OPINION ENTERED: May 24, 2013

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
VACATING AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. The City of Independence ("Independence") seeks review of the Opinion and Order rendered December 17, 2012 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), finding Phillip E. Dunford ("Dunford") sustained a work-related low back injury on February 8, 2010. The ALJ awarded Dunford permanent partial disability ("PPD")

benefits, increased by the three multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits. Independence also seeks review of the January 23, 2013 opinion denying its petition for reconsideration.

On appeal, Independence argues the ALJ's determination regarding causation and pre-existing active condition is arbitrary, capricious, and clearly erroneous based upon the evidence of record. It also argues the ALJ erred in enhancing the award by the three multiplier because the determination is not in conformity with KRS 342.730(1)(c)1 and is not supported by substantial evidence. Because we determine the ALJ failed to consider all evidence in the record, failed to adequately address whether Dunford's condition was pre-existing and active, and failed to properly address whether KRS 342.730(1)(c) is applicable by not properly conducting an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), we vacate and remand.

Dunford filed a Form 101 alleging he injured his low back on February 8, 2009[1] when he slipped and fell on ice in a parking lot while working. At the time of the accident, Dunford was working as a police officer earning

[1] Dunford later testified at the July 31, 2012 deposition the correct date of injury is February 8, 2010.

$1,090.00 per week. Dunford indicated on the Form 101 he had returned to work earning $1,120.80 per week.

The October 19, 2012 benefit review conference order and memorandum indicates no temporary total disability benefits were paid. The parties stipulated when Dunford retired on February 1, 2012, his average weekly wage was $1,083.18, and he currently earns "approximately the same." The following were identified as contested issues: whether Dunford retains the physical capacity to return to his former work; injury as defined by the Act; prior active; extent and duration; and medical expenses.

Dunford testified by deposition on July 31, 2012 and at the hearing held December 14, 2012. He was born on July 11, 1964, and resides in Covington, Kentucky. He completed high school and received specialized training in police science. He began working as a police officer in 1987, and worked for Independence from July 1994 until he retired on February 1, 2012, because he was "secure in [his] retirement" and wanted to ensure his family was taken care of.

Dunford currently works as a security guard at the federal courthouse where he works one or two twelve hour shifts per week, earning $27.30 per hour. Dunford generally monitors the scanner and "wands" people as they arrive at

the courthouse. He is required to sit or stand for prolonged periods of time, but does no lifting. He also works as a transport officer for the Kenton County Sheriff's Office approximately one hundred hours per month earning $18.50 per hour. As a transport officer, Dunford primarily serves papers and transports prisoners, which he stated "it's not that tough."

On February 8, 2010, Dunford slipped and fell on ice in a parking lot, hitting his elbow, after which he was sore and tight. He testified his low back began bothering him "within about a week" after the incident. At the hearing, he stated his nerve pain began approximately a month after the fall. Although his elbow problem resolved, Dunford alleges he injured his lower back on the right side and now experiences numbness in both legs. Dunford testified he did not seek medical treatment for approximately two to six months because he thought his symptoms would resolve.

Dunford testified he neither missed work nor had surgery due to the February 2010 fall. Eventually, Dunford treated with Dr. Craig Sanders, his family physician, who referred him to Dr. Michael Rohmiller. Dunford was then referred to Dr. Justin Kruer for pain management and initially received epidural shots. Dr. Kruer performed

radiofrequency ablations which provided some relief. Dr. Kruer has not ruled out the possibility of surgery in the event his low back symptoms return or worsen.

Dunford testified he was been receiving chiropractic adjustments for his entire back, including his low back, off and on throughout his career in law enforcement. He testified his ongoing chiropractic treatment is not the result of a specific incident or injury but is due to his "20-something years of being a police officer, wearing a gun belt and sitting in cars."

Dunford also admitted seeking treatment for low back pain with Dr. Sanders in October 2009, approximately four months prior to his February 2010 fall. At the hearing, Dunford testified the pain was in the left side of his back. He treated for his back with Dr. Beaver of Commonwealth Orthopedics on one occasion in October 2009, and x-rays were taken. He does not specifically recall whether medication was prescribed. Dunford testified "whatever it was, went away a couple of days later and I never went back and seen[sic] him." Other than his ongoing chiropractic care and the October 2009 treatment, Dunford denied any other injuries or treatment to his lower back prior to February 2010. Likewise, he denied having low back problems between November 2009 and February 2010.

Dunford testified his current symptoms are completely different than those he experienced before February 2010. Before February 2010, he experienced "annoying" low back pain which "would be aggravating me and I would get it adjusted, and the pain would go away." He stated his left side primarily bothered him. He agreed the pain was not immobilizing and did not limit his activities. Subsequent to his fall, Dunford has experienced constant, more severe sharp pain on the lower right side. He stated he had never experienced "this nerve damage . . . never had the numbness in my legs" until he fell. He stated he has difficulty getting out of a chair or picking up his infant child. He also stated he can no longer work out and can do only limited yard work.

In support of his claim, Dunford submitted the report of a June 10, 2010 lumbar MRI requested by Dr. Sanders, and treatment records from Drs. Rohmiller and Kruer. The MRI demonstrated degenerative narrowing of the right L5 lateral recess secondary to right paracentral component of discogenic changes at L4-5 and right-sided hypertrophic facet arthropathy, without definite evidence of compression; narrowing of the left S1 lateral recess on a degenerative basis secondary, without evidence of nerve root compression; degenerative narrowing of the left L4 and both

L5 neural foramina, without evidence of compression; and hypertrophic facet arthropathy of the lower lumbar spine.

On September 20, 2010, Dr. Rohmiller noted Dunford was referred to him by Dr. Sanders for complaints of low back pain radiating into the right buttocks. Dunford reported a prior history of low back pain and previous chiropractic treatment. Dunford reported experiencing a flare-up in October 2009, which completely resolved following treatment at Commonwealth Orthopaedics and physical therapy. Dunford reported he slipped and fell on ice on February 8, 2010, landing on his back. After reviewing the June 10, 2010 MRI and performing an examination, Dr. Rohmiller diagnosed Dunford with "HNP" at L4-L5 and L5-S1, and foraminal stenosis on the left at L4-L5 and bilaterally at L5-S1. He recommended epidural steroids and stated "I am going to continue having him work his regular duty as he has been."

Dr. Rohmiller noted Dunford continued to experience discomfort and pain despite three epidural injections administered by Dr. Kruer. Dr. Rohmiller was concerned about Dunford's ability to wear a gun belt for prolonged periods of time due to his low back pain. He agreed with Dr. Kruer's recommendation of radiofrequency ablation. On June 1, 2012, Dr. Rohmiller noted recent

complaints of right thigh numbness. On July 23, 2012, Dunford continued to have significant pain, but he had an excellent response to radiofrequency ablation. He stated Dunford had reached maximum medical improvement, but would require chronic pain management with Dr. Kruer with a possible lumbar spinal fusion procedure in the future.

Dunford treated with Dr. Kruer from October 2010 through December 2011. Dr. Kruer diagnosed lumbar disc degeneration with foraminal narrowing and facet arthropathy. He administered lumbar epidural steroid injections, and later performed radiofrequency ablations. Dr. Kruer noted an improvement in Dunford's low back pain, and allowed him to work full time.

In a letter dated August 17, 2012, Dr. Kruer noted the February 2010 fall and stated Dunford "reported a prior history of back pain but this was significantly worse." He stated the June 6, 2010 MRI showed right-sided hypertrophic facet arthropathy and a paracentral disc bulge at L4-5. Dr. Kruer noted lumbar paraspinal tenderness with facet loading pain. Pursuant to the American Medical Association, Guides to Evaluation of Permanent Impairment, Fifth Edition ("AMA Guides"), Dunford "would fall under DRE Lumbar Category II with an 8% impairment rating due to findings of spasm with guarding and loss of motion, with an imaging study that is

concordant with his region of pain." He recommended additional radiofrequency procedures one to two times per year, along with medication, for at least the next decade.

Dr. Kruer also testified by deposition on October 17, 2012. He confirmed he assessed an 8% impairment rating in his August 17, 2012 report pursuant to an examination, and findings consistent with muscle spasms and guarding, and loss of range of motion. He testified he did not have an opinion whether Dunford qualified for an impairment rating prior to the February 2010 fall because he "was not privy to any of the records before [he] saw him." On the initial visit, Dunford reported a long history of low back pain and seeing a chiropractor for over twenty years. Dr. Kruer did not have the prior chiropractic records when he evaluated Dunford in August 2012, nor was he aware Dunford had been referred for an orthopedic evaluation in October 2009.

Dr. Kruer declined to assess whether Dunford's back condition improved based solely upon the January 2010 and February 2010 chiropractic notes of Dr. Skinner since he was not present for those examinations. However, assuming the chiropractic records are accurate, "then potentially they would be in the five to eight percent of the Fifth Edition Guidelines, yes" prior to the February 2010 incident. Dr. Kruer testified he does not typically review

other physical exam findings before he performs an examination in order to prevent bias, but those records are important in forming an opinion regarding causation.

Independence submitted mostly handwritten records from Independence Chiropractic for treatment from 2000 to 2010, indicating physical examinations were performed no more than three times per year in 2000, 2001, 2004, 2006, 2007, 2008, and 2009. Dunford complained of pain and spasms in all areas of his back, including his low back during these treatment sessions. Included with the chiropractic records was a medical note dated October 9, 2009[2] indicating Dunford complained of low back pain and reported taking two Vicodin the night before. The physician prescribed Percocet and referred Dunford "to orthopedics."

Independence also submitted the August 15, 2012 report of Dr. Thomas Bender, who examined Dunford on August 13, 2012 at its request. Dr. Bender noted the February 8, 2010 slip and fall and subsequent treatment. He also noted Dunford reported a twenty year history of chiropractic management, including treatment within a month prior to the work accident. Dr. Bender compared the chiropractor records from Dr. Skinner dated January 20, 2010 and February 12,

[2] Although there is no indication regarding the origination of the note, Independence asserts it is by Dr. Sanders.

2010 and concluded there were no interval changes in the physical examination findings.

Dr. Bender diagnosed longstanding structural spinal degenerative disease and a history of protracted chiropractic care. He also noted a pelvic contusion and a potential sprain/strain of the lumbar spine due to the February 8, 2010 fall. Dr. Bender found Dunford had a pre-existing, active condition prior to the work-related fall, and assessed a 5 to 8% impairment rating pursuant to the AMA Guides as of January 20, 2010. He further opined the February 8, 2010 event did not result in an exacerbation or worsening of his pre-existing condition. Dr. Bender stated Dunford does not qualify for a "new" impairment relative to the February 2010 event, and retains the capacity to perform his job as a police officer. Likewise, Dunford neither requires permanent restrictions nor additional medical treatment.

In a supplemental report dated October 29, 2012, Dr. Bender opined Dunford had an 8% pre-existing active impairment before the February 8, 2010 event. He further stated Dunford had no significant change in impairment given his chiropractic care history and the subsequent performance examination of February 12, 2010. He opined Dunford experienced a temporary exacerbation of a pre-existing

active condition on February 8, 2010 and does not qualify for any impairment rating or increase in impairment due to a work-related event.

In the December 17, 2012 opinion and order, the ALJ listed the evidence submitted by each party, and briefly summarized Dunford's testimony, Dr. Kruer's August 17, 2012 report, and Dr. Bender's August 13, 2012 report. The ALJ made the following findings of fact and conclusions of law relevant to this appeal:

> **A. Injury as defined by the Act.**
>
> KRS 342.0011(1) defines "injury" to mean any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines "objective medical findings" to mean information gained through direct observation and testing of the patient applying objective or standardized methods.
>
> I saw and heard the plaintiff testify at the hearing. He was a credible and convincing witness. I found very persuasive the medical report of Dr. Kruer, the plaintiff's treating physician. Based upon the totality of the evidence in the record, including the plaintiff's sworn testimony and the medical report from Dr. Kruer, which I believe to be very compelling, I make the factual determination that Mr. Dunford did

sustain a work-related injury on February 8, 2010, which required medical treatment by Dr. Kruer.

B. Prior active.

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.

C. Extent and duration.

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

> Administrative Law Judge must determine whether the claimant can continue to earn that level of wages for the indefinite future.
>
> I find the testimony of the plaintiff and the evidence from Dr. Kruer, the treating physician, to be very credible, convincing and persuasive. I make the factual determination that under the above-cited evidence and 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), we have a situation here where Mr. Dunford has returned to work at approximately the same wage, but I make the factual determination that he is unlikely to be able to continue for the indefinite future to do work from which he can earn that wage. In other words, I make the factual determination that Mr. Dunford's work injuries on February 8, 2010 have permanently altered his ability to earn an income and that he is, therefore, entitled to recover enhanced permanent partial disability benefits under KRS 342.730(1)(c)1.

Independence filed a petition for reconsideration asserting the ALJ's decision contained no summary of the chiropractic records, and were not considered. Independence requested the ALJ reconsider his findings and conclusions on the issues of whether Dunford suffered an injury as defined by the Act and whether he had a pre-existing, active condition "in light of the chiropractic records in evidence and state why he dismissed the records as inconsequential to

his findings and conclusions of law." Likewise, Independence asserted the ALJ did not summarize or purport to consider the deposition testimony of Dr. Kruer, and requested the ALJ reconsider his findings and conclusion in light of several specific aspects of Dr. Kruer's testimony.

Independence also requested the ALJ make a finding of fact concerning Dunford's physical ability to return to the type of work he performed at the time of the work incident. Independence pointed to the fact Dunford did not miss any work, and continued to perform his usual duties for nearly two years after the accident until he retired for reasons unrelated to his alleged work injury. Independence also requested the ALJ state the evidentiary basis for his conclusion Dunford "is unlikely to be able to continue for the indefinite future to do work from which he can earn that wage."

In the January 23, 2013 opinion and order on reconsideration, the ALJ denied Independence's petition, stating in part as follows:

> 4. The Opinion and Order dated December 17, 2012 discussed all of the contested issues raised by the parties in the Benefit Review Conference Order. The rulings in the original Opinion and Order dated December 17, 2012 are, therefore, reaffirmed.

5. This is a factual situation where both the 3 multiplier and the 2 multiplier potentially apply under the facts of this claim within the principles enunciated in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). The Fawbush case requires the Judge to make three essential findings of fact. First, the Judge must determine, based on substantial evidence, that the plaintiff cannot return to the type of work performed at the time of his injury in accordance with KRS 342.730(1)(c)1; second, the plaintiff 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; third, whether the plaintiff can continue to earn that level of wages into the indefinite future. In the case at bar, based on the persuasive medical evidence from Dr. Kruer, the plaintiff's treating physician, and the testimony of the plaintiff at the final hearing, which I found to be credible and convincing, I make the factual determination that the plaintiff 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. Based on the sworn testimony of the plaintiff and the convincing medical evidence from Dr. Kruer, I make the further factual determination that although the plaintiff did return to work at an average weekly wage equal to or greater than his per-injury average weekly wage, the 2 multiplier does not apply. It is important to remember that under the holding 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 job. Under the Adkins case, the standard for decision is whether the injury has permanently altered the worker's ability to earn an income and whether the application of KRS 342.730(1)(c)1 is appropriate, where the individual returns to work at the same or greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage. Based on the sworn testimony of the plaintiff at the final hearing and the very persuasive medical evidence from Dr. Kruer, the treating physician, I make the factual determination that the third prong of the Fawbush analysis applies here and that under that application the plaintiff Mr. Dunford is entitled to the 3 multiplier.

On appeal, Independence argues the ALJ's determination regarding causation and pre-existing active condition is clearly erroneous since he disregarded or did not consider the chiropractic records and Dr. Kruer's deposition testimony. Independence alleges the chiropractic records were material to both issues "as evidenced by Dr. Kruer's reformulated opinion following his review of those records." Independence argues the presence of symptoms before the work-related event along with the absence of any harmful change to the human organism

evidenced by objective medical findings compels dismissal of Dunford's claim.

Independence points to the fact Dr. Kruer did not address the issue of prior active condition in his August 17, 2012 report. It asserts Dunford's testimony he was asymptomatic from October 2009 through February 2010 was impeached by the January 20, 2010 chiropractic record and his later admission the chiropractic records are accurate. Independence also argues the chiropractic records establish Dunford received regular treatment for low back pain for years before his work-related event, including on January 20, 2010, and he sought treatment in October 2009 from his family physician. Independence asserts Dr. Kruer acknowledged Dunford would have qualified for a 5 to 8% impairment rating prior to the work incident assuming the chiropractic records are accurate. Therefore, Independence argues the ALJ provided no rationale for rejecting unrebutted medical evidence and his determination regarding active impairment should be reversed as a matter of law.

Independence argues the ALJ's award of the three multiplier is not in conformity with the Act and is not supported by substantial evidence. Independence argues the ALJ failed to first determine whether Dunford retains the physical capacity to return to the type of work performed

at the time of injury pursuant to KRS 342.730(1)(c) before engaging in the analysis required by Fawbush v. Gwinn, supra, and its progeny. It points to the fact Dunford continued to work for Independence without restriction for approximately two years following the February 2010 fall and then retired for reasons unrelated to his work injury.

Independence also argues the ALJ determined Dunford retained the physical capacity to return to his former work in the opinion on reconsideration by stating:

> . . . I make the factual determination that the plaintiff 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 342.703(1)(c)1.

Therefore, the ALJ's calculation of benefits pursuant to KRS 342.730(1)(c)1, despite expressly finding otherwise, is not in conformity with the Act. In the alternative, Independence argues this claim is distinguishable from Fawbush, supra, since no physician restricted Dunford in any way following the work incident, he was not taking narcotic medication, and he is currently employed without restrictions. Independence asserts since there is no evidence to support the ALJ's award of the three multiplier, it must be reversed as a matter of law.

Since Dunford was successful before the ALJ with regard to causation and the application of the three multiplier pursuant to KRS 342.730(1)(c)1, the question on appeal is whether his determination is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). However, Independence bore the burden of proving the existence of a pre-existing active condition. Since Independence was unsuccessful in its burden, the question on appeal is whether the evidence compels a finding in its favor.

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16

(Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Although providing a *de minimis* analysis, we find substantial evidence exists in the record supporting the ALJ's finding Dunford sustained a work-related injury on February 8, 2010. An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Causation is a factual issue to be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scearce, 896

S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W. 2d 565 (Ky. 1969). It appears the parties do not dispute the occurrence of a work event on February 8, 2010. Dunford's testimony, along with the June 2010 MRI, and the treatment records of Drs. Rohmiller and Kruer constitute substantial evidence in the record supporting the ALJ's determination. We recognized the existence of conflicting evidence in the record. However, this is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., supra.

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

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

While Kentucky law holds the arousal of a pre-existing dormant condition into disabling reality by a work injury is compensable, an employer is not responsible for a pre-existing active condition present at the time of the alleged work-related event. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). The correct standard regarding a carve-out for a pre-existing active condition is set forth in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). In Finley v. DBM Technologies, 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. 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.

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.

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.

In Fawbush, supra, the Kentucky Supreme Court concluded in those instances in which both KRS 342.730(1)(c)1 and (c)2 apply, an ALJ is authorized to

determine which provision is more appropriate based upon the facts of the individual claim. Id. at 12. In Fawbush, the claimant, due to the effects of the work injury, no longer retained the physical capacity to perform the type of work he had been performing at the time of the injury. The claimant, however, had returned to work at a lighter job earning an average weekly wage equal to or exceeding his average weekly wage at the time of the injury.

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

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

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

Hence, where both the 3 multiplier and the 2 multiplier potentially apply 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.

Accordingly, the Opinion and Order rendered December 17, 2012, and the Order denying the petition for reconsideration rendered January 23, 2013, by Hon. William J. Rudloff, Administrative Law Judge, are hereby **VACATED.** This claim is **REMANDED** to the ALJ for entry of an amended

opinion, order and award in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

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