# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: August 12, 2016**

CLAIM NO. 200982990

DR. LARRY W. LYNN PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

DOTTIE RAMEY
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**
* * * * * *

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

**STIVERS, Member.** Dr. Larry W. Lynn ("Dr. Lynn") appeals from the November 9, 2015, Second Order on Remand and the January 5, 2016, Order Denying his Petition for Reconsideration of Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"). In this last decision, the ALJ enhanced Dottie Ramey's ("Ramey") income benefits via the three multiplier contained in KRS 342.730(1)(c)1. On appeal, Dr.

Lynn asserts the ALJ's analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) is not supported by substantial evidence and erroneous as a matter of law.

As this is the third time this case has come before us, we set forth the procedural history provided in our January 9, 2015, Opinion:

> During the proceedings before Hon. Joseph Justice, Administrative Law Judge ("ALJ Justice"), the parties stipulated Ramey sustained a work-related injury on January 13, 2009, Dr. Lynn received due and timely notice, Ramey's average weekly wage ("AWW") was $265.00, and she returned to work on January 4, 2009, at the same or greater wages. [footnote omitted].
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> On February 11, 2011, ALJ Justice rendered an Opinion, Award, and Order finding Ramey sustained work-related low back, left shoulder, and psychological injuries. ALJ Justice concluded Ramey had a 5% impairment rating for the low back condition, one-half of which was attributable to the work injury, and she had a 9% impairment rating due to the left shoulder injury. ALJ Justice also determined Ramey has a 9% psychological impairment rating, 6% of which is work-related, which combined with the impairments for the physical injuries resulted in a work-related 16.5% impairment rating.[footnote omitted].
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> Because Ramey alleged numerous other injuries, ALJ Justice found as follows:
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> > Plaintiff has not proven any permanent work-related

> impairment to any body parts other than the left shoulder and the lumbar spine. Plaintiff has proven a psychological impairment. Plaintiff's claim for benefits for these other conditions should be dismissed. Using the Combined Values Chart Plaintiff has a 16.50% WPI.

ALJ Justice found Ramey was not permanently totally disabled but did not retain the physical capacity to return to the job she was performing when injured. Relying upon Ramey's treating physician, Dr. T. Robert Love, the ALJ found she was capable of performing sedentary work.

Dr. Lynn appealed asserting the ALJ failed to provide an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). In an August 12, 2011, opinion, this Board vacated in part, stating:

> Based upon the foregoing, we conclude the ALJ did not carry out an appropriate analysis of the lay and medical evidence pursuant to Fawbush, supra, in determining whether the three (3) multiplier, as articulated in KRS 342.730(1)(c)1, or the two (2) multiplier pursuant to KRS 342.730(1)(c)2 more properly applies. For that reason, the Board vacates and remands that portion of the opinion, award and order to the ALJ to perform a proper analysis to determine, which, if any multiplier is

> appropriate for this claim. After performing this analysis, the ALJ may very well conclude the three (3) multiplier is applicable to this claim.
>
> On the other hand, if the ALJ determines KRS 342.730(1)(c)1 does not apply, then an analysis must be made pursuant to Chrysalis House, Inc. v. Tackett, 283 S.W.3d 67 (Ky. 2009), since Ramey continued to work for Lynn for several months after the accident, and the ALJ must determine whether the cessation of that wage was as a result of Ramey's work-related injury.

Ramey appealed to the Court of Appeals. In a February 28, 2012, Opinion, the Court of Appeals affirmed the Board holding:

> The ALJ found that Ramey was not permanently disabled, but also found that Ramey did not retain the physical capacity to return to her former duties and awarded the three times multiplier. Ramey undisputedly returned to work at equal or greater wages for more than six months following the injury. The ALJ did not make the determination of whether Ramey was likely to continue earning a wage that equals or exceeds the wage at the time of his injuries for the indefinite future. This determination is required by *Fawbush. See Adkins v. Pike*

> *Co. Bd. Educ.,* 141 S.W.3d 387, 390 (Ky. App. 2004). We conclude that the Board properly applied the controlling law in remanding the case to the ALJ for further analysis under Fawbush.

On remand, after providing a synopsis of Ramey's testimony and the evidence from Dr. Kermit Gibson, Dr. Love, Dr. Anbu Nadar, and Dr. David Herr, the ALJ entered the following:

> 1. Pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), with regard to the application of KRS 342.730 (1) (c) 1 (the 3 multiplier) or KRS 342.730 (1) (c) 2 (the 2 multiplier), I am authorized (and directed by the Board) to determine which provision is more appropriate on the facts.
>
> 2. Here, Ms. Ramey did return to work after the injury making the same wage. However, she did that out of a feeling of responsibility to her employer, by whom she had been employed for many years. Although she retained the same wage during this time period, her duties were significantly reduced, with most being assigned to other people. By her own testimony, she was physically unable to [sic] the same job duties after her injury that she could prior thereto. She specifically mentioned filing and mandatory cleaning duties. It is also of significance that she worked between her injury and

shoulder surgery, but not after the shoulder surgery.

3. So, her unrebutted testimony was that her post-injury work was done out of necessity, primarily because Dr. Lynn would not "let her quit" because of his mother's last illness and death…that she felt a sense of loyalty to continue as long as she could. Yet she could not continue when Dr. Love took her off-work to subsequently perform her shoulder surgery. Up to that point, she could only work because others performed the job duties that were outside her restrictions. A claimant's own testimony is competent and of some probative value. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky., 1977).

4. She has not worked since July 17, 2009. As stated herein above, her last work for Dr. Lynn was possible only because other people performed tasks she had previously performed, but could no longer, due to her restrictions.

5. By description, her restrictions would not allow her to file, carry out heavy bags of trash or perform the cleaning duties she described, such as sweeping, mopping and doing heavy cleaning for the entire office each Wednesday, as required.

6. She has psychological problems, both injury related and pre-existing that are set out in the record herein, that while they may not affect her physical capacity, would certainly affect her future employability.

7. Based upon the restrictions placed upon her by her treating and examining physicians as set out herein above, especially Dr. Nadar, Dr. Love, Dr. Snider, and Dr. Herr, whose opinions I find to be persuasive as to Plaintiff's physical capacity, I find that Ms. Ramey [sic] not have the physical capacity to return to the type of work that she performed at the time of the injury.

8. Further, based upon her own testimony, her education, work background and especially her physical restrictions, I find that the work related injury suffered by the Plaintiff has permanently altered her ability to earn an income. Further, that although she returned to work for a relatively brief period of time at a wage equal to that which she had earned before the injury, it [sic] highly unlikely that she would be able to continue for the indefinite future to do work from which to earn such a wage. Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006). In making that

> finding, I rely on the medical opinions of Dr. David Herr, which I find to be the most compelling and persuasive evidence in the record as to that issue.
>
> 9. Consequently, I conclude that Ms. Ramey is entitled to the 3 multiplier pursuant to KRS 342.730 (1) (c) 1.

Dr. Lynn filed a petition for reconsideration asserting the order contained multiple patent errors. First, he asserted the ALJ erroneously relied upon Dr. Herr's opinions as ALJ Justice had rejected Dr. Herr's opinions. He noted Dr. Herr diagnosed work-related medical conditions, for which he assessed impairment ratings, which ALJ Justice found were not work-related. Further, he argued Dr. Herr did not express an opinion as to Ramey's restrictions or abilities excluding the effects of the non-work-related medical conditions.

Next, Dr. Lynn contended the Fawbush analysis almost entirely concerned Ramey's capacity to perform the job she performed when injured. He asserted Ramey's inability to perform the job she was performing at the time of the injury, is relevant for purposes of determining whether a Fawbush analysis is needed. As that was not in issue, Dr. Lynn expressed concern the ALJ did not "fully comprehend" the Fawbush analysis.

Concerning the findings in paragraph eight of the order, Dr. Lynn asserted the ALJ needed to make additional findings providing the basic facts supporting his conclusory statements. He noted although Ramey

> may be excluded from performing heavy, medium, and light work, ALJ Justice found she was capable of performing sedentary work and that finding cannot be altered. Dr. Lynn also requested the ALJ identify the evidence which supports his conclusion the effects of the injury have permanently altered Ramey's ability to earn an income.
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> Finally, Dr. Lynn contended since ALJ Justice determined Ramey is not permanently totally disabled and she is not precluded from performing sedentary work, "there is no evidence, not already rejected by ALJ Justice, limiting Ramey to working less than on a regular and sustained basis." Dr. Lynn posited Ramey's AWW is $265.00 and if she earned a minimum wage of $7.25 per hour and worked forty hours a week she would make $290.00. Alternatively, it noted should she work 36.6 hours a week at minimum wage of $7.25 she would earn $265.35. Therefore, Dr. Lynn argued all the evidence in the record establishes Ramey retains the ability to earn equal or greater wages for the indefinite future and substantial evidence does not support a conclusion to the contrary.
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> In the July 29, 2014, Order, the ALJ noted the petition for reconsideration was primarily a re-argument of the facts and requested "additional findings which were already made or referenced by citations to the evidence of record." Finding no patent error appearing on the face of the order, the ALJ denied the petition for reconsideration.

After reciting Dr. Lynn's arguments on appeal, we held as follows:

This claim was remanded for the sole purpose of resolving the third prong of the Fawbush analysis. Therefore, determining whether Ramey possessed the capacity to perform the job she was performing at the time of the injury was unnecessary. The ALJ should have focused entirely upon whether the evidence indicates Ramey was 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 at 12.

In Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004) the Court of Appeals stated as follows:

> If every claimant's current job was certain to continue until retirement and to remain at the same or greater wage, then determining that a claimant could continue to perform that current job would be the same as determining that he could continue to earn a wage that equals or exceeds his pre-injury wages. However, jobs in Kentucky, an employment-at-will state, can and do discontinue at times for various reasons, and wages may or may not remain the same upon the acquisition of a new job. Thus, in determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job. Therefore, we remand this case to the ALJ for a finding

> of fact as to Adkins' ability to earn a wage that equals or exceeds his wage at the time of the injury for the indefinite future. If it is unlikely that Adkins is able to earn such a wage indefinitely, then application of Section c(1) is appropriate.

In Adams v. NHC Healthcare, 199 S.W.3d 163, 169 (Ky. 2006), the Supreme Court adopted the ruling of the Court of Appeals in Adkins, supra, stating:

> The court explained subsequently in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky. App. 2004), that the *Fawbush* analysis includes a broad range of factors, only one of which is the ability to perform the current job. The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income. The application of KRS 342.730(1)(c)1 is appropriate if an individual returns to work at the same or a greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage.
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> Unlike the situations in *Fawbush*, *supra*, and *Adkins*, *supra*, the claimant continued to work as a nursing assistant for several months after his injury but quit before his claim was heard. He asserted that he could no

> longer work. Having found the claimant to be only partially disabled, the ALJ's task was to determine whether his injury permanently deprived him of the ability to do work in which he could earn a wage that equaled or exceeded his wage when he was injured. The claimant asserts that it did and that he was entitled to a triple benefit under KRS 342.730(1)(c)1.

Based upon Ramey's testimony, education, work background, and physical restrictions, the ALJ found her work injuries have permanently altered her ability to earn an income. The ALJ did not cite to the portion of Ramey's testimony upon which he relied in making that finding. Similarly, he did not discuss how her education and work background factored into his decision. Further, the ALJ did not discuss the physical restrictions which were germane to his decision. In determining whether it is likely Ramey is able to continue earning a wage that equals or exceeds her wage at the time of the injury, the ALJ relied solely upon the opinions of Dr. Herr. The ALJ provided no further findings or explanation. Further, he did not cite to the specific opinions of Dr. Herr which swayed his decision. As urged by Dr. Lynn, we decline to rely upon the Court of Appeals' holding in Enterprise Mining v. Wilder, 2013-CA-000820-WC, rendered February 7, 2014, Designated Not To Be Published, as the Supreme Court in an opinion rendered December 18, 2014, Designated Not To Be Published, reversed the Court of Appeals' decision.[footnote omitted].

However, given ALJ Justice's findings, Dr. Herr's opinions do not constitute substantial evidence supporting the ALJ's finding that it is "highly unlikely that [Ramey] would be able to continue for the indefinite future to do work from which to earn such a wage."

First, we note ALJ Justice rejected Dr. Herr's impairment ratings and many of his diagnoses of work-related injuries. Dr. Herr diagnosed the following work-related conditions:

1. Degenerative disc disease lumbar spine.

2. HNP, lumbar, L4-5 and/or L5-S1.

3. Left sciatica.

4. Shoulder impingement syndrome, bilateral shoulders.

5. Tear of rotator cuff, left shoulder.

6. Recurrent tear of rotator cuff, right shoulder.

7. Osteoarthritis of AC joint, bilateral shoulders.

8. Osteoarthritis, bilateral knees.

9. Tear of medial meniscus, left knee.

10. Tricompartmental osteoarthritis, bilateral knees.

11. Osteoarthritis left hip.

In his Form 107 and attached report pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, Dr. Herr assessed a 21% impairment for the right shoulder, a 7% impairment for the left shoulder, a 20% impairment for the left knee, a 20% impairment for the right knee and a 5% impairment for her lumbar spine condition. He indicated Ramey had a minimum impairment rating of 55% and a maximum impairment of 63%. More importantly, in his report regarding Ramey's capacity to return to work, Dr. Herr stated as follows:

> Ms. Ramey cannot return to work in any capacity due to problems with bilateral knees, bilateral shoulders, and lower back. All four weight-bearing joints have been adversely affected as a result of the hard fall on January 23, 2009. Further, the condition of her lumbar spine will preclude prolonged sitting and repetitive and prolonged bending activities as a result of exacerbation of degenerative disc disease and degenerative joint disease of this 58-year-old lady's lumbar spine and probable herniated discs at L4-5 or/and L5-S1 causing persistent and progressive left sciatic pain.

Since Dr. Herr's opinion that Ramey cannot return to work in any capacity is, in large part, based on non-work-related conditions, his opinion cannot be relied upon in determining whether it was likely Ramey would be able to continue to earn a

wage that equals or exceeds her wage at the time of the injury for the indefinite future. ALJ Justice specifically rejected the work-related injuries to both knees and the right shoulder. He also found one-half of the impairment rating assessed for the lower back condition to be non-work-related. ALJ Justice also determined Ramey is not totally disabled and can perform sedentary work. These findings are now the law of the case and the ALJ is bound by the findings.

The ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). The 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). Here, regarding the issue before the ALJ, Dr. Herr's opinion cannot constitute substantial evidence in support of the ALJ's decision. Further, the bare bones statement of the ALJ that he relied upon the opinions of Dr. Herr, is insufficient and certainly does not advise the parties of the basis for his decision. This is especially true since ALJ

Justice rejected most of Dr. Herr's diagnoses and all of his impairment ratings.

All parties are entitled to findings of fact based upon a corrected understanding of the evidence submitted during adjudication of the claim. Where it is demonstrated the fact-finder may have held an erroneous understanding of the relevant evidence in reaching a decision, the courts have authorized remand to the ALJ for further findings. *See* Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985); Whitaker v. Peabody Coal Company, 788 S.W.2d 269 (Ky. 1990). Since the ALJ did not understand the opinions of Dr. Herr, the ALJ's decision must be vacated.

Finally, as we are without fact-finding authority, we decline to remand with directions to enter the award requested by Dr. Lynn. Ramey's deposition testimony of September 28, 2010, reveals she worked 76 hours every two weeks which equates to 38 hours a week. On remand, the ALJ may conclude that due to her physical problems, Ramey does not possess the capacity to work 38 hours or even 36.6 hours each week. The ALJ's task on remand is to determine whether Ramey can return to regular employment at the same or greater wages than she earned at the time of the injury. Therefore, on remand, the ALJ must determine the extent to which Ramey is capable of regularly working in a sedentary capacity each week. Nothing prohibits the ALJ from finding Ramey is not able to work 36.6 or more hours each week. On the other hand, the ALJ may determine Ramey is able to work more than 36.6 hours each week. We express no opinion as to the outcome on remand.

> Accordingly, the February 20, 2014, Order on Remand finding Ramey is entitled to PPD benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1 and the July 29, 2014, Order denying the petition for reconsideration are **VACATED**. This matter is **REMANDED** to the ALJ for entry of an amended opinion and award in conformity with the views expressed herein.

In the November 9, 2015, Second Order on Remand, the ALJ stated as follows:

> This matter comes before the undersigned on remand from an Opinion of the Workers' Compensation Board vacating and remanding this matter to the undersigned with direction that I make findings as to whether Ms. Ramey can return to regular employment at the same or greater wages than she earned at the time of her injury. Included therein is direction that on remand, the ALJ must determine the extent to which Ms. Ramey is capable of regularly working in a sedentary capacity each week. Dr. Herr's opinion cannot constitute substantial evidence in support of a decision.
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> The previously assigned ALJ entered an Opinion, Award and Order on February 11, 2011 awarding the Plaintiff permanent partial disability benefits. On page 21 of the Opinion, Award and Order, he found that the Plaintiff was "entitled to the three multiplier." His rationale was that she did not retain the physical capacity to clean the office without further enlightenment.

The Defendant/Employer filed a Petition for Reconsideration in which he requested that a Fawbush analysis be conducted by the ALJ. The petition for reconsideration was overruled, upon which an appeal was filed to the full board.

The Board, in an Opinion entered August 12, 2011, vacated the ALJ's decision in part, and remanded it to the ALJ with direction that he perform a proper analysis to determine which, if any, multiplier is appropriate for this claim. The board noted that after performing this analysis, the ALJ may very well conclude the three (3) multiplier is applicable to this claim.

On the other hand, the Board wrote, if the ALJ determines KRS 342.730 (1) (C) 1 does not apply, then an analysis must be made pursuant to Chrysalis House, Inc. v. Tackett, 283 S.W.3d 67 (Ky. 2009) since Ramey continued to work for Lynn for several months after the accident, and the ALJ must determine whether the cessation of that wage was as a result of Remy's work-related injury.

An Order on Remand issued February 20, 2014 to which another petition for reconsideration was filed and overruled. Plaintiff appealed, which resulted in the aforementioned Opinion Vacating and Remanding.

In complying with the Board's Order I do incorporate some of my previous order on remand to the extent that it has applicability to the mandate of the Board.

In her deposition of September 28, 2010, Ms. Ramey testified that while working for Dr. Lynn she would file and

take care of billing, empty garbage and generally keep the office clean, answered the phone and developed x-rays. She would pull files and place them in charts. Keeping the office clean included sweeping and mopping.

Dr. Lynn was a dentist. Apparently, she also performed some of the functions of a dental assistant when “helping him in the back” by getting dental tools, supplies and medications ready for him as he saw patients. However, her main duties were as a receptionist/janitor.

The Plaintiff returned to work after the injury and continued until July 27, 2010. Plaintiff testified that the only reason she worked so long was because there was nobody to replace her.

Ms. Ramey testified that she asked Dr. Lynn to find someone so she could train them to replace her so she could have surgery, but Dr. Lynn's mother became ill and she did not want to leave him at that time. Plaintiff stated that following the passing of Dr. Lynn's mother she again requested that he find someone for her to train to replace her and Dr. Lynn asked why she could not just wait until retirement to have the surgery.

Thereafter, Plaintiff had an MRI of her left shoulder with Dr. Love who started treating her in July, 2009 and ultimately took her off-work after reviewing the results of the MRI and telling her she needed left shoulder surgery.

The Plaintiff then informed Dr. Lynn that she was taken off-work, but upon his request she worked two more days to train a replacement. The

Plaintiff did not testify as to whether she worked under any limitations during this period of time post-injury.

At the time she left, Dr. Lynn was paying her a salary. She got $540.00 per week net after taxes. She did not know exactly what her annual salary was.

Her last day of employment with Dr. Lynn was July 17, 2009. She left, she testified, because she "wasn't able to perform what I had to do."

She was asked by counsel for the Defendant/Employer whether she performed the same duties after the injury as she performed before the injury. She responded that she "couldn't hardly do much after the injury." After the injury, she had a girl that did all the lifting. Ms. Ramey continued to answer the telephone and handle receptionist duties. She stopped doing the filing. She couldn't take out all of the trash and someone else had to do the mopping and sweeping.

On Wednesdays, her job included cleaning the entire office. She had to give that up and "the other girl" did that during the period Ms. Ramey stayed after the injury.

Ms. Ramey testified that Dr. Love operated on her left shoulder in July, 2009 and she is now at about 50% with it. Her left shoulder is not as strong as it was before the injury. She can't lift, pull or do her housework as she could previously.

She also has pain in her left hip and left knee from the fall at work, although it is not constant. The pain

in her hip that keeps her from being able to complete household chores. She also experiences sharp pain in her left knee that she says "feels like I have some ... something underneath the kneecap that's a-cutting it."

Plaintiff stated that she is unable to lift a gallon of milk from floor level and place it on a countertop. She also states that since her surgery she still has pain and swelling in her shoulder. Her left shoulder pain sometimes runs up her neck and around her back to her shoulder blade, and makes it difficult to carry anything.

Since the injury she says that she has had constant pain in the center of her back, below the belt line that runs around into her groin or down the left side of her body.

She states that she could not return to the type of work she did at the time of her injury. That it is mostly due to the fact that she cannot clean. More specifically, Plaintiff cannot sweep, mop, or lift heavy trash bags.

Ms. Ramey’s testimony at the formal hearing of December 15, 2010 did not differ materially from her deposed testimony. She reiterated her testimony concerning the injury and its effect on her person.

She did testify that she has anxiety and depression as a result of her injury. At the time of her hearing she was treating with “Dr. Roy Price” at Shelby Valley Clinic for her anxiety and/or depression. He was prescribing her Cymbalta. She testified that the Cymbalta had “helped a little.”

She described pain in the middle of her back as she was sitting at the hearing.

As to the more sedentary portion of her job, she testified that she answered the telephone, did all of the billing, all of the insurance for billing purposes, kept the financial records of the practice, and stored old files. She had to lift and carry file boxes and put up office supplies. The file boxes were “banker box” size, filled with files. The office supplies included reams of copy paper. She also had to manage the insurance billing.

In her testimony, she stated that from an emotional standpoint, she could not deal with a boss or co-workers or the public due to her anxiety and depression. Her reason for having this belief is because she gets “very aggravated right now”. She is “down-hearted” because she can’t work and doesn’t like to be dependent on people. With regard to medical evidence, Ms. Ramey was treated and/or examined by a number of mental health professionals regarding her emotional component.

**Findings of Fact and Conclusions of Law**

1. Pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), with regard to the application of KRS 342.730 (1) (c) 1 (the 3 multiplier) or KRS 342.730 (1) (c) 2 (the 2 multiplier), I am authorized (and directed by the Board) to determine which provision is more appropriate on the facts. More particularly, I am directed to determine whether Ms. Ramey can return to regular employment at the same or greater wages than she earned at the time of the injury, and further, the extent to which Ms. Ramey is capable of regularly

working in a sedentary capacity each week.

2. It will be noted that the defendant introduced no lay testimony whatsoever, so Ms. Ramey's testimony is uncontroverted. Defendant has not attacked her character or credibility through alternative lay evidence.

3. On the date of her deposition in September of 2010, Ms. Ramey was 58 years of age, making her 63 years of age as of the date of this writing. She is 5'2" tall and weighs 151 pounds.

4. Ms. Ramey has a 12th grade education with no specialized or vocational training.

5. As regards her vocational history, she started out as a cashier/general worker in a number of dry goods stores. This was short-lived and she went to work in a drugstore assisting the pharmacist as directed.

6. At the drugstore, her work was confined to general assisting, stocking shelves, helping to unload trucks, later working in the cosmetics department. This employment lasted for about 8-10 years.

7. She left the drugstore to get married. It appears from the record that she was a homemaker for about 10 years, then went to work for the defendant in 1990 or '91.

8. When she first went to work for Dr. Lynn. She appears to have performed about every non-medical function in the office. She was the receptionist, did the billing and the filing. However, she also did more labor intensive jobs such as cleaning, mopping and taking out the

trash. She pulled files and developed x-rays. She was not the only employee in the office, but by her testimony she had to make sure the office was clean and organized for the patients.

9. Her duties as receptionist were mostly sedentary, but there was no set time for her to do the more physically demanding work, which she says she did every day.

10. Prior to her injury, she worked around 76 hours per every two weeks (or 38 hours per week).

11. Her last date of work was July 17, 2009.

12. Here, Ms. Ramey did return to work after the injury making the same wage. However, she did that out of a feeling of responsibility to her employer, by whom she had been employed for many years. Although she retained the same wage during this time period, her duties were significantly reduced, with most being assigned to other people. By her own testimony, she was physically unable to the same job duties after her injury that she could prior thereto. She specifically mentioned filing and mandatory cleaning duties. It is also of significance that she worked between her injury and shoulder surgery, but not after the shoulder surgery.

13. Her unrebutted testimony was that her post-injury work was done out of necessity, primarily because Dr. Lynn would not “let her quit” because of his mother’s last illness and death…that she felt a sense of loyalty to continue as long as she could. Yet she could not continue when Dr. Love took her off-work to subsequently perform her shoulder surgery. Up to that point, she

could only work because others performed the job duties that were outside her restrictions. A claimant's own testimony is competent and of some probative value. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky., 1977).

14. She has not worked since July 17, 2009. As stated herein above, her last work for Dr. Lynn was possible only because other people performed tasks she had previously performed, but could no longer, due to her restrictions.

15. By description, her restrictions would not allow her to file, carry out heavy bags of trash or perform the cleaning duties she described, such as sweeping, mopping and doing heavy cleaning for the entire office each Wednesday, as required.

16. Therefore, while she did continue to perform sedentary duties after her date of injury and until she left to have shoulder surgery, she was absolutely not performing the same job duties and functions after the injury that she was previous to it.

17. She has psychological problems, both injury related and pre-existing that are set out in the record herein. These problems, while they may not affect her physical capacity, would certainly affect her future employability.

18. Appended to the transcript of record of the final hearing conducted on December 15, 2010 was the report of Roy S. Price, MSW, LCSW who conducted a mental assessment of Ms. Ramey's ability to do work-related activities.

19. Under the category of Making Occupational Adjustments, Mr. Price found Ms. Ramey to have no ability to relate to co-workers, deal with the public, interact with supervisors or deal with work stresses. He found her to have poor ability to follow work rules and maintain attention/concentration. Her judgment and ability to deal with work stresses was fair. He added a note to his findings in this category stating, “Ms. Ramey has severe chronic pain that interferes with her ability to concentrate, relate reliably in social situations… (partially indecipherable)… on edge at all times, exhausted adaptive coping skills.”

20. Under the category of making performance adjustments, Mr. Price found Ms. Ramey to have no ability to understand, remember and carry out complex job instructions. He found her to have poor ability to understand, remember and carry out detailed, but not complex job instructions and fair ability to understand, remember and carry out simple job instructions. He added a note to his findings in this category stating, ”Severe, chronic panic disorder and agoraphobia (Note: abnormal fear of open spaces). Major depression, severe(ly) interferes with her ability to complete tasks as above.”

21. Under the category of making personal/social adjustments, Mr. Price found Ms. Ramey to have no ability to behave in an emotionally stable manner or to relate predictably in social situations. He did find her able to maintain her personal appearance and demonstrate reliability.

22. The defendant filed no rebuttal to Mr. Price's report.

23. Dr. Eric Johnson performed a psychiatric evaluation of Ms. Ramey on May 13, 2010. He opined that her injury was the cause of her psychological complaints and diagnosed, among other things, Adjustment Disorder with mixed mood, Borderline Intellectual Functioning, and R/O Pain Disorder. He rated her at 9% WPI, assigning 6% to the current injury.

24. Dr. Douglas Ruth also did a psychiatric evaluation for the defendant and rated her at 4% WPI (1% due to injury). He confirmed Mr. Price's diagnosis of panic disorder with agoraphobia, Depression due to pain and physical limitations, cognitive disorder (which he attributes to cerebral ischemia) and learning disorder.

25. In my Order on Remand of February 20, 2014, I found Ms. Ramey to be entitled to a statutory 3 multiplier because in my opinion, based solely on the evidence, she was unable to return to the job she was performing at the time of her work-related injury. I understood that she continued to work in the same position drawing the same or greater wages, but to me, she was still in the same position but able to perform her job duties successfully only because the employer had accommodated her by having other employees do the physically demanding portions of the job. Further, that she had great difficulty performing the job even with accommodation and finally had to leave to get shoulder surgery. She never went back.

26. The Board and even the defendant, realizes that she could not go back to performing the same physical job duties as she did at the time of her injury, but when I made my initial analysis, I felt that I made it clear that she never really had a completely sedentary job. She had a job position that included at least medium and even some heavy labor aspects when it came to day to day performance. The only thing that changed was the accommodation for her physical limitations by having other employees do that part of her job duties that she could no [sic] perform. No one ever told her that she had a permanent, sedentary job after the injury. No one knows what the employer's prospective intentions were with regard to that accommodation.

27. Therefore taking into consideration her education, work background and especially her physical restrictions, I found that the work related injury suffered by the Plaintiff has permanently altered her ability to earn an income. Further, that although she returned to work for a relatively brief period of time at a wage equal to that which she had earned before the injury, it highly unlikely that she would be able to continue for the indefinite future to do work from which to earn such a wage. Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006). Unfortunately, I erred in relying on the medical opinions of Dr. David Herr.

28. As Ms. Ramey's physical inability to return to the pre-injury job has apparently been conceded by the defendant, I am directed by the Board to make findings as to whether Ms. Ramey can return to regular employment at the same or greater wages than she earned at the time of her injury.

Included therein is direction that on remand, I must determine the extent to which Ms. Ramey is capable of regularly working in a sedentary capacity each week.

29. KRS 342.730 (1) (C) 1, the so-called "3 multiplier" provision states in pertinent part, "If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection…"

30. From a purely physical standpoint, I note that Dr. Anbu K. Nadar, in his IME found the plaintiff to suffer from chronic back pain, some of which resulted from the work-related injury of January 13, 2009. He imposed limitations on her of no prolonged standing, walking, bending, twisting, or lifting, some of which would affect the sedentary duties she would be expected to perform in an office setting where she might be expected to lift, carry, sort and handle boxes of files or supplies. Even were she to have a completely sedentary position where she did nothing that required more effort than processing telephone communications, she likely could not perform consistently on a permanent basis due to her chronic back pain and psychological limitations as discussed herein below. KRS 342.730 (1) (c) 1.

31. I do not conclude that she is disabled from all employment. That issue is moot. However, even taking into account defendant's clever argument based upon a calculation of minimum level wages close to those

previously earned by the plaintiff, I do conclude from the evidence that she would have great difficulty maintaining continuous, stable employment consistently over a period of time.

32. First, there is her age. At 63, she is close to retirement age.

33. Second, there is her work history. Any position that she could qualify for that is of a sedentary nature would likely be outside her range of knowledge and experience, unless she could find another medical/dental position.

34. She does not have the education to work in any other specialized field and is likely too old to be a good candidate for re-education.

35. Most significant in my considerations, however, is her mental state. Both psychiatrists find her to have current psychological disabilities directly attributable to the work injury. Both Dr. Johnson and Dr. Ruth rate her and diagnose her with psychological conditions that would actively impair her ability to function in even a sedentary setting.

36. Mr. Price’s evaluation all but eliminates her from the job market completely. She apparently cannot function consistently, even in a sedentary position, with the mental deficits he assigns to her.

37. For those reasons, I conclude that Ms. Ramey does not retain the physical capacity to return full-time to the sedentary work that she was performing at the time of her injury, not only because of her physical limitations (low back pain), but because of the

> physical effects that her injury had on her psyche. In making this finding, I rely on the medical evidence of Mr. Price, Dr. Johnson, Dr. Ruth and Dr. Nadar, which I find to be persuasive.
>
> 38. Although she was able to earn the same or more money than at the time of her injury, her unrebutted testimony was that the post-injury work was done out of necessity, was outside her medical restrictions and was possible only because other employees were assigned to do tasks for which she was physically incapable. It is apparent that she could not have maintained the employment indefinitely. Even had she been given sedentary tasks exclusively, it is unlikely that her mental faculties would allow her to function every day on a consistent basis. Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).
>
> 39. Consequently, I conclude that Ms. Ramey is entitled to the 3 multiplier pursuant to KRS 342.730 (1)(c)1.

In his November 25, 2015, Petition for Reconsideration, Dr. Lynn asserted the ALJ erred in finding Ramey "is not physically and mentally able to perform any services for another in return for remuneration on a regular and sustained basis in a competitive economy." Additionally, he asserted the ALJ erred because he "appears to have made his analysis based upon Ms. Ramsey's current age, rather than upon her age at the time this claim was originally submitted for decision."

In the January 5, 2016, Order Denying Dr. Lynn's Petition for Reconsideration, the ALJ stated as follows:

> This matter comes before the undersigned on Defendant's Petition for Reconsideration.
>
> Defendant's first allegation of error patently appearing on the face of the Second Order on Remand dated 11/9/2015 is that a finding of fact or findings of fact contained therein are incorrect in that I find that she ***is not*** (Defendant's emphasis) physically and mentally able to perform any services for another in return for remuneration on a regular and sustained basis in a competitive economy, thus leading to an incorrect conclusion of law. Defendant does not specify the specific findings or conclusions upon which he relies.
>
> At page 10, paragraph 27, I did find that Plaintiff's injury "permanently altered her ability to earn an income." However, I did not, at any point find that she was "unable to perform any services for another in return for remuneration on a regular and sustained basis in a competitive economy." At page 12, paragraph 37, I did conclude that she could not "return full-time to the sedentary work she was performoing [sic] at the time of her injury…" However, this finding was limited to the position that she was employed in by Dr. Lynn, a finding that is supported by an extensive analysis of those job duties as contained in the evidence, and which job duties were peculiar to Dr. Lynn's office.
>
> I also stated with specificity at page 11, paragraph 31 that I did not conclude that she is disabled from all

employment. As there was no vocational evaluation in the record, I have no specific information concerning the nature and quality of jobs that she could perform in a competitive market, but as noted at page 1, paragraph 33, she might be able to find another medical/dental position. I simply noted that any sedentary job that she did find would likely have to exclude a requirement for heavy lifting.

My analysis at pages 10-12 is limited to whether she would qualify for a statutory "2" or "3" multiplier. Based upon her inability to perform the work duties of her position at Dr. Lynn's office without significant and ongoing accommodation of her restrictions, I did not believe, based upon the evidence, that she retained the physical capacity to return to the type of employment performed at the time of injury. Recognizing that in this somewhat unique fact situation, the Plaintiff did return to work at a weekly wage equal to the average weekly wage at the time of injury, I also noted that she was not performing the same job functions, but rather was being induced by the employer to stay on for an indeterminate period of time in order to take advantage of her specialized knowledge of his office and its procedures. As I clearly stated, I also believe from the evidence that the Plaintiff could not continue to earn a wage that equaled or exceeded her pre-injury wages. See page 12, paragraph 38. Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004).

Thus, as to Defendant's first allegation of error, I find no error patently appearing on the face of the

> Second Order on Remand of November 9, 2015. KRS 342.281.
>
> Defendant's second allegation of error is that at page 11, paragraph 32, I made reference to Plaintiff's current age. The reference was for current status purposes only. Of course, she was aged 56 years, 10 months at the time of her injury and that would be the basis for any award. I do not consider the 6 years difference in her age between the date of injury and the date of the Second Order on Remand to be significant to my analysis under Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) as the conclusion to be drawn is simply that she is at the latter stages of her expected work life and therefore arguably harder (but not impossible) to place in the employment market.
>
> Thus, as to Defendant's second allegation of error, I find no error patently appearing on the face of the Second Order on Remand of November 9, 2015. KRS 342.281.
>
> Defendant's Petition for Reconsideration is therefore **DENIED** and **DISMISSED**.

On appeal, Dr. Lynn asserts the ALJ's analysis pursuant to Fawbush, supra, is not supported by substantial evidence, and requests this Board reverse the decision and remand the claim to the ALJ to enter an award based on the two multiplier. We affirm.

In the Board's January 9, 2015, Opinion, the ALJ was asked to "determine whether Ramey can return to regular

employment at the same or greater wages than she earned at the time of the injury." Within this determination, the ALJ was asked to determine "the extent to which Ramey is capable of regularly working in a sedentary capacity each week."

The ALJ devoted numerous paragraphs in the November 9, 2015, Second Order on Remand and in the January 5, 2016, Order Denying Dr. Lynn's Petition for Reconsideration satisfying our request. In the November 9, 2015, Second Order on Remand, the ALJ cited to the Independent Medical Examination report of Dr. Anbu K. Nadar and the restrictions he imposed. The ALJ concluded these restrictions would likely affect Ramey's ability to perform sedentary work in an office setting where she might be required to lift boxes, files, and supplies. Additionally, the ALJ concluded that even if Ramey were to have a completely sedentary position, she would be unable to perform the job "consistently on a permanent basis" due to her chronic back pain and her psychological limitations. The ALJ concluded, in part, as follows:

> For those reasons, I conclude that Ms. Ramey does not retain the physical capacity to return full-time to the sedentary work that she was performing at the time of her injury, not only because of her physical limitations (low back pain), but because of the

> physical effects that her injury had on her psyche. In making this finding, I rely on the medical evidence of Mr. Price, Dr. Johnson, Dr. Ruth and Dr. Nadar, which I find to be persuasive.
>
> Although she was able to earn the same or more money than at the time of her injury, her unrebutted testimony was that the post-injury work was done out of necessity, was outside her medical restrictions and was possible only because other employees were assigned to do tasks for which she was physically incapable. It is apparent that she could not have maintained the employment indefinitely. Even had she been given sedentary tasks exclusively, it is unlikely that her mental faculties would allow her to function every day on a consistent basis. Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

In response to Dr. Lynn's petition for reconsideration, the ALJ added, in part, as follows: "As I clearly stated, I also believe from the evidence that the Plaintiff could not continue to earn a wage that equaled or exceeded her pre-injury wages."

At some point, both Dr. Lynn and this Board must be satisfied with the ALJ's analysis pursuant to Fawbush, supra. Further, it should be emphasized that the ALJ is only required to provide a factual basis for his ultimate conclusions sufficient to afford meaningful appellate review. Kentland Elkhorn Coal Co. 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 need not provide a detailed summary of the evidence nor include the minute details of his reasoning in reaching his determination. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). Between the additional language contained in the November 9, 2015, Second Order on Remand and the January 5, 2016, Order Denying Dr. Lynn's Petition for Reconsideration, the ALJ has amply satisfied our request on remand. Remanding this claim to the ALJ for a third time would be, in the words of the Court of Appeals, "an exercise of futility and a waste of judicial time and energy." Woolum v. Woolum, 684 S.W.2d 20 (Ky. App. 1984). The ALJ's award of the three multiplier will not be disturbed.

Accordingly, the award of the three multiplier as set forth in the ALJ November 9, 2015, Second Order on Remand and affirmed by the January 5, 2016, Order Denying Dr. Lynn's Petition for Reconsideration is **AFFIRMED**.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON JAMES G FOGLE
610 S FOURTH ST STE 701
LOUISVILLE KY 40202

**COUNSEL FOR RESPONDENT:**

HON JOHN EARL HUNT
P O BOX 960
ALLEN KY 41601

**CHIEF ADMINISTRATIVE LAW JUDGE:**

HON ROBERT L SWISHER
657 CHAMBERLIN AVE
FRANKFORT KY 40601