Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 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.

ALVEY, Chairman. Trim Masters, Inc. ("Trim Masters") seeks review of the opinion and order rendered May 13, 2013 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding Eva Beth Roby ("Roby") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits due to a cumulative trauma

injury. Trim Masters also seeks review of the June 10, 2013 order denying in relevant part its petition for reconsideration.

On appeal, Trim Masters argues the ALJ's decision is not supported by substantial evidence. We vacate and remand to the ALJ for further findings of fact supporting his determination.

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.

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.

In support of her claim, Roby filed treatment records from Drs. Gabriel and Parrish. On July 13, 2011, Dr. Gabriel noted Roby is right-hand dominant and gradually developed elbow problems due to repetitive use during her six years of assembly line work with Trim Masters. He ordered an MRI and placed restrictions on her right arm and hand. He reviewed a July 21, 2011 MRI which demonstrated lateral epicondylitis and partial exterior tear. Dr. Gabriel noted conservative treatment, including a cortisone shot, elbow brace and medication had failed and he recommended surgical repair.

The October 20, 2011 operative report reflects Dr. Gabriel performed a debridement and lateral release with partial epicondyletomy; repair of common extensor origin with PRP; and dorsal compartment forearm fasciotomy. Despite the surgery and post-operative physical therapy, Roby had continued complaints of right elbow pain through her last visit on April 3, 2012, when he opined she had reached maximum medical improvement ("MMI"). He permanently

restricted her from lifting over ten pounds with no repetitive use of her right upper extremity. In a letter dated April 30, 2012, Dr. Gabriel assessed a 2% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment 5th Edition ("AMA Guides") for Roby's residual pain following her surgery and anticipated no further treatment. In September 2011, Roby suffered a non-work-related right wrist fracture. Her wrist was placed in a cast and the injury is not part of this claim.

The record reflects Roby treated with Dr. Parrish from April 25, 2011 to September 23, 2011 for her right wrist and elbow complaints. He prescribed medication, assigned restrictions to her right upper extremity, ordered physical therapy, administered a cortisone injection, and placed her elbow in a brace. In an August 25, 2011 note, Dr. Parrish stated Roby's complaints may be a recurrent problem unless she stops her repetitive motion job and he encouraged her to consider a different career.

Roby filed Dr. Warren Bilkey's April 11, 2012 report. He diagnosed a "4/22/11 work injury right elbow, forearm strain injury in response to repetitive upper extremity work." He noted Roby had acquired medial and lateral epicondylitis requiring surgical release and now has

residual chronic elbow pain and impaired grip. Dr. Bilkey opined the above diagnoses are due to the April 22, 2011 work injury and found Roby had attained MMI on April 3, 2012. He agreed with the permanent restrictions imposed by Dr. Gabriel of no lifting over ten pounds and no repetitive right upper extremity work and found Roby was precluded from resuming the usual work duties she performed prior to April 22, 2011. He assessed a 6% impairment rating based upon the AMA Guides due to Roby's loss of grip function. He also noted he based the impairment rating on grip function rather than chronic pain since it is the greatest functional concern and "it is certainly the issue that prevents her from being able to return to work." Dr. Bilkey recommended Roby be placed on a grip strengthening exercise regimen and continue over the counter anti-inflammatory medication.

Roby filed the March 5, 2013 vocational report of William Ellis. Mr. Ellis responded yes to the question of whether Roby's "current limitations and restrictions in essence limit her to one handed duty." He noted Roby's pain level documented in the treatment records inhibit the use of her right arm. Mr. Ellis opined Roby's restrictions preclude her from returning to any of her past work noting a light work level requires the use of both arms and hands, and to hold, grasp and turn objects. Mr. Ellis then noted

Roby could not perform work at the medium, heavy or very heavy exertion levels since they require lifting over ten pounds and the use of both arms and hands. Mr. Ellis noted even sedentary work requires the use of both arms and hands, and to be able to hold and twist objects. Therefore, "the inability to use both hands in combination to the higher pain level, in my opinion, would make Ms. Roby 100% vocationally disabled."

Trim Masters filed the April 19, 2013 vocational report of Paula R. Shifflett. Ms. Shifflett noted Roby is receiving vocational rehabilitation from the Kentucky Department of Vocational Rehabilitation including tuition assistance and additional monetary resources for education from WIA. Roby is enrolled as a full-time student at Saint Catherine's College pursuing her Bachelor of Science degree in Nursing, which will cost approximately $72,304.00. She noted an Associate's degree in Nursing from the Bluegrass Community & Technical College would cost a total of $10,969.00. Ms. Shifflett concluded Roby would only need to obtain an Associate's degree in order to obtain the opportunity to become a registered nurse. Therefore, the additional cost of attending a private college to obtain a Bachelor's degree as compared to an Associate's degree is not warranted to return Roby to sustainable employment.

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:

> 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.

The ALJ awarded TTD benefits, PTD benefits and medical benefits. He also referred Roby to the Kentucky Department of Vocational Rehabilitation for a vocational evaluation in accordance with KRS 342.710.

Trim Masters filed a petition for reconsideration requesting the ALJ award a credit for unemployment benefits received by Roby. It also requested additional findings of fact regarding the ALJ's conclusion Roby "cannot find work consistently under regular work circumstances and work dependability." Trim Masters argued the above cited language amounts to a legal conclusion with no supporting findings of fact. It also argued the ALJ erred in relying, in any degree, upon Mr. Ellis' vocational report.

In the opinion and order on reconsideration rendered June 10, 2013, the ALJ amended the opinion to reflect Trim Masters is entitled to an offset for unemployment benefits paid to Roby against the awarded income benefits. The ALJ denied the remainder of Trim Masters' petition requesting additional findings of fact regarding the award of PTD benefits, stating as the May 13, 2013 opinion discussed all of the contested issues raised by the parties in the BRC order.

On appeal, Trim Masters argues the PTD finding is not supported by substantial evidence. It also argues the

ALJ did not provide an individualized determination in support of his award of PTD benefits. Trim Masters asserts Roby has not sought medical treatment for her work-related injury in over a year, and only takes over-the-counter anti-inflammatories a couple of times per week. Trim Masters also notes Roby is only thirty-six years old, has a high school education, and is currently enrolled in a four-year college degree program. Trim Masters argues it is not enough for an ALJ to simply set out what he or she considered in reaching a determination. "The [ALJ] should be ordered to at least briefly address those factors and to explain why each factor does or does not support a finding of permanent total disability." Trim Masters requests this Board remand the claim to the ALJ with instructions to enter an award of permanent partial disability benefits enhanced by the three multiplier or with directions for further findings of fact regarding his finding of permanent total disability.

As the claimant in a workers' compensation proceeding, Roby had the burden of proving each of the essential elements of her cause of action, including the extent of her disability. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Roby was successful in that burden, the question on appeal is whether

there was substantial of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

Authority has long acknowledged in making a determination granting or denying an award of PTD benefits, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

With that said, the ALJ must provide a sufficient basis to support his or her 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). This Board is cognizant of the fact 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). We also find instructive the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004), where the claim was remanded to the ALJ "for further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review."

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:

> 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).

Accordingly, those portions of the May 13, 2013 opinion and order and the June 10, 2013 order on reconsideration by Hon. William J. Rudloff, Administrative Law Judge, finding Roby permanently totally disabled and awarding PTD benefits are **VACATED**. This claim is **REMANDED** to the ALJ for entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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