OPINION ENTERED: August 2, 2012

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
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Best Buy seeks review of the March 28, 2012, opinion and order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding John Clark ("Clark") sustained a work-related low back injury on November 27, 2009. The ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability

("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)(1), and medical benefits. Best Buy also appeals from the April 19, 2012, "opinion and order on reconsideration" overruling its petition for reconsideration.

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 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?

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[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.

> 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.

Clark submitted the report of Dr. Charles A. Barlow, an orthopedic surgeon, generated as a result of an independent medical examination ("IME") on November 29, 2010, and Dr. Barlow's Form 107 dated November 29, 2010. Clark submitted the medical records of Dr. Will, and the records of his family physician, Dr. Thomas Staton. Clark also submitted the August 11, 2010, and March 31, 2011, reports of Dr. Michael Chabot.

Best Buy submitted the March 8, 2012, and March 14, 2012, medical reports of Dr. Martin Schiller as well as the records of Pain Management.

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.
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> *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.

Pursuant to KRS 342.730(1)(c)1, the ALJ enhanced Clark's PPD benefits by the three multiplier.

Best Buy filed a petition for reconsideration stating Dr. Schiller had not expressed an opinion as to whether Clark could return to the type of work he was performing at the time of the injury. However, Dr. Barlow stated Clark could return to the type of job he was performing at the time of the injury. Best Buy maintained Clark testified he returned to the very same job he performed at the time of the injury and worked approximately one month before he was promoted. Best Buy argued Clark testified since the June 23, 2010, surgery, he is better physically and has not needed any type of back treatment which established Clark's back pain was not as severe as the pain he experienced prior to the injury. It argued the sole basis for enhancing Clark's benefits appeared to be the report of Dr. Chabot. Best Buy maintained, as pointed out by the ALJ, Dr. Chabot evaluated Clark before he reached maximum medical improvement ("MMI"). Best Buy asserted at the time Dr. Chabot conducted his examination, Clark had not returned to work. Further, it noted Dr. Chabot's second letter was not based on a subsequent examination. Best Buy maintained the second letter contained an opinion given without conducting

another examination and only after reviewing more records. It argued the last sentence of Dr. Chabot's March 31, 2011, letter establishes Clark's current back pain is due to chronic pain and not the work injury. Best Buy argued Clark's injury is not responsible for his inability to return to the type of work he performed at the time of the injury and therefore the three multiplier "should be removed." Significantly, Best Buy did not ask for additional findings or raise as an issue the ALJ's failure to conduct an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

On April 19, 2012, the ALJ overruled Best Buy's petition for reconsideration stating, in relevant part, as follows:

> 4. *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.
>
> 5. Plaintiff had back surgery performed by Dr. Will. Defendant had plaintiff examined by Dr. Chabot, who placed upon plaintiff lifting

> restrictions and stated that plaintiff should avoid repetitive bending and twisting. The uncontradicted testimony of John Clark at the hearing was that his pre-injury job required him to unload trucks and stock shelves and to lift in excess of 40 pounds, and that his pre-injury job required him to do frequent bending and stooping.
>
> 6. I saw and heard Mr. Clark testify at the hearing. It is obvious that he is a well-motivated individual.
>
> 7. I made the factual determination that based upon Mr. Clark's physical restrictions he does not retain the capacity to perform his pre-injury job and that the defendant promoted him to a lighter job. I made the factual determination that the plaintiff was, therefore, entitled to the three multiplier. I also make the factual determination that Mr. 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 for the indefinite future due to his November 27, 2009 work injuries.
>
> 8. Based upon the totality of the evidence in the record, including the uncontradicted testimony of Mr. Clark and the medical evidence from Dr. Barlow and Dr. Chabot, I made the above factual determinations. For all of the above reasons, I awarded to Mr. Clark enhanced permanent partial disability benefits pursuant to KRS 342.730(1)(c)1.

On appeal, Best Buy argues there is no basis for the imposition of the three multiplier contained in KRS

342.730(1)(c)1. It asserts the record does not justify a finding Clark's injury caused him to lose the physical capacity to return to the type of work he was performing at the time of his injury. Best Buy maintains Dr. Will released Clark indicating "the surgery was good" and allowed Clark to drive from Dallas to Kentucky. Further, Drs. Barlow and Staton indicated Clark was released to work with no restrictions. Best Buy submits Dr. Schiller did not offer an opinion as to whether Clark had any restrictions.[3] Best Buy asserts Clark testified he returned to work performing the same job and missed no work during the time period he held that position. It cites to Clark's testimony he is taking over-the-counter medication after the surgery and has not had to return to Pain Management where he was a regular patient before his injury. Best Buy posits although Dr. Chabot imposed work restrictions of no lifting in excess of thirty to forty pounds, he stated Clark could return "to his prior work duties based on the records from Dr. Will." Citing to the last two paragraphs of Dr. Chabot's March 31, 2011, letter, Best Buy asserts

[3]It appears Dr. Schiller imposed no physical restrictions. In his letter of March 8, 2012, in response to the question what restrictions he would place upon Clark if he were his physician, Dr. Schiller stated he would give Clark no restrictions.

Dr. Chabot did not attribute Clark's current pain to the work injury. Best Buy next argues as follows:

> Before concluding, we [sic] assert that we [sic] are not attempting to ignore or change the Law as set forth in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and its progeny. The ALJ must determine whether a Claimant can return to the type of work performed at the time of the injury. In this case, Clark did return to the type of work he was doing at the time of the injury and worked one month without missing any time from work. He then was 'promoted.' He was not 'accommodated.' Further, Plaintiff had been a regular patient at Paducah Pain Clinic for years before the injury and since the injury has not been back to that medical facility.
>
> Secondly, the [sic] Fawbush (supra) indicates that the ALJ must determine whether the Claimant has returned to work at an average weekly wage equal to or greater to the pre-injury wage. There is no doubt that he did. Thirdly, the ALJ must determine whether the Claimant can continue to earn that level of wages for the indefinite future. The inability to continue to work for the indefinite future must be based on the injury, however. In this case there was conflicting testimony and Dr. Chabot made it very clear that the present problems Clark was experiencing was due to the pre-existing condition and not the injury. Thus, we [sic] submit that the Fawbush (supra) analysis will not support a three factor in this case.

Clark, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential

elements of his cause of action, including entitlement to enhancement of his benefits by the three multiplier. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Clark was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same

adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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

The August 11, 2010, letter of Dr. Chabot, generated after conducting an IME on that same date, reflects the following:

> Based on the supplied medical records, it is my opinion that the patient's prior complaints were work-related.
> It is my opinion that the patient has not reached MMI quite yet. He is in need of additional treatment, consisting of physical therapy/work-conditioning.
>
> It is my opinion that the patient can return to limited work duties with no lifting more than 25-30 pounds.
>
> It is my recommendation that the prior medical records from Dr. Stanton or other treating physicians be obtained and forwarded to me. There is some question whether or not he was treated for chronic back pain symptoms prior to his alleged injury based on the fact that the records indicate that he was already on pain medication prior to being seen by Dr. Stanton.
>
> Please also forward the patient's prior MRI and myelogram CT studies so I can review them and complete my report.

Dr. Chabot's letter of March 31, 2011, reflects the following:

> 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.

The reports of Dr. Chabot and the testimony of Clark constitute substantial evidence supporting the ALJ's determination Clark cannot return to the type of work he was performing at the time of the injury. In the August 11, 2010, report Dr. Chabot restricted Clark to lifting no more than twenty-five to thirty pounds. In his March 31, 2011, report, Dr. Chabot stated Clark's persistent back pain symptoms are "associated with his chronic complaints and not specifically his work injury." Earlier in the letter Dr. Chabot imposed weight lifting limitation of no more than thirty-five to forty pounds. Dr. Chabot went on to state Clark should avoid repetitive bending and twisting. Accordingly, the ALJ could reasonably believe Dr. Chabot's restrictions relate to Clark's work injury. The fact Dr. Chabot stated Clark's pain level is associated with chronic complaints and not his work injury does not establish the physical restrictions were not due to the work injury. There is no dispute Clark underwent surgery as a result of a work-related disc herniation, thus the ALJ could reasonably conclude the work restrictions Dr. Chabot imposed were due to the surgery.

As noted earlier, the ALJ is free to accept the opinions of Dr. Chabot expressed in one letter even though he may have expressed contradictory opinions in a

subsequent letter. Therefore, at the very least, Dr. Chabot's opinions expressed in the August 11, 2010, letter constitute substantial evidence supporting the ALJ's decision. This is particularly true in light of Clark's unrebutted testimony, that as a salesman he lifted items weighing as much as sixty pounds and regularly lifted boxes weighing in excess of forty pounds. Clark's testimony establishes he could not return to work as a computer salesman and adhere to the weight lifting and movement restrictions imposed by Dr. Chabot. We note the ALJ stated he relied upon the lifting and movement restrictions assessed by Dr. Chabot in concluding Clark did not retain the capacity to perform his previous job. Since Dr. Chabot's opinions and Clark's testimony support the ALJ's finding, the determination Clark could not return to the job he was performing at the time of the injury must be affirmed.

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.

We disagree with Best Buy's assertion the claim should be remanded to the ALJ without any enhancement of Clark's benefits. Since the two multiplier is applicable, the ALJ must determine whether application of either the two or three multiplier is appropriate. At a minimum, Clark is entitled to enhancement of the award by the two multiplier subject to the conditions set forth in Chrysalis House Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009), and Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010). On remand, if the ALJ determines enhancement by the three multiplier is not appropriate, then appropriate language regarding enhancement of Clark's benefits by the two multiplier must be included in the amended opinion and order on remand. At some point during the 425 weeks Clark receives PPD benefits, his employment may cease due to reasons which relate to the disabling injury or a previous work-related injury. *See* Chrysalis House, Inc., supra and Hogston, supra. This may have

already transpired. If Clark's employment ceases due to reasons which relate to the disabling injury or a previous work-related injury, he is entitled to have his income benefits enhanced by the two multiplier upon a properly filed motion to reopen. See Chrysalis House, Inc., supra and Hogston, supra. This is consistent with KRS 342.730(1)(c)4 which allows a claim to be reopened in order to modify or "conform" the "award payments" with the "requirements of subparagraph 2," i.e., the two multiplier. While neither party has raised this issue on appeal, this Board may raise it *sua sponte*.

Accordingly, that portion of the March 28, 2012, opinion and order finding Clark cannot return to the type of work performed at the time of the injury is **AFFIRMED**. That portion of the opinion and order enhancing Clark's benefits by the three multiplier is **VACATED** and this claim is **REMANDED** for additional findings of fact pursuant to Fawbush v. Gwinn, supra, and entry of an amended opinion and award enhancing Clark's benefits consistent with the views expressed in this opinion.

ALL CONCUR.

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