

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 11, 2015

CLAIM NO. 201300911

GOHMANN ASPHALT & CONSTRUCTION

PETITIONER

VS.

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

DAVE RICH
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

STIVERS, Member. Gohmann Asphalt & Construction ("Gohmann") appeals from the March 3, 2015, Amended Opinion and Order on Remand of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding Dave Rich ("Rich") sustained work-related injuries as a result of a fall occurring on July 23, 2011, while in the employ of Gohmann.

Relying upon the impairment rating of Dr. Warren Bilkey, the ALJ determined Rich has a 13% permanent impairment rating and awarded permanent partial disability ("PPD") benefits enhanced by the three multiplier set forth in KRS 342.730(1)(c)1 and medical benefits. Gohmann also appeals from the May 22, 2015, Opinion and Order on Reconsideration overruling its petition for reconsideration.

As this is the third time this claim has been before us and the procedural history is immense, we will only discuss the evidence germane to the appeal. There was no dispute Rich fell approximately six to eight feet off a bulldozer. Rich alleged injuries to his head, back, neck, right shoulder, elbow, hip, knee, and abdomen.

In a December 17, 2013, Opinion and Order, after providing a brief summary of some of the lay and medical evidence, the ALJ found Rich had a 13% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). The ALJ performed an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and concluded enhancement by the three multiplier was appropriate.

Gohmann filed a petition for reconsideration which was overruled by Order dated January 22, 2014. Gohmann appealed contending the opinions of Dr. Bilkey do not constitute substantial evidence.

In a June 20, 2014, Opinion Vacating and Remanding, this Board summarized the lay and medical evidence germane to the issue on appeal:

During his August 8, 2013, deposition, Rich testified regarding the physical symptoms he experienced before the July 23, 2011, injury as follows:

Q: Then also before this injury it looks like you have been treated for arthritis?

A: Symptoms.

Q: Who treats you for arthritis?

A: Nobody was. They picked it up at the VA.

Q: And it looks like from the arthritis before this you were reporting pain in your back, hands, shoulders, and knees due to arthritis?

A: That I don't know.

Q: Now, in the VA records in 2005 I noted that you had chronic back and knee pain. Have you had back and knee pain for sometime?

A: Just- it was just that one time I think I went there.

Q: Now, following this work injury, the history indicated that you were already taking Tramadol?

A: Yes.

Q: Pain medicine?

A: Yes.

Q: How long had you been taking Tramadol?

A: Oh, I don't know.

Q: Were you taking Tramadol at the time of this injury?

A: Yes.

Q: What would you be taking the pain medication for?

A: That's what the doctor had me on. I'm not- I'm not real sure. I take nine different kinds.

Q: You take nine different kinds of what?

A: Medicine.

Q: But this was for pain. Where were you having pain that you were taking- that you required to take prescription pain meds?

A: I think that was when they asked about my arthritis. I think that's what that was for. I'm not sure.

...

Q: Now, in your medical records following this work

injury when they took a history of you, you reported that you were routinely taking Tramadol which you take for arthritis pain in your back, hands, knees, and shoulders?

A: Yeah, that's what- that's what the VA had me on.

Q: Okay.

A: Or they still have me on.

Q: So at the time of this incident you were experiencing pain in your back, hands, knees, and shoulders, and taking pain medication?

A: No, but, I mean- when they- you know, like they send it to you in the mail, like, you know, I don't go see them every week or two. It's only like once every six months you go see them.

Q: But you were taking Tramadol before this injury?

A: I was taking all those medicines.

Q: But are you saying that you weren't having arthritis pain in your back, hand, knees, and shoulders?

A: There at one time I would say yes, but then that was- I only went to them one or two times for it and they give [sic] me that medicine and that was- you know, that was it.

Concerning his last treatment by Occupational Physician Medicine in August 2011, and his return to work, Rich testified as follows:

Q: And then your last visit at Occupational Physician Medicine was August 1st of 2011?

A: August 1st? Might have been.

Q: And their notes indicate that you were not having any problems, that you felt good and wanted to go back to your regular job. Do you recall that you weren't having any more problems?

A: I said I could go back to work.

Q: Did you tell them you were no longer having any pain and not taking any pain medication?

A: I don't think they ever give [sic] me any pain medicine.

Q: Okay.

A: I don't think they give [sic] me any medicine at all over there at Occupational Therapy.

Q: Were you just taking the pain medication you were already taking, the Tramadol?

A: Yeah.

Q: And then they released you from their care and returned

you back to work regular duty?

A: Yeah.

Q: And did you go back to work [sic] your regular job?

A: Oh, I think it was a couple weeks after that. Might not have been that long.

Q: Now, in August of 2011 it looks like you did have a visit at the VA and you told them about the laceration on your forehead?

A: Yeah, yes.

Q: And I didn't see any other complaints made to the VA at that time. Was your only complaint as far as the forehead laceration?

A: I went- that's when I was starting to- you know, because I had no insurance. I had to go to them.

Q: But you never went back to Occupational Medicine Physicians?

A: No, that- that was company.

Q: But you went back to work [sic] your regular job after Occupational Physicians released you?

A: Yes.

Q: It looks like you continued working your

regular job until November 19th?

A: November something.

Q: And did you have any additional treatment for your injuries during that time?

A: No.

Q: Did you make any complaints as far as being in any type of pain at that time?

A: Just to myself.

Q: You didn't complain to anybody else or seek any type of treatment?

A: Just I did at the VA.

Q: Okay. Now, I don't see any VA treatment until March of 2012. Did you go to the VA when you were working full duty for Gohmann?

A: Yes.

Q: Did you go more than that one time where you were seen for your laceration on your forehead?

A: I can't tell you how many times I've been.

Q: But I am talking about from the time after your injury, August of 2011, until you stopped working on November 19th of 2011. Did you have any treatment for your injuries during that period?

A: No, I don't think so. I'm not- I'm not real sure.

Rich's November 10, 2012, "Medical Examination Report For Commercial Driver Fitness Determination" ("DOT physical report") was introduced which has "no" checked by the following in the "Health History" section: "Any illness or injury in last five years?"; "Head/Brain injuries, disorders or illnesses"; "Eye disorders or impaired vision (except corrective lenses)"; "Spinal injury or disease"; and "Chronic low back pain." In the "Physical Examination" section, "no" is checked by the following: "11. Spine, other musculoskeletal- Previous surgery, deformities, limitation of motion, tenderness." In addition, the report indicates as follows under "Musculoskeletal":

General no limitation in motion, no muscle or joint pain, no muscle weakness, no neck/backache/shoulder pain, no swelling or redness in joints. Thoracic Lumbar Spine pain none. Injuries none. Arthritis none. Joint pain none. Joint stiffness none. Joint swelling none. Leg cramps none. Muscle aches none. Neck pain none.

Several sets of medical records from the Veterans Administration Medical Center ("VA") were introduced which includes records dating back to 2005 indicating, in part, as follows: "51 y/o male with h/o back and knee pain who presents for initial visit to the va. was followed by private pcp, now wishes to follow here. chronic bil knee and back pain. does not take anything for this."

The September 9, 2013, report of Dr. Mark O. Gladstein provides the following history:

- "On careful review of his previous VA records, this patient was seen by Dr. Bruno on April 1, 2005 complaining of chronic back and bilateral knee discomfort."
- "The patient reported to Occupational Physician Services that he felt like a new man on July 27, 2011. The patient was cleared for a return to regular duty on August 1, 2011."

Three reports or completed questionnaires from Dr. Bilkey were introduced by Rich. The first is an Independent Medical Examination report dated July 23, 2013, which contains the following statements by Dr. Bilkey which are relevant to the issue on appeal:

- "Mr. Rich had subsequent treatment through OMP which is a work injury clinic. He was placed on light duty. He had subsequent treatment at the VA Medical Center."
- "For Mr. Rich, pain is a daily phenomenon. Pain intensity is 5-10 on a 0 to 10 scale with 10 being the most severe pain imaginable. He feels that he has been symptomatically stable since his work injury. This means that no treatment has been of benefit to him."

- "He does not have a prior history of injury or surgery to the neck, back or head."
- "Following the work injury, he returned to work in a light duty capacity. He has been off work since the past 4 months. He is not employed at present."

Dr. Bilkey also states he reviewed records from Occupational Medicine Physicians and the VA.

An October 25, 2013, questionnaire completed by Dr. Bilkey on November 11, 2013, contains the following:

You previously evaluated Dave Rich at the request of this office on July 23, 2013. We enclose for your review a copy of Dr. Mark Gladstein's September 9, 2013 report, as well as a copy of a DOT physical performed November 10, 2012. Both medical records have been filed as evidence by the Defendant-Employer in Mr. Rich's workers' compensation claim. By this letter we request you review the enclosed records and respond to the following:

1. At the time of your evaluation of Mr. Rich, did you review the VA Medical Center records dating back to 2005 regarding Mr. Rich's prior neck and back treatment and were said records considered when issuing your report?

[Dr. Bilkey checked "yes."]

2. Does the November 10, 2012 DOT physical change your opinions previously expressed in your July 23, 2013 report?

[Dr. Bilkey checked "yes."]

If yes, please explain:
[handwritten by Dr. Bilkey]
DOT Health History
Contradicts IME Medical
History.

A November 14, 2013, questionnaire completed by Dr. Bilkey on November 17, 2013, states, in relevant part, as follows:

I am in receipt of and thank you for your November 11, 2013 response to our October 25, 2013 correspondence. Mr. Rich testified at the time of his deposition on August 8, 2013 that he continued to experience pain and symptoms as a result of the work-related injury. Assuming Mr. Rich's deposition testimony is accurate, would your opinions previously expressed in your July 23, 2013 report remain unchanged?

[Dr. Bilkey checked "yes."]

With respect to Gohmann's argument on appeal, we noted:

Gohmann cites the following as support for the rejection of Dr. Bilkey's opinions:

- "First, Rich denied any prior history of injury or surgery to the neck, back, head or any other significant illness

history to Dr. Bilkey. (Bilkey report, p.2). This is completely false. At the time of the July 23, 2011, injury, Rich admits that he has been treating for chronic back, shoulder and bilateral knee pain at the VA Medical Center for the last 10-12 years for which he has been taking Tramadol two times a day to control his pain. (7/13/11 DOT physical; Rich dep. pgs. 22-29; records from VA Medical Center; OMP records 7/28/11)."

- "Second, Dr. Bilkey's history indicates that following the injury, Rich had subsequent treatment through OMP followed by subsequent treatment at the VA Medical Center. While technically correct, it is inaccurate as he was released from Occupational Medicine Physicians on August 1, 2012 with a complete resolution of symptoms and did not seek additional treatment which he alleges is related to the work injury until nearly 10 months later on May 17, 2012 at the VA Medical Center. The history provided to Dr. Bilkey that Rich has had continuous symptoms since his date of injury and failed to improve with conservative care is false."
- "Third, the history provided to Dr. Bilkey regarding Rich's return to work is not accurate. The history obtained by Dr. Bilkey at the

time of his July 23, 2013 examination was that following the work injury he returned to work in a light duty capacity but was off work the past four months. Dr. Bilkey notes that Rich has not been able to resume his usual work activities that he successfully performed prior to July 23, 2011. This is completely inaccurate. It is undisputed that Rich lost no time from work and while he did work light duty for a short period of time, as of August 1, 2011 he returned to work regular duty, unrestricted including extensive amounts of overtime routinely working 60 hours per week and continued doing so until laid off November 19, 2012 due to seasonal layoffs at which point he applied for and started collecting unemployment."

"Fourth and finally, Rich underwent a DOT physical on November 10, 2012, eight months prior to the evaluation with Dr. Bilkey and nearly a year after being laid [sic] at Gohmann. Rich completed the health history and certified the history he provided was complete and true. He signed and dated the history. He denied any illness or injury in the last five years. He denied any head/brain injuries, disorders or illnesses. He denied any eye disorder or impaired vision. He denied any spinal injury or disease.

He denied chronic low back pain. On physical exam he denied any previous problems with his spine or other musculoskeletal areas as well as any impairment regarding any extremities. He had a normal back exam and normal musculoskeletal exam. He was found generally able to do usual activities, had a good exercise tolerance, good general state of health and no fatigue. There were no headaches, no dizziness, no lightheadedness noted and vision was normal. There was no thoracic lumbar neck or joint pain. This is in stark contrast to the history he provided to Dr. Bilkey the time of the July 23, 2013 examination as well as Rich's testimony in his workers' compensation claim. Rich's counsel had Dr. Bilkey review the records from Seheta Medical Group and Dr. Bilkey opined that upon review of these records his opinions expressed in his July 23, 2013 report would change. Dr. Bilkey stated that the history Rich gave for the DOT exam contradicted the history he received. Thus, based on this fact alone, it was in error for the ALJ to rely on the opinion of Dr. Bilkey. Dr. Bilkey opined that his opinions originally provided would change. Thus the opinion for which the ALJ relied was no longer a valid opinion. Rich's counsel then followed up with Dr. Bilkey asking him to assume that

Rich's deposition testimony is accurate and if that were the case then Dr. Bilkey opined his opinions previously expressed would remain unchanged."

We vacated the ALJ's award reasoning and directing as follows:

In light of Rich's representations as documented in the November 10, 2012, DOT physical report, the disparity between these representations and the history Dr. Bilkey received and documented at the July 23, 2013, examination, and the fact that on October 25, 2013, Dr. Bilkey indicated that the DOT physical report changes his opinions as expressed in the July 23, 2013, report, the ALJ should have directly addressed Gohmann's arguments in its petition for reconsideration and made additional findings of fact resolving the contradictions in the record. While the ALJ is not required to engage in a detailed explanation of the minutia of his reasoning in reaching a particular result, his decision must effectively provide adequate findings of fact based on the evidence upon which his ultimate conclusions are drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973); Shields v. Pittsburg and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

Medical evidence predating the work injury indicates Rich had chronic back, hand, shoulder, and bilateral knee pain. Further, other medical records generated after the injury reveal Rich's physical symptoms were no

longer present. Given this medical evidence, we believe the matter must be remanded for the ALJ to directly address this evidence and make findings of fact as to whether this evidence causes Dr. Bilkey's opinions to be less than reliable.

. . .

Since the ALJ has not sufficiently addressed the reliability of Dr. Bilkey's opinions in light of the contradictions identified in the record, the award of income and medical benefits must be vacated and the claim remanded for additional findings of fact regarding the contradictory medical evidence discussed herein and its direct bearing on the reliability of Dr. Bilkey's opinions. Stated another way, the ALJ must provide the basis for his rejection of the medical evidence which casts doubt about the reliability and credibility of Dr. Bilkey's opinions.

On remand, the ALJ entered a July 29, 2014, Amended Opinion and Order again determining, based on the opinions and impairment rating of Dr. Bilkey, Rich has a 13% permanent partial impairment rating and awarding PPD benefits enhanced by the three multiplier and medical benefits. Gohmann filed a petition for reconsideration which the ALJ overruled. Gohmann again appealed. We vacated stating as follows:

In the August 25, 2014 Opinion and Order on Reconsideration, the ALJ essentially provided the same analysis found in the July 29, 2014 opinion on

remand. He reiterated his reliance upon the testimony of Rich, and the reports of Dr. Bilkey without specifically addressing Gohmann's arguments in its petition for reconsideration.

We concluded and directed as follows:

Because the ALJ's analysis on remand is not in accordance with the directive we provided in the June 20, 2014 opinion, we must vacate the award of indemnity and medical benefits. In our previous opinion, in light of Gohmann's petition for reconsideration, we clearly stated the ALJ should have specifically addressed and resolved the contradictions found in the histories provided by Rich in the DOT physical report and Dr. Bilkey's report, and the fact Dr. Bilkey indicated the DOT physical report changes his opinions as expressed in the July 23, 2013, report. We also noted other contradicting evidence submitted by Gohmann, including medical evidence indicating prior chronic pain complaints and medical records indicating Rich's symptoms from the work injury had resolved in August 2011. The Board found the ALJ did not sufficiently address the reliability of Dr. Bilkey's opinions in light of contradictions identified in the record. The claim was remanded for "additional findings of fact regarding the contradictory medical evidence discussed herein and its direct bearing on the reliability of Dr. Bilkey's opinions. Stated another way, the ALJ must provide the basis for his rejection of the medical evidence which casts doubt about the reliability and credibility of Dr. Bilkey's opinions." Since the opinion was not appealed, it is the law of the case.

On remand, the ALJ merely provided an inaccurate summary of the November 11, 2013 report and November 17, 2013 report by Dr. Bilkey. The ALJ summarized the November 11, 2013 report by stating Dr. Bilkey had reviewed the VA records dating back to 2005 and the November 10, 2012 DOT physical report and "Dr. Bilkey stated that he had taken into consideration all of the above medical records in reaching his opinions." This summary is simply inaccurate. After acknowledging he reviewed and considered the VA records dating back to 2005 in issuing his July 23, 2013 report, Dr. Bilkey indicated the November 10, 2012 DOT physical report changed his opinions since the "DOT Health History Contradicts IME Medical History."

In summarizing the third medical report by Dr. Bilkey dated November 17, 2013, the ALJ stated Dr. Bilkey had read Rich's deposition testimony, and had taken said sworn testimony into consideration in reaching his July 23, 2013 opinions. This summary is again inaccurate. Rather, Dr. Bilkey simply indicated his opinions contained in the July 23, 2013 report remained unchanged in light of the fact Rich testified he continued to experience pain and symptoms as a result of the work-related injury. There is no indication Dr. Bilkey reviewed the entirety of Rich's deposition testimony.

Once again, the ALJ failed to address Gohmann's arguments in its petition for reconsideration and failed to make additional findings of fact resolving the contradictions in the record. In the findings of fact and conclusions of law section, the ALJ merely repeated he found the testimony of Rich credible and the opinions of

Dr. Bilkey persuasive without addressing the contradictory evidence submitted by Gohmann. In the June 20, 2014 Opinion Vacating and Remanding, the Board remanded the claim for:

additional findings of fact regarding the contradictory medical evidence discussed herein and its direct bearing on the reliability of Dr. Bilkey's opinions. Stated another way, the ALJ must provide the basis for his rejection of the medical evidence which casts doubt about the reliability and credibility of Dr. Bilkey's opinions.

The ALJ failed to comply with this directive.

Because the ALJ provided inaccurate summaries of the November 11 and November 17, 2013 reports by Dr. Bilkey, and failed to discuss in any fashion the impact of the contradictory medical evidence in his assessment of the reliability of Dr. Bilkey's opinions, the opinion on remand and the order on petition for reconsideration awarding PPD benefits and medical benefits must be vacated and the claim remanded for an analysis consistent with the Board's opinion of June 20, 2014.

On March 3, 2015, the ALJ adopted his previous summary of Rich's testimony, Dr. Bilkey's July 23, 2013, medical report, the vocational report of Dr. Robert Tiell, the medical reports of Dr. Mark Gladstein, and the

vocational report of Dr. Luca Conte. The ALJ's opinion contains the following additional summaries of evidence:

Medical records from **Occupational Medicine Physicians** were filed in the record. The July 25, 2011 record contained the plaintiff's complaints of pain in his back, neck, right shoulder, right ribs, right elbow and right knee and abdomen. The diagnosis was that Mr. Rich had had multiple contusions, lacerations, contusions to the right shoulder, right elbow, right ribs, right knee and abdomen, and a cervical strain/neck pain and lumbar pain/strain. Mr. Rich was placed on seated duty and prescribed pain medication. A medical record dated July 27, 2011 stated that Mr. Rich reported that he was doing much better and felt like a "new man." A medical record dated August 1, 2011 contained Mr. Rich's statement that he was having no problems. The record stated that the plaintiff's contusions and cervical strain/neck pain had resolved and the plaintiff was return to regular duty work.

Filed in the case were medical records from **Veterans Affairs Medical Center**. An April 1, 2005 record stated that Mr. Rich had a history of chronic back and knee pain. A record dated August, 2011 did not mention any work-related symptoms other than a forehead laceration. A March 1, 2012 record reflected that Mr. Rich complained of back and right leg pain. A May 17, 2012 record noted that Mr. Rich complained of headaches, pain in his neck, right shoulder and hip since his fall in July, 2011. Mr. Rich voiced similar complaints in medical records dated August, 2012 and September, 2012. Mr. Rich received prescription

medication and physical therapy for his symptoms.

Also filed in the case was a **Medical Examination Report for Commercial Driver Fitness Determination**, which Mr. Rich signed on November 10, 2012. In response to questions about any illness or injury in the last five years, head/brain injuries, disorders or illnesses, eye disorders or impaired vision (except corrective lenses), spinal injury or disease and chronic low back pain, Mr. Rich responded "no." In the physical examination section of the form, Mr. Rich checked "no" in regard to spine, other musculoskeletal, previous surgery deformities, limitation of motion, tenderness and musculoskeletal complaints.

The ALJ amended his summary of Dr. Bilkey's November 11, 2013, and November 17, 2013, answers to questionnaires. The ALJ entered the following new findings:

I saw and heard the plaintiff Mr. Rich testify at the Final Hearing. I sat a few feet from him and carefully observed his facial expressions during his testimony, carefully listened to his voice tones during his testimony and carefully observed his body language during his testimony. I am the only decision maker who actually saw and heard Mr. Rich testify in person. Mr. Rich was a very stoic individual. He has a very limited educational background. He only completed the 8th grade. I make the factual determination that he is a very unsophisticated gentleman. I also make the factual determination that he was a very

credible and convincing lay witness. I make the factual determination that his testimony rang true, even though he has a very limited education and is very unsophisticated.

. . .

Over the years I have found Dr. Bilkey to be a very experienced and reputable medical examiner. He has performed many physical examinations, both for the plaintiff's attorney and the defense attorney. I have read many medical reports prepared by Dr. Bilkey.

It has been my experience that there is almost always contradictory medical evidence in every workers' compensation case. This case is no exception.

As noted hereinabove, I make the determination that Mr. Rich only completed the eighth grade. In other words, he has an extremely limited educational background. I also make the determination that Mr. Rich's limited educational background and unsophisticated nature has been a serious handicap to him in presenting his side of this case. I make the determination that those factors definitely apply when we consider the evidence from Occupational Medicine Physicians, Veterans Affairs Medical Center and the Medical Examination Report for Commercial Driver Fitness Determination. However, I also make the determination that the main thrust of the evidence from the Veterans Affairs Medical Center supports Mr. Rich's evidence of significant medical problems and occupational disability.

I have compared, contrasted and weighed the medical evidence from Dr. Bilkey with the medical evidence from

Occupational Medicine Physicians,
Veterans Affairs Medical Center and the
Medical Examination Report for
Commercial Driver Fitness
Determination. I make the determination
that the medical evidence from Dr.
Bilkey, an experienced and reputable
medical examiner, is much more current,
comprehensive, persuasive and
compelling and much more reliable than
the other medical records.

In determining Rich was entitled to enhanced
benefits, the ALJ entered the following findings of fact
and conclusions of law:

Based upon the credible and
convincing testimony of the plaintiff
Mr. Rich, as covered above, and the
comprehensive, persuasive and
compelling medical evidence from Dr.
Bilkey, which is covered in detail
above, I make the factual determination
that the plaintiff Mr. Rich cannot
return to the type of work which he
performed at the time of his work
injuries on July 23, 2011. The parties
stipulated that Mr. Rich last worked on
November 19, 2011.

Based upon the plaintiff's sworn
testimony, as covered above, and the
comprehensive, persuasive and
compelling medical evidence from Dr.
Bilkey, which is summarized in detail
above, I make the factual determination
that Mr. Rich cannot return to the type
of work which he performed at the time
of his work injuries in accordance with
KRS 342.730(1)(c)1. Giving the
defendant the benefit of the doubt, I
make the factual determination that
after his work injuries Mr. Rich
returned to work earning the same
average weekly wage that he earned at

the time of his work injuries as per KRS 342.730(1)(c)2. I also have to make the determination whether Mr. Rich is unlikely or likely to be able to continue earning a wage that equals or exceeds his wage at the time of his injuries for the indefinite future.

Mr. Rich is now 60 years of age, meaning that he is at an advanced age for employment in the highly competitive job market. I further make the factual determination based upon Mr. Rich's sworn testimony, as covered above, and the comprehensive, persuasive and compelling medical evidence from Dr. Bilkey, which is covered in detail above, that Mr. Rich cannot continue to earn his former level of wages for the indefinite future. I make the factual determination that Mr. Rich's work injuries on July 23, 2011 will permanently alter his ability to earn an income.

I make the further factual determination that under the decision of the Kentucky Court of Appeals 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 the decision is whether the plaintiff's injuries have permanently altered his ability to earn an income and whether the application of KRS 342.730(1)(c)1 is appropriate. Based upon the plaintiff's sworn testimony, as covered above, and the comprehensive, persuasive and compelling medical evidence from Dr. Bilkey, as covered in detail above, I make the factual determination that it is unlikely that

Mr. Rich will be able to continue for the indefinite future to do work from which to earn such a wage. Based upon the above-cited evidence from the plaintiff and Dr. Bilkey, I make the factual determination that the third prong of the Fawbush analysis applies here and that the plaintiff's July 23, 2011 work injuries have permanently altered his ability to earn an income and that he is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage, and that he is, therefore, entitled to the 3 multiplier under KRS 342.730(1)(c)1. In making that determination, I also rely upon the Opinion of the Kentucky Supreme Court in *Adams v. NHC Healthcare*, 199 S.W.3d 163 (Ky. 2006).

In addition, I make the factual determination that the three medical reports from Dr. Bilkey are comprehensive, persuasive, compelling and reliable expert medical evidence. I make the determination that the plaintiff's enhanced permanent partial disability benefits shall be based upon Dr. Bilkey's 13% permanent partial impairment rating under the AMA Guides, Fifth Edition.

Gohmann filed a petition for reconsideration asserting this Board directed the ALJ to make additional findings of fact regarding the contradictory medical evidence and its direct bearing on the reliability of Dr. Bilkey's opinion. It cited to the specific evidence which the ALJ was required to consider on remand. Gohmann asserted the ALJ failed to comply with the Board's

directive. It also argued it was patent error for the ALJ to rely upon his personal opinions of Dr. Bilkey as this was not evidence. It contended the issue is whether Dr. Bilkey's opinion is credible based on the information Rich had provided to various other entities. Gohmann requested the ALJ comply with the Board's directive.

In a May 22, 2015, Opinion and Order on Reconsideration, the ALJ merely reiterated his summary of the medical evidence contained in the March 3, 2015, decision and his findings regarding Rich's entitlement to enhancement by the three multiplier and added the following language:

The defendant contends that my statements regarding Dr. Bilkey were improper. The defendant seems to think that workers' compensation cases are litigated in a hermetically sealed vacuum. However, as Judge Overfield observed, in considering evidence and witnesses a Judge must consider same in light of his or her life experiences, and the Judge's opinion that a witness is credible or not credible falls upon the Judge to review the witness' testimony in light of his or her life experiences.

I made and again make the determination that the medical evidence from Dr. Bilkey is comprehensive, persuasive, compelling and reliable expert medical evidence.

On appeal, Gohmann argues the ALJ failed to comply with the Board's opinion directing that he address the reliability and credibility of Dr. Bilkey's opinions in light of the contradictory evidence. It contends Dr. Bilkey's opinions do not constitute substantial evidence as his opinions regarding the cause of Rich's current symptoms and impairment rating are corrupt. Gohmann contends the history provided by Rich is substantially inaccurate, largely incomplete, and unsupported by any other credible evidence. It argues the opinions of Dr. Bilkey are based on a history that Rich had no symptoms prior to the July 23, 2011, work injury, has had ongoing symptoms which did not respond to conservative treatment, and was unable to resume his usual work activities. Gohmann observes the Board's June 20, 2014, opinion, ordered the ALJ to directly address the contradictory evidence presented by Gohmann and determine whether this evidence caused Dr. Bilkey's opinions to be less than credible. It cites and discusses the specific evidence to be addressed by the ALJ. Gohmann contends this evidence establishes Dr. Bilkey's opinion cannot be relied upon.

Gohmann cites to the evidence which it contends conclusively establishes Rich misrepresented to Dr. Bilkey his prior health history, treatment, resolution of

symptoms, and the work he performed following his injury. Since Gohmann believes the ALJ has failed to respond to the directive in the Board's June 20, 2014, opinion and address the contradictory evidence and its impact on the reliability of Dr. Bilkey's opinions, it requests the Board find Dr. Bilkey's opinions do not constitute substantial evidence, reverse the ALJ's decision and direct the claim be dismissed.

Because the ALJ did not comply with the Board's directives in both the June 20, 2014, and January 16, 2015, opinions, we vacate the finding Rich has a 13% permanent impairment rating and the award of income and medical benefits.

We point out that in summarizing Dr. Bilkey's November 11, 2013, answers to the first questionnaire, the ALJ did not note Dr. Bilkey stated the November 10, 2012, DOT physical changed his opinion previously expressed in his July 23, 2013, report. Further, the ALJ's statement that based on his experience over the years, he found Dr. Bilkey to be very experienced and a reputable medical examiner, has no bearing on this issue. The ALJ was only required to resolve the conflict between the history Dr. Bilkey received from Rich and the history about which Rich testified and supplied to other medical providers. The

finding Dr. Bilkey has performed examinations for plaintiffs and defendants and he has read many reports by Dr. Bilkey is irrelevant to the limited issue to be resolved by the ALJ.

The ALJ's statement Rich's limited education applies in considering the evidence from the Occupational Medicine Physicians, the Veterans Affairs Medical Center ("VA"), and the Medical Examination Report for Commercial Driver's Fitness Determination ("DOT Physical Report") provides no insight as to the significance of Rich's limited education since the ALJ does not explain what he meant in making this statement. The fact Rich may have been seriously handicapped "in presenting his side of the case" does not resolve the inconsistent medical histories identified by this Board in its opinions. On multiple occasions, Rich provided medical histories which are completely different than the medical history provided to Dr. Bilkey. The ALJ has yet to address the significance of and weight to be afforded these inconsistencies. Merely stating Rich was handicapped in presenting his side of the case does not comply with this Board's directive.

Similarly, the ALJ's statement the main thrust of the evidence from the VA "supports Rich's evidence of significant medical problems and occupational disability"

is a conclusory statement which is not supported by a citation to specific portions of the VA's record upon which the ALJ relied in making this statement.

Further, the ALJ's statement that after comparing, contrasting, and weighing the medical evidence from Dr. Bilkey with the medical evidence from Occupational Medicine Physicians, the VA, and the DOT Physical Report, "the medical evidence from Dr. Bilkey, an experienced and reputable medical examiner, is more current, comprehensive, persuasive, compelling, and much more reliable than the other medical records" is merely a conclusion and does not cite a basis for this statement. This "determination" is of no benefit to the parties and the Board without the ALJ putting forth an analysis and providing the factual basis for his determination as we previously directed.

In our initial June 20, 2014, opinion, we cited Rich's August 8, 2013, deposition testimony which clearly indicated that prior to the subject work injury he had arthritic problems in his back, hands, shoulders, and knees for which he was taking Tramadol for pain. Significantly, Rich reinforced this testimony at the November 21, 2013, hearing. Notably, Rich testified the VA was treating him for degenerative disc disease in his back, neck, knees, shoulders, and hands and as a result was taking Tramadol

daily for these conditions. We went on to cite portions of Rich's testimony regarding his treatment by Occupational Physicians Medicine in August 2011. In the same vein, we referenced the November 10, 2012, DOT Physical Report which clearly indicated Rich had no injury in the last five years and no current problems in the spine or musculoskeletal regions. We also cited the medical record of the VA referencing pre-existing knee and back problems dating back to 2005. Finally, the Board also noted the questionnaire completed by Dr. Bilkey on November 11, 2013, indicating the November 10, 2012, DOT Physical Report changed his opinions expressed in his July 23, 2013, report.

In spite of the Board's directive, the ALJ failed to make additional findings of fact resolving the contradictions in the record. The ALJ stated he found the testimony of Rich credible and the opinions of Dr. Bilkey to be much more current, comprehensive, persuasive, compelling, and more reliable than the other medical records. There is no explanation for this finding and more importantly, other than a very limited summary, there is no discussion of the contradictory medical history provided by Rich on multiple occasions and no explanation why the ALJ chose to ignore this evidence. Stated otherwise, this statement does not constitute the requisite additional

findings of fact resolving the contradictions in the record as previously directed by this Board. There is absolutely no analysis and discussion of the contradictory evidence in relation to the credibility of Dr. Bilkey's report. The ALJ made no specific finding explaining why the records from Occupational Medicine Physicians, the VA, and the Kentucky Department of Transportation, did not cause the history Dr. Bilkey received from Rich to be corrupt. The VA records clearly contradict the history Dr. Bilkey received regarding the condition of Rich's lumbar and cervical spine prior to the July 23, 2011, work injury. The records from Occupational Medical Physicians rebut the history Rich provided to Dr. Bilkey regarding his physical condition following the subject work injury. Those records indicate Rich had fully recovered from the injuries and had eventually returned to work performing the same task. Finally, the DOT Physical Report reveals Rich represented he had no physical problems before or after the July 23, 2011, event which clearly contradicts what he told Dr. Bilkey at the time Dr. Bilkey performed his examination. Despite the contradictions these medical records create, the ALJ did not specifically address, in the form of additional findings of fact, why this information must be rejected.

As he stated in his March 3, 2015, decision, the ALJ cannot rely upon all three reports of Dr. Bilkey, since Dr. Bilkey clearly stated in his November 11, 2013, report that he changed his opinions as previously expressed in the July 23, 2013, report. Thus, if the ALJ is going to rely upon the reports of Dr. Bilkey as support for his decision in favor of Rich, his reliance must be on the initial report of July 23, 2013, and the questionnaire he completed on November 17, 2013.

In summary, when we initially remanded this claim we directed the ALJ provide additional findings of fact resolving the contradictions between the history received by Dr. Bilkey and the medical history provided by Rich during his testimony and to other medical specialists. The ALJ failed to explain why this evidence which bore directly on the reliability of Dr. Bilkey's opinions did not cause Dr. Bilkey's opinions to be unreliable. The amorphous statement that Dr. Bilkey is an experienced reputable examiner and "the medical evidence from Dr. Bilkey" is "more current, comprehensive, persuasive, and compelling, and much more reliable than the other medical records," without providing the basis for such a determination does not comply with the Board's directive. The ALJ provided no explanation based in fact as to why Dr. Bilkey's reports

are more current, comprehensive, persuasive, compelling, and more reliable than the other medical records. Just as important, the ALJ failed to provide the factual basis for rejecting the medical history Rich provided in his testimony and to other medical providers.

The ALJ's analysis pursuant to Fawbush v. Gwinn, supra, in which he determined based on Dr. Bilkey's medical evidence, Rich was entitled to enhanced PPD benefits via the three multiplier is also defective. First, the ALJ cannot rely upon all of the medical evidence from Dr. Bilkey in resolving the issue of entitlement to enhanced income benefits. Second, the ALJ failed to cite the portions of the medical evidence from Dr. Bilkey which he found to be more current, comprehensive, persuasive, compelling, and more reliable. Third, the ALJ also failed to provide the reasons he found Dr. Bilkey's opinions to be more current, comprehensive, persuasive, compelling, and much more reliable than the uncontradicted testimony of Rich regarding his pre-existing back, hand, knee, and shoulder condition as well as the medical history Rich provided to three different medical providers.

This claim is again remanded to the ALJ with the same directions we provided in our June 20, 2014, decision. On remand, the ALJ shall directly address the medical

evidence identified in the June 2014 opinion contradicting the history Rich provided to Dr. Bilkey. In doing so, the ALJ shall address Gohmann's arguments and determine whether this contradictory evidence causes Dr. Bilkey's opinions to be less than credible by entering additional findings of fact resolving these contradictions in the record.

We again decline Gohmann's request that we reverse the ALJ's decision and order Rich's claim dismissed. There is no dispute Rich sustained a head injury which required multiple stitches. Thus, Rich clearly sustained a work injury which merited medical treatment and he is at least entitled to an award of medical benefits. Since this Board is not a fact-finding tribunal, the ALJ must be given the opportunity to again directly address the evidence which casts doubt on Rich's claim pertaining to the injury he sustained on July 23, 2011, and the effects of the injury.

We strongly urge the ALJ to follow the remand instructions of this Board and resolve this litigation for the parties.

Accordingly, the ALJ's finding that Rich sustained a 13% impairment rating as a result of the injury occurring on July 21, 2013, and the award of income and medical benefits set forth in the in the March 3, 2015,

Amended Opinion and Order on Remand and the May 22, 2015, Opinion and Order on Reconsideration reaffirming that award are **VACATED**. This matter is again **REMANDED** to the ALJ for entry of an opinion in conformity with the views expressed in the June 20, 2014, opinion and the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, DISSENTS AND FILES A SEPARATE OPINION.

RECHTER, MEMBER. I respectfully dissent and would affirm the ALJ's Amended Opinion and Order on Remand. I believe the ALJ adequately addressed the discrepancies in the evidence and, more specifically, the various opinions of Dr. Bilkey. The ALJ attributed the various medical histories to Rich's lack of sophistication and limited education, which would impact his ability to clearly articulate his medical history. While other, perhaps most, fact finders may reach a different conclusion, I believe it is within the ALJ's discretion to so conclude. As such, I believe this Board's analysis should focus exclusively on whether Dr. Bilkey's opinions constitute substantial evidence. Dr. Bilkey did not fully recant his original opinion. He merely noted the medical history provided at the DOT evaluation differed from the history he received.

Accordingly, I would conclude the ALJ, in his discretion as fact-finder, was entitled to rely on this evidence. Finally, I do not believe it is in the interest of the litigants or judicial economy to remand this case for further fact-finding.

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