Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 3, 2014

CLAIM NO. 201166743

TRIM MASTERS, INC. PETITIONER

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

EVA BETH ROBY
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Trim Masters, Inc. ("Trim Masters") seeks review of the February 14, 2014, Amended Opinion and Order on Remand of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding Eva Beth Roby ("Roby") to be totally occupationally disabled and awarding temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits. The ALJ granted

Trim Masters a credit against its obligation to pay TTD or PTD benefits for the amount of unemployment insurance benefits received by Roby. He also referred Roby to the Department of Vocational Rehabilitation for a vocational evaluation.

On appeal, Trim Masters challenges the sufficiency of the evidence supporting a finding of permanent total disability and argues that on remand the ALJ did not comply with the Board's directive in its January 3, 2014, Opinion Vacating and Remanding.

In our January 3, 2014, Opinion Vacating and Remanding, we summarized the facts and Roby's testimony as follows:

> Roby filed a Form 101 on November 26, 2012 alleging a gradual onset of right upper extremity symptoms caused by her work which she reported to Trim Masters on April 22, 2011. Roby testified by deposition on February 15, 2013 and at the hearing held April 24, 2013. Roby resides in Bloomfield, Kentucky and was born on July 8, 1977. Roby is right hand dominant. She graduated from high school in 1995 and is currently enrolled as a full-time student at Saint Catherine College pursuing a Bachelor of Science degree in Nursing, with the goal of becoming a pediatric nurse.
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> Roby testified her work history includes working as a cashier, a waitress, and assembly line worker. She worked on several lines before being

moved to the Paccar department in 2005 or 2006, which makes door panels for trucks. Roby testified she sprayed glue onto a part, placed the part in the oven, transferred it to a table to edge fold, stapled it and placed it in a rack. The door panels weighed between five and ten pounds, and other parts weighed less. Roby stated her job did not involve heavy lifting, but required constant repetitive movement and some overhead work.

Roby stated a few weeks prior to April 22, 2011, she began experiencing pain throughout her right arm and elbow when gripping. Her symptoms gradually worsened to the point she experienced radiating pain from her thumb to her elbow when she squeezed the handle of either the stapler or glue gun. On April 22, 2011, she reported her symptoms to her employer.

Roby then sought treatment with Dr. Charles Parrish at Bardstown Ambulatory Center and Dr. Thomas Gabriel at Specialty Orthopaedics. Dr. Parrish placed her wrist in a splint, recommended home exercises and placed restrictions on her right arm. He also ordered physical therapy and administered a cortisone shot in her right elbow. Although Roby initially improved, her symptoms worsened when she was released to full duty. As a result, Roby was returned to light duty restriction with her right arm. Dr. Gabriel ordered an MRI and eventually performed right elbow surgery on October 20, 2011. He released Roby from his care on April 3, 2012 and permanently restricted her from repetitive movement and lifting over ten pounds with her right arm. Roby stated she retains full use of her left arm.

Roby stated she continues to experience pain radiating up her arm when she attempts to lift items such as a gallon of milk, and also has lack of grip strength. She records lectures at college because note taking causes pain. She also has difficulty with daily tasks requiring use of her right arm. Roby stated she currently takes over the counter Tylenol or Aleve and uses a TENS unit a couple of times per week.

Roby has not returned to work since October 2011. At the hearing, Trim Masters conceded Roby is physically incapable of returning to her former job. Roby stated she has applied for several other jobs since April 2011, but has been unsuccessful due to her restrictions. Roby stated she could probably perform a cashiering job similar to ones she has held in the past as long as she is not required to lift over her restricted amount. She is currently receiving unemployment benefits which she began drawing in April 2012, but is not required to actively look for work since she is in school. Roby receives tuition assistance through the Kentucky Vocational Rehabilitation program and the "WIA program" from the unemployment department.

Roby stated she had spoken to various nurses, counselors and teachers who agree she could perform pediatric nursing duties within her restrictions since very little lifting is required. Roby stated she plans to complete her Bachelor's degree in 2015.

We summarized the ALJ's Opinion as follows:

The April 10, 2013 benefit review conference ("BRC") order and memorandum reflects the following contested issues:

> benefits per KRS 342.730, vocational rehabilitation, and permanent total disability. In the May 13, 2013 opinion, the ALJ briefly summarized Roby's testimony, Dr. Bilkey's April 11, 2012 report, Dr. Gabriel's September 18, 2012 report, and the vocational reports of Mr. Ellis and Ms. Shifflett. He found Dr. Bilkey's assessment of impairment most persuasive and found Roby sustained a 6% permanent impairment rating as a result of her work-related cumulative trauma. After citing the definition of permanent total disability found in KRS 342.0011 and the analysis outlined in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000), the ALJ made the following findings of fact:
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>> In the present case, I considered the severity of the plaintiff's work injury, her age, her work history, her education, the sworn testimony of the plaintiff and the very persuasive medical opinions of Dr. Bilkey regarding her permanent impairment and occupational disability. Based on all of those factors, I make the factual determination that the plaintiff Ms. Roby cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that she is permanently and totally disabled.

Observing Trim Masters argued the finding of permanent total disability was not supported by substantial evidence and the ALJ did not provide an individualized

determination in support of his award of PTD benefits, we vacated the decision and remanded holding and instructing:

> We find the ALJ failed to set forth adequate findings of fact and explanation which would allow meaningful review regarding his conclusion Roby is permanently totally disabled due to her cumulative trauma injury. Permanent total disability is defined as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. KRS 342.0011(11)(c). "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). The Kentucky Supreme Court set forth the following analysis in Ira A. Watson Department Store, 34 S.W.3d at 51, in determining whether a claimant is permanently and totally disabled:
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>> 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.

We strongly emphasize, as we have on several occasions, a mere recitation of the factors set out in Ira A. Watson Department Store vs. Hamilton, supra, without linking those factors to the specific facts at hand is not an appropriate analysis of a claimant's entitlement to PTD benefits. The ALJ must set forth exactly how the severity of Roby's injury as well as how her age, work history, and education factored into his decision to award PTD benefits. This is especially true in light of the fact Trim Masters requested additional findings of fact regarding the ALJ's conclusory determination Roby is permanently and totally disabled.

On remand, the ALJ is directed to conduct an analysis in accordance with both the statutory and case law referenced above and provide with more specificity the rationale supporting his determination Roby is permanently totally disabled due to her work injury. We note the ALJ summarily stated he relied upon Dr. Bilkey's opinion and Roby's testimony, but failed to identify

> specific testimony in support of his finding. Therefore, the Board and the parties are left to guess what portions the ALJ relied upon in reaching his decision. On remand, the ALJ is further directed to specifically address the factor of education and discuss how Roby's current schooling and nursing aspirations factor into his decision. Although there may be substantial evidence in the record supporting the ultimate determination Roby is permanently and totally disabled, the ALJ must provide an adequate explanation of the basis for his decision. This Board may not, and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

In the February 14, 2014, Amended Opinion and Order on Remand, the ALJ expanded his summary of Roby's testimony. However, he provided the same summary of the medical and vocational testimony set forth in his initial Opinion and Order. In his Findings of Fact and Conclusions of Law, after adopting the same preface and the definitions of "injury" and "permanent total disability" contained in his previous opinion, the ALJ concluded Roby was permanently totally disabled stating as follows:

> In this case, I saw and heard the plaintiff Ms. Roby testify at the Final Hearing. I carefully observed her facial expressions and voice tones during her testimony. I also carefully observed her body language during her testimony. I make the factual

determination that she was a credible and convincing lay witness. I make the factual determination that Ms. Roby has continuing and very painful permanent work-related injuries to her right upper extremity and that she is right hand dominant. It is uncontradicted that Ms. Roby last worked at any job on October 20, 2011, which is more than two years ago. She is now in early middle age. She received her high school diploma many years ago and has no college degree and absolutely no specialized or vocational training or education. Her work history has consisted of employment at factories, restaurants and at Wal-Mart. The defendant admitted that Ms. Roby is not physically capable of returning to her former job at the defendant's plant. Since leaving her employment with the defendant, she has applied for other jobs, but has not been able to obtain employment due to the permanent physical restrictions placed upon her by Dr. Gabriel. I make the factual determination that the medical evidence from Dr. Bilkey was persuasive and compelling. His diagnoses were that Ms. Roby sustained a 4-22-11 work injury to her right elbow, a forearm strain injury in response to repetitive upper extremity work and that she acquired medial and lateral epicondylitis and that she has undergone a surgical release of the lateral epicondylitis with residual chronic elbow pain and impaired grip. Dr. Bilkey stated that those diagnoses were due to the plaintiff's work injury on April 22, 2011. Dr. Bilkey stated that the permanent physical restrictions placed on Ms. Roby by Dr. Gabriel were appropriate and were the result of her April 22, 2011 work injuries and that those permanent restrictions preclude Ms. Roby from being able to resume the

> usual work duties which she successfully carried out before April 22, 2011. Dr. Bilkey stated that under the AMA Guides, Fifth Edition, Ms. Roby will sustain a permanent 6% whole person impairment due to her April 22, 2011 work injuries. William Ellis, a vocational expert, stated in his report that he reviewed multiple medical records dealing with Ms. Roby over a period of more than one year and that those medical records showed that she had pain levels of at least 7 and 8 on a 1-10 pain scale and that there were notations in those medical records that she had increased pain level on any type of exertion, which pain would inhibit her use of her right arm. Mr. Ellis stated that it was his opinion that based upon Ms. Roby's inability to use both hands, it was his opinion that she is now 100% vocationally disabled and that she will need to get her pain level under control and get the use of her right elbow before she can consider vocational rehabilitation.
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> Based upon the above factual determinations, including the plaintiff's very credible and convincing lay testimony, and the persuasive and compelling expert evidence from Dr. Bilkey and Mr. Ellis regarding Ms. Roby's permanent impairment and occupational disability, I make the factual determination that she cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that she is permanently and totally disabled.

The ALJ referred Roby to vocational rehabilitation stating:

KRS 342.710 provides that when as a result of a work injury the plaintiff is unable to perform work for which she has previous training or experience, she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore her to suitable employment. The administrative law judge on his own motion, may refer the employee to a qualified physician or facility for evaluation of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him/her fit for a remunerative occupation. After reviewing the record this Administrative Law Judge is persuaded the plaintiff should be afforded this opportunity, and finds accordingly.

I make the above determination based upon the plaintiff's credible and convincing lay testimony and the persuasive and compelling expert evidence from Dr. Bilkey and Mr. Ellis, all of which is summarized immediately hereinabove. I also noted that Ms. Roby is now a student at St. Catherine's College and wants to get her Bachelor's Degree in pediatric nursing. If she receives vocational rehabilitation to assist her in obtaining her nursing degree, it is reasonably probable that she will obtain employment for which she is physically capable and that she will obtain regular gainful employment as a nurse, thereby entitling the defendant to move to reopen the case based upon a change of condition under KRS 342.125.

I also base that determination on the fact that Ms. Roby is unable to perform work for which she has previous training or experience. In addition, I

> rely on the provisions of KRS 342.710 and the Opinion of the Kentucky Court of Appeals in *Wilson v. SKW Alloys*, 893 S.W.2d 800 (Ky.App.1995).

No petition for reconsideration was filed.

On appeal, Trim Masters argues the ALJ's conclusion Roby is permanently totally disabled is not supported by substantial evidence. It contends the ALJ did not sufficiently explain how Roby's age and education factored into his decision.[1] With respect to Roby's age, Trim Masters notes the ALJ stated she was "early middle-age." Concerning Roby's education level, it asserts the ALJ only stated she had received a high school diploma many years ago and does not have a college degree. Trim Master's posits Roby's age supports an award of permanently partial disability ("PPD") benefits and the fact she has a high school diploma should be a "neutral factor" in determining the level of her disability. In addition, Trim Masters asserts the ALJ completely ignored the Board's directive to specifically address how Roby's current schooling and nursing aspirations factor into his decision.

Trim Masters suggests the ALJ attempted to fashion a remedy for Roby which does not exist under the Kentucky Workers' Compensation Act since an award of PPD benefits

[1] Upon her birthday this year, Roby will be 37 years old.

would not be sufficient to support Roby while attending college. It also contends that in determining Roby's occupational disability, the ALJ should consider her vocational opportunities. Trim Masters maintains since it admitted Roby does not have the physical capacity to return to the job she was performing at the date of injury, an important consideration is her future vocational activities, not her past activities. It cites to Roby's testimony that she plans to attend college and obtain a degree because she believes she can function as a pediatric nurse even with her restrictions.

Finally, Trim Masters argues remand is futile as there are "no more facts to be found which are relevant" and the ALJ cannot be expected to "change his mind with respect to the legal effect of the facts he has found." It contends much of what the ALJ refers to as "facts" is simply not a correct interpretation of the testimony. Therefore, Trim Masters submits the Board should hold the award of PTD benefits is not supported by substantial evidence and remand with directions to enter an award of PPD benefits in conformity with the evidence and its concession KRS 342.730(1)(c)1 is applicable.

Because the ALJ's analysis is not in accordance with the directive we provided in the January 3, 2014,

opinion, we vacate the determination Roby is totally occupationally disabled and the award of PTD benefits. In our previous opinion, we directed that in performing the analysis concerning Roby's occupational disability the ALJ must address how the nature of Roby's injury, her age, work history, and education factors into the award of PTD benefits. As our opinion was not appealed, it is the law of the case.

On remand, with respect to Roby's age and education, the ALJ merely stated she was early middle age, had attained a high school diploma many years ago, and had not attained a college degree or any specialized training or education. The ALJ did not discuss further Roby's age or education in reaching his decision that Roby was totally occupationally disabled. Rather, the ALJ stated he relied upon Roby's testimony, the opinions of Dr. Bilkey and Mr. Ellis, the vocational expert, in determining Roby was permanently totally occupationally disabled. Consistent with the directive in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), the ALJ must consider Roby's age, work history, and education. Roby is relatively young, and although she only has a high school education her testimony reveals she had spoken to various nurses, counselors, and teachers who agreed that in spite of her

physical restrictions she could perform the duties of a pediatric nurse. Consequently, it was Roby's plan to obtain a bachelor's degree in 2015. That testimony rebuts Mr. Ellis' answer to question four which reads as follows:

> In order for Ms. Roby to return to the job market, would you agree that Ms. Roby is a good candidate for vocational rehabilitation?
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> I feel that Ms. Roby would have to get her pain level under control and get the use of her right elbow, before she can consider vocational rehabilitation.

In spite of Mr. Ellis' statement, Roby is already engaging in vocational rehabilitation as she is enrolled in college pursuing a nursing degree.[2]

In short, the ALJ has failed to address Roby's age and education level and how both factor into the resolution of the issue of the extent of her occupational disability. Particularly, the ALJ has failed to directly address the education Roby is obtaining at St. Catherine's College and its bearing on the determination of whether she is totally occupationally disabled. Further, characterizing Roby's age as "early middle age" does not provide any

[2] We note that Roby represents in her brief to the Board that after the ALJ's decision she was not admitted to the program for which she applied and there is no way of knowing whether she will be able to complete the program let alone actually work as a pediatric nurse limited to the use of her non-dominant hand. The facts supporting that representation are not in evidence, and therefore should have no bearing on the ALJ's decision.

insight as to how her age factors into the consideration of her occupational disability.

Because the ALJ's did not address the significance of Roby's age, her education, and the fact she is in college striving to obtain a nursing degree, the February 14, 2014, decision determining Roby is totally occupationally disabled and awarding PTD benefits must be vacated and the claim remanded for an analysis consistent with our opinion of January 3, 2014.

We decline Trim Master's request to remand the claim to the ALJ with directions to find Roby is permanently partially disabled. As the ALJ is the fact-finder, he must determine the extent of Roby's occupational disability. As we previously observed, we are not suggesting an outcome in this claim.

Accordingly, that portion of the February 14, 2014, amended opinion and order on remand finding Roby to be totally occupationally disabled and awarding PTD benefits is **VACATED**. This matter is **REMANDED** to the ALJ for entry of an opinion consistent with the views expressed in the Board's January 3, 2014, opinion as outlined herein.

ALL CONCUR.

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