OPINION ENTERED: February 1, 2013

CLAIM NO. 200971795

BEST BUY PETITIONER

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

JOHN CLARK
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Best Buy appeals from the September 14, 2012, amended opinion and order on remand in which Hon. William J. Rudloff, Administrative Law Judge ("ALJ") determined John Clark ("Clark") cannot continue to earn his present level of wages for the indefinite future and is therefore entitled to enhanced benefits pursuant to KRS 342.730(1)(c)1. *See* Fawbush v. Gwinn, 103 S.W.3d 5 (Ky.

2003). Best Buy also appeals from the October 15, 2012, order overruling its petition for reconsideration. The factual background of this case, as summarized in the Board's August 2, 2012, opinion is as follows:

> Clark's Form 101 alleges on November 27, 2009, he injured his low back, both hips, and legs when "after squatting and stocking shelf, [he] stood up and felt a pain in my lower back." Clark underwent surgery on June 23, 2010, in Dallas, Texas performed by Dr. Kelly Will. Clark testified he was injured the day after Thanksgiving while working as a computer salesman. Clark explained that on that day he had worked approximately twelve hours, and two trucks loaded with freight remained to be unloaded. Clark unloaded a box of routers and placed them on a lower shelf in the router aisle. When he stood up Clark stated he felt as if someone had stabbed him in the back. He immediately experienced pain in both legs. He reported his injury to his supervisor. Clark went to Western Baptist Hospital and the next day went to Dr. Thomas Staton, his family physician. Clark sought treatment by Dr. Will who was performing a new type of surgery. The records reveal on June 23, 2010, Dr. Will performed the following procedure:
>
> > Discectomy & Neural Decompression L4-5, L5-S1 (Bilateral) Intraoperative Neural Monitoring, Medial Branch Facet Rhizotomies, Platelet/Fibringen Rich Plasma Injections Fluoroscopic Guidance (77003-26)

Clark believes he returned to work as a computer salesman on September 4, 2010. Clark testified that approximately a month after he returned to work he was promoted to supervisor over the "Geek Squad." At the time of his February 15, 2012, deposition, Clark's wages were $15.20 per hour. He acknowledged that as a result of being promoted he makes more than the $11.00 per hour he earned as a computer salesman.

Clark testified his current job as a supervisor is less physically demanding. He explained that as a computer salesman, he was required to unload trucks and stock shelves which involved frequent bending and stooping. Clark regularly lifted boxes in excess of forty pounds. The heaviest items he lifted as a salesman weighed approximately sixty pounds. He is now working more hours at a higher hourly rate. After returning to work, Clark has not missed work and has not returned to see Dr. Will post-surgery.

Clark testified that prior to his injury he had intermittent low back problems. Clark explained he developed mid-back problems in 2001 and as a result was treated by Paducah Pain Management.[1] He testified he was treated by Pain Management Center of Paducah ("Pain Management") through the date of his work injury.[2]

After surgery was performed by Dr. Will, Clark has not returned to Pain

[1] The record reflects the correct name of the facility is Pain Management Center of Paducah.

[2] The records of Pain Management, filed in the record, reflect Clark was first treated by Pain Management on April 18, 2001, and was last seen before his November 27, 2009, injury on October 19, 2009. Clark was seen one time by Pain Management after the work injury.

Management. He testified he takes two Aleve in the morning which gets him through the day. Clark described his current job as supervising other members of the Geek Squad making sure they perform their job correctly and occasionally repairing a computer. Regarding his condition post-surgery, Clark testified as follows:

> Q: How has Dr. Will's surgery been, in your own opinion?
>
> A: It's been phenomenal. I can work, I can walk with little pain. I mean it's more like I think I've developed arthritis a little bit. Because when it's cold or rain, I get a little pain, but it's nowhere near what it was after the accident.
>
> Q: Okay. Is your pain level now even better than it was before the accident?
>
> A: Somewhat, yeah. I mean I still have a little bit of pain in the mid back, but really not that bad.
>
> Q: Okay. Are you having to seek any treatment through Pain Management now?
>
> A: No.
>
> Q: Are you having to seek any treatment through a medical specialist such as a neurosurgeon?
>
> A: No sir.
>
> Q: Are you having to seek any treatment for your back by

> even your general practitioner at this time?
>
> A: No sir.
>
> . . .

We summarized the ALJ's decision as follows:

> Relying upon the opinions of Dr. Barlow, the ALJ determined Clark had an 18% whole person impairment, 12% of which was attributable to a pre-existing active condition and 6% was attributable to the work-related injury. Concerning Clark's entitlement to the three multiplier, the ALJ stated as follows:
>
>> The plaintiff argues that he is entitled to the three multiplier. The ALJ agrees. Based on the lifting and movement assessed by Dr. Chabot, the defendant's first evaluator, the plaintiff does not retain the capacity to perform his pre-injury job. In fact the defendant promoted the plaintiff to a position that requires less lifting. I therefore find the plaintiff entitled to the three multiplier.
>
>> *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 ALJ must determine whether a claimant can return to the type of work performed at the time of injury. Second, the ALJ must also determine whether the claimant has returned to work

> at an AWW equal to or greater than his pre-injury wage. Third, the ALJ must determine whether the claimant can continue to earn that level of wages for the indefinite future.
>
> The ALJ has determined that the plaintiff cannot return to the type of work performed at the time of injury. The parties agreed that the plaintiff returned to work at the same or greater wages, so that the two multiplier does not apply. *Fawbush* only applies where the ALJ must decide between the two factor and the three factor. Since the two factor is not available, *Fawbush* does not apply.

In the first appeal, Best Buy asserted the record did not support the ALJ's finding the injury caused Clark not to retain the physical capacity to return to the type of work he performed at the time of the injury. *See* KRS 342.730(1)(c)1.

In the August 2, 2012, opinion affirming in part, vacating in part, and remanding, we determined Dr. Michael C. Chabot's opinion and Clark's testimony constituted substantial evidence supporting the ALJ's decision Clark did not retain the capacity to return to the type of work he was performing at the time of the injury. We stated there was no dispute Clark underwent surgery as a result of

his work-related disc herniation and Dr. Chabot's work restrictions and Clark's testimony established he could not return to work as a computer salesman and adhere to the weight lifting and movement limitations imposed by Dr. Chabot. However, we *sua sponte* remanded the claim to the ALJ holding as follows:

> Because of the ALJ's statement that since the parties agreed Clark returned to work at the same or greater wages, the two multiplier does not apply, we feel compelled to address the ALJ's Fawbush analysis. Significantly, in its petition for reconsideration, Best Buy did not raise the ALJ's failure to conduct a Fawbush analysis. Rather, it argued the record did not support the ALJ's determination Clark did not retain the capacity to perform his pre-injury job. Further, in its brief on appeal, Best Buy does not submit the ALJ did not conduct a proper analysis pursuant to Fawbush. Instead, it asserts a Fawbush analysis does not support enhancement by the three multiplier. As we have already determined substantial evidence supports the ALJ's determination Clark could not return to the work performed as a computer salesman the first prong of Fawbush is satisfied. Clark's testimony establishes he returned to work earning the same or greater wages and is now earning greater wages than at the time of the injury. Thus, the two multiplier clearly applies. In the March 28, 2012, opinion and order, the ALJ incorrectly stated the two multiplier and Fawbush "[do] not apply." However, it appears in his opinion and order on reconsideration, the ALJ realized the two multiplier did

apply since he stated he was making "the factual determination that Clark cannot continue to earn his present level of wages for the indefinite future…" which is the last finding required by Fawbush.

Because the ALJ did not recite the evidence upon which he relied in enhancing Clark's benefits, we vacate that portion of the ALJ's award enhancing Clark's benefits by the three multiplier. In Fawbush, the Supreme Court stated as follows:

> We conclude, therefore, that an ALJ is authorized to determine which provision is more appropriate on the facts. If the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future, the application of paragraph (c)1 is appropriate.
>
> Here, the ALJ based the decision to apply paragraph (c)1 upon a finding of a permanent alteration in the claimant's ability to earn money due to his injury. The claimant's lack of the physical capacity to return to the type of work that he performed for Fawbush was undisputed. Furthermore, although he was able to earn more money than at the time of his injury, his unrebutted testimony indicated that the post-injury work was done out of necessity, was outside his medical restrictions, and was

> possible only when he took more narcotic pain medication than prescribed. It is apparent, therefore, that he was not likely to be able to maintain the employment indefinitely. Under those circumstances, we are convinced that the decision to apply paragraph (c)1 was reasonable.

In this case, Clark's unrebutted testimony, a portion of which is recited herein, establishes he returned to work performing a much less strenuous job and earning more money. His testimony also establishes his pain level is somewhat less than before the work injury. Further, since the surgery, Clark has not had to seek treatment from Pain Management, a medical specialist, or his general practitioner. Clark is able to manage whatever pain he experiences using over-the-counter medication. The only apparent similarity between Fawbush and this case is that both Fawbush and Clark lacked the physical capacity to return to the type of work performed when injured. Clark's work was not done out of necessity, he was working more hours and not outside his medical restrictions, and was not taking more pain medication than prescribed in order to perform his job. Clark's testimony indicates that since the surgery he is working more hours and his physical condition seems to have improved.

The ALJ's statement Clark's ability to compete for jobs in the competitive economy is significantly impaired for the indefinite future due to the work injury is merely a conclusion. The ALJ does not provide

> the reason why Clark is "unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future." Id. at 12. While Clark has physical restrictions, the record does not establish Clark's current job is affected by his physical restrictions and the ALJ has not cited to any evidence establishing Clark cannot continue to work at his less strenuous job for the indefinite future. Because we cannot engage in fact-finding, we remand to the ALJ for additional fact-finding and a recitation of the evidence which supports a finding Clark "is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future." Id. at 12.

Neither party appealed our decision. No additional proof was taken. In the September 14, 2012, amended opinion and order on remand the ALJ enhanced Clark's permanent partial benefits ("PPD") by the three multiplier, determining as follows:

> In making my factual determination and in awarding Mr. Clark enhanced permanent partial disability benefits, I relied on Weinstein, et al "Surgical vs Nonoperative Treatment for Lumbar Disk Herniation, The Spine Patient Outcomes Research Trial (SPORT): A Randomized Trial," Journal of American Medical Association (Nov.,2006) Vol. 296, No. 20, PP. 2441 et seq. That learned treatise and reliable authority studied lumbar diskectomy, which is the most common surgical procedure performed for back and leg symptoms in United States patients to assess the efficacy of surgery for lumbar

intervertebral disk herniation. The article reviews a randomized clinical trial enrolling patients between March 2000 and November 2004 in 11 of the United States and 501 surgical candidate patients. The study concluded that patients who undergo lumbar disc surgery improve substantially. However, the study also showed that: (1) 60-70% of the patients continue to have bodily pain; (2) 70-80% of the patients continue to have limitations of physical function; (3) 70-80% of the patients had reduced work status.

In making my factual determination that John Clark cannot continue to earn his present level of wages for the indefinite future and that his ability to compete for jobs in the competitive economy is significantly impaired due to his November 27, 2009 work injuries, I also relied upon my professional experience as an attorney from 1965 to 2011, a period of 46 years, during which I handled thousands of workers' compensation and personal injury cases, hundreds of which involved lumbar disk injury and lumbar disk surgery. In the workers' compensation cases I represented both employees and employers. I observed injured workers who had lumbar disk injuries and surgeries and saw the practical long-term effects on them over periods of 5, 10, 15 and 20 years after their surgeries. A substantial percentage of those injured workers had continuing painful symptoms, limitations in their physical function and loss of time from work, resulting in reduced work-life expectancy, and loss of time from work, i.e., occupational disability. In other words, my real world experience over a period of 46 years taught me that workers who suffer lumbar disk injuries and undergo lumbar disk

> surgeries such as John Clark cannot continue to earn their pre-injury level of wages for the indefinite future and cannot compete for jobs in the competitive economy, thereby resulting in significant future earnings loss or occupational disability due to their work injuries and surgeries.
>
> For all of the above reasons, I made and again make the factual determination that John Clark cannot continue to earn his present level of wages for the indefinite future and that his ability to compete for jobs in the competitive economy is significantly impaired due to his November 27, 2009 work injuries. I, therefore, again award to Mr. Clark enhanced permanent partial disability benefits pursuant to KRS 342.730(1)(c)1.

Best Buy filed a petition for reconsideration asserting, in part, the claim was remanded for an analysis pursuant to Fawbush v. Gwinn, supra, and the ALJ failed to "make factual findings to accomplish this task." Instead, the ALJ relied on inadmissible evidence and "inaccurate renditions of the evidence." Consequently, Best Buy requested the ALJ make additional findings in accordance with Fawbush v. Gwinn, supra.

In the October 15, 2012, opinion and order on reconsideration denying Best Buy's petition for reconsideration, the ALJ stated, in relevant part, as follows:

4. In both the original Opinion and Order and the Amended Opinion and Order on Remand, in awarding to the plaintiff enhanced permanent partial disability benefits, I relied on the totality of the evidence, including the medical reports of Dr. Chabot, in making the factual determination that the plaintiff does not retain the physical capacity to perform his pre-injury job and also cannot continue to earn his present level of wages for the indefinite future. As emphasized by the plaintiff in his most recent Response, Dr. Chabot stated in his March 31, 2011 medical report that it is his medical opinion that John Clark has a significantly high risk for recurrence of his back pain symptoms, which is completely consistent with the objective medical findings cited in Weinstein, et al "Surgical vs Nonoperative Treatment for Lumbar Disk Herniation, The Spine Patient Outcomes Research Trial (SPORT): A Randomized Trial," Journal of American Medical Association (Nov.,2006) Vol. 296, No. 20, PP. 2441 et seq., the learned treatise upon which I relied in the Amended Opinion and Order on Remand dated September 14, 2012.

5. In *Adkins v. Pike County Board of Education*, 141 S.W.3d 397 (Ky.App.2004), the Court of Appeals emphasized that the *Fawbush* analysis includes a broad range of factors, only one of which is the ability to perform the current job. The standard for the decision is whether the injury has permanently altered the workers' ability to earn an income. The application of KRS 342.730(1)(c)1 is appropriate if an individual returns to work at the same or a greater wage but is unlikely to be able to continue for

> the indefinite future to do work from which to earn such a wage.
>
> 6. Plaintiff also emphasized in his Response my factual determination that the employer reassigned Mr. Clark to a lighter job as a supervisor and that factual determination has already been affirmed by the Workers' Compensation Board. The defendant, therefore, has no basis to reargue those factual findings.
>
> It is clear that this case has been thoroughly litigated and should be laid to rest. For all of the reasons stated hereinabove, the defendant's present Petition for Reconsideration is hereby overruled and denied.

On appeal, Best Buy asserts Clark is able to continue his employment for the indefinite future, and KRS 342.730(1)(c)2 is not applicable. It argues Clark's testimony establishes "he is doing phenomenally well and is earning 'a lot' more money following his promotion to supervisor than he was at the time of the injury." Best Buy also asserts the ALJ "provided no credible recitation of evidence to support his conclusion [Clark] would be unable to perform work at the same or greater wages for the indefinite future." Therefore, the ALJ's award is arbitrary and capricious and is not based on any evidence in the record. Specifically, it asserts the ALJ's decision was based upon the following: 1) a research article found in the Journal of American Medical Association; and 2) the

ALJ's personal experience; and 3) Dr. Chabot's statement Clark will likely have pain in the future.

Best Buy argues the research article was not referenced as an authority by any medical expert or treating physician. Therefore, the article is inadmissible because the proper foundation was not laid, as 803 KRE (18) mandates a "'learned treatise'" be admitted into evidence through a medical expert. Thus, it contends the article is inadmissible because it is hearsay. Likewise, Best Buy argues the ALJ's personal bias and opinion is inadmissible. It contends the ALJ's recitation of his personal experiences is hearsay, has no relation to the case *sub judice*, and is not evidence in the record. Further, it argues the ALJ's personal experience is not relevant evidence and cannot support his decision on the issue before him.

Best Buy also maintains Dr. Chabot's statement Clark will likely have pain in the future is insufficient to support enhancement by the three multiplier. It argues "nothing is stated in relation to impairment, restrictions, job duties, job security or the like." Best Buy notes Clark has a 12% impairment for a non-work-related prior back condition, and the records establish he is going to have back pain in the future regardless of whether he works

for Best Buy. It argues "Dr. Chabot's reference to future pain has no evidential relation to [Clark's] ability to continue working in his current position." Best Buy requests the ALJ's decision be vacated and a "substitute" order and award be entered pursuant to KRS 342.730(1)(c)2 and the applicable case law relating thereto.

On the other hand, Clark insists substantial evidence supports the ALJ's determination. He argues the following statement of Dr. Chabot in his March 31, 2011, letter constitutes substantial evidence in support of the ALJ's decision:

> it is my opinion that he has a significantly high risk of recurrence of his back pain symptoms even performing activities of daily living.

Clark argues the Board previously stated Dr. Chabot's testimony constitutes substantial evidence regarding his physical capacity to return to the job he was performing at the time of the injury; therefore, the above-cited opinion is substantial evidence supporting the ALJ's finding he is not likely to continue earning the same or greater wages into the indefinite future.

In referencing his personal experiences, Clark maintains the ALJ was essentially setting forth the reasons he found Dr. Chabot's opinion to be credible. He argues

there is nothing wrong with the trier of fact utilizing his life experiences, including his years of practicing law, in determining the credibility of the witness. In support of this proposition, Clark cites Jeffries v. Clark & Ward, 2006-CA-2554-WC, rendered August 17, 2007, in which the Board and the Court of Appeals affirmed the ALJ's determination Jeffries was not a credible witness despite the fact the ALJ used his life experiences in making that determination. Clark argues since the ALJ "is entitled to utilize his life experiences in determining credibility" and he identified the substantial evidence in the record upon which he relied in making his determination, the decision of the ALJ should be affirmed.

Because the ALJ erred in relying upon the article from the Journal of American Medical Association, his personal experiences, and the above-cited statement of Dr. Chabot without further explanation, we vacate and remand.

803 KAR 25:010§14(1) directs that the rules of evidence "shall apply in all proceedings before an Administrative Law Judge except as varied by a specific statute and this administrative regulation."

KRE 803 Section 18, which was not varied by statute or regulation, reads as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . .
>
> (18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

In this case, the contents of the purported learned treatise were not introduced upon direct or cross-examination of an expert witness. Further, the article in the Journal of American Medical Association was not proven to be a learned treatise. Finally, the contents of the article relied upon by the ALJ were never read into the record and made a part of the record. Thus, the article cannot constitute substantial evidence and serve as a basis for the ALJ's decision.

Similarly, the ALJ's past experience as an attorney cannot constitute substantial evidence and serve as the basis for his decision. The ALJ's past experience as a practicing attorney for forty-six years is not in

evidence. Likewise, his experience as an attorney handling thousands of workers' compensation cases is not in evidence. The ALJ made a general statement regarding his experience as a practitioner and his observation of injured workers who have lumbar disc injuries and undergone surgeries. We agree with Clark the ALJ may draw upon his experiences in determining the credibility of a witness. However, his personal experiences cannot constitute evidence supporting his decision on a contested issue. To permit the ALJ to base his decision upon his personal experiences would create a myriad of problems, not the least of which would be allowing the ALJ to testify.

In addition, we find Clark's reliance upon Jeffries v. Clark & Ward, supra, to be misplaced. In that case, the ALJ stated many of the factors relating to the judgment of credibility by a trier of fact are subconscious and related to life experiences. The ALJ made no attempt to base his substantive decision upon his life experiences. Rather, the ALJ limited the use of his life experiences to resolving witness credibility. In dismissing Jeffries' claim, the ALJ relied upon a doctor's opinion that her complaints of pain were not caused by a work-related activity or condition. Here, unlike Jeffries, the ALJ decided the substantive issue in question relying, in part,

upon his personal experiences and biases. In Manalapan Mining Co., Inc. v. Turner, Claim No. 2000-81937, rendered May 7, 2003, we stated:

> An ALJ's primary responsibility is fair and impartial weighing of the totality of the evidence contained within the record. Any fact-finder who resorts to personal experiences or biases that may be reasonably interpreted as constituting a basis, in whole or in part, for the decision leaves the door ajar for the well-deserved criticism that he/she is being neither fair nor impartial, either in appearance or fact, leaving those decisions extremely vulnerable to post award attack. Accordingly, the ALJ erred in relying upon his personal experiences as an attorney as a partial basis for his decision.

Concerning Dr. Chabot's statement referenced by the ALJ, we point out in our August 2, 2012, opinion, we determined Clark's testimony and Dr. Chabot's opinions combined constituted substantial evidence supporting the ALJ's determination Clark did not retain the physical capacity to perform the type of work he was performing at the time of the injury. However, our conclusion substantial evidence supports the ALJ's determination the three multiplier was applicable did not establish Clark is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of his injury. Fawbush v. Gwinn, supra.

In his September 14, 2012, amended opinion and order on remand, the ALJ did not cite Dr. Chabot's opinions as being part of the basis for his determination Clark could not continue to earn his present level of wages for the indefinite future. Rather, in his October 15, 2012, order ruling on the petition for reconsideration, the ALJ, for the first time, referenced Dr. Chabot's statement in the March 31, 2011, medical report. This statement by Dr. Chabot, however, needs to be viewed in its proper context. Dr. Chabot's March 31, 2011, report contains the following language:

> After reviewing these medical records, it is my opinion that it is possible that Mr. Clark aggravated or exacerbated his pre-existing chronic back condition, which for all accounts dates back to 2000.
>
> It is my opinion that the recommendations regarding PPD by Dr. Barlow appear to be reasonable with the majority of the disability associated with pre-existing disease.
>
> It is my opinion that this individual could return to his prior work duties based on the records from Dr. Will, but it is my recommendation that those work duties limit lifting in excess of 35-40 pounds.
>
> **With this individual's history of chronic back pain complaints**, it is my opinion that he has a significantly high risk of recurrence of his back

> pain symptoms even with performing activities of daily living.
>
> It would be my recommendation to his employer that he be placed on work duties that avoid repetitive bending and twisting.
>
> It is my opinion that this individual has reached MMI.
>
> This individual has a long-standing history of back and lower extremity complaints that predated his injury and he had undergone multiple treatments with pain management prior to his alleged injury of November 27, 2009. It is my opinion that he was likely to develop exacerbation of his back and lower extremity complaints even with activities of daily living.
>
> Based on his medication use at the time I saw him on August 11, 2010 and his persisting subjective complaints, it is my opinion that he will continue to have persisting back pain symptoms. His present pain level is associated with his chronic complaints and not specifically to his work injury.

(emphasis added.)

The particular statement of Dr. Chabot referenced by the ALJ in his order overruling the petition for reconsideration is contained in the fourth paragraph set out above. Significantly, both Clark and the ALJ failed to cite the *full sentence* as Dr. Chabot indicates that based on Clark's "history of chronic back pain complaints" it was his opinion Clark had significantly higher risk of

recurrence of his back pain symptoms even with performing activities of daily living. Thus, it is clear Dr. Chabot's opinion was based on Clark's history of chronic back pain complaints most of which pre-existed the work injury.

Relying upon Dr. Charles A. Barlow's opinion, the ALJ determined Clark had a 12% impairment due to chronic back problems which pre-dated the injury of November 27, 2009. Dr. Barlow also assessed a 6% impairment due to the November 27, 2009, work injury. In the second paragraph of his March 31, 2011, letter, Dr. Chabot states he agrees with Dr. Barlow's impairment ratings, as "the majority of the disability is associated with pre-existing disease." This is consistent with the above-cited opinion that based on Clark's history of chronic back pain, Clark has a significantly higher risk of recurrence of his back pain symptoms even with performing activities of daily living. In making this statement, Dr. Chabot does not make any attempt to distinguish between Clark's back pain complaints before the injury and after the injury. Further, Dr. Chabot allowed Clark to return to work with certain restrictions. Certainly, Clark's testimony does not establish he has violated those restrictions or his symptoms prohibit him from performing his current work. We also note in the last sentence of his March 31, 2011,

report, Dr. Chabot indicates Clark's present pain level is associated with his chronic complaints and not to his work injury. Therefore, without further explanation, the mere reliance upon one incomplete statement of Dr. Chabot cannot constitute substantial evidence supporting the enhancement of Clark's benefits by the three multiplier.

Because we lack fact-finding authority, this claim must again be remanded to the ALJ for additional fact-finding as to whether Clark is likely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future in accordance with the mandate of Fawbush v. Gwinn, supra. While we express no opinion as to the outcome, the ALJ must base his findings upon evidence in the record, and provide the evidentiary basis for his finding which the ALJ has not done in this case. As noted in Arnold v. Toyota Motor Mfg., 375 S.W.3d 56, 62 (Ky. 2012):

> Only when an opinion summarizes the conflicting evidence accurately and states the evidentiary basis for the ALJ's finding [footnote omitted] does it enable the Board and reviewing courts to determine in the summary manner contemplated by KRS 342.285(2) whether the finding is supported by substantial evidence and reasonable. [footnote omitted]

(emphasis added.)

The contents of the journal article and the ALJ's personal experiences cannot constitute an evidentiary basis for his decision. Similarly, the portion of Dr. Chabot's statement cited by the ALJ standing alone does not constitute substantial evidence in support of the ALJ's finding.

Accordingly, the September 14, 2012, amended opinion and order on remand and the October 15, 2012, opinion and order on reconsideration are **VACATED**. This claim is **REMANDED** to the ALJ for additional findings of fact pursuant to Fawbush v. Gwinn, supra, and entry of an amended opinion and order enhancing Clark's benefits consistent with the views expressed herein and the Board's previous opinion of August 2, 2012.

ALL CONCUR.

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