Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 8, 2014

CLAIM NO. 201200124

CITY OF INDEPENDENCE PETITIONER

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

PHILLIP DUNFORD
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. The City of Independence ("Independence") seeks review of the August 16, 2013, "Amended Opinion and Order on Remand" of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding Phillip Dunford ("Dunford") permanent partial disability ("PPD") benefits and medical benefits. No petition for reconsideration was filed.

Because of the issues raised on appeal, a recitation of the history of this claim is necessary.

Dunford was employed by Independence as a police officer on February 8, 2010, when he slipped and fell in the police station parking lot. Prior to the work injury, Dunford had a twenty year history of lower back problems for which he was treated by chiropractors on numerous occasions. Dunford testified his lower back problems were different and more severe after the fall. Dunford was treated by Independence Chiropractic before and after the injury. After the injury, he was referred to Dr. Michael T. Rohmiller by his family physician, Dr. Craig Sanders. Dr. Sanders also ordered an MRI which was performed on June 10, 2010. Dunford subsequently came under the care of Dr. Justin Kruer, a pain specialist.

Independence obtained an independent medical evaluation ("IME") from Dr. Thomas Bender, an orthopedic surgeon, and his August 15, 2012, report was introduced.

In a December 17, 2012, opinion and order, the ALJ determined Dunford sustained a work-related low back injury on February 8, 2010, and had an 8% impairment none of which was due to a prior active condition. The ALJ purported to conduct an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and determined enhancement

of Dunford's income benefits by the three multiplier was more appropriate.

On appeal, the Board concluded Dunford's testimony, the June 10, 2010, MRI, and the treatment records of Drs. Rohmiller and Kruer constituted substantial evidence supporting the ALJ's determination Dunford sustained a work-related injury on February 8, 2010. However, the Board vacated the ALJ's determination Dunford did not have a pre-existing active condition which merited an impairment rating and the award of PPD and medical benefits, holding as follows:

> Here, the ALJ concluded "Based upon the totality of the evidence in the record, including the plaintiff's sworn testimony and the persuasive medical report of Dr. Kruer, the treating physician," Dunford did not have a pre-existing active condition on February 8, 2010."
>
> The ALJ's decision, as well as the order on reconsideration, is bereft of any discussion of the basis for his decision, other than making the above conclusory statement. We find it puzzling the ALJ notes his reliance upon the medical report of Dr. Kruer, which contains no discussion of whether Dunford's alleged pre-existing condition was symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to February 8, 2010. Likewise, Dr. Kruer testified by deposition he did not have an opinion as to whether Dunford qualified for an impairment rating prior to his fall

> since he was not privy to any of the records before he saw him.
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> On remand, the ALJ must consider Dr. Kruer's October 17, 2012 deposition testimony, as well as the records from Chiropractic Independence, in his determination of whether Dunford had a symptomatic and impairment ratable pre-existing condition on February 8, 2010. The only medical opinion touching on this issue appears to be rendered by Dr. Bender in his August 15, 2012 and October 29, 2012 reports, who ultimately stated Dunford had an 8% active pre-existing impairment. On remand, the ALJ must provide with more specificity, the rationale supporting his determination regarding whether Dunford's condition was pre-existing active. The Board may not, and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). However, the ALJ must provide an explanation of the basis for his decision.

The Board also determined the ALJ erred in enhancing Dunford's award by the three multiplier stating as follows:

> Independence also argues the ALJ erred in enhancing Dunford's award by the three multiplier. In the case *sub judice*, it is undisputed Dunford did not miss any work following the February 8, 2010 fall and at no point was assigned restrictions by a medical provider, including his treating physicians. Likewise, it is undisputed Dunford continued to work for Independence for approximately two years until he retired for reasons

unrelated to his work injury. He currently maintains two part time jobs as a security guard at the federal courthouse and as a transport officer for the Kenton County Sheriff's Office, and is under no restriction.

. . .

Hence, where both the 3 multiplier and the 2 multiplier potentially apply pursuant to the given facts of a claim, the principles enunciated in Fawbush, supra, and its progeny, require an ALJ to make three essential findings of fact. First, the ALJ must determine, based on substantial evidence, a claimant cannot return to the "type of work" performed at the time of the injury in accordance with KRS 342.730(1)(c)1; second, the claimant has returned to work at an average weekly wage equal to or greater than his pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and, third, whether the claimant can continue to earn that level of wages into the indefinite future.

Here, the ALJ's Fawbush analysis is incorrect. It is undisputed Dunford did not miss any work following the work accident, and returned earning approximately the same average weekly wage, which was stipulated at the BRC and confirmed by the ALJ in his opinion. He continued to work for Independence for approximately two years until his retirement, and currently maintains two part time jobs. At no time has Dunford been assigned any restrictions. The ALJ's determination the two multiplier as set forth in KRS 342.730(1)(c)2 does not apply is simply incorrect. Since potentially both the two and the three multipliers are applicable to this

claim, the ALJ must determine which is appropriate, and must provide an adequate basis to support his conclusion.

Step one of the Fawbush analysis requires the ALJ to determine whether the injured worker retains the physical capacity to perform the job he was performing at the time of the injury. The evidence establishes Dunford continued to work at his usual job under no restriction for approximately two years until he retired from the State, and then began working two part time jobs earning approximately the same rate of pay.

The ALJ's December 17, 2012 opinion did not address step one of the Fawbush analysis. Despite the fact Dunford continued to work as a police officer for two years until he retired, in the order on reconsideration, the ALJ determined he "was marginally physically able to perform his work duties after having medical treatment from Dr. Kruer, and I make the factual determination that the plaintiff, therefore, was not occupationally disabled as set forth in KRS 342.730(1)(c)1." This conclusive statement of marginal ability does not adequately address step one. In fact, the finding seems to indicate the three multiplier is not applicable. On remand, pursuant to Fawbush, the ALJ must make a determination whether, based on substantial evidence, Dunford can or cannot return to the "type of work" performed at the time of the injury in accordance with KRS 342.730(1)(c)1; not whether he was marginally physically able to perform his work duties.

As noted above, the ALJ's determination the two multiplier as set forth in KRS 342.730(1)(c)2 does not apply is simply incorrect. Despite the fact Dunford continued to work as a police officer until his retirement, if the ALJ determines he no longer retains the physical capacity to perform the type of work he performed at the time of injury, a determination must be made regarding whether he is working at a job earning an average weekly wage equal to or exceeding his wage at the time of the injury.

The ALJ stated in the opinion "Dunford has returned to work at approximately the same wage . . . ." In the order on reconsideration, the ALJ found Dunford did return to work at an average weekly wage equal to or greater than his pre-injury average, but that the two multiplier does not apply. By virtue of finding Dunford returned to work at a greater or equal wage, a fact to which the parties stipulated, the two multiplier is potentially applicable as a matter of law.

Therefore, if the ALJ determines Dunford cannot return to the type of work performed at the time of injury, he must determine whether Dunford can continue to earn that level of wages into the foreseeable future. While the ALJ outlined the steps necessary to determine the applicability of KRS 342.730(1)(c)1, he failed to provide any analysis and failed to make the appropriate determinations to support his conclusions.

The ALJ's statement that based on Dunford's testimony and the medical evidence from Dr. Kruer, he was making the factual determination the third

prong of the Fawbush analysis "applies" and under that application Dunford is entitled to the three multiplier completely misses the point. The third prong of the Fawbush analysis always applies, and must always be considered in completing a Fawbush analysis which the ALJ has not done in this case. After determining the two multiplier and three multiplier are applicable, the third prong requires a determination of whether Dunford is unlikely or 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." Fawbush v. Gwinn, supra at 12. The ALJ failed to make such a determination. Therefore, the ALJ's basis for enhancing Dunford's benefits by the three multiplier was clearly erroneous. Accordingly, on remand, the ALJ must determine whether Dunford is likely to be able to continue earning a wage equaling or exceeding his wages at the time of the injury for the indefinite future.

On remand, the ALJ must also provide with more specificity the rationale supporting his determination. As noted previously, while the ALJ is not required to perform a detailed fact-finding, he is required to make findings sufficient to inform parties of the basis for his decision which would allow for meaningful review on appeal. Kentland Elkhorn Coal Corp. v. Yates, supra; Shields v. Pittsburgh and Midway Coal Mining Co., supra.

We may not, and do not direct any particular result, because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, supra. However, the ALJ must provide the appropriate analyses

> and the bases for his determination rather than merely providing a conclusory statement.

On remand, after providing a short summary of Dunford' testimony and summarizing the August 17, 2012, report of Dr. Kruer as well as the report of Dr. Bender, the ALJ again determined Dunford sustained an injury as defined by the Act.[1] As to whether Dunford had a pre-existing active condition, the ALJ stated as follows:

> The correct standard regarding a carve-out for a pre-existing active condition is set forth by the Court of Appeals in *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky.App.2007). In *Finley*, *supra*, the Court instructed in order for a pre-existing condition to be characterized as active, it must be both *symptomatic* and *impairment ratable* pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. The burden of proving the existence of a pre-existing active condition is on the employer. *Finley v. DBM Technologies*, *supra*.
>
> Based upon the totality of the evidence in the record, including the plaintiff's sworn testimony and the persuasive medical report of Dr. Kruer, the treating physician, I make the factual determination that Mr. Dunford did not have a pre-existing active condition at the time of his work injuries on February 8, 2010.

[1] As the Board's opinion was not appealed and is now final, the determination substantial evidence supported the ALJ's decision Dunford sustained a work-related injury is the law of the case and is not at issue in this appeal.

Concerning the impairment rating resulting from the work injury, the ALJ entered the following findings of fact and conclusions of law:

> The plaintiff relies upon the medical report of Dr. Kruer, the plaintiff's treating physician. The defendant relies upon the medical report of Dr. Bender, who examined the plaintiff at the defendant's request. I found more persuasive the evidence and opinions of Dr. Kruer, the plaintiff's treating physician. I, therefore, make the factual determination that as a result of the plaintiff's work injuries on February 8, 2010 he will sustain a permanent impairment of 8% to the body as a whole under the AMA Guides, Fifth Edition.

In determining Dunford was entitled to enhanced benefits, the ALJ concluded, in relevant part, as follows:

> In this case, based upon the plaintiff's sworn testimony, which I found to be very credible and convincing, and the persuasive and compelling medical report from Dr. Kruer, all of which is summarized in detail above, I make the factual determination that the plaintiff cannot return to the type of work which he performed at the time of his work injuries in accordance with KRS 342.730(1)(c)1. I note that he has moved to two much lighter part-time jobs, one as a security guard at the Federal Building and the other where he works as a road deputy for the Kenton County Sheriff's Office. His present jobs are not physically demanding. I note that in the Benefit Review Conference Order the parties stipulated that the plaintiff retired on February

1, 2012 and that his wages currently earned are "approximately the same." The plaintiff's sworn testimony was that his wages are considerably less than they were as a police officer. I, therefore, make the factual determination that the plaintiff is now earning the same or greater average weekly wage that he earned at the time of his work injuries per KRS 342.730(1)(c)2. Based upon the totality of the record, I make the factual determination that potentially both the 2 multiplier and the 3 multiplier could apply in this case, and I must determine which is appropriate. I also have to make the determination whether the plaintiff is unlikely or likely to be able to continue earning the wage that equals or exceeds the wage at the time of his injuries for the indefinite future. Based upon the plaintiff's sworn testimony that he has worked hard his entire life and has always had a lot of pain tolerance and that after his work injuries he came to work hurt because he had to support his wife and children, plus his testimony that he suffers constant chronic pain, which he described as sharp pain, and has numbness down both legs, and also taking into consideration the persuasive and compelling medical evidence from Dr. Kruer, the treating physician, I make the further factual determination that under the decision of the Court of Appeals of Kentucky in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky.App.2004), the *Fawbush* analysis includes a broad range of factors, only one of which is the plaintiff's ability to perform his current jobs. Under the *Adkins* case, the standard for the decision is whether the plaintiff's injuries have permanently altered his ability to earn an income and whether

> the application of KRS 342.730(1)(c)1 is appropriate. I make the factual determination under the above-cited detailed testimony from the plaintiff and the above-cited medical evidence from Dr. Kruer that it is unlikely that the plaintiff will be able to continue for the indefinite future to do work from which to earn such a wage. Based upon all of the above-cited specific evidence, I make the factual determination that the third prong of the *Fawbush* analysis applies here and that the plaintiff's injuries have permanently altered his ability to earn an income and that he is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage. I, therefore, make the factual determination that the third prong of the *Fawbush* analysis applies here and that under that application the plaintiff is entitled to the 3 multiplier.

On appeal, Independence asserts the ALJ's decision regarding the existence of a prior active impairment is not in conformity with the Board's instructions. It asserts the ALJ's opinion "parrots his original 'Opinion and Order' in all respects," and except for elaborating further on Dunford's testimony with respect to the three multiplier, the ALJ provides no additional findings. In conjunction with this argument, Independence asserts the ALJ's decision is arbitrary, capricious, and an abuse of discretion since the ALJ failed to follow the Board's directive and consider all of the evidence

pertaining to the existence of a prior active condition. Independence contends there is no evidence to support the ALJ's summary conclusion Dunford had no prior active condition.

Independence also posits the evidence compels a finding Dunford had a prior active condition that was symptomatic and impairment ratable and the work-related incident produced no additional impairment. Independence maintains on remand, the ALJ cited no evidence in the record which supports his conclusion all of Dunford's impairment was not pre-existing and active. It notes Dr. Kruer's report does not address the question of a prior active impairment. Rather, the issue was addressed on cross-examination during Dr. Kruer's deposition. Independence contends Dr. Kruer testified he had little information regarding Dunford's prior treatment and he had no opinion as to whether Dunford had a ratable impairment prior to the slip and fall because he did not review any of Dunford's prior medical records. It also notes Dr. Kruer testified Dunford's injury could be an exacerbation of a pre-existing condition. In addition, Dr. Kruer testified if Dunford's earlier records are "presumed accurate" then Dunford qualified for a 5% to 8% rating prior to the work injury. Independence asserts Dunford's testimony he was

asymptomatic is rebutted by the records of Independence Chiropractic. Independence argues Dr. Bender's opinion that Dunford had a 5% to 8% impairment prior to the work injury and the injury did not generate any additional impairment is unrebutted and compelling. Therefore, it advocates the Board reverse and remand with directions that Dunford's claim for income benefits be dismissed.

Independence also argues the ALJ's July 31, 2013, interlocutory opinion and order awarding medical benefits was improperly granted as it was never served with Dunford's verified motion to compel medical treatment even after it filed a verified motion to set aside the interlocutory opinion and order. That fact aside, it argues the interlocutory opinion and order contains no finding Dunford would suffer irreparable injury, loss, or damage pending a final decision which is a necessary finding in order to award interlocutory relief pursuant to 803 KAR 25:010 Section 12 (4)(a). In addition, it also argues it was deprived of due process and an opportunity to be heard on this motion in violation of 803 KAR 25:010 Section 12(2).

Independence also contends that based on the medical evidence, particularly Dr. Kruer's testimony on cross-examination, Dunford is not entitled to an award of

future medical benefits. It argues Dr. Kruer's concessions following his review of the relevant chiropractic medical evidence establish Dunford "did not carry his burden to prove any permanent impairment resulting from the work incident, so as to support an award of future medical benefits. [citation omitted]."

Finally, Independence maintains enhancement of the award by the three multiplier is not in conformity with Chapter 342 and is not supported by substantial evidence. It cites to Dunford's testimony that after the injury he continued to perform his usual work as a police officer for two years and retired only due to concerns for the financial security of his family. Further, although Dunford is now performing "much lighter part-time jobs" there is no evidence he sought light duty work because he was physically incapable of performing his job as a police officer. Independence notes Dr. Kruer never placed any restrictions on Dunford's work activities but instead stated he could perform full duty work. Thus, with respect to the first prong of the Fawbush analysis, substantial evidence does not support the conclusion Dunford cannot return to his pre-injury work.

With respect to the third prong of the Fawbush analysis, it argues there is no evidence to support a

finding Dunford cannot continue earning equal or greater wages than his pre-injury average weekly wage ("AWW") for the indefinite future. It maintains the evidence does not reveal Dunford was limited in the performance of his work duties during the two years following the work-related incident nor in the performance of his current work duties. Accordingly, the award of enhanced benefits by the three multiplier must also be reversed.

The first issue raised by Independence can be dispensed with in short order. On remand, the Board directed that in determining whether Dunford had a symptomatic and impairment ratable pre-existing condition on February 8, 2010, the ALJ "must consider" Dr. Kruer's October 17, 2012, deposition testimony and the records of Independence Chiropractic. In the August 16, 2013, "Amended Opinion and Order on Remand," the ALJ did not discuss nor consider Dr. Kruer's deposition testimony and the records of Independence Chiropractic. In determining Dunford did not have a pre-existing active condition as defined in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), the ALJ stated he relied upon Dunford's sworn testimony and the report of Dr. Kruer. Clearly, the ALJ erred in not complying with the Board's directive he consider Dr. Kruer's deposition testimony and the records

of Independence Chiropractic. Thus, the ALJ's determination Dunford did not have a pre-existing active condition at the time of his February 8, 2010, work injury and the award of PPD benefits based on an 8% impairment enhanced by the three multiplier must be vacated. On remand, the ALJ's shall consider Dr. Kruer's deposition testimony and the records of Independence Chiropractic in determining whether Dunford had an impairment ratable pre-existing active condition at the time of the work injury and, if necessary, the applicable impairment rating.

We decline Independence's invitation to declare there is not substantial evidence which would support a determination Dunford did not have a prior active condition meriting an impairment rating. Dunford's testimony that he merely had intermittent problems off and on over twenty years which chiropractic care substantially alleviated and the pain he experienced after the injury is completely different, along with Dr. Kruer's August 17, 2012, letter and portions of his deposition testimony would constitute substantial evidence in support of a determination Dunford sustained a work-related injury which merited an impairment rating.

In the August 17, 2012, letter, Dr. Kruer stated that based on a June 10, 2010, MRI and his physical

examination, Dunford has an 8% impairment pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Thus, the question becomes whether Dr. Kruer believed any or all of the impairment rating is attributable to a pre-existing active condition. Dr. Kruer testified he did not have any of Dunford's prior medical records. However, as to whether the contents of Independence Chiropractic records were conclusive evidence of a pre-existing active impairment, he testified as follows:

> Q: Okay. The most immediate record prior to the date of injury is dated 1/20 of 2010. I'm specifically interested in the comparison between those two dates, between the complaints referenced with pain and spasm?
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> A: The, again, I didn't make any of these marks and I was, I don't exactly understand their table as to left, right. I assume they're as regards to pain and spasm. There's a left and a right and I assume that's referring to the spinal column. And then there's a, a, there's rows that include cervical from C3 to C7, looks like thoracic T1-T2 and lumbar 1-5 and then a sacral. In the January of 2010 note it looks like spasm and pain are marked in from thoracic 10 to lumbar 5 on the left and right as well as cervical 3 to thoracic 1 left and right.
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> As far as the February 2010 note, it appears that there's spasm on the left from T8 to L5 and pain on the left

> from L2 to L5. So I, that's what I would gather from this information.
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> Q: Now assuming that assessment is true, and that's how I read it as well, does this not look like an improvement as far as his condition is concerned at least as far as what he's reporting from immediately before the work injury to immediately after, not as many areas, not as many symptoms?
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> A: It's hard for me to make an assessment because I really don't know how they examined him and I don't know exactly what they, what was done to determine a level of spasm or, or what was done. I know just going by the graph one would say that potentially there seems to be a decreased amount of spasm and pain. But how accurate that is and how precise this is and what method they used, I can't comment on because I was not there.
>
> Q: Assume that these records are accurate, Doctor, and that he had been receiving regular care from a chiropractor for ten years or more before this and that the care was related to low-back pain, spasm, tenderness, loss of range of motion, all the symptom and signs have been documented in these records, would you agree that these findings also likely, likewise warrant an eight percent impairment rating under the Fifth Edition of the AMA Guides?
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> A: If there truly is spasm and guarding then potentially they would be in the five to eight percent of the Fifth Edition Guidelines, yes.

Portions of the above testimony constitute substantial evidence in support of a determination Dunford

either did or did not have a prior active condition which merited an impairment rating. We emphasize the fact Dr. Kruer did not have any of Dunford's previous medical records merely goes to the weight to be afforded his August 17, 2012, report and testimony and not its admissibility.

Without question, prior to an award of income benefits, the ALJ must first determine whether Dunford had a pre-existing active condition and the percentage of impairment, if any, attributable to the pre-existing condition. Should the ALJ determine Dunford has a pre-existing 8% impairment then he is not entitled to an award of PPD benefits. However, should the ALJ determine based on the opinion of either Dr. Bender or Dr. Kruer or both, that Dunford had a pre-existing impairment rating of less than 8% then he is entitled to an award of income benefits. Likewise, should the ALJ determine Dunford did not have an active impairment prior to the work injury he is entitled to an award of PPD benefits.

We are compelled to address the ALJ's analysis pursuant to Fawbush v. Gwinn, supra. Concerning the first prong of the Fawbush analysis, the ALJ determined Dunford could not return to the type of work he performed at the time of the injury. This determination was based upon Dunford's testimony and the medical report of Dr. Kruer.

Dunford's July 31, 2012, deposition was introduced and he testified at the December 14, 2012, hearing. However, the ALJ does not identify the testimony upon which he relied in determining Dunford cannot return to the type of work he performed at the time of injury. Although the ALJ noted Dunford was performing two much lighter part-time jobs which were not physically demanding, the ALJ did not address Dunford's testimony he did not stop working because of his physical condition. Rather, Dunford testified he stopped working in order to secure his retirement and to ensure the care of his family. Significantly, Dunford secured the part-time position as a security guard with a private company which provided security at the federal courthouse in 2010 approximately two years before he retired. Dunford explained he took this job because of "future thoughts of retirement and extra income." This testimony would not support a finding that Dunford cannot return to the type of work he performed at the time of the injury. However, other portions of Dunford's testimony would support a finding that KRS 342.730(1)(c)1 is applicable. Thus, Dunford's testimony would support a finding either way as to whether he could return to the type of work he performed at the time of his work injury. Therefore, the ALJ must cite the specific portion of

Dunford's testimony he relied upon in resolving the first prong of the Fawbush analysis.

Moreover, Dr. Kruer's medical report, relied upon by the ALJ, does not support a finding Dunford does not retain the physical capacity to return to the type of work he performed at the time of injury. In the August 17, 2012, letter, Dr. Kruer did not impose any restrictions or offer an opinion on this issue. Further, his medical records covering the period from October 14, 2010, through December 21, 2011, specifically state Dunford could continue to work full-time. Consequently, with respect to Dr. Kruer's medical report, the ALJ has not stated a sufficient basis for his determination Dunford could not return to the type of work he performed at the time of the injury.

We next address the ALJ's analysis concerning the third prong of the Fawbush analysis. In our May 21, 2013, opinion, we stated by virtue of the stipulation Dunford returned to work at a greater or equal wage the two multiplier is potentially applicable as a matter of law. Consequently, there was no need for the ALJ to revisit the issue on remand. Further, the amount of Dunford's retirement income is not to be considered in addressing the third prong of the Fawbush analysis. The definition of

wages contained in KRS 342.0011(17) does not specifically include retirement income. Similarly, the definition of wages contained in KRS 342.140(6) does not include retirement income.

In concluding it was unlikely Dunford would be able to continue for the indefinite future to continue earning such a wage, the ALJ indicated he relied upon Dunford's testimony he had worked hard all his life, had a high tolerance of pain, and he continued to work in order to support his wife and children. The ALJ also relied upon Dunford's testimony that he suffers from constant sharp chronic pain and numbness down both legs. Finally, the ALJ relied upon the persuasive and compelling medical evidence of Dr. Kruer. Without further explanation, the mere statement Dr. Kruer's persuasive compelling medical evidence supports his determination is not a sufficient basis for the decision to enhance the PPD benefits by the three multiplier. As previously noted, Dr. Kruer's August 2012 letter offers no opinion on Dunford's ability to perform his past or current jobs. In the same vein, his records contain the following notation: "work status: continue full time."

Likewise, the brief recitation of Dunford's testimony by the ALJ does not sufficiently provide the

basis for his determination Dunford is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future. Fawbush v. Gwinn, supra, at 12. Thus, the ALJ must provide further explanation in light of the fact Dunford testified he currently has part-time jobs and is working between thirty and forty hours a week at those jobs both of which pay an attractive hourly rate. Should the ALJ again determine Dunford is unable to return to the type of work he performed at the time of his injury, in addressing the third prong of the Fawbush analysis the ALJ must provide further explanation beyond what he provided in the August 16, 2013, decision.

We decline to address Independence's argument Dunford is not entitled to an award of future medical benefits as that issue is now moot.

However, the propriety of the July 31, 2013, interlocutory opinion and order must be addressed. In the July 31, 2013, interlocutory opinion and order the ALJ determined, in relevant part, as follows:

> Section 12 of the Workers' Compensation Regulations deals with interlocutory relief and provides that during a claim a party may seek interlocutory relief for interim payment of medical benefits. That section provides that on motion by any

> party an informal conference shall be held to review the plaintiff's entitlement to such relief and that an informal conference may be held telephonically. To date in this case, neither party has filed a motion for an informal conference. Under Section 12 entitlement to interlocutory relief shall be shown by means of Affidavit demonstrating that the plaintiff will suffer irreparable injury, loss or damage pending a final decision on his application. As noted, plaintiff has filed the appropriate Motion supported by his attorney's Affidavit and a medical report supporting his claim for medical benefits, and defendant has not responded thereto.
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> . . .
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> In this case the record at this time is uncontradicted to the effect that the plaintiff's treating physicians have recommended the medical treatment sought by the plaintiff in his Motion for his alleged work injuries. Based on the record as it now stands, I make the factual determination that the plaintiff is entitled to the interlocutory relief for which he has moved, consisting of medical expense benefits. I make the factual determination that the plaintiff is entitled to the medical treatment from his physicians named in his Motion and supporting documents.

The order constitutes an abuse of discretion and was not rendered in conformity with the regulations. In the motion to compel medical treatment, resulting in entry of the order, Dunford requested the ALJ compel medical treatment requested by Dr. Kruer stating Dr. Kruer had

requested “RFA treatment” in order to allow him to continue working. Dunford alleged this request had been denied and he had not received proper treatment and he suffers from the effects of his work-related injury. Dunford also alleged the RFA treatments were needed to delay an inevitable spinal fusion which was to be performed by Dr. Rohmiller. This motion was not sworn to by Dunford. Attached to the motion was a print-out from Neuroscience Associates of Northern Kentucky which Dunford’s attorney verified by affidavit to be true and accurate to the best of his knowledge.

The regulation pertaining to interlocutory relief is 803 KAR 25:010 Section 12, which reads as follows:

> (1) During a claim, a party may seek interlocutory relief through:
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> (a) Interim payment of income benefits for total disability pursuant to KRS 342.730(1)(a);
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> (b) Medical benefits pursuant to KRS 342.020; or
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> (c) Rehabilitation services pursuant to KRS 342.710.
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> (2) Upon motion of any party, an informal conference:
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> (a) Shall be held to review the plaintiff's entitlement to interlocutory relief; and
>
> (b) May be held telephonically.

> (3) Any response to a request for interlocutory relief shall be served within twenty (20) days from the date of the request and thereafter, the request shall be ripe for a decision.
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> 4)(a) Entitlement to interlocutory relief shall be shown by means of affidavit, deposition, or other evidence of record demonstrating the requesting party:
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> 1. Is eligible under KRS Chapter 342; and
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> 2. Will suffer irreparable injury, loss or damage pending a final decision on the application.

The above section does not apply in this case. The order was entered sixteen days before the ALJ rendered his amended opinion and order on remand. When the motion was filed the claim was not pending, but had been decided and was remanded to the ALJ for entry of an amended opinion and order resolving very narrow issues. That aside, entitlement to interlocutory relief is to be shown by means of affidavit, deposition, or other evidence of record. Irrespective of Independence's assertion it did not receive the motion and assuming Dunford's motion was timely, the attachment to the motion is not one of the three means delineated in the regulation which would permit a determination of entitlement to the relief requested. Further, the attachment does not establish any of the

allegations Dunford made in his motion. Finally, the motion does not allege, nor did the ALJ find, Dunford will suffer irreparable injury, loss, or damage pending a final decision. Consequently, the July 13, 2013, interlocutory opinion and order must be vacated.

Accordingly, those portions of the August 16, 2013, Amended Opinion and Order on Remand determining Dunford did not have a pre-existing active condition which merited an impairment rating and awarding income benefits based on an 8% impairment enhanced by the three multiplier are **VACATED**. This matter is **REMANDED** to the ALJ for entry of an additional amended opinion and order in conformity with the views expressed herein.

Further, it is ordered the July 31, 2013, Interlocutory Opinion and Order is **VACATED**.

ALL CONCUR.

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