take proof and cross-examine the witnesses violates Masco's due process rights. In setting the proof schedule where the parties merely had sixty days to file their proof, the ALJ put each party at the mercy of the other. As contemplated by 803 KAR 25:010 Section 8, Masco was entitled to time when it could rebut Dr. Owen's report and conduct cross-examination of the opposing witnesses. Certainly, Masco's ability to depose Dr. Owen or submit proof rebutting his opinion was unduly compromised by Richmond's failure to file the report until two weeks prior to the hearing. We note in her objection to Masco's motion to reschedule the hearing and for an extension of proof time, Richmond stated she had no objection to allowing Masco additional time to respond to the report of Dr. Owen. Yet, the ALJ refused to grant Masco the additional time.

The test for abuse of discretion is whether the ALJ's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Officeware v. Jackson, 247 S.W.3d 887, 892 (Ky. 2008). The ALJ's actions in setting the proof schedule, ordering the BRC and final hearing to be held on the same day, and in refusing to continue the hearing and grant Masco additional time to submit proof constituted an abuse of discretion. The ALJ's orders of February 19, 2013, and April 13, 2013, were arbitrary, unreasonable, and unfair to Masco, and were contrary to the applicable regulations.

Since the ALJ indicated "the record has been carefully documented," we have reviewed the record to discern whether it reflects there was an agreement by the parties regarding the BRC hearing date. We are unable to find any support in the record for the ALJ's statement at the final hearing and in his May 22, 2013, order ruling on the petition for reconsideration that the parties agreed to the BRC and hearing date. At the April 25, 2013, hearing the following exchange occurred:

> JUDGE RUDLOFF: Let's proceed with the final hearing. Again, this is claim number 2012-92062, Janice Richmond, Plaintiff, versus Masco Builder Cabinet Group, Defendant. And let the record show that the case was set for a combination benefit review conference

and hearing on April 25, 2013, at 9:30 a.m., eastern time, here in Louisville, by the Order I signed on April 16, 2013, after conferring with counsel, who agreed as to the date for the benefit review conference and the final hearing. Let's have for the record the names and addresses of the attorneys, first of all for the Plaintiff.

MR. VANOVER: Thank you, Your Honor. I'm Gerald Vanover from Morgan, Brashear, Collins, and Yeast, 921 South Main Street, London, Kentucky 40741. I'm here on behalf of the claimant, Ms. Janice Richmond, Your Honor.

JUDGE RUDLOFF: And for the Defendant.

MR. DONKIN: Thomas Donkin from Ward, Hocker, and Thornton, attorneys at law, here for the Defendant Employer, Masco Builder Cabinet Group. And, Judge, I apologize for being such a stickler, but I think it needs to be put on the record that the counsel for the Defendant has in fact objected to this hearing and did not agree to it.

JUDGE RUDLOFF: Well, I understand what your position is now. I'm saying that when the case was set, after we had a telephonic conference on April 16, 2013, everything was set by agreement – today, here in Louisville. And I understand that since then you made a motion and you have objected to the final hearing being held today. I understand that.

MR. DONKIN: Can we go off the record for a second?

JUDGE RUDLOFF: Yes.

. . .

> JUDGE RUDLOFF: Let the record show that by order dated April 16, 2013, after having input from both sides – for the Plaintiff and the Defendant, this case was set for a benefit review conference and a final hearing on April 25, 2013, at 9:30 a.m., eastern time, in Louisville, Kentucky. And the order further provided that both parties were granted an extension of time to and including the final hearing to file proof, which they have. Subsequently, the Defendant made a motion objecting to the final hearing being held on April 25, 2013, and moving that it be reset. The Plaintiff objected to that, and I've made a ruling on that, so I think the record has been carefully documented. Who are the witnesses today?

Further, at the end of the direct examination, on page 21 of the hearing transcript, Masco's counsel again stated as follows:

> I think it's important the record is clarified on this, the Defendant filed its motion to continue this final hearing on April 5th of 2013. It was before the order, which was referred to earlier, on April 16th. And the Plaintiff had a chance to respond to that, also, before that order.

The record does not reveal a telephonic conference was conducted on April 16, 2013, at which time the parties allegedly agreed to conduct a BRC and final hearing on April 25, 2013. In fact, the record reveals on February 19, 2013, the ALJ sustained Richmond's motion to re-docket, directed all parties had until the BRC/Formal

Hearing to introduce proof, and set the BRC/Final Hearing on April 25, 2013, at 9:30 a.m., in Louisville. The order was not an agreed order. The order was clearly tendered by Richmond as it directs the motion to re-docket and reschedule a BRC/Formal Hearing was sustained. We can only surmise that the April 16, 2013, order was entered after Masco filed a motion for an extension of proof time and to reschedule the BRC/Formal Hearing and Richmond had filed an objection to that motion. In essence, the April 16, 2013, order did not alter the proof schedule or change the hearing date and tacitly overruled Masco's motion for an extension of time and to reschedule the hearing, as the order reaffirmed the terms of the February 19, 2013, order containing the same provisions. At any rate, Masco was not permitted ample opportunity to present its case and was denied its due process rights, especially given the fact the report of Dr. Owen was not introduced in the record by Richmond until fifteen days before the hearing. We believe this is significant in light of Richmond's representation in her motion to remove the claim from abeyance that something would occur within two weeks.

We will also address the ALJ's statements in the May 22, 2013, order ruling on the petition for reconsideration. At the end of paragraph six, the ALJ

states the April 25, 2013, order was entered pursuant to the agreement of the parties, and the claim was set for a combination BRC/Formal Hearing on April 25, 2013, in Louisville. We have previously stated there is nothing in the record indicating there was any such agreement. The parties' motions were filed on February 13 and 14, 2013, and on February 19, 2013, the ALJ signed Richmond's tendered order. The record does not reflect a telephonic conference was held prior to entry of the order or that the parties agreed to the order. In paragraph eight of the May 22, 2013, order, the ALJ states the record reveals, pursuant to the agreement of the parties on April 16, 2013, the claim was set for a BRC and hearing on April 25, 2013, in Louisville. Both parties were granted an extension of time including the final hearing date to submit proof. Paragraph eight seems to be in conflict with paragraph six wherein the ALJ stated the parties agreed in February to the combined BRC and hearing being set on April 25, 2013. The April 16, 2013, order was entered apparently in response to Masco's motion to reschedule the BRC/Formal Hearing and requesting additional time to take proof. The record does not reveal the parties agreed on April 16, 2013, to the BRC and hearing being held on April 25, 2013. There is nothing indicating the April 16, 2013, order was

an agreed order or was entered pursuant to a telephonic conference. Thus, the ALJ's decision must be vacated and the matter remanded for additional proceedings.

We emphasize we are not disputing the ALJ's statement regarding that to which the parties agreed; however, our decision must be based on the contents of the record.

Although we are vacating the ALJ's decision and remanding for further proceedings, we must address Masco's first argument. Masco argues Richmond does not qualify for an award of PTD benefits. However, we *sua sponte* conclude the ALJ's fact-finding regarding permanent total disability is deficient as a matter of law. It is axiomatic the ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). However, an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must

adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). In the case *sub judice*, the ALJ's opinion does not provide findings sufficient to inform the parties and this Board of the basis for his decision.

In determining Richmond was totally disabled, the ALJ stated he relied upon the severity of her work injury, her age, her work history, her education, her testimony, and Dr. Owen's specific opinions regarding her permanent impairment and occupational disability. In light of the limited summary of Richmond's testimony and his failure to discuss how her age, her work history, and her education factored into his decision, the ALJ failed to state the basis for his conclusion Richmond is totally occupationally disabled. In addition, the ALJ failed to explain why Dr. Owen's opinions led him to conclude Richmond is totally occupationally disabled.

In his summary of Richmond's testimony, after mentioning her surgery, the ALJ stated Richmond testified about her continuing left knee symptoms and that she was not physically able to return to her former jobs. The ALJ said nothing more. He provided a rather lengthy summary of

Dr. Owen's testimony. In ruling on the petition for reconsideration, the ALJ provided an additional summary of Richmond's testimony regarding the requirements of her job, the symptoms she currently experiences, and her current difficulty standing and walking. However, the ALJ failed to discuss how the severity of Richmond's injury, her age, her education, and her work history factor into his determination of her vocational ability after recovering from the injury. The only reference to her age and education in the opinion is contained in Section II of the opinion in which the ALJ notes the parties stipulated Richmond's date of birth is April 1, 1967, and she has an education level of 9th grade/GED. The ALJ did not, however, discuss what role Richmond's age and education played in leading him to conclude she was totally occupationally disabled. Although the ALJ acknowledged Richmond indicated she could not perform her past jobs, the ALJ did not delve into those portions of her work history dealing with her operation of a business and the clerical work she performed as an employee at the jail.

Dr. Owen stated Richmond was not able to return to her previous employment, but he offered no other opinions regarding her occupational capacity. Rather, in the Form 107 completed on March 18, 2013, he restricted

Richmond from bending, squatting, or stooping. He also indicated she should not engage in prolonged walking greater than half a mile and prolonged standing or walking on uneven ground. Dr. Owen did not provide any limitations regarding prolonged standing or walking on even surfaces. Thus, we are unable to determine the portion of Dr. Owen's opinions the ALJ relied upon and how those opinions impacted his decision Richmond is totally occupationally disabled.

In Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), the Supreme Court set out the required analysis to be performed in determining whether a worker is totally occupationally disabled 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. at 51-52.

Therefore, we must also vacate the ALJ's decision pursuant to Masco's first argument on appeal, as the ALJ indeed failed to conduct the required analysis. Specifically, while the ALJ discussed Richmond's post-injury physical status in the May 22, 2013, order, he did not analyze this claim in regard to Richmond's post-injury intellectual and vocational status and how those factors interacted. The ALJ made one conclusory statement without explaining the significance of each factor he identified as having a bearing on his decision. Thus, we believe the ALJ's analysis does not comport with the guidelines set down in Ira A. Watson Department Store v. Hamilton, supra.

Further, the ALJ should have responded to Masco's request in its petition for reconsideration for specific findings of fact to apprise the parties of the basis for his decision. Although the May 22, 2013, order does shed light on the portion of Richmond's testimony he may have relied upon regarding her post-injury physical condition,

the ALJ did not elaborate on how her post-injury physical condition in conjunction with her age, education, and vocational aptitude after the injury caused her to be totally occupationally disabled.

Accordingly, those portions of the April 30, 2013, opinion and order and the May 22, 2013, opinion and order finding Richmond totally occupationally disabled are **VACATED**. This matter is **REMANDED** to the ALJ for imposition of a proof schedule, to conduct a BRC and final hearing, and rendition of an opinion and order in conformity with the views expressed herein.

ALL CONCUR.

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