OPINION ENTERED: April 12, 2013

CLAIM NO. 201196196

BAUMANN PAPER COMPANY, INC. PETITIONER

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

CHRIS BAKER
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Baumann Paper Company ("Baumann") seeks review of the opinion, order and award rendered December 17, 2012, by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits to Chris Baker ("Baker") for a right ankle

injury he sustained when he slipped on ice in the parking lot at work on February 9, 2011. Baumann also appeals from the order entered January 11, 2013 denying its petition for reconsideration.

On appeal, Baumann argues the ALJ erred in awarding PPD benefits based upon Dr. Robert Johnson's 16% impairment rating because it was not assessed pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Baumann also argues the ALJ improperly enhanced Baker's PPD benefits by the three-multiplier pursuant to KRS 342.730(1)(c)1, because he failed to perform a proper analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Baumann also argues the ALJ improperly failed to address the KORT physical therapy records, Dr. Johnson's deposition testimony, Dr. Daniel D. Primm Jr.'s deposition testimony, and Margaret Baumann's testimony in his decision. We vacate and remand.

On remand, the ALJ must determine whether Dr. Johnson's impairment rating was appropriate pursuant to Jones v. Brasch-Berry Generalt Contractors, 189 S.W.3d 149 (Ky. App. 2006). Likewise, the ALJ must perform a complete analysis pursuant to Fawbush, supra. Finally, the ALJ's

determination must be based upon consideration of all evidence of record.

Baker sustained a right ankle injury on February 9, 2011, when he slipped and fell in an icy parking lot at work. He filed a Form 101 on August 3, 2012 alleging a right ankle injury.

Baker testified by deposition on October 11, 2012, and at the hearing held December 12, 2012. Baker was born on October 2, 1971, and resides in Nicholasville, Kentucky. He completed the eleventh grade and has no specialized vocational training other than a forklift certification. His work experience includes work as an assembler, order selector, and forklift operator.

Baker was taken to St. Joseph's Hospital in Lexington, and was transferred to the University of Kentucky Medical Center. On February 10, 2011, Dr. Primm, an orthopedic surgeon, operated on Baker's right ankle. Baker missed five months of work, and followed up with Dr. Primm until May 2012. Subsequent to the surgery, Baker wore a brace on the right leg from his ankle to the knee, and attended physical therapy for two months. He has had no treatment for his work injury since he last saw Dr. Primm on May 14, 2012. Although he takes no prescription medication, Baker testified he continues to take over-the

counter-Aleve, and wears an air cast brace at night due to swelling.

Baker returned to work on June 26, 2011. He stated his job consists of selecting orders eight hours per day which involves utilizing a forklift which requires constant standing. The last one to two hours per day, he uses a different forklift which allows him to sit. Despite primarily operating forklifts, Baker is still required to lift cases weighing twenty to fifty pounds. At the time of the accident, Baker worked ten hours per day, earning $13.50 per hour. He now earns the same hourly pay rate, but his hours have been reduced to 9 to 9 1/2 hours per day due to the employer's loss of business which he indicated has also affected all co-workers.

Regarding his ability to perform his job, Baker testified as follows at his deposition:

> Q. Have you been able to return to your previous job as a warehouse employee and continued to do that job just as you did before the injury?
>
> A. Yeah, I can still do it you know, but I deal with some pain now.

At the hearing, Baker testified as follows regarding his return to work:

> Q. Do you believe that you will be able to keep your employment there?

> A. I think so.
>
> . . .
>
> Q. Can you think of any reason why you cannot continue to work at Baumann Paper for the forseeable future?
>
> A. No.

Margaret Baumann, the secretary for Baumann, testified at the hearing. She performs technological services, and manages human resources for Baumann. She stated Baumann provides wholesale distribution of janitorial and food service supplies. She testified neither Baker nor anyone else has expressed a concern about his inability to perform his job.

In support of the Form 101, Baker submitted records from the University of Kentucky Healthcare. Those records reflect Baker sustained a closed right bimalleolar ankle fracture. Dr. Primm performed an open reduction interval fixation of the right trimalleolar ankle fracture on February 10, 2011.

Baker also filed Dr. Johnson's Form 107-I report dated September 13, 2012. Dr. Johnson noted the February 9, 2011 date of injury when Baker slipped and fell in an icy parking lot. Baker advised he experiences pain when first getting up after sitting, which improves with

walking. He also complains of worsening pain after driving a forklift for a couple of hours. Dr. Johnson noted Baker walks with an antalgic gait. Dr. Johnson diagnosed Baker's condition as follows:

> Dislocation of the right ankle, fractured posterior lip of the tibia and major fracture of the lower fibula including the lateral malleolus, managed by open reduction and internal fixation.
>
> It is impossible for me to report the current diagnosis because I have not been provided the appropriate x-rays.
>
> Mr. Baker has localized dysesthesia over two of the lower crew heads. He also has a neuropathy anteriorly to the surgical site. (In my opinion, it would not be ratable).
>
> Mr. Baker has a substantial loss of mobility, which I will rate in Section J.
>
> In my opinion, Mr. Baker will undoubtedly exhibit posttraumatic arthrosis in the right ankle joint. Whether or not the joint damage has caused a measurable loss of cartilage space at this time is unknown, but assuredly it will occur.
>
> In my opinion, consideration should be given to removal of the fibular screws, two of which are causing significant dysesthesia, in my opinion.
>
> I anticipate seeing the x-rays that have been obtained on Mr. Baker at a later time. I am deferring a complete diagnosis on him until that occurs.

Dr. Johnson assessed a 16% impairment rating which he stated was pursuant to the AMA Guides. Dr. Johnson assessed restrictions of ambulating on the right lower extremity only as tolerated. Baker may require elevation of the extremity during the day. He also advised Baker to avoid running, jumping, climbing, repetitive strenuous activities with the right ankle, working on hazardous surfaces, and unprotected heights.

In an addendum dated September 24, 2012, Dr. Baker noted he had reviewed the May 14, 2012 x-ray. He stated this demonstrated an anatomic position of the bones, and the screws fixating the fibula were all in good position. He also indicated a slight "window wiper" in the tibia, representing some loosening and possible future breakage. He recommended screw removal. He stated, "I observed no arthrosis of the right ankle, but, in my opinion, based upon the severity of the original dislocation, that will occur." He stated he found no reason to alter the impairment rating he assessed on September 24, 2012.

Dr. Johnson testified by deposition on November 12, 2012. He is an orthopedic surgeon whose practice consists solely of performing evaluations. Dr. Johnson stated Baker had been misdiagnosed, and had a fracture with

dislocation, not a trimalleolar fracture. Dr. Johnson initially testified he did not utilize muscle atrophy in assessing the 16% impairment rating, but later stated he had in fact done so. Dr. Johnson expressed his disagreement with the AMA Guides, and was "upset" with the book. He indicated the book was improperly written, and was only a guideline, stating as follows:

> Q. And I appreciate that, but I just want to make sure I understand that you are substituting your own clinical judgment for the expressed terminology of the guides, is that an accurate way of putting this?
>
> A. No, it's a guide. There is nothing in there biblical.
>
> Q. I'm not saying that there is. I'm saying that what you are doing here in combining these impairment ratings is substituting your own judgment against the expressed terminology of the guides?
>
> A. I have a certificate on my wall, excellence in the handling of AMA Guides.
>
> Q. Okay. You're not answering my question though.
>
> A. Well, your question is ridiculous.
>
> Q. But you aren't answering it.
>
> A. You're not a doctor.
>
> Q. I'm not a doctor.

> A. Well, then quit trying to act like one.
>
> Q. No. I'm just trying to understand if you are substituting your own opinion and own judgment against the expressed terminology of the AMA Guides? If you are, that's fine.
>
> A. Yes.

Dr. Johnson later testified he substituted his judgment for the methods set forth in the AMA Guides, stating as follows:

> Q. Okay. So if the guides say that you can't use range of motion in combination with diagnosis-based estimate, if you had to choose one of those two impairment ratings to use, which would you recommend using in this case?
>
> A. I used both of them.
>
> Q. But if you have to choose one of those.
>
> A. I don't have to choose one of them.
>
> Q. It says here on page 527, if more than one method can be used, the method that provides the higher rating should be adopted. Now, my understanding is that the rating impairment due to a fracture is the higher of the two with an eight percent. Is that what you would recommend using?
>
> A. I don't know.
>
> Q. Okay. So you - -
>
> A. I do know that I did exactly what is says - - oh, where in the hell is that?

> Second paragraph, evaluation, evaluating patients, explain in writing why a particular method to assigned rating was chosen, right there.
>
> Q. Okay. And it follows to say - -
>
> A. And this is my explanation in writing, and this is what the judge is supposed to see, and I just disagree with you picking it apart.
>
> Q. Your paragraph that you just started reading continues to say when uncertain about which method to choose, the evaluator should calculate the impairment using different alternatives and choose the method or combination of methods that gives the most clinically accurate impairment rating.
>
> A. This is a combination of methods.
>
> Q. That combination of methods that is improper under the guides that you just - - I mean, you just told me that you cannot combine those. Now, it might be proper underneath your own judgment, but under the guides, it's improper. Do you agree with that?
>
> A. It's a guide.

Dr. Johnson also stated Baker has no ratable arthritis of the ankle, "but there will be". He also stated at one point, "If you want me to give you expert testimony, you're going to have to pay for it." He later stated he was not providing an expert opinion, but he was merely "trying to explain my report."

Dr. Primm treated Baker from February 10, 2011 through May 14, 2012. In addition to his treatment records, he prepared a report dated November 12, 2012. In the report, Dr. Primm outlined his disagreement with Dr. Johnson's assessment. He assigned a 3% impairment rating pursuant to the AMA Guides, and stated the following:

> I, again, feel he has a very good clinical result, and I would allow him to continue at his regular work with no specific restrictions at this time. It is possible, but certainly not probable, that he could develop some traumatic arthritis in the future, and that he would require further evaluations and treatment.

Dr. Primm subsequently testified by deposition at Baumann's request on December 7, 2012. Dr. Primm testified Baker had sustained a trimalleolar fracture of the right ankle with fracture lines in three places. He stated his assessment of a 3% impairment rating was appropriate because Baker has no displacement of the ankle. He disagreed with Dr. Johnson's assessment of atrophy, and indicated the calf circumference discrepancy would need to be greater than two and a half centimeters to make that determination. Baker's discrepancy was much less. Dr. Primm opined Baker could perform all of his job activities without restrictions. He noted Baker had no limp or

antalgic gait when last seen. He opined if Baker is now exhibiting such finding, he would have sustained a new injury. Dr. Primm noted Baker requires no prescription medication, but could take over-the-counter Aleve if he experiences some swelling. Dr. Primm stated it is inappropriate pursuant to the AMA Guides to combine the impairment rating from a Diagnosis Related Estimate, with an impairment rating derived from measuring range of motion. He further opined it is inappropriate to include muscle atrophy in the determination, especially when none is present.

Baumann filed records from KORT physical therapy for treatment provided from April 14, 2011 through June 24, 2011. Those records reflect twenty treatment dates with continued improvement.

A benefit review conference ("BRC") was held on December 4, 2012. In the BRC order and memorandum, the parties stipulated to an injury occurring on February 9, 2011; average weekly wage of $689.28; and TTD benefits were paid at the rate of $522.72 per week. The contested issues preserved for decision were benefits per KRS 342.730; unpaid or contested medicals; and whether Baker retains the capacity to perform his previous work.

In a decision rendered December 17, 2012, the ALJ found as follows:

> **SECTION IV – SUMMARY OF EVIDENCE**
>
> The plaintiff testified by deposition and also at the final hearing. The plaintiff filed the following evidence: Report of Dr. Robert Johnson. The defendant filed as evidence the following: Deposition of plaintiff, deposition of Dr. Robert Johnson, report and record of Dr. Daniel Primm, record of Kort Physical Therapy, Job Description and Pre-Injury Wage Certification.
>
> The Administrative Law Judge has carefully reviewed and considered all of the above evidence.
>
> The plaintiff **Chris Baker** testified that on the date of his injury, February 9, 2011, he slipped on ice in the employee parking lot and fell, sustaining injuries. He testified about his subsequent medical treatment and his continuing painful symptoms.
>
> **Dr. Robert Johnson** examined the plaintiff and filed his medical report dated September 24, 2012. Dr. Johnson took a comprehensive history from the plaintiff and reviewed detailed medical records concerning Mr. Baker. Dr. Johnson then performed a thorough physical examination and detailed in his report his findings on physical examination. Dr. Johnson's diagnosis included dislocation of the right ankle, fractured posterior lip of the tibia and a major fracture of the lower fibula, including the lateral malleolus, managed by open reduction and internal fixation. Dr. Johnson

stated that within reasonable medical probability the plaintiff's injuries were the cause of his complaints and that the causal relationship included a violent force being applied to the right ankle when Mr. Baker fell, causing the fracture and dislocation. Dr. Johnson stated that utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Mr. Baker's permanent whole person impairment will be 16%. Dr. Johnson stated that Mr. Baker did not have an active impairment prior to his work injuries. Dr. Johnson stated that Mr. Baker does not retain the physical capacity to return to the type of work which he performed at the time of his work injuries. However, Mr. Baker appeared to be performing his normal work activities, but Dr. Johnson noted that he is doing so with pain and that his condition is likely to worsen over time. Dr. Johnson placed upon Mr. Baker the following work restrictions: Mr. Baker should ambulate on the right lower extremity only as tolerated and he might require some time during the day to elevate his right lower extremity and he should not run, jump, climb or do repetitive strenuous activities with his right ankle and should avoid hazardous work surfaces and should not be at any unprotected heights.

The medical report of **Dr. Daniel Primm** has been filed in the record. Dr. Primm's report is dated November 12, 2012. He noted Mr. Baker's history of work injuries, at which time he slipped and fell, injuring his right ankle. The history continued with Mr. Baker's medical treatment for his injuries and his continuing symptoms. Dr. Primm reviewed the surgery performed on Mr. Baker. He noted that

he last saw Mr. Baker on May 14, 2012, at which time he was continuing to work and reported that he was on his feet most of the day. Dr. Primm stated that he disagreed with Dr. Johnson's conclusions. Dr. Primm stated that he believed that in his opinion Mr. Baker had achieved a very good clinical result and that he would allow Mr. Baker to continue at his regular work with no specific restrictions at this time. Dr. Primm admitted it was possible, but certainly not probable, that Mr. Baker could develop some traumatic arthritis in the future. According to Dr. Primm, Mr. Baker will retain a permanent impairment of 3% to the body as a whole under Chapter 17 of the AMA Guides, Fifth Edition. All of Dr. Primm's opinions were expressed in terms of reasonable medical probability.

SECTION V – FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Benefits per 342.730.

Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and its progeny require an Administrative Law Judge to make three essential findings of fact. First, the Administrative Law Judge must determine whether a claimant can return to the type of work performed at the time of injury. Second, the Administrative Law Judge must determine whether the claimant has returned to work at an average weekly wage equal to or greater than his pre-injury wage and then ceases that employment. Third, the Administrative Law Judge must determine whether the claimant can continue to earn that level of wages for the indefinite future.

> I saw and heard the plaintiff testify at the hearing. He was a credible and convincing witness. Based upon the totality of the evidence, including the plaintiff's sworn testimony and the persuasive medical report from Dr. Johnson, I make the factual determination that plaintiff cannot continue to earn that level of wages for the indefinite future. I make those factual determinations based upon the credible and convincing evidence from both the plaintiff and Dr. Johnson. In reaching that finding, I rely upon *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), and also the decision of the Kentucky Court of Appeals in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky. App. 2004), because it is my factual determination that Mr. Baker's work injuries will permanently alter his ability to earn an income.

Both Baker and Baumann filed petitions for reconsideration. Baker requested the ALJ amend the opinion to reflect at the hearing he had been relieved of the stipulation he had returned to work earning the same or greater wages. Baumann argued the ALJ incorrectly awarded benefits based upon the 16% impairment rating assessed by Dr. Johnson, because it had been improperly calculated pursuant to the AMA Guides. Baumann also argued the ALJ incorrectly awarded the three-multiplier pursuant to KRS 342.730(1)(c)1 without providing a complete analysis. Baumann next argued the ALJ failed to address the KORT

physical therapy records, Dr. Johnson's deposition, Margaret Baumann's hearing testimony, and Dr. Primm's deposition in his opinion. Baumann requested the ALJ provide additional findings of fact supporting his decision.

The ALJ stated the following in his order on reconsideration entered January 11, 2013:

> The Hearing Order listed as the evidence filed by the plaintiff as the report of Dr. Robert Johnson and the evidence filed by the defendant as the deposition of the plaintiff, the deposition of Dr. Robert Johnson, the report and record of Dr. Daniel Primm, the record of Kort Physical Therapy, Job Description and Pre-Injury Wage Certification. Due to some clerical oversight by the defendant, the deposition of Dr. Daniel Primm was not listed as part of the defendant's evidence in the Hearing Order. The Opinion and Order dated December 17, 2012 is corrected and amended to state that the deposition of Dr. Daniel Primm was filed as evidence by the defendant and further that all of the evidence listed in the Hearing Order and the deposition of Dr. Primm was carefully reviewed and considered by the Administrative Law Judge before preparing the Opinion and Order dated December 17, 2012.
>
> 4. The defendant also complains about the Hearing Transcript having not been transcribed or filed in the record. The record reveals that the hearing was held on December 12, 2012 and that the Opinion and Order was rendered by the Judge on December 17,

2012. The fact that the Administrative Law Judge rendered the Opinion and Order on December 17, 2012 before the Hearing Transcript was filed in the record does not in any manner cause the Opinion and Order to be deficient nor does it violate the defendant's right to due process. In fact, the rendering of a written Opinion and Order on the same day as the hearing before the Hearing Transcript has been filed is expressly permitted by 803 KAR 25:010 Section 18(2) and (4). That was the holding of the Workers' Compensation Board in Claim No. 2011-83504, Perry Real Estate & Appraising, Inc., Petitioner, vs. Joy Routt, Respondent, which Board Opinion was entered on December 21, 2012.

5. The Opinion and Order dated December 17, 2012 addresses all of the contested issues raised by the parties in the Benefit Review Conference Order, including benefits per KRS 342.730 and unpaid or contested medical expenses. All of the issues raised by the parties in the Benefit Review Conference Order were discussed by the Judge in the Opinion and Order dated December 17, 2012, and that Opinion and Order is hereby reaffirmed.

. . .

WHEREFORE, in light of the above findings of fact and conclusions of law the Petition for Reconsideration filed by the defendant is hereby overruled and denied, subject to the above corrections, and the plaintiff's Petition for Reconsideration is granted and sustained as specified hereinabove.

Since Baker was successful before the ALJ, the question on appeal is whether his determination is supported by substantial evidence. 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 the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). 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, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

That said, the ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the

basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). We also find instructive the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004), where the Kentucky Supreme Court remanded the claim to the ALJ "for further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review."

Here, the ALJ determined Baker was entitled to an award of PPD benefits based upon the 16% impairment rating assessed by Dr. Johnson, without providing an explanation or analysis for doing so. Baumann argues the impairment rating was not assessed in accordance with the AMA Guides, and therefore does not constitute substantial evidence. Our courts have consistently stated the proper method for impeaching a physician's methodology pursuant to the AMA Guides is through cross-examination of that physician or the opinion of another medical expert. Jones v. Brasch-Berry General Contractors, supra. In this instance, Baumann both cross-examined Dr. Johnson, and presented evidence from Dr. Primm who challenged Dr. Johnson's impairment rating and explained why it was not assessed in accordance with the AMA Guides.

In Jones v. Brasch-Berry, 189 S.W.3d at 153-154, the Kentucky Court of Appeals held as follows:

> A claimant found to have a compensable, permanent partial disability receives workers' compensation benefits based on the percentage of the employee's disability assessed by the ALJ in accordance with the AMA Guides. Thus, the AMA Guides are an indispensable tool utilized by an ALJ to determine the nature and severity of any claimant's injuries. In the case at hand, two physicians found that Jones suffers from a "Category III" impairment under the AMA Guides; and only Dr. Reasor found that Jones suffered from a "Category IV" impairment. Thus, the ALJ's decision to find Jones twenty-six percent disabled rests solely upon Dr. Reasor's opinion.
>
> As noted by the Board, Dr. Reasor's impairment rating "is a reflection of a personal [sic] desired outcome for the numerical percentage rather than an expert medical application of the definitions reflected within the categories of impairment [found in the AMA Guides]." This inescapable conclusion is borne out by the fact that Dr. Reasor testified repeatedly in his deposition that Jones's impairment properly fell within the "strict definition" of Category III of the AMA Guides, not Category IV. We will not belabor this opinion by reprinting the lengthy excerpt of Dr. Reasor's opinion on this topic, especially in light of the fact that the Board has already done so on pages 5-12 of its opinion. Category III calls for an impairment range of ten to sixteen percent. Accordingly, Dr. Reasor's assignment of a twenty-six percent impairment rating

for Jones was not in accordance with the strictures of the AMA Guides.

We agree with Jones that the AMA Guides do not abrogate a physician's right to assess independently an individual's impairment rating. We also agree that if the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe. But an ALJ cannot choose to give credence to an opinion of a physician assigning an impairment rating that is not based upon the AMA Guides. In other words, a physician's latitude in the field of workers' compensation litigation extends only to the assessment of a disability rating percentage within that called for under the appropriate section of the AMA Guides. The fact-finder may not give credence to an impairment rating double that called for in the AMA Guides based upon the physician's disagreement with the disability percentages called for in the AMA Guides, which is precisely what Dr. Reasor did in the case at hand.

Under our law, the AMA Guides are an integral tool for assessing a claimant's disability rating and monetary award. So to be useful for the fact-finder, a physician's opinion must be grounded in the AMA Guides, meaning that a physician's personal antagonism toward the AMA Guides, such as that demonstrated by Dr. Reasor in this case, is legally irrelevant. And any assessment that disregards the express terms of the AMA Guides cannot constitute substantial evidence to support an award of workers' compensation benefits.

> Therefore, Dr. Reasor's opinion that Jones is twenty-six percent disabled is not competent, substantial evidence because such a finding is greatly in excess of the express terms of the AMA Guides for the Category III injury Dr. Reasor found Jones to have. Since the Board found that the ALJ's decision was not supported by substantial evidence, it neither "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.
>
> (Footnotes omitted).

As noted in his deposition, Dr. Johnson explained his basis for arriving at the 16% impairment rating. He stated the AMA Guides are merely guidelines, and he relied upon his own “gestalt” or experience in arriving at the impairment rating. Interestingly, Dr. Johnson stated more than once he was not providing expert testimony.

The ALJ’s decision, as well as the order on reconsideration, is bereft of any discussion regarding Dr. Johnson’s methodology in arriving at his impairment rating, including whether the AMA Guides were properly utilized, and if not, whether there was a valid basis for not doing so. On remand, the ALJ must determine whether Dr. Johnson appropriately utilized the AMA Guides in arriving at the impairment rating, and provide an explanation or analysis as to how he arrived at his conclusion. The ALJ is also

directed to provide an analysis of the applicability of Jones v. Brasch-Berry, supra, to the case *sub judice*. We direct no particular result. However, the ALJ must provide the basis for his decision.

Baumann next argues the ALJ failed to properly perform an analysis pursuant to Fawbush, supra, in applying the three multiplier pursuant to KRS 342.730(1)(c)1. Here Baker returned to work for Baumann, performing the same job without restrictions, at the same hourly pay rate. He testified he worked a half an hour to an hour less per day than he worked at the time of the injury due to Baumann having lost part of an ongoing contract, not because he could not perform the job. He testified co-workers performing the same job were also working fewer hours. Baker specifically testified he knew of no reason he would not be able to continue his employment into the foreseeable future. This was confirmed by Margaret Baumann.

In Fawbush, supra, the Kentucky Supreme Court concluded in those instances in which both KRS 342.730(1)(c)1 and (c)2 apply, an ALJ is authorized to determine which provision is more appropriate based upon the facts of the individual claim. Id. at 12. In Fawbush, the claimant, due to the effects of the work injury, no longer retained the physical capacity to perform the type

of work he had been performing at the time of the injury. The claimant, however, had returned to work at a lighter job earning an average weekly wage equal to or exceeding his average weekly wage at the time of the injury.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Court remanded a claim for a determination of the claimant's average weekly wage following his return to work. The Court instructed if the ALJ determined the claimant earned the same or greater wage as he had at the time of his injury:

> The ALJ must then apply the standard that was set forth in Fawbush v. Gwinn, supra, to determine from the evidence whether he is likely to be able to continue earning such a wage for the indefinite future and whether the application of paragraph (c)1 or 2 is more appropriate on the facts. *Id*. at 211

In Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004), the Court held the Fawbush analysis includes a "broad range of factors", only one of which is the ability of the injured worker to perform his pre-injury job.

Hence, where both the 3 multiplier and the 2 multiplier potentially apply under the given facts of a claim, the principles enunciated in Fawbush, supra, and its

progeny, require an ALJ to make three essential findings of fact. First, the ALJ must determine, based on substantial evidence, a claimant cannot return to the "type of work" performed at the time of the injury in accordance with KRS 342.730(1)(c)1; second, the claimant has returned to work at an average weekly wage equal to or greater than his pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and, third, whether the claimant can continue to earn that level of wages into the indefinite future.

In this instance, the ALJ only determined Baker could not continue to earn his level of wages into the "indefinite" future based upon the evidence from both Baker and Dr. Johnson. The ALJ did not explain the basis for his conclusion, which is contrary to Baker's testimony regarding his ability to perform his job into the foreseeable future. Because the ALJ's analysis stops short of that required by Fawbush, supra, on remand, he must perform a complete analysis to determine whether KRS 342.730(1)(c)1 is applicable in this instance. Again, in remanding, we are not requiring any particular result. All findings of fact lay within the discretion of the ALJ.

Finally, Baumann argues the ALJ failed to review all evidence in rendering his decision. Specifically

Baumann took issue with the ALJ allowing Dr. Primm's deposition to be taken, and failing to consider it in his decision. In the order on reconsideration, the ALJ noted he had inadvertently failed to note he had indeed reviewed and considered Dr. Primm's deposition testimony in arriving at his conclusions. We note Dr. Primm testified by deposition on December 7, 2012. The hearing was held December 12, 2012. Dr. Primm's deposition transcript was received by the Department of Worker's Claims on Friday, December 14, 2012. The transcript of the deposition was actually scanned into the Department of Worker's Claims Filenet data base on December 17, 2012. The ALJ's opinion was rendered on December 17, 2012. The transcript of the deposition bears a secondary date stamp of December 19, 2012. We make no determination regarding what the ALJ did or did not review in arriving at his decision. On remand, the ALJ shall review all applicable evidence in arriving at his determinations.

Accordingly, the opinion, order and award rendered December 17, 2012, and the order denying the petition for reconsideration rendered January 11, 2013, by Hon. William J. Rudloff, Administrative Law Judge, are hereby **VACATED.** This claim is **REMANDED** to the ALJ for

entry of an amended opinion, order and award in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

COUNSEL FOR PETITIONER:

HON TIGHE A ESTES
300 EAST MAIN ST, STE 400
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT:

HON MCKINNLEY MORGAN
921 SOUTH MAIN STREET
LONDON, KY 40741

ADMINISTRATIVE LAW JUDGE:

HON WILLIAM J RUDLOFF
400 EAST MAIN ST, STE 300
BOWLING GREEN, KY 42101