

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 10, 2021

CLAIM NO. 201459017

DELTA GLOBAL SERVICES

PETITIONER

VS. **APPEAL FROM HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE**

MICHAEL BLAUROCK
and HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

STIVERS, Member. Delta Global Services (“Delta”) seeks review of the May 2, 2021, Opinion, Award, and Order on Reopening of Hon. Christina D. Hajjar, Administrative Law Judge (“ALJ”). The ALJ found Michael Blaurock (“Blaurock”) experienced a worsening of his impairment resulting in the award of permanent total

disability benefits (“PTD”) beginning October 21, 2019. Delta also appeals from the May 27, 2021, Order overruling its Petition for Reconsideration.¹

On appeal, Delta challenges the ALJ’s decision on four grounds. First, it contends the ALJ ignored or mischaracterized Dr. Frank Burke’s testimony resulting in an award contradicted by the medical evidence. Delta also contends the ALJ erroneously labeled its description of Blaurock’s work schedule and work activities as “misleading.” Next, Delta argues the ALJ erroneously concluded Blaurock’s work activities at Home Depot, a subsequent employer, did not worsen his right knee condition. Finally, Delta maintains the ALJ erroneously imposed liability upon it for Blaurock’s PTD benefits and medical benefits.

BACKGROUND

On February 4, 2015, Blaurock filed a Form 101 alleging November 18, 2014, and November 25, 2014, right knee injuries while in the employ of Delta (Claim No. 2014-59017). Blaurock also filed a Form 101 alleging he sustained a June 30, 2008, neck injury while in the employ of Comair, Inc. (Claim No. 2015-00149). The claims were subsequently consolidated.

On September 11, 2015, Hon. William Rudloff, Administrative Law Judge, entered an Opinion and Order dismissing Blaurock’s cervical injury claim (Claim No. 2015-00149) against Comair, Inc., but finding he sustained November 2014 work-related right knee injuries and awarded PPD benefits based on a 2% impairment rating enhanced pursuant to KRS 342.730(1)(c)1. Blaurock appealed the

¹ In accordance with Blaurock’s response to the Petition for Reconsideration, the ALJ corrected the Opinion to reflect his date of birth is April 20, 1956.

decision in Claim No. 2015-00149, and in a February 26, 2016, Opinion this Board affirmed in part, vacated in part, and remanded.² No appeal was filed in the case *sub judice*.

On October 21, 2019, Blaurock filed a Motion to Reopen seeking an increase in income benefits for the 2014 right knee injury. He attached numerous medical records, the previous decision and award, pleadings, and his affidavit. Blaurock asserted his physical condition had deteriorated to the point that he is unable to return to work. Blaurock represented he is scheduled to undergo an independent medical examination (“IME”) by Dr. Burke and anticipated he would receive an increased impairment rating. Delta objected to the Motion. By Order dated November 26, 2019, Hon. Douglas W. Gott, Chief Administrative Law Judge, sustained the Motion finding Blaurock made a *prima facie* case for reopening and ordered the claim assigned to an ALJ for a decision on the merits.

Blaurock testified at a January 24, 2020, deposition and at the March 4, 2021, Hearing. Blaurock, a high school graduate, testified his last employer was Home Depot where he worked until approximately four months prior to the deposition. He believed he began working for Home Depot some three years earlier.

At Home Depot, he worked as a stocker which he described as follows:

Q: Just kind of tell me, briefly, in your own words, kind of what you did day to day there, at Home Depot, as a stocker.

A: I would come in at night and they would have – trucks would come in and they would fill the trucks –

² Because our decision in 2015-00149 does not relate to the injuries in question, it will not be further addressed.

take the inventory off the trucks and they would put it on carts with wheels. And we took them into the aisles. They have numbers on them. And take them into the aisles and distribute it in those aisles.

Q: In the aisles or on to the actual shelves?

A: Shelves.

Q: Okay. I've been in Home Depot in my life, so I know there's several – were you working in a particular Home Depot in town, or?

A: Harrodsburg Road.

Q: And would you stock every aisle or just a particular department?

A: We would have throughout the store, but I sort of knew which ones that were not very hard and had the lightest material, so I would always grab those carts. So there was like three departments that I would stack in, which was plumbing, electrical – and what was the other one? Like tools and stuff like that.

Q: Hardware?

A: Hardware.

When Blaurock initially sought employment with Home Depot, he advised its personnel he could not work in the paint department due to the weight lifting requirements in the department. In the plumbing department, the heaviest item he unloaded and stocked weighed approximately twenty pounds. He believed the heaviest item he lifted in the electrical department was a saw weighing approximately ten pounds. In the hardware department, the heaviest item consisted of boxes of nails, bolts, and screws weighing approximately three pounds. Blaurock clarified there were heavier items within the hardware department which he was not required to lift.

Q: So obviously you just said the nails and the bolts and the little items come in little boxes that you said weighed about three pound. Is there anything in hardware that weighed, you know, 10, 20 pounds at all?

A: Yeah, but most of that stuff, they had like forklifts. They would put that stuff on pallets and they would put that up high. It's not stuff that we handled, because the carts were only made for lighter stuff. And they had designated people that worked the forklifts and stuff.

Other workers unloaded the trucks and put items on the cart. He then pushed the carts to the aisles within the store. While in the aisles, he stocked shelves from just above floor level to over his head. Regarding his use of a ladder to stock the shelves, he testified as follows:

Q: Would you have a ladder or something?

A: They had ladders, but I couldn't use the ladders because it tended to really hurt my knee. Not going up as much as going down the ladder. They're really high ladders, like 10, 12 feet; they go all the way to the top. And every time I would go down the ladders, after several times, my knee would start hurting. So I know they had lifts that we would use. You drive around in these lifts and you put the stuff on the lifts and you wouldn't have to do any lifting or anything. You just bring them up and it was like belly level and you'd stack the stuff up, so you didn't have to squat or anything and I would tend to use those. I would wait until one was available before I would stock high stuff.

Q: So obviously based on what you just described to me about how – about what you noticed hurt your knee, you did at least try to use the ladders at some point, didn't you? Or is that fair?

A: To do my job, and if the others weren't available, I had to try.

Q: Sure. So you would try to – you would avoid it when possible and use the lift when possible?

A: Yeah, because I knew what it would do to my knee.

Q: Sure. How often would that happen where you wouldn't have a lift available or you were forced to use a ladder?

A: Maybe once a week.

Blaurock described the problems he experienced while descending a ladder:

Q: And you said on your way down the ladder, you would notice what in your knee? What would happen?

A: It just gets sore and – it's hard to explain it. As I start to bend it and support it, it would – I could feel it in the knee.

Q: Which part of the knee? Front, back, left side, right side?

A: Lower part of my knee, kneecap –

Q: On the front or the back?

A: On the bottom and –

Q: On –

Ms. Izzo: Hold on. Let him answer.

A: Just a feeling I had in my knee and I – like right now, I can't point to it, I guess, but even right now it's my bottom left side. I can touch it and it's sore to touch.

Q: The bottom left side of your right knee?

A: Yeah. Yeah, when I –

Q: On the front?

A: On the front. On my kneecap. And it tends to go all the way through my kneecap, you know, into my knee.

Q: So when you're on your way up the ladder and you're planting that knee and you're pushing up to go up to the next step, you don't notice anything there, it's when you're coming down?

A: Mostly. And I tend to make a half step. I don't make a full step down to – so I don't have to bend my knee, I do a half step, and I've trained myself to do that. Do you know what I'm saying?

He recounted the problems he incurred upon squatting to stock.

Q: Sure. No, but I understand. Other than going down ladders, what other stuff at Home Depot did you notice aggravated or –

A: Squatting. When I have to squat down and be squatted for more than a few seconds and then when I would stand up, I couldn't use this leg to stand up. I usually use all the weight on my left leg. And as the night progressed, I use my left knee, or my left leg more, to stand up.

Q: So when you would be stocking the lower part of the shelving, would you get down on your knees and do it? How would you do it?

A: I actually laid down on the ground.

Q: So you would lay, what, on your side?

A: Yeah.

Q: And then to get up, you're saying you would mainly use your left leg?

A: Yeah.

Q: But you did say that squatting, when you did squat, it would hurt your knee?

A: Yes.

Q: And same question I had before about the ladder, how frequently would you find yourself squatting? On average.

A: An average, half an hour a night.

Q: How many days a week, or nights a week, were you working?

A: Five

Blaurock also experienced knee problems walking throughout the store. His leg was swollen at the end of each night. He testified the carts used to transport the items to each aisle were fairly easy to push and if he received a cart containing heavier weight, he would secure someone to help him move it into the aisle.

Initially, Blaurock worked six hours a day but because of knee problems, his hours were reduced to four per day. He worked four hours daily during the last two years at Home Depot. Occasionally, he worked six hours a night. However, he worked no more than 24 hours a week as part-time employment was restricted to that weekly amount. In cases where he worked a six-hour shift, he worked four days a week. Blaurock estimated he worked between 20 and 24 hours a week. His knee would swell while working at Home Depot especially when he worked six hours a day. He iced his knee on any occasion he experienced swelling. He stopped working at Home Depot due to an aneurism which developed in his leg necessitating surgery. Blaurock denied experiencing a work injury while working for Home Depot.

Blaurock testified he worked for Delta for almost ten years. The job at Delta entailed the following:

Q: What did you do as a lead?

A: Loaded planes and pushed planes and de-iced. Did all the ground crew stuff.

Q: When you say loaded planes, you mean actually bringing them in from the runways or load stuff into the planes?

A: No, we actually brought the planes in and parked them, and then we also located the planes with the luggage.

Q: So would you take the luggage off of those carts and put them on the –

A: Belt loader and into the plane.

Q: Right. And there's actually several references to different dates about when you had your right knee injury. From the best I can tell from the Order from Judge Rudloff, the injuries to your knee were on November 18th, 2014 and November 25th, 2014. Does that sound about right, that in 2014 is when you hurt your knee, at least? Maybe not those specific dates.

A: I can't remember. But if that's what he's got, I'll go with that.

He described the November 2014 injuries as follows:

Q: Sure. And what were you doing when you hurt your knee?

A: I was in the bottom of a – we have two types of planes. One had a belly load and there was only like a four foot clearance from the floor to the roof, and you either had to bend over or get down on your knees. And you had two people in the plane and they would take the luggage and slide it. We had stainless steel floors and they would slide. You would side it maybe 10, 15 feet, slide them. And a lot of times we'd crouch down on your knees and grabbed them and tossed them. You get leverage with your legs squatted because you couldn't stand up, and it was really awkward work.

Q: And is that what you call throwing the bags? There was some reference previously to throwing bags; is that what you would call, or no?

A: Yeah, tossing it. Well, you would get – you would take it about six inches off the ground and give it a – sort of like doing hay bales.

Q: And so you were doing that when you hurt your knee?

A: Yes. That was the first day.

Q: What about the second?

A: Okay. I asked – I told my supervisor that my knee was hurting real bad. So he had me get out of the plane and just load on to the belt loader the rest of the that day, which was a couple of hours that day. And then the next morning I still had soreness in my leg, so they put me in the bag room so I could just take them off and put them into the carts. There was no doing that – where I had to bend my knee and stuff. And I'm not sure how long I had been on that, maybe an hour or so, and I was walking to the computer room and halfway there my knee just blew out. I mean, I just – I couldn't put any weight on it at all. I didn't fall over, but And then I had to call the guy to come and get me, and they got an ambulance there.

Q: So you were just walking to the computer room, just casually walking?

A: Yeah.

Q: On a flat surface?

A: Yes.

Q: And you just said your knee kind of gave out?

A: Yeah, it just – it just went out. I tried to put weight on it and I couldn't put any weight on it. Just not even touch the ground hardly, without a lot of pain.

Q: And did you have surgery at some point after that?

A: Yes.

Q: Just one surgery?

A: Yes.

Blaurock returned to work at Delta following surgery for the November 2014 injuries. He stopped working for Delta approximately three and half to four years ago. He provided the following explanation for quitting Delta:

A: They gave me a – because I couldn't work out on doing the planes anymore, and they gave me a lead position that was more desk stuff, work on computers and stuff, and I couldn't grasp the computer part of it, the weight and balance, particularly. They sent me to two classes, one class and then a re-do class on the same thing, and I failed them both. And after that, they sort of gave me an ultimatum, either they were going to let me go or I could retire early so I could retain my flight benefits, which was the only benefit we actually got through them. We didn't get a pension or anything, but we did get flight benefits.

Blaurock experienced no further knee injuries while working at Delta.

He discussed the right knee symptoms he experienced while working for Home Depot.

Q: And you've testified that when you went back to work after leaving Delta Global Services for Home Depot, you would have, I think as you put it, pretty regular swelling in your right knee during shifts?

A: Yes.

Q: Would that pretty much be a daily occurrence as far as when you were working a shift? Would you have you [sic] it every shift, or just some shifts?

A: Off and on. I mean two times, three times a week, to where I would have to ice it down. I always had swelling, pretty much every day, but to where it really got painful and it would keep me up at night. Especially when I'm in bed, I try and slide my leg around and the friction of the sheets grab my leg when I'm trying to, you know, move position, really hurt my knee. I can feel a lot of pain.

Q: Did the symptoms you were having with your knee, did they get better, worse, or stay about the same while you were with Home Depot?

A: Worse. When I was working the six hours, it got a lot worse. And then they put me on the four, and not as frequent. With my knee, it's time. The more time I'm on my knee, the worse it gets.

Q: Okay. You mentioned swelling several times; what about any other symptoms that you've had that have gotten worse since you stopped working for Delta Global Services?

A: Occasionally my knee will actually go out on me. I'll be walking and it will just give out, you know, just And once it does it, it will do it for the rest of that day. I mean, I'll have to consciously walk different, straight legged, almost peg legged, because it seems like just a little bit of bending on that, it would just give out. And I never fell from it, but it's kind of hard to explain how that just And once it did it, it would do it for – I would have to, in my head, remind me not to bend my knee.

Q: Did that ever happen while you were at work at Home Depot?

A: Not just at work. Like before I got to work it did it.

Q: Well, for example, would you ever be walking down the aisles with the cart or walking from one place to another at Home Depot in the aisles and you have that instability in your knee and it would give out?

A: Yes.

Q: Is that something that got worse, also, for several years you were at Home Depot, or did it stay about the same?

A: Like I said, the more I work, the worse it gets.

Q: So in other words, would the answer to that be a yes, that over time it got worse while you were working at Home Depot?

A: Yes.

Q: So now you mentioned swelling, instability or giving out in the knee, any other symptoms that have gotten worse since you stopped working for Delta Global Services?

A: Other, just daily pain. I always feel pain in it all the time. But how – you live with it so long you get used to

it, if you know what I mean. You get used to the pain so it doesn't bother you as much, if that makes any sense.

He estimated his right knee pain during the last four months ranged between 3 to 5 on a scale of 1 to 10. While working for Home Depot, the pain ranged between 7 or 8. While working for Delta, the pain was between 3 to 5. Whenever he is active, his knee swells. He takes aspirin since he is unable to take anti-inflammatories because he has one kidney. Blaurock had not sought work or been injured since quitting work at Home Depot. He explained why he believes he is not capable of returning to any type of work.

At the Hearing, Blaurock testified he worked for Delta approximately a year after the 2014 injuries. He stopped working because he was unable to perform the work. When given the option, he retired with benefits. After leaving Delta, he did not work for a year. He recounted the symptoms he experienced between the time he stopped working for Delta and began working for Home Depot.

Q: All right. Let's go now, then, I'd like to discuss what your symptoms were after you were no longer working for Delta, but before you started working for Home Depot. During that period of time, what sort of symptoms were you feeling in your knee?

A: Swelling, things that I would do just around the house and stuff. I would have to watch what I was doing. And the – anything that I tried to do, like I used to play tennis a lot, I can't play tennis anymore because it really hurts my knee. And mowing, I – I started – I trim around the yard and stuff, then my wife finishes the inside. I just do the parts that she might cut down stuff that shouldn't be cut down and maybe stay away from stuff that I try and do, but I – I can't do the things that I used to do. You know, I pretty much sit a lot and I do housework and cook dinner and stuff like that. That's about all I can do without my – aggravating my knee.

...

Q: ... How often did your – did your knee swell up before working at Home Depot?

A: At least once a week I would have to put ice packs on it, sometimes twice a week and I still do.

Q: Would there be times where – that you would experience swelling in your knee where you would not put ice packs on it?

A: Yeah, I mean, to the extent – it's the – sometimes it would swell up more than others. You know, if I went to the mall with my wife or something and I walked in the mall and eventually I'd have to sit down and let her go on and I said I'll just [sic] here and wait for you, but that's when it would swell up the most. When I'd try and do a little more than I should have that I know I – you know, what I mean? Well, I shouldn't have walked so much in the mall, you know, so it would swell up more.

Q: Had the frequency, the numbers of times that it would swell up increased since you left Delta and before you starting [sic] work at Home Depot or stayed the same or decreased?

A: Well, it's hard to say that because I've done less. So the swelling, probably about the same, but I – my activity has decreased more. Does that – do you understand what I'm saying? I – the only reason it's not swelling as much is because I'm doing less.

Q: All right.

A: And I just – my knee going out on me, just going out, has been more often.

Q: Is that the period before you started working at Home Depot it became more often?

A: Yes.

Blaurock began working at Home Depot in or around January 2017 because its personnel allowed him to work part-time and accommodated his restrictions. He was offered employment elsewhere which he declined when

informed of his job duties and he would have to work overtime. Blaurock recounted the accommodations Home Depot offered him.

Q: Now, going to Home Depot, when you started working there, what sort of accommodations did they offer you?

A: They always told me, you know, if it starts bothering you, go to the break room, take a break. They gave me – instead of having to climb stairs and stuff, because I told them I had trouble with stairs, that I couldn't climb up and down stairs more going down stairs than up stairs. And not just ladders, I'm talking stairs, you know, and when I go to the doctor, I had stairs to go down and up and – if I didn't use the elevator – and that would be [sic] bother me. So I'd have to take like a half a step, half a step, to avoid extending that knee out and they always accommodated me. That's why I, you know, when everybody started talking about bringing them into it, they bent over backwards. They gave me a lift so I wouldn't have to climb stairs and they actually purchased another one because there were other people there that had handicaps that they accommodated. They were so good. And if I had to take off a couple of days, I'd call in and say my knee is sore this day or two days in a row they would – they would never give me any hassles with it. They always just bent over backwards for me that I wouldn't have to be sore on my knee.

He denied injuring his right knee while working at Home Depot. He believed his current symptoms are the same as when he stopped working at Home Depot. Because he has not been as active, his knee does not swell as much. Currently, his knee swells approximately once every two weeks. He avoids activities which he normally performed in the past. He believes his knee is “definitely worse” than it was post-surgery.

Blaurock testified that “right off the bat” he stopped using a ladder at Home Depot because he developed knee soreness. He requested a lift be provided for

him to use, which he estimated was provided to him approximately one month after he began working at Home Depot. After obtaining the lift, he did not use a ladder. There are no stairs at Home Depot for him to climb.

Delta introduced Dr. Ralph Crystal's vocational report, the records of Dr. Peter Ko, Blaurock's family physician, and Dr. Rick Pound's Functional Capacity Evaluation report. It also introduced the report of Dr. Daniel Primm generated as a result of a February 18, 2020, evaluation and the deposition of Dr. Burke. Blaurock introduced Dr. Burke's medical report generated after a November 18, 2019, examination.

In the May 2, 2021, decision, the ALJ noted the parties agreed Blaurock does not retain the physical capacity to return to work. She also noted they agreed he has increased impairment; however, disagreed as to the amount of the increase. After summarizing the lay and medical evidence, the ALJ provided the following *verbatim* findings of fact and conclusions of law in finding Blaurock sustained a worsening of impairment due to the injury:

...

Both Dr. Primm and Dr. Burke agree that Blaurock had a 2% impairment rating at the time of the initial decision and that since then, his condition has worsened, and he now has a 10% impairment rating. Dr. Primm attributes 2% to the original injury; 2% to the aging process, and 2% to an aggravation or further arousal of his chronic degenerative symptoms based on his job description at Home Depot. Dr. Primm attributes the final 4% of the 10% impairment to his original injury.

Dr. Burke acknowledged that 2% of the impairment could possibly be attributed to his work activities at Home Depot after his injury and award in

the sense that his work at Home Depot would account for about 20% of the time he was weight bearing on his injured knee. However, Dr. Burke did not agree with apportioning any impairment to his work at Home Depot and natural causes, as he stated that the pathology would not have been there unless the original event had occurred.

Dr. Burke dismissed the argument that a portion of the impairment is age related, since he stated it is not relevant once you have an injury to the joint. He also disagreed with the characterization that the work activities at Home Depot were considered cumulative trauma. Additionally, in Dr. Burke's deposition, Defendant characterized Blaurock's work at Home Depot as three years, five nights a week, 20-24 hours a week of squatting, climbing, and walking. However, this ALJ finds that such characterization of the work activities is misleading. Blaurock described he only squatted for about 30 minutes a night, and while doing so, he laid on the ground, and he got up by primarily using his left leg. He also rarely used a ladder, and when he did, he took it one step at a time and kept his right knee straight. Additionally, at least some of his walking occurred while pushing a cart. He stated that Home Depot was always aware of his injury, and accommodated him by allowing him to take breaks as needed. He also decreased his working hours from six to four hours a night due to pain which has continued and remained active since the initial injury.

This ALJ finds that Blaurock has experienced a worsening of impairment due to the injury and that Burke's impairment rating of 10% due to the injury is most convincing. Blaurock's knee condition was pre-existing and active when he started working for Home Depot. He continued to have pain and swelling after his injury before, during and after his work with Home Depot. Although his work activities increased his pain level, he also described worsening pain simply by repositioning his leg in bed at night.

Dr. Burke's testimony was clear that but for the injury, his knee would not have deteriorated so quickly with his regular activities, including his work activities. Even if 2% of the increased impairment could be due to his work activities at Home Depot, even Dr. Primm

agrees that the initial work injury caused twice as much worsening of impairment as did the work at Home Depot since the Award. This ALJ finds that any increase in pain that may have occurred as a result of his work activities at Home Depot is not sufficient to constitute an intervening event. Further, Dr. Burke's opinion was more convincing that but for the initial injury, he would not have had the increase in impairment. Thus, this ALJ rejects Defendant's argument that Home Depot is liable for medical benefits simply because it was Blaurock's last employer.

The ALJ provided findings of fact and conclusions of law finding Blaurock permanently totally disabled which will not be provided, as the finding of permanent total disability is not in dispute.

Delta filed a twenty page Petition for Reconsideration primarily asserting the same arguments it now makes on appeal. In overruling Delta's Petition for Reconsideration, the ALJ furnished additional findings set out in relevant part, *verbatim*:

Other Issues Raised in Petition

Having reviewed Defendant's petition for reconsideration, the undersigned notes that it is simply an impermissible re-argument of the merits of the claim, and the petition for reconsideration is, therefore, OVERRULED. However, since Defendant argues that the ALJ did not consider or had an inadequate understanding of the evidence, this ALJ will address the specific evidence in the record which led to her decision.

As a general matter, this ALJ reviewed and considered Dr. Burke's entire deposition transcript, and the other evidence of record in making her initial decision. In the interest of brevity, this ALJ summarized Dr. Burke's testimony in her opinion, and admits that her summaries ineloquently oversimplified Dr. Burke's testimony. However, this ALJ still finds that the initial work injury, and not the work at Home Depot, caused his current physical condition, inability to work, and permanent total disability.

Blaurock did not “Admit” Home Depot’s Liability

This ALJ does not agree with Defendant’s argument that the motion to join Home Depot was an “admission” by Blaurock of Home Depot’s liability. Section 17 of 803 KAR 25:010 specifically excludes CR 36, “Requests for Admission,” from application to practice before the administrative law judges or the Board. Thus, this ALJ does not consider the Motion to Join an “admission”. Rather, the decision not to file a Form 101 against Home Depot could indicate that after further review of the evidence, Blaurock did not think it could succeed in a case against Home Depot. Thus, this ALJ has considered the motion but did not find it to be persuasive evidence.

Burden on Reopening

...

Here, Blaurock has met this burden. Dr. Burke’s and Dr. Primm’s opinions prove that Blaurock’s knee condition worsened since the injury. Although the doctors disagree as to what percentage of the worsening is due to the initial injury, Dr. Primm agreed that at least some of the worsening is due to the injury itself. This ALJ ultimately relied on Dr. Burke’s testimony that all of the worsening was due to the initial work injury. This ALJ also found that because of such worsening, he is now permanently and totally disabled.

Defendant argues that Blaurock sustained cumulative trauma while working at Home Depot, and that because the last employer is responsible for income and medical benefits for the full extent of a cumulative trauma injury, Defendant’s liability is extinguished. However, it has long been held in Kentucky courts that a worker is entitled to be compensated for all the harmful changes that flow from a work-related injury that are not attributable to an independent, intervening cause. *Elizabeth Sportswear v. Stice*, 720 S.W. 2d (Ky. App. 1986). As Blaurock’s injury was pre-existing and active when he started working for Home Depot, this ALJ believes it is necessary for Defendant to prove that the Home Depot cumulative trauma injury was an independent, intervening cause for Defendant to be

relieved of liability, but Defendant has not met that burden.

This ALJ has relied on Dr. Burke's testimony to find that there was no independent, intervening event that caused his knee condition. Dr. Burke's testimony was clear that but for Blaurock's initial meniscus injury, Blaurock would not have had a narrowing of the disc space from his post injury activities, including his work at Home Depot. Although his work activities at Home Depot could have contributed to the narrowing and worsening, Dr. Burke stated that such worsening would have occurred with regular every day activities, including just walking. At most, 2% of the current 10% impairment rating could be due to a progression of the narrowing from his physical activities at Home Depot, but such activities did not independently cause his worsening condition or permanent total disability.

This ALJ also did not believe that the 2% impairment rating could be relied upon as substantial evidence of cumulative trauma as Dr. Burke had an inadequate understanding of his work modifications at Home Depot.

The Initial Injury caused the Current Condition

Defendant argues that the ALJ mischaracterized Dr. Burke's testimony on Page 6 and 9 of the Opinion when she stated: "Although [Dr. Burke] stated [Blaurock's] Home Depot work could be considered 20% of his total time of weight bearing, Dr. Burke did not agree with apportioning the impairment to his work at Home Depot and natural causes, as the pathology would not have been there unless the original event had occurred." Defendant further took issue with the ALJ's statement on page 9: "Dr. Burke did not agree with apportioning any impairment to his work at Home Depot and natural causes, as he stated that the pathology would not have been there unless the original event had occurred."

This ALJ agrees that she overly simplified Dr. Burke's testimony and her conclusion. However, Dr. Burke's testimony taken as a whole supports a finding that his work injury, and not his Home Depot activities, caused his current condition.

Defendant argues that Dr. Burke “clearly and unequivocally apportions 2% of his overall 10% impairment rating to Blaurock’s work activities with Home Depot.” Defendant points to Dr. Burke’s testimony on page 42 when Defendant asked Dr. Burke:

“Okay, so to summarize that, your rating today for the –for the Home- for the worsening of the condition in relation to the Home Depot activities is 20 percent of 10 percent or 2 percent?” Dr. Burke answered “Correct.” This ALJ agrees that by looking only at this exchange on page 42 of Dr. Burke’s deposition, Dr. Burke agreed that Home Depot’s work activities contributed 2% to the 10% impairment rating.

However, Dr. Burke, on more than one occasion, and throughout his testimony, qualified this answer, by noting that his knee condition would not have worsened but for his initial work injury. Dr. Burke explained it is important to understand that it is not a repair, because it was not normal following the event. He stated that is why you get a gradual increase in pain, swelling and mechanical symptoms from the time of his surgery. Burke Tr. p. 21.

Dr. Burke admitted that when Blaurock had his surgery, it is possible to have microtrauma to the same knee going forward post surgery, and that is the reason they recommend lifestyle modification in an attempt to mitigate it. However, Dr. Burke reiterated that the reason he had the recommendation (for the lifestyle modifications) is because he had an active problem. Burke Tr. p. 63.

Further, he noted that it was all of Blaurock’s activities, including just living, that would have caused his progression. Defense counsel asked, “would the 2 percent rating that you have provided already for the Home Depot activities, would that be considered, I’m going to use the word again, a cumulative trauma or repetitive trauma, in your opinion?” Dr. Burke responded:

...that's what I would think he would do. I mean again, it isn't talked about that way, but I think that would ... take in his Home Depot and all the other activities that would ever have that might do that, not just Home Depot. Again, I keep coming back to the point he would never be here with this question being asked if he hadn't had the loading, twisting thing that damaged that meniscus in the first place, it would be absent, a non problem, but he does have a problem.

Burke Tr. p. 64.

Defense counsel asked Dr. Burke if he could break down and attribute the impairment to the different causes they discussed, the age, work at Delta Global Services, work thereafter at Home Depot and just natural causes. Dr. Burke responded:

...I believe that this is – a - this is a relation – it started – the clock started there and that's where - because he didn't have it before. And so, I don't think that - that would be pathologically accurate, you know as far as pathology is concerned. Yeah, it wouldn't have been – it wouldn't have been there unless the original event had occurred.

Burke Tr. pp. 29-30.

He agreed the 2% of the 10% is a reasonable theory, but only in the sense that Blaurock might have spent about 20% of his time weight bearing while he was working. Dr. Burke disagreed that the theory was pathologically accurate. He repeatedly testified that Blaurock would never have had the progression had he not had the initial meniscal injury. Defense counsel asked Dr. Burke:

So within a reasonable degree of medical probability do you believe that Mr. Blaurock's work over the three years performing the physical activities that we've already addressed multiple times, do you believe that that physical activity

would have or did result in any progression of the narrowing of the joint space of his knee?

Dr. Burke responded:

I think that that or any activity whatsoever would have contributed to it, just getting up and walking around and doing his thing. At this age with the progression over such a very short period of time, so this would just one of - although he did it 25 hours a week, so whatever – however many other hours a week, other than sleeping and not weight bearing, they contributed to it too. So, I think being frankly being alive and weight bearing contributed to the – to the picture of his knee from the time that his knee got injured and from that point forward.

Burke Tr. p. 25-26.

Blaurock's condition was pre-existing and active before working for Home Depot

Blaurock's condition was active prior to his work at Home Depot. Blaurock described he was unable to perform many activities before he ever worked at Home Depot. He could no longer play tennis, and his wife had to help him mow the yard. He stated that his knee would swell after walking with his wife at the mall. He had swelling at least once or twice a week, and he had to use ice packs. Hearing Tr. pp. 15-16. His knee was going out on him more often prior to working for Home Depot. Hearing Tr. p. 17. He also described he only worked at Home Depot part time, as he could not work full time anymore. Hearing Tr. p. 19.

Dr. Burke's Understanding of Blaurock's Work Activities at Home Depot

Dr. Burke did not have a clear understanding of how Blaurock performed his work, and was asked about activities that exceeded Blaurock's actual work activities. In Dr. Burke's deposition, Defendant described Blaurock's work at Home Depot as three years, five

nights a week, 20-24 hours a week of squatting, climbing, and walking. Although mostly correct, this ALJ found this description to be misleading, as Blaurock significantly modified his climbing and squatting while working at Home Depot due to his existing knee pain.

Blaurock described his activities at Home Depot, where he worked for a little less than three years, from January 2017 through about October 2019. Blaurock Tr. p. 7. Hearing Tr. p. 19. Blaurock described he only squatted for about 30 minutes a night, and while doing so, he laid on the ground, and he got up by primarily using his left leg. Blaurock Depo Tr. p. 15. He also rarely used a ladder at work, and when he did, he took it a half step at a time and kept his right knee straight. Hearing Tr. pp. 26-27; 34; Blaurock Tr. p. 14. He stated that Home Depot provided him with a lift “right off the bat” when he realized his knee would hurt if he tried to use a ladder. Hearing Tr. p. 28. Blaurock clarified his deposition testimony (on page 13) that he had to use a ladder once a week due to the unavailability of a lift. He stated that was only when he first started there, and they got the lift about a month after working there. Hearing Tr. p. 29. He walked every shift, primarily while pushing a cart, and it was not very heavy because he chose the carts with the lighter items. Blaurock Tr. p. 16.

Blaurock explained that Home Depot was always aware of his injury, and accommodated him by allowing him to take breaks as needed. Hearing Tr. p. 21. They allowed him to work in the lighter departments. Blaurock Depo Tr. p. 9. He also decreased his working hours from six to four hours a night after the first year due to pain which has continued and remained active since the initial injury, and he never worked more than 24 hours per week. If he worked six hours a day, he would only work four days that week. Blaurock Tr. p. 18.

Dr. Burke’s understanding of the work activities was that Blaurock did not attempt any lifestyle modifications. Dr. Burke stated, “So, in his case, this thing started at the time of his original event and progressively had those mechanical symptoms, so he didn’t do those lifestyle modifications at least the way the Academy- the American Academy of Orthopedic

Surgeons would suggest if you have a known injury like this, including working.” Burke Tr. p. 24.

Defense counsel asked about Blaurock’s work activities, stating:

[Blaurock] testified that he had to do, as part of stocking those shelves, squatting, he had to climb ladders, both up and down ladders, he had to walk quite a bit around the aisles to get to each shelf. Would ...these activities be something that would contribute to the narrowing that just talked about of the knee cartilage?

Dr. Burke responded: “Yeah, I think that any activity that loads and impacts his knee has the potential for contributing to the progression.” He stated that it’s possible that the length of time, particularly, and the frequency could contribute to it.” Burke Tr. p. 18. Defense counsel described the frequency and length of time as:

[Blaurock] testified that he worked for three years, he worked five nights a week, four to six-hour shifts for each ... night of work....I think he testified 20 to 24 hours a week was what he came—came to. At each shift he was doing at least some squatting, some climbing and quite a bit of walking around the Home Depot... So with that in mind, three years, five nights a week, 20 to 24 hours a week, squatting, climbing and...walking, would you expect that to have some pathological affect on his ...right knee?

Burke Tr. p. 18-19 (with Blaurock’s counsel objecting to the form of the question).

Dr. Burke responded:

Yeah...I think that once you lose the meniscus, once you lose that – that structure, once it does whatever it has done to the articular cartilage at that point it’s always interesting really it is that you

can look at it and it looks fine, but it isn't fine...But he's had a meniscus that got torn in the load and twisting and it swelled and the knee is now messed up. So, now three or four years later of walking around on a knee like that those are those lifestyle modifications that we're talking about that – that didn't occur except maybe in the 20-25 hours a week, you know, it's a part-time job it sounds like.”

It's still some form of walking on it, some form of using it. So you know, once you end up developing those symptoms you're continu[ing] to do without those, ...obligatory lifestyle modification[s] you're going to load the knee in that area more with it's potential on longer term consequences.

Burke Tr. pp. 19-20 (emphasis added).

Dr. Burke recommended one-legged squats as follows: if you do a squat, do one-legged squats so you rely on your good leg and bring the other one down, and you rely on your good leg to get out of the spot, and bring your bad along with it as you're getting up. Burke Depo Tr. p. 16. Defendant did not ask Dr. Burke about Blaurock's squatting modifications.

Dr. Burke explained that Blaurock had 1 mm of remaining joint space, and that his cartilage space in his knee had narrowed. Dr. Burke stated that the activities that they discussed, including crawling, climbing, squatting, and twisting on the knee, would contribute to a progression of narrowing. Burke Tr. p. 17.

Defendant counsel asked:

You've already testified that these activities, the crawling, climbing, squatting, the twisting of the knee, that – that Mr. Blaurock testified that he was doing at work. You've already testified that this, at least to some degree would contribute to a progression of the

narrowing in the knee, is that – is that a fair statement?

Dr. Burke agreed it could. Hearing Tr. p. 22. Defense Counsel asked: “Would ... the activities at Home Depot for those three years, the crawling, climbing, squatting or twisting of the knee, have contributed to the [impairment] of his knee?” Dr. Burke responded:

I—I think that the activities itself it’s potentially possible for that to have contributed to it, you know, because again, it’s a loading event. What I – what I never forget is is that he wouldn’t have had that problem if he hadn’t had the cartilage tear originally

Burke Tr. p. 23.

Defendant suggested that Blaurock was performing crawling and twisting activities at work, which were not mentioned in Blaurock’s testimony. The questioning also indicated Blaurock was performing ladder climbing and squatting without modifications. Thus this ALJ found that Dr. Burke’s testimony concerning apportionment was based upon an exaggerated description of his work activities.

Cumulative Trauma

Cumulative trauma can be proven by showing the nature and duration of the work probably aggravated a degenerative disc condition to the degree that it culminated in an active physical impairment sooner than would have been the case had the work been less strenuous. *Haycraft v. Corhart Refractories*, 544 S.W.2d 222 (Ky. 1976). This ALJ did not find substantial evidence that the Home Depot activities culminated in his active impairment, as Blaurock already had an active physical impairment prior to working for Home Depot due to his initial injury. Such active impairment at that time prevented him from returning to suitable employment. For example, he explained that he could only work part-time for Home Depot due to his knee condition. Additionally, Dr. Burke found that simply walking and his every day activities could have and did contribute to his progression.

Although the extent of his work activities are not clear, there is no dispute that Blaurock walked while working at Home Depot. Dr. Burke also explained that with the loss of the meniscus, walking alone, by itself, “can get you with time,” and these things all [increase] that pressure acutely with each one that you are doing, the load twisting in particular. Burke Depo Tr. p. 16. However, simply because he performed activities at Home Depot that could lead to progression, does not mean that he sustained “cumulative trauma” from his work activities. As Dr. Burke stated, “he’s going to walk.” Burke Tr. pp. 30. He indicated that any weight bearing activity, including his everyday activities (such as walking) could contribute to the progression.

This ALJ acknowledges that Blaurock’s knee symptoms worsened while working six hours a shift, but when he went to four hours, it was not as frequent. He acknowledged that the more he was on his knee, including while at work, the worse it gets. Blaurock Tr. p. 28. He described his knee would go out on him at Home Depot, but it would also do so before he went to work. Blaurock Tr. p. 29.

When asked yet again about apportionment, Dr. Burke stated that his work “probably had some contribution” and “maybe” could be attributed to his work and that you “might give 20% of the 10% to it.” He explained that “If you went down the amount of time that you’re talking about and in his total universe of weight bearing time it might be around 20 percent, maybe, if you do it that way.” Burke Tr. p. 33.

Dr. Burke disagreed with Dr. Primm’s opinion that 2% of his degenerative changes are due to aging, noting that age related changes would only be microscopic unless you had some sort of pathology contributing to it. Burke Tr. Pp. 40-41.

Defense counsel asked: “And so, for Mr. Blaurock, every time he was to squat, crawl, kneel, twist while working at Home Depot for example, would that also have a similar microtrauma sort of effect?” Dr. Burke responded “Probably. That was the reference of assigning a 20 percent to the – because you know it’s part of his day, but it’s not his whole day, so it’s a reasonable theory.” Dr. Burke stated, “I just never

thought of an aggravation of a preexisting dormant osteoarthritis problem that has been aroused in disabled reality, which is always a matter of progression of that arthritis as cumulative.” Burke Tr. p. 59.

The basis for the cumulative trauma theory was that out of all of his weight bearing time, 20% of his weight bearing time occurred while he was at Home Depot. However, this does not support a finding that his condition worsened sooner than would have been the case had he not been working at Home Depot, as his knee was worsening from every day activities as well.

Blaurock met his burden of proving his condition has worsened due to the injury and that he is permanently totally disabled as a result of his work injury. Defendant had the burden to prove apportionment and extinguishment of liability of medical expenses, but this ALJ found Defendant did not meet that burden.

Delta first contends the ALJ erred by failing to rely upon the following testimony from Dr. Burke:

Mr. List: Okay. So, to summarize that, your rating today for the – for the Home – for the worsening of the condition in relation to the Home Depot activities is 20 percent of 10 percent or 2 percent?

Dr. Burke: Correct.

Delta asserts the above-cited testimony resulted in Blaurock seeking to join Home Depot as a party during the proceedings. Further, Dr. Burke did not change or modify his opinion that 2% of the overall 10% impairment rating is due to Blaurock’s work at Home Depot. Delta observes Dr. Primm also assessed a 2% impairment rating attributable to Blaurock’s Home Depot employment. Delta complains the ALJ refused to adopt the doctors’ opinions. Rather, the ALJ concluded there is no support for the premise Blaurock’s work at Home Depot resulted in a worsening of his right knee condition and by extension a worsening of

his impairment. Delta argues the ALJ does not have the authority to make this finding which is directly contradicted by the medical evidence. It seeks remand for a decision in conformity with the above-cited medical evidence.

Delta also contends the ALJ erred in concluding it mischaracterized Blaurock's testimony he worked for Home Depot for three years, five nights a week, 20 to 24 hours per week engaging in squatting, climbing, and walking. Delta cites to the testimony evidencing it accurately described Blaurock's period of employment. Specifically, it cites to Blaurock's testimony establishing that he worked five nights a week, 20 to 24 hours a week, and the physical activities in which he engaged during his employment at Home Depot.

Next, Delta maintains the ALJ erroneously found Blaurock's right knee condition did not worsen while working at Home Depot. Delta again references the opinions of Drs. Primm and Burke as support for its argument Blaurock sustained a harmful change to the right knee while working at Home Depot. Consequently, the ALJ's conclusion is unsupported by the medical evidence. It cites extensively to Dr. Burke's deposition testimony as support for its argument Blaurock's Home Depot work schedule and work activities resulted in a pathological change in the right knee. According to Delta, Dr. Burke "clearly and irrefutably opined" the repetitive activities at Home Depot contributed to the narrowing of the joint space in Blaurock's right knee resulting in a harmful and pathologic change to the human organism.

Notably, Delta urges the Board to attribute little significance to Dr. Burke's refusal to opine that cumulative trauma arising from his Home Depot

employment is in part the cause of the increase in Blaurock's right knee problems. Even though Dr. Burke believed Blaurock did not sustain cumulative trauma to his knee while working at Home Depot, it insists the sum and substance of his testimony establishes cumulative trauma occurred.

Finally, Delta maintains the ALJ erroneously found it liable for PTD benefits and future medical benefits. Delta insists that because the record clearly establishes that while working at Home Depot, Blaurock sustained repetitive cumulative micro-trauma to the right knee, liability for all benefits associated with the cumulative trauma falls on the last employer. According to Delta, it cannot be held liable for the 2% impairment attributed by Drs. Primm and Burke to Blaurock's work at Home Depot nor can it be held liable for the PTD benefits and medical benefits. As Blaurock's last employer, Delta contends Home Depot is liable for the cumulative trauma right knee injury and all benefits arising therefrom. Delta requests the Board remand the claim for entry of an opinion consistent with the medical evidence and applicable case law.

ANALYSIS

In a Motion to Reopen, "the party seeking to increase an award has the burden of proving that there has been a change of condition resulting from the original compensable injury." Griffith v. Blair, 430 S.W.2d 337, 338 (Ky. 1968)(citing KRS 342.125; Jude v. Cabbage, 251 S.W.2d 584 (Ky. 1952)). Since Blaurock was successful in that burden, the question on appeal is whether there was substantial evidence 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We are unconvinced the ALJ mischaracterized Dr. Burke's testimony resulting in an award directly contradicted by the medical evidence. In formulating this argument, Delta relies upon Dr. Primm's opinions and Dr. Burke's deposition testimony. However, Dr. Burke's November 18, 2019, report contains the following impression:

He has now had an aggravation of his pre-existing osteoarthritis into a disabling reality as a result of the loss of the padding and stabilizing function of the medial meniscus that was removed as a result of his work-related injury in 2014.

Dr. Burke assessed a 10% impairment rating:

This patient has had progression to osteoarthritis in a posttraumatic basis as a result of the loss of his medial meniscus required for treatment of the tear that took place in his work-related injury in October of 2014. This fulfills the expected injury process and recommendations of Dr. Gary Bray, who completed a defense IME previously for this original injury. I would not recommend that he crawl, climb, squat, or twist on this knee.

Dr. Burke's report attributing the 10% impairment rating to Blaurock's worsened work-related right knee condition comprises substantial evidence supporting the ALJ's decision. We emphasize Dr. Burke's potential contradictory deposition testimony did not prevent the ALJ from disregarding that purported testimony and instead rely upon his opinions expressed in the report.

Amerigas Partners, LP v. Nivison, Claim No. 2012-SC-000675-WC, rendered September 26, 2013, Designated Not To Be Published, dealt with a similar situation. In Nivison, Dr. Allen changed his mind about the nature of Nivison's psychological impairment concluding Nivison did not have a pre-existing active

problem when he had previously opined Nivison had a pre-existing active impairment. The Board affirmed the ALJ's dismissal of Nivison's claim relying upon the previous opinion of Dr. Allen rather than the opinion given in a subsequent deposition. The Kentucky Court of Appeals reversed noting Dr. Allen's testimony contradicted his prior psychiatric findings and opinions set forth in his Form 107. The Chief Judge of the Court of Appeals dissented from the majority opinion believing Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000) had been misapplied. The Kentucky Supreme Court agreed holding:

Thus, Chief Judge Acree believed that since "substantial evidence ... supported both sides of the question whether Nivison's pre-existing condition was dormant" the ALJ properly applied *Magic Coal*, by selecting the substantial evidence that supported his conclusion while disregarding the evidence which supported the opposite conclusion. Chief Judge Acree also noted that Dr. Allen stated multiple times during his deposition that he believed none of Nivison's psychological impairment was work-related.

We agree with Chief Judge Acree's dissent. The ALJ apparently found that Dr. Allen's Form 107 was more persuasive than his deposition testimony, which contradicted those findings. The ALJ had the right to do so because he has the sole discretion to determine the quality, character, and substance of the evidence and to draw reasonable inference from that evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). Further, the ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. *Caudill v. Moloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

Here, Dr. Allen did provide testimony which could support a belief that he changed his mind about whether Nivison's psychological impairment was work-related. But, he also testified multiple times during the same deposition that he did not believe any of Nivison's

psychological impairment was attributable to his work-related injuries. Thus, the Court of Appeals incorrectly found that Dr. Allen's deposition provided *clear and convincing* evidence that Nivison's psychological impairment is work-related. If anything, the testimony was contradictory. Faced with such evidence, the ALJ has the discretion to “reject any testimony and believe or disbelieve various parts of the evidence.” *Magic Coal*, 19 S.W.3d at 96. The ALJ chose to believe Dr. Allen's testimony that Nivison's psychological impairment, whether pre-existing active or dormant, is not work-related. It was within his discretion to make that choice and, because Dr. Allen's testimony was evidence of substance, the ALJ must be affirmed.

Slip Op. at 2-3.

Based on the Supreme Court's holding in Nivison, the ALJ could rely upon Dr. Burke's opinion set forth in his report and disregard any contradictory opinions expressed during his deposition. Thus, Dr. Burke's report constitutes substantial evidence supporting the ALJ's determination the entire 10% impairment rating is attributable to a worsened work-related right knee condition.

That said, we have reviewed Dr. Burke's deposition testimony and conclude, as did the ALJ, his opinions are not nearly as unequivocal as Delta contends. Dr. Burke was asked whether the activities in which Blaurock engaged while at Home Depot would be “something that would contribute to the narrowing of the cartilage space.” He responded “any activity that loads and impacts the knee has the potential for contributing to progression.” Notably, Dr. Burke's reluctance and even his refusal to attribute 2% of the 10% impairment rating to Blaurock's work at Home Depot is illustrated by the following testimony:

Q: ... You already testified that these activities, the crawling, climbing, squatting, the twisting of the knee, that – that Mr. Blaurock testified that he was doing at

work. You've already testified that this, at least to some degree, would contribute to a progression of the narrowing in the knee, is that – is that a fair statement.

A: It can.

Q: So, as you know and as indicated in your report, Mr. Blaurock, at the time of his litigation, worked at Delta Global Services and then his testimony was that, as we've already talked about, he worked at Home Depot for three years most recently.

A: Uh-huh.

Q: Would – would the activities at Home Depot for those three years, the crawling, climbing, squatting or twisting of the knee, have contributed to the – the impairment of his – of his knee, at least the impairment rating that you came up with?

...

A: I – I think that the activity itself it's potentially possible for that to have contributed to it, you know, because again, it's a loading event. What I – what I never forget is is [sic] that he wouldn't have had that problem if he hadn't had the cartilage tear originally and when we have to do that – this is an interesting series of questions you have here, but the – but the reality of it is it starts when and then – then you have your examination point and time with the x-ray, because that's what that table, that was used, is – looks for the joint space narrowing in Table 1731 [sic] and what's there when you're doing – so, whenever – whenever the clock starts that's when you now get [sic] would get that x-ray, the standing x-ray, and then you measure it. So, it's possible, all those things. I would expect it that if you end having a loading impact activity over time and the clock started at this point and time and place and is symptomatic. ...

So, in his case this thing started at the time of his original event and progressively had those mechanical symptoms, so he didn't do those lifestyle modifications at least the way the Academy – the American Academy of Orthopedic Surgeons would suggest if you have a known injury like this, including working. But, you

know, unless you have a problem and I guess you have the capacity not to work – you know, it’s interesting, because if you ended up having a replaced knee and this was your only problem we would generally send people back to work with appropriate precautions not to squat and that kind of stuff, but it wouldn’t – it wouldn’t stop most of us from sending people back to work if the knee was replaced.

...

Q: So, within a reasonable degree of medical probability do you believe that Mr. Blaurock’s work over the three years performing the physical activities that we’ve already addressed multiple times, do you believe that that physical activity would have or did result in any progression of the narrowing of the joint space of his knee?

...

A: I think that that or any activity whatsoever would have contributed to it, just getting up and walking around and doing this thing. At this age with the progression over such a very short period of time, so this would be just one of –although he did it 25 hours a week, so whatever – however many other hours a week, other than sleeping and not weight bearing, they contributed to it too. So, I think being – frankly being alive and weight bearing contributed to the – to the picture of his knee from the time that his knee got injured and – and from that point forward. So, yeah, I think any activity, including the 25 hours that you’re referring to, but also all the other hours of weight bearing.

Q: Okay. So, you use the word contribute and when you said contribute you were talking about contributing to the narrowing?

A: Contributing to the forces that went across that joint that eventually manifested itself as a visual narrowing that was seen on that x-ray.

Q: Okay. And so, you mentioned the – the – his work at Home Depot, that he’s talked about, would have

contributed and then also just being alive and living your every day life would have contributed, is that also fair?

A: Potentially, yeah.

...

Q: Okay. Would it be appropriate or could you, I guess is a better question, could you allocate impairment to the different causes that we have discussed, age, work at Delta Global Services, work thereafter at Home Depot and just natural causes or any other causes, would you be able to break it down in that way?

A: I – I – my own deal is I believe that this is a – this is a relation – it started – the clock started there and that's where – because he didn't have it before. And so, I don't think that – that would be pathologically accurate, you know, as far as the pathology is concerned. Yeah, it wouldn't have been – it wouldn't have been there unless the original event had occurred. So --

Dr. Burke did not know how to apportion an impairment rating to

Blaurock's work at Home Depot stating as follows:

A: ... So, just being – doing some of that probably had some contribution, I would think, just because it's a physical activity that he was doing and how to apportion that – I don't – I don't know. I think that you're – when you ask that question – you asked me again that question about is it the 2 percent added to the – or combined rather, it might actually be 12 percent. You might give a 20 percent to that deal, you might do something for that.

Q: Twenty percent of the 10 or the 12 percent, is that what you're saying?

A: Maybe.

On page 42 of his deposition, Dr. Burke provided the following:

Q: So, 20 percent of the 10 percent that you've –

A: Well, I mean again, I think he's – I think he's going along with an active impairment. So, if you have an

active impairment it has to be combined is what his logic is saying. So, it would then become 12 percent and then at 2 percent it would then be removed. Then you have 2 – you have the 2 percent, or whatever, the 20 percent of this other activity that he’s participated in. That’s – that’s the logic of what Dr. Primm has said, that he has an active impairment, so it would have be combined with his other active impairment, which is now his joint space narrowing, so that would then make it 12 percent and then you go from there. ...

Q: Okay. So, to summarize that, your rating today for the – for the Home – for the worsening of the condition in relation to the Home Depot activities is 20 percent of 10 percent or 2 percent?

A: Correct.

However, Dr. Burke reaffirmed the opinions expressed within his

November 18, 2019, report testifying as follows:

Q: Okay. And what about your report in 2019, what’s your diagnosis for that report?

A: Well, he had an aggravation of a preexisting dormant osteoarthritis in his knee with – there was aroused and disabling reality as a result of his – the passage of time really from an original injury of a complex medial meniscal tear of his knee sustained at work in November of 2014.

Dr. Burke believed his diagnosis was consistent with the history received from Blaurock and supported by objective medical findings. He explained the impact of Blaurock’s day-to-day activities on the 2014 knee injury.

Q: Okay. In your opinion, what are the day-to-day real life consequences of this knee injury to Mr. Blaurock?

A: Well, as I mentioned and recorded in the current symptom section, he has weight-bearing ambulatory pain, it means it hurts to walk on his knee, it doesn’t stop him, because he’s not going to let himself get stopped if he can avoid it, but it’s associated with swelling that’s worse with usage. Which means – so, he

wakes up in the morning and it's at the least amount of swelling he's going to have. When he starts walking that – that load and turn, that light twist, is present with every step we take, it grinds a little bit more of the articular cartilage down. So, he starts with a normal joint space and it has now ground down through, what did I say, almost 10 millimeters of joint space, so he's got 1 millimeter of joint space left, that's all articular cartilage has been ground down over time. So, that – that debris is an irritant to the lining of the joint. So, that's why he gets the swelling and that's why he gets it when he weight bears on it, because there's more debris.

Within her discretion, the ALJ concluded Dr. Burke was not willing to unequivocally attribute 2% of the 10% impairment rating to Blaurock's work activities at Home Depot. She provided her reasoning behind her findings within the opinion and award. In the May 27, 2021, Order she cited to extensive portions of Dr. Burke's testimony supporting her findings. Thus, we find no merit in Delta's assertion the ALJ ignored or mischaracterized Dr. Burke's testimony resulting in an award directly contradicted by the medical evidence.

Similarly, we find no merit in Delta's assertion the ALJ erroneously labeled its description of Blaurock's work schedule and work activities as "misleading." After reviewing Blaurock's testimony and the questions posed to Dr. Burke, we believe the ALJ could reasonably conclude portions of Delta's questions to Dr. Burke were indeed misleading. We note there is no dispute Blaurock testified he worked three years for Home Depot and worked as a part-time employee 20 to 24 hours a week. When he worked six hours a day he only worked four days a week. This, Delta accurately described. However, contradictory to Delta's description of Blaurock's work activities is the fact that Blaurock testified that "right off the bat," he informed Home Depot he could not use a ladder. Blaurock testified that one month

into his Home Depot employment, he stopped using a ladder. Consequently, Delta's representation that Blaurock continually used a ladder during the three years of his employment at Home Depot is misleading.

Concerning the frequency of his squatting, we agree Blaurock testified he averaged squatting for half an hour a day, five days a week. However, we also note Delta fails to reference Blaurock's testimony indicating that in order to avoid squatting he laid down when stocking on the lower levels. Notably, the ALJ referenced Blaurock's testimony that he laid on his side to avoid squatting as a reason she found Delta's description of Blaurock's work misleading. The ALJ reasonably concluded Delta's reference to Blaurock continual squatting during the three-year period he worked at Home Depot was also somewhat misleading.

Moreover, there is no testimony, as Delta asserted to the ALJ and again to this Board, indicating Blaurock's work activities included a great deal of walking. Blaurock did not discuss the extent of his walking nor did he testify he engaged in a great deal of walking while working at Home Depot. This was a conclusion drawn by Delta without citing to any testimony establishing Blaurock engaged in a great deal of walking. The testimony cited by Delta in its brief on appeal indicates Blaurock testified he walked every night; however, he did not testify he engaged in a great deal of walking. His testimony establishes he walked every shift pushing carts with light weights, and when he was forced to push a cart with heavy weight, he obtained help. Again, the ALJ could reasonably conclude Delta's assertion Blaurock engaged in a great deal of walking each day while working for Home Depot was misleading. Although there is no question Blaurock worked 20 to

24 hours approximately five days week over a three-year period, the extent of his work using a ladder, squatting, and walking while working for Home Depot as framed by Delta was correctly characterized by the ALJ as misleading. Thus, we find no grounds to reverse the ALJ's decision on this issue.

We also find no merit in Delta's assertion the ALJ erroneously found Blaurock's work activities at Home Depot did not worsen his right knee condition because the medical evidence did not support her finding. Again, we reference Dr. Burke's November 18, 2019, report in which he attributes the 10% impairment "to an aggravation of [Blaurock's] pre-existing osteoarthritis into a disabling reality as a result of the loss of the padding and stabilizing function of the medial meniscus that was removed as a result of his 2014 work-related injuries." That evidence constitutes substantial evidence supporting the ALJ's refusal to apportion any of the 10% impairment rating to Blaurock's work at Home Depot.

We disagree with Delta's assertion that Drs. Primm and Burke clearly opined Blaurock sustained a harmful change to the right knee while working at Home Depot. As previously delineated, although Dr. Primm offered such an opinion, Dr. Burke was equivocal and hesitant to attribute any of the 10% impairment rating to Blaurock's work at Home Depot. In fact, we note a question posed by Delta to Dr. Burke cited on page 15 of its brief is in fact misleading. That question is as follows:

Mr. List: And these activities that we just talked about, crawling, climbing, squatting, twisting on the knee, would – is that – is that something that contributes to – to a progression of narrowing?

Significantly, Blaurock did not testify to engaging in any crawling. Further, Blaurock indicated that his climbing on a ladder ended one month into his employment with Home Depot, and he limited his squatting by laying down on his side when stocking at lower levels. Finally, there is no testimony from Blaurock he experienced twisting on his knee.

As previously noted, Dr. Burke did not clearly and irrefutably opine Blaurock's repetitive work activities at Home Depot contributed to the narrowing of the joint space cartilage in his right knee, thus resulting in a harmful and pathological change to the human organism. Interestingly, Delta requests the Board attribute no significance to Dr. Burke's refusal to express the opinion Blaurock sustained a cumulative trauma injury while working for Home Depot. Dr. Burke's deposition testimony firmly demonstrates he refused to state Blaurock sustained a cumulative trauma injury while working for Home Depot, as he stated he "actually never thought about Blaurock as having a cumulative trauma event." He buttressed this statement with the following:

Q: Okay. And kind of piggy backing on that, so without – without any knowledge of any acute injuries would you classify the – the progression of his knee condition or the worsening of his knee condition at least with respect to what he was doing at Home Depot, would you classify those work activities as a cumulative trauma to the knee?

...

A: As I mentioned earlier, I just never thought of an aggravation of a preexisting dormant osteoarthritis problem that has been aroused in disabling reality, which is always a matter of progression of that arthritis as cumulative. I'm not – I'm not familiar with using with that particular thing.

...

A: A cumulative trauma has always been in my mind an issue with soft tissue with respect to ligaments and tendons and tenosynovial sheaths and things like that, but not to the bone, not to the articular cartilage, not to the – some of which is – they're entirely different kinds of structures, they're not made out of the same kind of collagen with other tissues hanging on it and they respond to trauma in an entirely different way. So, generally speaking and if we're going to use that term and it is [sic] actually has a place in the medical literature I would reserve that really to those type of tissues, but not the joint tissues, only because there's nobody every writes that – it's not written like that in language for joints. But there's no question that there's multiple trauma, but the response to that articular cartilage, when it experiences that, is to die, the other stuff stretches out, scarifies, does other things to it, but cartilage dies and breaks down. So, if you have a field or articular cartilage like this you might have seven cartilage cells in here, but it supports all this articular cartilage. You lose one cartilage cell, there's an area of cartilage that dies and then it begins to take out the rest of the cartilage adjacent to it. That's not true of the structure that is a tendon or a tenosynovial sheath or a joint ligament. That's why it's a – it's true that those kinds of things exist to some degree, but I can see how they can be talked about that way, but that's not how they're talked about.

...

Q: So, then without any acute type injuries to the extent that his impairment for his knee has worsened since his original acute injury and subsequent surgery, would the 2 percent rating that you have provided already for the Home Depot activities, would that be considered, I'm going to use the word again, a cumulative trauma or repetitive trauma, in your opinion?

...

A: I – that's – that's what I would think he would do. I mean, again, it isn't talked about that way, but I think that would – that would – that would take in his Home Depot and all the other activities that he would ever

have that might do that, not just Home Depot. Again, I keep coming back to the point he would never be here with this question being asked if he hadn't had the loading, twisting thing that damaged that meniscus in the first place, it would be absent, a non problem, but he does have a problem.

The above testimony establishes Blaurock did not sustain a cumulative trauma injury while working for Home Depot, and his work activities did not worsen his right knee condition. Delta's assertion to the contrary, there is no medical evidence supporting a finding that Blaurock sustained a cumulative trauma injury while in the employ of Home Depot, as neither Dr. Primm nor Dr. Burke proffered an opinion Blaurock sustained such an injury while working at Home Depot.

Delta confuses Blaurock's increased symptomology while working for Home Depot as support for the premise Blaurock sustained a right knee injury. Apparently, the ALJ concluded Blaurock's testimony revealed his right knee condition did not change and/or worsen, only the severity of his symptoms changed while working for Home Depot. This is evidenced by Blaurock's testimony that his pain level decreased after he stopped working for Home Depot. His testimony establishes that while working for Home Depot his knee pain and discomfort increased but once he ceased performing those activities at Home Depot his symptoms resided. Thus, the ALJ reasonably concluded that although Blaurock's symptoms increased while working for Home Depot, the condition of his right knee did not worsen due to his Home Depot employment. This is consistent with Dr. Burke's report and portions of his deposition testimony. Moreover, the ALJ also enjoyed the discretion to rely upon Blaurock's testimony that he did not sustain an injury while in the employ of Home Depot.

Finally, we have affirmed the ALJ's finding that none of Blaurock's 10% impairment rating is attributable to his work at Home Depot and determined substantial evidence in the form of Dr. Burke's report and deposition testimony establish Blaurock did not sustain a repetitive cumulative micro-trauma injury while working for Home Depot. Therefore, the ALJ did not err in imposing liability upon Delta for the income and medical benefits for Blaurock's work-related right knee condition.

Accordingly, the May 2, 2021, Opinion, Award, and Order on Reopening and the May 27, 2021, Order overruling the Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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