OPINION ENTERED: March 8, 2013

CLAIM NO. 201097308

CITY OF ASHLAND PETITIONER

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

TAYLOR STUMBO
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. The City of Ashland ("Ashland") appeals from the October 10, 2012, opinion and order and the November 2, 2012, opinion and order overruling Ashland's petition for reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the October 10, 2012, opinion and order, the ALJ awarded temporary

total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits.

The Form 101 alleges on February 1, 2010, Taylor Stumbo ("Stumbo") was injured while working as a waste water operator when "[h]e stepped out of a dump truck and stepped on ice. He slipped causing injury to his left knee." Under "body part injured" is the following: "Left knee, deep vein thrombosis. Plaintiff reserves the right to add an emotional component." The Form 104 attached to Stumbo's Form 101 indicates Stumbo worked at the following businesses before working for Ashland: Sears, Kay Jewelers, Colorama, Eagle Security, Ryans Steakhouse, Speedway, Taco Bell, Premier Physical Therapy, Breezeland Country Club, EKU, Foodland, Baskin Robbins, and Gattiland.

Ashland's Form 111 Notice of Claim Denial asserts as follows:

> The Plaintiff did not sustain an 'injury' as defined by the Kentucky Workers' Compensation Act. At the time of the work accident, Plaintiff was suffering from pre-existing active impairment of this left knee. There is also a dispute regarding extent and duration and the amount of compensation owed to Plaintiff. Any disability suffered by Plaintiff is due to conditions unrelated to the work accident in question.

The June 12, 2012, benefit review conference ("BRC") order lists the following contested issues: TTD rate and duration, extent and duration, PTD, multipliers, unpaid/uncontested medicals, and vocational rehabilitation.

On June 11, 2012, Stumbo filed a "Motion to Amend 101 To Add Pulmonary Embolus" asserting as follows:

> Plaintiff's file was reviewed by Dr. Quida Draine on 7/19/11. In his Peer Review Report, Dr. Draine stated that 'As a direct result of the knee injury and subsequent surgery, this patient developed a severe complication of DVT (deep vein thrombosis) and subsequent PE (pulmonary embolus)' (see report attached).

Stumbo's motion was sustained by order dated June 19, 2012.

On August 6, 2012, Stumbo filed a "Motion to Amend 101 To Include Upper Gastrointestinal (UGI)" stating as follows:

> Plaintiff's file was reviewed by Dr. Quida Draine on 7/19/11. In his Peer Review Report, Dr. Draine stated that 'As a direct result of the knee injury and subsequent surgery, this patient developed a severe complication of DVT (deep vein thrombosis) and subsequent PE (pulmonary embolus). For thes [sic] severe medical diagnosis, there is a need to have therapy for [sic] anti-coagulant medications like Aspirin and Coumadin....The use of anti-coagulant medications, like Coumadin, is associated with well recognized and real and potential complications.... Therefore, it is appropriate to

> conclude that the use of Coumadin has caused the current gastrointestinal symptoms' (see report attached).

Ashland's first argument on appeal is that the ALJ's finding of permanent total disability is clearly erroneous. Ashland argues as follows:

> Here, the evidence in the record compels the conclusion that Stumbo has the ability to perform certain types of work despite his previously fractured tibia. He has work experience in outside sales, which he should still be able to perform. For example, he has had an outside sales job in acquiring land leases. He testified at the Final Hearing that this previous job required him to 'travel upwards of about three to four hours a day, sitting in a car....And, between the times that [he] would have to take breaks for stops to allow [his] legs to stretch and stuff....[he believes] it would be pretty hard' to return to this type of work.

Ashland asserts Stumbo's hearing testimony conflicts with his deposition testimony in which he testified to recently taking a vacation to North Carolina. Ashland argues Stumbo has three years of college at Eastern Kentucky University and approximately 90 credit hours towards a degree in criminal justice. Additionally, Ashland alleges Stumbo testified a broken leg would not prevent him from working a

desk job, although he has not sought employment since July 2011.

Concerning the issue of extent and duration, in the October 10, 2012, opinion and order, the ALJ determined as follows:

> I saw and heard the plaintiff testify at the hearing. He was a credible and convincing witness. Based on the totality of the evidence in the record, including the plaintiff's testimony and the medical reports of Dr. Kulwicki, Dr. Herr and Dr. Nadar, which I found persuasive, I make the factual determination that Mr. Stumbo sustained a significant permanent whole person impairment as a result of his work injury on February 1, 2010.
>
> In rendering a decision, KRS 342.285 grants the Administrative Law Judge 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).
>
> "'Permanent total disability' means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson*

> *Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,
>
> > "the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."
>
> Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).
>
> In the present case, I considered the severity of the plaintiff's work injury, his age, his work history and the specific medical evidence from Dr. Kulwicki, Dr. Herr and Dr. Nadar regarding his permanent impairment and occupational disability. Based on all of those factors, I make the factual determination that Mr. Stumbo cannot find work consistently under regular circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled.

In its October 23, 2012, petition for reconsideration, Ashland requested the ALJ reconsider the determination Stumbo is permanently totally disabled. In the alternative, Ashland requested additional findings of

fact "clarifying how Plaintiff's restrictions preclude him from working in any capacity and render him permanently totally disabled." Ashland also sought additional findings clarifying to what extent Stumbo's "pulmonary embolism or deep vein thrombosis injuries contribute to his permanent disability and impairment."

In the November 2, 2012, opinion and order overruling Ashland's petition for reconsideration, the ALJ determined as follows:

> 1. Defendant has filed a Petition for Reconsideration and plaintiff has responded thereto.
>
> 2. In Ford Furniture Company v. Claywell, 473 S.W.2d 821 (Ky.1971), Kentucky's highest court held that KRS 342.281 limits the reviewing court to the correction of errors patently appearing on the face of the award, order or decision. It is clear that the defendant is attempting to reargue the case regarding the plaintiff's award of permanent and total disability benefits.
>
> 3. 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, whether on reopening or at the time of an original proceeding, 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).

4. The Opinion and Order dated October 10, 2012 comprehensively reviews the stipulations, the evidence and the issues raised in the case. In the Opinion and Order I noted that I saw and heard the plaintiff testify in person at the hearing and that he was a credible and convincing witness. Based on the plaintiff's testimony and the persuasive medical reports from Dr. Kulwicki, Dr. Herr and Dr. Nadar, I made the factual determination that Mr. Stumbo will sustain a significant permanent whole person impairment as a result of his work injuries on February 1, 2010 and is entitled to recover appropriate compensation benefits, including benefits for temporary total disability, medical expenses, permanent total disability and vocational rehabilitation. All of the above-cited evidence supports the award of

> compensation benefits, as does the decision of the Kentucky Supreme Court in *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000).
>
> WHEREFORE, in light of the above findings of fact and conclusions of law, defendant's Petition for Reconsideration is hereby overruled and denied.

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion with regard to every element of the claim, including notice. *See* Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). As Stumbo was the party with the burden of proof regarding his alleged permanent total disability and was successful before the ALJ, we are left to determine whether substantial evidence supports the ALJ's conclusion. *See* Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *See* Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). Although a party may note evidence that would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. *See* McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Our task on appeal, then, is to determine if

substantial evidence supports the ALJ's award of PTD benefits.

In the October 10, 2012, opinion and order and again in the November 2, 2012, opinion and order overruling Ashland's petition for reconsideration, the ALJ indicated he relied on Stumbo's testimony and the reports of Drs. Kulwicki, Herr, and Nadar in determining Stumbo is permanently totally disabled. Additionally, the ALJ stated he "considered the severity of the plaintiff's work injury, his age, [and] his work history."

A review of Dr. Kulwicki's June 3, 2011, report reveals he assessed a 13% impairment rating based upon the 6th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). By letter dated June 4, 2012, Dr. Kulwicki was asked if his opinions regarding diagnosis, causation, and impairment rating would remain the same using the AMA Guides, 5th edition. On June 10, 2012, Dr. Kulwicki handwrote the following: "I do not own or use the 5th Edition. The [illegible] rating in the 6th Edition should correspond to the 5th Ed. rating. [illegible]." Again, by letter dated June 4, 2012, Dr. Kulwicki was asked if his opinions regarding diagnosis, causation, and impairment rating would remain the same using the AMA Guides, 5th edition. Dr.

Kulwicki handwrote the following on June 18, 2012: "I don't use the 5th edition. Kulwicki 6-18-12."

It is well established that while an ALJ has the discretion to pick and choose amongst the medical evidence, the ALJ cannot rely on a physician who assigns an impairment rating which contradicts the AMA Guides, 5th edition. In Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006), the Court of Appeals of Kentucky determined as follows regarding an ALJ's reliance upon Dr. Reasor who assigned an impairment inconsistent with the AMA Guides, 5th edition:

> 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." Accordingly, the Board's decision to remand this case to the ALJ with instructions to select an impairment rating in accordance with Category III of the AMA Guides is affirmed.

Id. at 153-154.

We have previously held this same logic must apply to a physician who relies upon the wrong edition of the AMA Guides. Here, Dr. Kulwicki stubbornly adhered to

the AMA Guides, 6th edition, despite two opportunities to couch his opinions in terms of the 5th edition. For this reason, Dr. Kulwicki's opinions and impairment rating do not constitute substantial evidence, and the ALJ cannot rely upon them. Consequently, we turn to the opinions of Dr. David Herr and Dr. Nadar in order to determine whether their opinions support the ALJ's determination Stumbo is permanently and totally disabled.

Attached to the Form 101 is a report by Dr. Herr dated August 11, 2011. Dr. Herr diagnosed Stumbo with a "1. Fracture, Medial Tibial Plateau, Left Knee. 2. Posttraumatic Arthritis, Left Knee." Dr. Herr assigned a 5% whole person impairment rating pursuant to the AMA Guides, 5th edition. Dr. Herr opined as follows regarding Stumbo's prognosis:

> The prognosis is for progressive worsening of Mr. Stumbo's left knee as a result of depression of the medial tibial plateau and the resulting varus deformity which shifts weightbearing load into the medial compartment. Over time, this will result in progressive destruction of the medial compartment and can reasonably be expected to result in an indication for hemiarthroplasty of the medial compartment or total knee arthroplasty within 10 to 15 years.

Dr. Herr assessed the following restrictions:

> Limitations necessary for Mr. Stumbo are prolonged standing and walking of greater than 1 hour continuous, squatting, crouching, kneeling, climbing stairs and ladders, working on scaffolding, working around dangerous machinery, and standing. The restrictions are considered permanent. He will have particular difficulty standing and walking, with heavy lifting and carrying of over 25 pounds on an occasional basis, kneeling, squatting, and crouching, and climbing. He will also have difficulty operating equipment with left foot-operated controls such as trucks or other equipment that requires clutching or other foot-control operation with the left lower extremity.

A Form 107-I completed by Dr. Herr is also attached to the Form 101 and mirrors the contents of his August 11, 2011, report. In the Form 107-I, Dr. Herr opined Stumbo does not retain the physical capacity to return to the type of work he performed at the time of injury.

Also in the record is Dr. Herr’s June 18, 2011, supplemental report in which he commented on medical records from Dr. David Jenkinson, Dr. James Wood, Dr. John Johnson, and Dr. Srinivas Ammisetty.

In an August 29, 2012, supplemental report Dr. Herr was asked to provide an opinion regarding "the long term vascular and pulmonary effects due to DVT and Pulmonary Embolus suffered by Mr. Stumbo following his left knee surgery." Dr. Herr opined as follows:

> With respect to the impairment effects associated with the DVT and pulmonary embolus sustained by Mr. Stumbo complicating the surgery of his left knee, I agree with Dr. Westerfield that there are no permanent adverse effects upon Mr. Stumbo's pulmonary function or the venous function of his left lower extremity as a result of the DVT and associated pulmonary embolus. These conditions have resolved without sequela that would result in an impairment of greater than 0%. The pulmonary impairment related to the work-related injury sustained by Mr. Stumbo is 0% and the DVT related impairment of his left lower extremity results in 0% impairment of the lower extremity and 0% impairment of the whole person as a result of the DVT that complicated Dr. Kulwicki's left knee surgery.

Attached to the Form 101 is a Form 107-I dated December 19, 2011, completed by Dr. Anbu K. Nadar in which he diagnosed the following: "Strain, left knee; status post-tibial plateau fracture; 2) status post-arthroscopy, removal of loose body and partial lateral menisectomy; 3) DVT with pulmonary embolus." Dr. Nadar assigned a 3% whole person impairment pursuant to the AMA Guides, 5th edition, Chapter 17, Table 17-33. Dr. Nadar assessed the following restrictions: "He has limitation in work activity that requires prolonged standing, walking and walking on uneven terrain, crawling, kneeling and activity of such nature."

Also attached to the Form 101 is a report dated December 19, 2011, by Dr. Nadar which mirrors the Form 107-I.

Stumbo testified at an April 9, 2012, deposition that he is twenty-five years old and attended Eastern Kentucky University for three years where he worked towards a degree in criminal justice with a minor in occupational science. Stumbo testified he has a history of DVTs or blood clots. His first DVT was in 2003 after surgery on his left knee necessitated by a football injury. A typical day on his job with Ashland "could be anything from going and cleaning out a clogged pipe, running the jet hose through it, or digging up old pipe and replacing it with new pipe on, on orders." He was "generally" on his feet all day and was required to lift forty to eighty pound bags of concrete, his tools, PVC pipe, ladders, and manhole covers.

Concerning his current condition, Stumbo stated as follows:

> Q: Okay. Well, tell me about your condition right now. How does your knee feel?
>
> A: It takes spells. It goes from, from aching pains to sharp pains. I don't have the full range of motion. It like snap/crackle/pops when like I do full extensions or flexions.
>
> Q: Do you require the use of any sort of assistance in walking or standing?

A: The only type of medical assistance that I have is I have compression stockings for the blood clots, and that just keeps my leg from swelling, but I don't have any type of walkers or anything like that.

Q: So do you have to wear the compression stockings every day?

A: I use them as much as tolerable. I only have one pair of them. So anytime I try to do long trips driving, I try to wear them, or anytime I'm going to be on my leg a lot that day.

...

Q: Okay. Are you able to, you know, do you do household chores, things of that nature?

A: Yes. I'm able to do like laundry and dishes and stuff of that nature.

Q: Do you mow the yard?

A: [My father] actually mows the yard. We have inclines and stuff. I weed-eat on the level part of the house sometimes.

Q: Are you not able to mow the yard because of the inclines?

A: No. I can't do it with, with the embankment and the banks that we have.

Q: Okay. I sounds like in your history, you, you were pretty into sports. Do you still do any sports recreationally?

A: The only thing I do now is just mainly fish and hunt at the farm.

Q: What kind of hunting do you do?

A: I didn't go this past year; I went the year before last. It was [sic] deer hunt.

Q: Have you done any trips or vacations recently?

A: Actually this past week, I just got back from North Carolina.

...

Q: Okay. Kind of tell me how, how has your daily routine changed since you've had the injury as opposed to before. Tell me some-- are there things that you could do before that you can't do now?

A: Yes.

Q: Give me some examples.

A: As far as, I guess, it would be loss of strength and no ability to do, you know, physical tasks. I can't do like my range of motion for anything, you know, if I have to go pick, pick something up off the ground. Anytime like before, you know, I'd work out or go for jogs on the treadmill or something for long periods of time, I can't do that. I mean it's pretty much limited now to brisk walks at shorter distances and resting.

Q: So you don't work out anymore?

A: No, sir.

Q: But you're still able to take short-distance walks?

A: Yes, sir. Used [sic] to [sic] I'd do recreational activities like the [sic] hunting and fishing, I could go into deeper places, I guess, like more traverse [sic] terrain. Now it's pretty much limited to hunting on flat ground out of, you know, blinds on the ground to just fishing off the spillway where they already have benches so I can sit down.

...

Q: Okay. So, and I'm just trying to get some hypothetical examples. You know, if you had a job where you had to be on your feet and walking around but you weren't carrying anything, you know, do you think you could do something like that as long as you were able to take periodic breaks to sit down?

A: You know, walking around is maybe, I guess a hypothetical like in an office-type setting or anywhere like in an open landscape, I could probably, you know, walk around, you know, and not lift any weights maybe for about two (2) hours before I would have to rest, I guess, roughly. I don't know.

Q: Okay. And, and how long would you have to rest?

A: I don't know. I mean it varies. Sometimes my leg hurts, you know, sometimes, I mean, it just feels like it's going to explode. It could take fifteen (15), twenty (20) minutes with it over my heart, you know, elevated or it could take longer. I mean I don't really know.

Q: Okay. Do you have any problem sitting down for a long period of time like if you're at a desk or something?

A: Sitting gives me more trouble than the actual walking around, like something about my knee being bent or restricted blood flow affects it worse.

Q: So give me, give me an example of, you know, you were kind of telling me that walking on it too long, you know, you can't do that for too long, but then you also can't sit still. So, you know, kind of tell me what you do

> during the day, how, you know, what's your routine like.
>
> A: A typical day, I mean I probably get out of bed; shower; talk to Dad, see if there's anything else going on that day, if he needs me to do anything for him. I guess, you know, run those errands if they needed to be run; like if he needed something from the grocery store at Kroger's or something, go get that. Maybe I'll talk to some friends and see what they're doing, maybe visit with them for a little bit. Most of the time though once I get up, you know, and get out of the shower, if there's nothing on, I normally go in the living room and get in the recliner and put my feet up and watch some TV until something is going on that day, until I get up with some friends.
>
> Q: Okay. But you're able to drive okay?
>
> A: Like on that trip to North Carolina that I just got back from, we, we stopped maybe about every hour and a half to two (2) hours at a rest area or gas station. I'd get out and walk around and stretch, and then I'm normally ready to go for another hour and a half or so.

At the August 30, 2012, hearing, Stumbo testified regarding his current level of pain as follows:

> A: Yes. After- after [sic] surgery I still have pain and limitations. It's- from just my knee it- it goes, just from, like, almost like a dull to a sharp pain, just depending on what activity or what I may be doing at that time, like, stairs or bending over or just, you know, repetitive use of it,

like, through walking and stuff of that nature.

Q: All right. Now, when you say pain, what type of pain are you- are you saying?

A: The type of pain I experience is anywhere from, just, like, a dull pain, to it gets, you know, to a sharp pain where, you know, it will stop me, you know, almost abruptly and- until I change what I- what I'm doing at that time.

Q: Now, what is the normal pain for you? Say, you're sitting at home not- haven't done any activity that day or you've got up out of the bed, haven't done any activity, do you have pain at that point in time?

A: For instance, if I- if I'm in my recliner, I guess, it will just be, like, almost a dull ache. I mean, maybe just like, on a scale of one to ten, that's what the doctors always used, was like, maybe, like, just a one or two, it doesn't- it's not, you know, very impairing, I can just feel it, like, at that point, I know it's there.

Q: Do you have that pain all the time, the one and two or does it come and go?

A: It comes and goes.

Q: Okay. Are there times that you're pain free?

A: Yeah. I would say there's- there's certain times, just for my knee exclusively, like, that it doesn't bother me.

Stumbo testified sitting does not cause the pain level in his knee to increase and standing still in one location

causes the pain level to increase the most. He is able to walk short distances without a "great deal of pain."

Stumbo takes five milligrams daily of Coumadin which causes him to have chills, bruising, and nose bleeds.

Stumbo's work history includes working at Kay Jewelers, which he does not believe he could perform because it required him to be on his feet all day. Stumbo also has experience acquiring land leases, but he believed returning to that job would be "pretty hard" because it requires driving three to four hours a day.

Stumbo testified as follows regarding his work potential:

> Q: If you had a job where you had to sit, stand and walk eight hours a day, five days a week in your current condition, do you think you could hold a job down like that?
>
> A: It would depend on, I guess, how much sitting, standing and walking. If it was, you know, broken up and I was able to- to move around, I guess, in my discretion and elevate my leg, when it was- when it was time to hurt, yes.

In making a determination regarding permanent and total disability, an ALJ is vested with broad discretion. *See* Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). However, substantial evidence is "'more than a scintilla'" and "'means such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion.'" Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67, 71 (Ky. App. 1940). "'Vague, uncertain, or irrelevant matter not carrying the quality of proof'" should not be deemed substantial evidence. Clear Branch Min. Co. v. Holbrook, 247 S.W.2d 48, 50 (Ky. 1953). That said, while this Board cannot engage in fact finding, we can determine whether the ALJ has adequately identified the substantial evidence which supports his determination Stumbo is permanently totally disabled and can request additional findings when the ALJ has fallen short. Here the ALJ has fallen short.

In both the October 10, 2012, opinion and order and the November 2, 2012, opinion and order overruling Ashland's petition for reconsideration, the ALJ indicated he relied upon Drs. Herr and Nadar, as well as Stumbo's testimony.[1] However, without additional explanation by the ALJ which Ashland requested in its petition for reconsideration and did not receive, this Board is unable to determine how the above-cited evidence supports the determination Stumbo is permanently totally disabled. Dr. Herr assigned a 5% impairment rating for Stumbo's left knee

[1] Based on our ruling regarding the ALJ's reliance on Dr. Kulwicki, we will disregard his opinions for the sake of this discussion.

and 0% for the DVT complication following the left knee surgery. While Dr. Herr assigned certain restrictions, none pertained to Stumbo's ability to sit. Additionally, Dr. Nadar assigned a 3% impairment rating for the left knee, and his restrictions also did not encompass Stumbo's ability to sit.

Regarding Stumbo's testimony, the ALJ has simply stated he relied upon "the plaintiff's work injury, his age, [and] his work history." However, Stumbo's testimony establishes he was twenty-six years old at the time of the hearing and has 90 credit hours at Eastern Kentucky University towards a criminal justice major. He is able to fish, hunt, perform household chores, and spend his days with his friends. Stumbo is able to drive for two hours at a time before needing to take a break and has retail experience. There are times when Stumbo is pain-free. *Significantly, Stumbo testified he would be able to work an eight-hour-a-day job as long as he could, in his discretion, periodically elevate his leg.*

While an ALJ is not required to set forth the minute details of his reasoning in reaching a particular result, he 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). The parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful appellate 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). The ALJ must articulate sufficient findings to apprise both the parties and this Board of the reasons for his ultimate conclusions. Here, not only are there insufficient findings of fact, but Stumbo's testimony indicates that with accommodation, he is capable of gainful employment over an eight hour day.

Ashland's second argument on appeal regarding the ALJ's reliance upon Dr. Kulwicki has been addressed.

Accordingly, the ALJ's determination Stumbo is permanently totally disabled, and the award of income benefits is **VACATED**. This claim is **REMANDED** to the ALJ for additional findings of fact concerning whether Stumbo is permanently totally disabled.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

COUNSEL FOR PETITIONER:

HON SCOTT GUENTHER
P O BOX 861
COVINGTON KY 41012

COUNSEL FOR RESPONDENT:

HON JOHN EARL HUNT
P O BOX 308
STANVILLE KY 41659

ADMINISTRATIVE LAW JUDGE:

HON WILLIAM RUDLOFF
400 E MAIN ST STE 300
BOWLING GREEN KY 42101