Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 25, 2022

CLAIM NO. 201957284

FLOWERS BAKERY OF LONDON, LLC PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

NETTIE BECKNER
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * * *

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

STIVERS, Member. Flowers Bakery of London, LLC ("Flowers") appeals from the November 9, 2021, Amended Opinion and Order of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ awarded Nettie Beckner ("Beckner") permanent total disability ("PTD") benefits and medical benefits due to a September 22, 2019, left knee work injury commencing on the date of injury.

On appeal, Flowers asserts Beckner retains the ability to perform some type of work and is not entitled to PTD benefits. Next, it argues Beckner is not entitled to PTD benefits because she "voluntarily" left her job at Flowers. Finally, Flowers asserts Beckner is not eligible for PTD benefits during the time she returned to work at the bakery after the work injury.

BACKGROUND

Beckner's Form 101, filed July 16, 2020, alleges she sustained a work-related left knee injury on September 22, 2019, in the following manner: "Another employee was pushing trays into work area and Plaintiff turned around and ran into cart causing her to fall. Injury to left knee."

Beckner was deposed on August 21, 2020. At the time of her deposition, Beckner was still working at Flowers packaging doughnuts. She testified as follows:

> A: Well, I help run the wrapper. And I box up doughnuts as they come out of the wrapper.
>
> Q: Do you rotate between certain lines or are you on one line all the time?
>
> A: We are on one line all the time.
>
> Q: Okay. And this work requires you to stand, is that correct, ma'am?
>
> A: Yes.
>
> Q: Okay. Do you walk?
>
> A: Yes, we walk.
>
> Q: Is any part of your job a sit down position?
>
> A: No.

Q: How many hours a day are you working right now?

A: I am restricted to 8 hours a day right now.

Beckner worked forty hours a week earning $18.89 per hour. At the time of her injury, she was earning $18.49 per hour. She testified as follows regarding her current position at the bakery:

> Q: Okay. The position you are doing now, is that the same position you were in at the bakery at the time of the injury?
>
> A: Yes.
>
> Q: Okay. So the only change then in that position would be your limitation of only working 8 hours a day, is that correct?
>
> A: Yes.
>
> Q: Okay?
>
> A: Yes.
>
> Q: Before the injury, were you working more overtime or were you working less days?
>
> A: I was working more overtime. I was working about 4 to 5 days a week, 12 hour shifts.
>
> Q: 4 to 5 days a week, 12 hour shifts?
>
> A: Yes.
>
> Q: And now you are working 5 days a week, 8 hour shifts. Is that correct?
>
> A: Yes.

Concerning whether she planned to work at the bakery indefinitely, she testified as follows:

> A: No. I'm getting ready to retire.

Q: Okay. Getting ready. When do you retire?

A: 66 and a half.

Q: Okay. When do you turn 66 and a half?

A: February 15 of '23.

Q: 2023?

A: Yes.

Q: Okay. So you plan to retire when you reach your social security age of retirement, is that correct?

A: Yes.

Following her injury, Beckner returned to work in a light-duty position. She explained:

Q: Okay. Now, I know you went back to work doing – did you have a sit down position at the bakery for a while?

A: Yes. It is called light duty. I sat from November, I think, 19th and until January the 30th.

Q: Okay. So you had a light duty job between November 18, 2019 to January 30 of 2020?

A: Yes.

Q: Okay. What kind of light duty work did you do?

A: Just sit in a chair and what we call shuck-out. We get the doughnuts out of the packages.

Q: So essentially it is kind of like quality control, right? You take out the bad doughnuts and you put them in a – I think you put them in a barrel, don't you?

A: Yes.

…

Q: Okay. So essentially you just took out the bad doughnuts out of the packages and essentially put them in a barrel. And that's what you did all day long?

A: That's all I did for 8 hours and that.

Q: And that was part of the quality control?

A: Yes.

Beckner's light duty work terminated on January 30, 2020. She returned to full-duty work around March 21 or 22, 2020. At that time, she wore a knee brace. In June 2020, she requested a reduction in hours to eight hours a day. She recounted the continued pain and swelling she experiences:

Q: What symptoms are you having with your left knee?

A: I still have the pain.

Q: Yes, ma'am?

A: And the swelling.

Q: And the swelling?

A: Yes.

Q: Now, the pain that you experience in the left knee, is it in the front part of the knee, the side, or the back?

A: It is in the front part of the knee where the kneecap was connected back where it is supposed to be.

Q: Yes. Okay. And the swelling that affects your knee, is it in the same area?

A: Yes. And it swells under the kneecap and down underneath.

Q: Do you have this pain on a daily basis or is it dependent on how much activity you perform?

A: I have the pain on a daily basis.

Q: Daily basis?

A: Yes.

Q: Do you take any medication for it?

A: The only thing I take for it is Advil.

Q: Advil?

A: Yes.

Q: Do you take the Advil every day?

A: Yes, I do. I have to.

Q: Do you take it before you start working?

A: I take 2 of [sic] a morning before I start work. And then a lot of the time, I take it in the evening when I get home.

Q: So you take 2 in the morning. And then you take some more when you get home?

A: Yeah. 2 in the evening.

Q: 2 in the evening? And these are over-the-counter Advil?

A: Yes.

Regarding the reduction to eight-hour shifts, she testified:

Q: Nettie, could you have continued working those 12 hour days up until the time the doctor took you off to [sic] 8 hour days?

A: Yes. I – before he took me off? No. If I had to continue the 12 hour shifts, I couldn't have done it.

Q: And back on May 27 of 2020, did you ask the doctor to take you off and not put you on any restrictions?

A: Yes.

Q: And I am looking at that note. It says you did not want to have restrictions, did you?

A: No.

Q: Did the doctor tell you that you had a 63 year old knee and had major ligament surgery and that you might have some pretty substantial problems with that knee at that time?

A: Yes, he did.

Q: And in that note he said you were having increasing problems with your knee, is that correct?

A: Yes, he did.

Q: Is that why he put you on 8 hours?

A: Yes. That's the reason why he wanted to put me off from work but he said he would put me down to 8 hour shifts and see how that went.

Q: Because you like to work, don't you?

A: Yes, I do.

Q: But you are still having problems with your knee?

A: Yes, I am.

Q: And did going from 12 hours to 8 hours, did that help?

A: Yes. A little but not much.

Q: And for right now, do you think it is bearable?

A: For right now, yes. But I don't see it being bearable much longer because it is getting where it swells more and I have more pain from it.

Beckner testified she is not able to perform her job sitting down. "No. Not possible what I do, no."

Prior to working at the bakery, Beckner worked at Kroger for five and a half years. At Kroger, she worked at the salad bar and the checkout lane, as well as stocking produce. She has worked at Flowers for nineteen years.

Beckner was deposed a second time on December 7, 2020. Since the first deposition, Beckner had broken her right ankle on September 7, 2020, in a non-work-related incident at home. Beckner was off work for seven weeks following this injury. She testified her position in the first shift was no longer available when she was ready to return to work. The following testimony transpired:

> Q: Did she tell you at that time there was no first shift job available?
>
> A: Yes.
>
> Q: And I think – and this is just from what she indicates – you resigned at that point; is that correct?
>
> A: Yes, I did, because I weighed my options with my knee and stuff, and my knee – I live with pain every day in my knee, and the swelling.
>
> Q: I'm sorry, did you tell her you did not want to work second or third shift, ma'am?
>
> A: I told her I didn't want – it was hard for me to work second and third shift. But the real reason I resigned, it wasn't because I did not want to work second or third shift, is because of the – the pain and stuff that I was going through.

Beckner testified in greater detail concerning the reduction to eight-hour shifts:

> Q: Now, you had talked about it already today, but I want to just ask you a little bit further and get a little bit more detail. When you were reduced from 12 hours to 8 hours per shift, was that with Dr. Wilson?

A: Yes.

Q: And why specifically was it that you went back to Dr. Wilson?

A: Because that is the one that I had seen and he was the one that treated the knee. He knew the damage that was done to my knee and how much damage that was done.

Q: And what were the complaints you were dealing with at work that made you feel like you had to follow up with him about your work?

A: Well, I was having pain, I couldn't hardly bend the knee, and the swelling was so bad that it was – he had me in a brace then, and it was swelling over the brace, and it was hard to move and stand eight hours a day.

Q: So you specifically requested could you reduce me from 12-hour shifts to 8-hour shifts?

A: Yes.

Q: So did the amount of days per week that you worked change, or were you still only working five days a week?

A: Five days a week.

Q: And was it your impression that Dr. Wilson wanted to take you completely off work at that time when you asked for a reduction?

A: Yes, he – he did. He said he wanted to take me off from work.

Beckner recounted the pain and swelling she experienced even with the reduction to eight-hour shifts:

A: Eight-hour shifts was hard. I would come home from work, my knee would be so swollen I would have to ice it down to try to get the swelling down. I couldn't hardly walk, and it was just getting unbearable, even with eight hours a day.

Q: And when you say you had to ice it, was that daily after – after every shift you had to ice it or just after some shifts?

A: Daily.

Q: Was there anything else you did daily to deal with the symptoms and the issues that you were having?

A: I would take ibuprofen and try to elevate it as much as I could. Like if I had – when I would go on break, I would put my leg up to try to help relieve the pain and the swelling.

Q: So when you were on break at work, you would elevate it?

A: Yes.

Q: Now, just your personal understanding of your work and how your knee is, what is it at work that was aggravating your issues? What was it that was causing you to have pain? Is there anything specific?

A: Having to stand on that concrete eight hours a day, I was standing. There was no sitting positions, you're standing eight hours a day on concrete. And the bending, I cannot bend, I cannot kneel, I cannot squat. There's – I have – I can't do that.

Beckner's last shift at the bakery was September 7, 2020.

Beckner also testified at the August 19, 2021, hearing. At the time of the hearing, Beckner was not working. She testified her shifts prior to the work injury consisted of eight-hour shifts with "quite a few 12-hour shifts." She also worked overtime. She reiterated that her goal following the work injury was to return to full-duty work at Flowers until she reached retirement age. She explained:

Q: Was it ultimately your goal to return back to work at Flowers Bakery?

A: Yes, it was.

Q: And why was it you wanted to continue working there?

A: Until I get to my retirement age to where I could get my full retirement.

Q: Do you know what your retirement age was?

A: Sixty-six and a half.

Q: And did Dr. Wilson ultimately allow you to return to work?

A: Yes, he did. I asked him to let me go back to work because I wanted to go back to my regular duties and be able to work and work until my full retirement.

She addressed the pain and swelling she encountered when returned to regular-duty:

Q: And when you did return to work and were trying to work the hours that you were used to, did you feel physically capable of continuing to do that?

A: No, no. The swelling kept getting worse. The pain kept getting worse. It was hard for me to stand and walk.

Q: And did you follow up with Dr. Wilson after that about your issues with returning?

A: Yes, I did. And he mentioned to me going on restricted eight-hour shifts every day, no overtime at all. And I told him I wanted to work. I wanted to be able to work and get to my full retirement.

Q: And when you were working those shorter shifts with no overtime, were you still having symptoms? Were you still having issues with work?

A: Yes, I did. I still have the pain. I still had the swelling and difficulty in walking and standing. And it seems like when I was home every evening, I would have to ice my knee, elevate my knee and try to get the swelling down and try to ease the pain off.

> Q: And on the days that you weren't working, what are you doing during that time?
>
> A: I was trying to keep my leg up and trying to ease it off from the eight-hour shifts, the five days a week, and trying to rest it to start back to work again.

She believes she is incapable of performing the same type of work she was performing at the bakery:

> A: No, not whatsoever because my knee is in such bad shape to have to stand on it and work an eight-hour shift on concrete every day.
>
> …
>
> Q: And if you had to estimate now, about how long do you think you can stand before the pain or swelling starts to kick in?
>
> A: I'm able to stand and work on it for maybe 10 to 15 minutes, and then I've got to sit down and get off of it.
>
> Q: Was that 10 to 15 minutes?
>
> A: Yes.
>
> Q: And what about walking, how long do you think you could walk before you had any kind of pain or swelling?
>
> A: I can walk maybe ten minutes, and then the pain starts and then the swelling starts back in the knee again.

Beckner ambulates with a cane approximately three to four times a week and continues to take Advil for pain. She has difficulty sleeping at night because of knee pain. She is unable to climb stairs. She believes she is incapable of comfortably performing any type of employment.

Beckner filed the August 22, 2020, report of Dr. Frank Burke. After performing a physical examination and medical records review, Dr. Burke diagnosed the following:

> This patient sustained a traumatic lateral patellofemoral dislocation with osteochondral impaction fractures of the medial patellar and the distal femoral facets of the patellofemoral joint with loss of osteochondral contour and continuity. This required a ligament repair of the joint to prevent recurrent dislocations. This injury caused an acute post-traumatic osteoarthritic damage to the PF joint within her knee. She is at MMI and can be rated.

Dr. Burke assessed a 9% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment and recommended the following restrictions: "I would not recommend that she be engaged in work that requires climbing, squatting, or kneeling. Because she is in a job, which allows her to stand, she may continue the work at which she was injured."

Beckner also filed Dr. Burke's July 17, 2021, "Addendum to Independent Medical Evaluation" in which he expressed opinions regarding the contents of Dr. Michael Best's January 7, 2021, report and March 15, 2021, supplemental letter.

Dr. Burke was deposed on December 21, 2020. Pertinent to the issues on appeal is the following testimony from Dr. Burke regarding Beckner's permanent restrictions:

> A: For her, with her known – the known pathology that we have in the ways that we know it, then she would – the permanent restriction says no kneeling, not squatting, no pivoting on her legs – on her knee, which

> means feet are planted and you turn with your knees okay, because she's got post-traumatic arthritis patella femoral joint. **And I would not have her prolonged standing or walking.** She'd have to be on some kind of surface to protect her knee. So most of those places have shock absorbing pads that they stand on or should, or if she doesn't have that, then the shoes that can do that same thing.
>
> I don't know what the amount of time is. Usually you're going to try to let these people have a change in position from standing and sitting, or you should, if she has this kind of thing. I don't think that she's capable of this eight-hour a day business of standing all day long. I don't think that's possible, frankly. I would think you'd have to have the ability to change position frequently to her tolerance.
>
> Remember, again, this lady has a swollen knee, she has active ongoing post-traumatic arthritis in her knee. And she's got active pain associated with that and synovitis that's part of what happens when you have this kind of presentation, from all the debris in the knee. So – and I wouldn't have her climb and I wouldn't have her – require to use stairs. I'm thinking of all the things that load the knee…. (emphasis added.)

Both parties filed Dr. Timothy Wilson's medical records. The October 22, 2019, "Operative Report" sets forth the following preoperative diagnosis: "Left patella dislocation with cartilage defect, lateral meniscus tear, and medial patellofemoral ligament tear." Dr. Wilson performed the following procedures:

> 1. Left knee arthroscopy.
> 2. Partial lateral meniscectomy.
> 3. Cartilage debridement.
> 4. Open medial patellofemoral ligament repair using Smith and Nephew anchor.

On March 18, 2020, Dr. Wilson determined Beckner reached maximum medical improvement following the surgery and released Beckner to full-duty work as of March 22, 2020.

In a June 22, 2020, letter, Dr. Wilson expressed the following: "It is my medical opinion that Nettie Beckner is restricted to work 8 hours per day. These are permanent restrictions."

The August 19, 2021, Benefit Review Conference Order and Memorandum lists the following contested issues: "benefits per KRS 342.730," "PTD," and "proper use of the AMA Guides." It indicates temporary total disability ("TTD") benefits were paid between September 30, 2019, through November 2, 2019, and February 1, 2020, through March 21, 2020.

The original Opinion, Award, and Order was entered on October 18, 2021. However, because he sustained, in part, Flowers' October 29, 2021, Petition for Reconsideration, the ALJ entered an Amended Opinion and Order on November 9, 2021, setting forth the following findings of fact and conclusions of law:

> …
>
> 3. The ALJ finds that Dr. Burke's opinion is credible and is based upon the best objective medical evidence available consisting of the operative report from Dr. Wilson and the MRI.
>
> 4. The ALJ further finds that Dr. Burke credibly and effectively supported his conclusions with the applicable and corresponding portions of the AMA Guides. He specifically referenced the figures and tables in Chapter 17.2 and on page 544, and assessed a 9% whole person impairment pursuant to the AMA Guides.
>
> 5. The ALJ is therefore convinced by Dr. Burke's diagnosis of traumatic lateral patellofemoral dislocation with osteochondral impaction fractures of the medial patellar and the distal femoral facets of the patellofemoral joint with loss of osteochondral contour and continuity and his corresponding assessment of a 9% whole person impairment per the AMA Guides.

6. Permanent total disability is defined in KRS 342.0011(11)(c) 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. Hill v. Sextet Mining Corporation, 65 SW3d 503 (KY 2001).

7. "Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. Ira A. Watson Department Store v. Hamilton, 34 SW3d 48 (KY 2000). In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker's age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. Id.

8. The ALJ is compelled to reference that the Plaintiff was an exceptional witness and that her 19 years of service to the Defendant Employer along with her attempt to return to work after the injury is laudable.

9. Dr. Burke restricted the Plaintiff from kneeling, squatting, pivoting the leg, and prolonged standing or walking and seriously doubted that this Plaintiff would be capable of returning to her prior job for eight-hour days.

10. The Plaintiff has also credibly testified that she continues to experience pain and swelling and that she cannot work in a standing position for any longer than 10-15 minutes without having to sit down. She added that she would not be able to perform any type of continued work having only worked for the Defendant Employer for the past 19 years and having attempted unsuccessfully to return.

11. The ALJ finds based upon the credible objective medical opinion of Dr. Burke and the credible testimony provided by the Plaintiff, that considering her advanced age and her unsuccessful attempt to return to work, she

> would be unable to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy.
>
> 12. The ALJ finds that the Plaintiff credibly explained why her attempt to return to work performing 8-hour shifts was unsuccessful. She specifically said that she could barely walk after each shift and would have to ice her knee. She also added that after she stopped work, she noticed some improvement but was still unable to put any pressure on her knee, was unable to negotiate stairs and had to put her clothes on while lying down.
>
> 13. The ALJ consequently finds, that the Plaintiff's unsuccessful attempt to return to the only job she had held for the prior 19 years, along with her current condition including numerous restrictions and considerable impairment, have rendered her permanently and totally disabled.

ANALYSIS

Flowers first asserts the ALJ erred in awarding PTD benefits as Beckner is able to return to some type of work. Significantly, Flowers has not challenged the sufficiency of the ALJ's findings concerning this issue. Instead, Flowers challenges the ALJ's ultimate determination – i.e. Beckner is "unable to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy" – asserting it is not supported by substantial evidence. We affirm on this issue.

In Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), the Kentucky Supreme Court decided that in determining whether a particular worker is partially or totally occupationally disabled as defined by KRS 342.0011, the analysis "requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy." The Court explained:

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson, supra,* it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. *See, Osborne v. Johnson, supra,* at 803.
>
> …
>
> A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. *Hush v. Abrams,* Ky., 584 S.W.2d 48 (1979).

Id. at 51-52.

The Court reaffirmed this holding the next year in McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 860 (Ky. 2001), stating as follows:

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson, supra,* it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions.

> A worker's ability to do so is affected by factors such as whether the individual will be dependable and whether his physiological restrictions prohibit him from using the skills which are within his individual vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. *See, Osborne v. Johnson, supra,* at 803. (emphasis ours).
>
> …
>
> It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability. Although the ALJ must necessarily consider the worker's medical condition when determining the extent of his occupational disability at a particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. *See, Eaton Axle Corp. v. Nally,* Ky., 688 S.W.2d 334 (1985); *Seventh Street Road Tobacco Warehouse v. Stillwell,* Ky., 550 S.W.2d 469 (1976). A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. *Hush v. Abrams,* Ky., 584 S.W.2d 48 (1979).

Id. at 860.

Beckner bore the burden of proving each of the essential elements of her claim, including the extent of her occupational ability. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Beckner was successful in her burden before the ALJ, we must determine whether substantial evidence supports his 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 supporting a different outcome than 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 they must be reversed as a matter of law. Ira A. Watson Dept. Store v. Hamilton, supra. 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).

The ALJ relied upon several pieces of evidence in concluding Beckner is unable "to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy," including the medical restrictions assigned by Dr. Burke. Compelling to the ALJ is Dr. Burke's deposition testimony

regarding permanent restrictions he would impose which would include no prolonged standing. He further opined Beckner is incapable of "this eight-hour a day business of standing all day long." A review of Beckner's deposition testimony indicates her job at Flowers on the doughnut assembly line required her to stand the entire shift. Her only other work experience, prior to her nineteen-year tenure at Flowers, was in the checkout lane at Kroger which also required her to constantly stand. As the ALJ noted, Beckner testified at the hearing she cannot stand for more than fifteen minutes before having to sit down. Her attempt to return to the bakery following her injury was, as the ALJ opined, "unsuccessful." As noted by the ALJ, Beckner "specifically said that she could barely walk after each shift and would have to ice her knee." Beckner also testified she believes she is unable to perform any type of continued work. The applicable case law directs this testimony may be relied upon in determining whether Beckner is totally occupationally disabled.

The above-cited evidence comprises substantial evidence supporting the finding Beckner is unable "to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy." Dr. Burke unequivocally testified Beckner should not engage in prolonged standing, which Beckner's job with Flowers and Kroger entailed. While this Board acknowledges that in his August 22, 2020, report, Dr. Burke opined Beckner could return to her job at Flowers, the ALJ is free to rely upon Dr. Burke's deposition testimony on this issue and reject the opinions expressed in the August 22, 2020, report. *See* Jackson v. General Refractories Co., supra; Caudill v. Maloney's Discount Stores, supra.

Further, Beckner testified at the hearing that she is unable to perform any type of work which, standing alone, is substantial evidence in support of the ALJ's conclusion. As held by the Court in Ira A. Watson Dept. Store v. Hamilton, supra,

> [i]t is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability. Although the ALJ must necessarily consider the worker's medical condition when determining the extent of his occupational disability at a particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. *See, Eaton Axle Corp. v. Nally,* Ky., 688 S.W.2d 334 (1985); *Seventh Street Road Tobacco Warehouse v. Stillwell,* Ky., 550 S.W.2d 469 (1976). A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. *Hush v. Abrams,* Ky., 584 S.W.2d 48 (1979).

Id. at 52.

Flowers next argues the ALJ erred in awarding PTD benefits because Beckner "voluntarily" left the job market. It claims Beckner left the bakery because of a non-work-related ankle injury and a shift change "rather than the work-related injury." Therefore, an award of PTD benefits is erroneous. We note once again Flowers does not challenge the sufficiency of the ALJ's findings on this issue. We affirm on this issue.

As an initial matter, we note that the reason *why* Beckner left her employment at the bakery is one more piece of evidence the ALJ can review in the analysis of whether Beckner is permanently totally disabled. *See* Ira A. Watson Dept. Store, supra. However, the sole inquiry the ALJ was required to resolve is whether Beckner is able "to provide services to another in return for remuneration on a

regular and sustained basis in a competitive economy" and not solely why Beckner ultimately left the bakery. Consequently, Flowers' second issue on appeal is without merit. That said, we observe the ALJ relied upon Beckner's testimony that she struggled with pain upon returning to regular-duty work at the bakery. A review of Beckner's testimony indicates she had every intention of working at the bakery through February 15, 2023, when she reached her Social Security retirement age. However, even though her shifts had been reduced to eight hours from twelve hours, Beckner still experienced pain and swelling in her knee and was taking medication daily. At her first deposition, Beckner testified that she did not think working would be "bearable much longer." At the time of her second deposition, Beckner had stopped working at the bakery despite desiring to work until retirement age. She unambiguously testified she stopped working because of the continued pain and swelling in her knee. As she testified, "the real reason I resigned, it wasn't because I did not want to work second or third shift, is because of the – the pain and stuff that I was going through." We acknowledge Beckner's testimony regarding her non-work-related ankle injury on September 7, 2020, and the fact that first shift was no longer available at the bakery following her recovery from the injury. However, the ALJ was free to infer that Beckner left her job at the bakery because she was struggling to continue working. The ALJ opined in the November 9, 2021, Amended Opinion and Order, Beckner "credibly explained why her attempt to return to work performing 8-hour shifts was unsuccessful."

Finally, Flowers argues Beckner is not entitled to PTD benefits during the time she returned to light-duty and regular-duty work at Flowers. Flowers

requests this Board vacate the award of PTD benefits prior to the cessation of Beckner's employment on September 7, 2021, and remand for a determination of the extent of permanent partial disability ("PPD") benefits to which Beckner may be entitled during this time period. We agree and vacate the award of PTD benefits during the periods in question and remand for additional findings.

In the November 9, 2021, Amended Opinion and Order, the ALJ initiated the award of PTD benefits on September 22, 2019, the date of injury, with credit for any TTD benefits paid. However, the record indicates Beckner returned to work following her injury in light-duty and regular-duty capacities. Beckner returned to work shortly after the October 22, 2019, surgery performed by Dr. Wilson. She returned to regular-duty work on March 22, 2020, following Dr. Wilson's release to full-duty work. The record also indicates she continued to work, albeit eight-hour shifts instead of twelve-hour shifts, following Dr. Wilson's June 22, 2020, letter permanently restricting her to eight-hour shifts. Beckner worked in this capacity until September 7, 2021, her last day of employment. Wage records filed in the record by Flowers reveal Beckner worked from 37.83 hours per week to 80 hours per week following her injury.

The ALJ initiated the award of PTD benefits on the date of injury without any findings addressing Beckner's entitlement to those benefits during the time periods she returned to work. An ALJ is charged with effectively setting forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision, and he has not done so here. Shields v. Pittsburgh and Midway Coal

Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

On remand, the ALJ must analyze Beckner's entitlement to PTD benefits prior to her cessation of employment pursuant to the pertinent case law. Relevant to the ALJ's inquiry is Underwood v. Pella Windows DEPE PLLC, Claim No. 2016-CA-001424-WC, rendered March 31, 2017, Designated Not To Be Published, in which the Court of Appeals affirmed this Board's holding that a claimant cannot be considered totally permanently disabled if he/she continues to work full-duty at a regular job. The Court of Appeals held:

> Underwood acknowledges that workers' compensation is a creature of statute. *Williams v. Eastern Coal Corp.*, 952 S.W.2d 696, 698 (Ky. 1997). The statute defines permanent total disability 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). The statute affords us no latitude. **We are compelled to agree with the Board that "as a matter of law, a worker cannot be considered totally permanently disabled during a period he continues to work at his regular job, with no accommodations, at full wages.**" (emphasis added.)

Slip Op. at 2.

In contrast, the case of Gunderson v. City of Ashland, 701 S.W.2d 135 (Ky. 1985) supports the proposition that a return to work does not conclusively establish as a matter of law that a claimant is no longer permanently totally disabled. That said, we are compelled to point out that Gunderson is a highly unique case in which a police officer was rendered quadriplegic when shot in the line of duty. The Supreme Court explained that post-injury, "Gunderson is working on a police

dispatching system **which has been specially outfitted for his handicap** and is subsidized by local, federal and state government. It is highly questionable whether he could find employment in the 'outside' work force." (emphasis added.) Id. at 137. As held by the Supreme Court, but for the "compassionate treatment of his employer, Gunderson is entirely precluded from successful competition for employment in the job market." Id. Consequently, it affirmed the finding Gunderson is totally occupationally disabled despite the fact he worked full-time following the injury. An ALJ should proceed with caution when attempting to draw parallels between this extreme set of facts and virtually any other set of facts.

On remand, the ALJ must determine whether Beckner's return to light-duty and full-duty work fits within the confines of Gunderson. Should the ALJ determine Beckner's return to work following her injury does not fall under the auspices of Gunderson, the award of PTD benefits during the periods Beckner worked post-injury at Flowers is contrary to law. Stated differently, the ALJ cannot award PTD benefits during those periods Beckner worked for Flowers without first concluding Beckner's return to work at Flowers was a direct result of the "compassionate treatment of his employer" and setting forth adequate findings of fact in support of such a proposition. Id. Instead, the award of PTD must begin on September 8, 2021, the day after Beckner's employment with Flowers ceased. The ALJ must then decide to what extent, if any, Beckner may be entitled to PPD benefits prior to September 8, 2021.

Accordingly, concerning the first two issues raised on appeal, the November 9, 2021, Amended Opinion and Order, is **AFFIRMED**. The award of

PTD benefits set forth in the November 9, 2021, Amended Opinion and Order is **VACATED**, and the claim is **REMANDED** to the ALJ for additional findings and an amended decision consistent with the views expressed herein.

ALL CONCUR.

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