Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 30, 2014

CLAIM NO. 201287924

JACK COOPER TRANSPORT — PETITIONER/ CROSS/RESPONDENT

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

RICKY D. WIGGINTON — RESPONDENT/ CROSS-PETITIONER

DR. STACIE GROSSFELD
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE — RESPONDENTS

AND

RICKY D. WIGGINTON — PETITIONER

V.

JACK COOPER TRANSPORT — RESPODNENT

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * * *

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

ALVEY, Chairman. Jack Cooper Transport ("Jack Cooper") seeks review of the opinion, award and order rendered October 31, 2013 by Hon. Chris Davis, Administrative Law Judge ("ALJ") awarding Ricky Wigginton ("Wigginton") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits for a work-related low back injury he sustained on May 22, 2012. The ALJ also found Wigginton sustained a temporary left hip injury on April 19, 2012, which resulted in no permanent condition requiring income or medical benefits. Jack Cooper also appeals from the order on reconsideration rendered December 13, 2013. Wigginton also appeals from the ALJ's order on reconsideration rendered December 13, 2013, and filed a notice of cross-appeal from both the ALJ's decision, and order on reconsideration.

On appeal, Jack Cooper argues the ALJ erred in carving out an incorrect percentage for Wigginton's pre-existing active disability. Jack Cooper also argues the ALJ erred in awarding the three multiplier pursuant to KRS 342.730(1)(c)1. In his cross-appeal, Wigginton argues the ALJ did not err in awarding PPD benefits based upon a 10% impairment rating. Wigginton also argues the ALJ did not err in enhancing the award of PPD benefits pursuant to KRS 342.730(1)(c)1. Finally, Wigginton argues the ALJ erred in

failing to award ongoing TTD benefits. Because we determine the ALJ did not err in carving out an 8% impairment for pre-existing active disability, and awarding PPD benefits based upon a 10% impairment rating, we affirm, in part. Because the ALJ amended the award of TTD benefits in his January 21, 2014 order on Jack Cooper's second petition for reconsideration, we vacate, in part the assessment of when Wigginton reached maximum medical improvement ("MMI") in light of the August 13, 2012 release to return to work without restrictions. We also vacate the ALJ's determination enhancing the award of PPD benefits pursuant to KRS 342.730(1)(c)1, and remand for a determination pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). We also remand for the ALJ to determine the outstanding medical dispute, and request for additional TTD benefits.

Wigginton filed a Form 101 on February 27, 2013 alleging he injured his left hip while climbing into a truck bed on April 19, 2012, and injured his low back while lifting a skid ramp on May 22, 2012. Wigginton testified by deposition on May 16, 2013, and again at the hearing held September 18, 2013.

Wigginton, a resident of Louisville, Kentucky, was born on January 5, 1961. He completed the eleventh grade, subsequently obtained a GED, and has a commercial driver's

license. His work history consists of working as a butcher, sanitation supervisor, welder, and truck driver. He has also worked in pipeline construction. He began working for Jack Cooper, or its predecessor, in February 2000. His job there consisted of loading vehicles on car haulers, securing them with chains, and delivering them to automobile dealerships at various locations around the country.

Wigginton sustained a previous low back injury in 2007 when he pulled a lever in an attempt to disconnect a trailer. His complaints at that time consisted of low back and left leg pain. He treated with various physicians and was released to return to work. He eventually returned to his regular job, despite his restrictions. He was evaluated by Dr. Jules Barefoot in July 2008, who assessed an 8% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He settled his claim for a lump sum of $25,000.00 which was approved by Hon. Lawrence F. Smith, Administrative Law Judge, on October 23, 2008. Wigginton stated he returned to work as a milk truck driver for a year then resumed his regular job for Jack Cooper. He stated he had no further problems until his left hip injury in April 2012, and his low back injury in May 2012.

On April 19, 2012, Wigginton was unloading a truck in Flint, Michigan, which required him to climb into the truck bed. When he got out, he was limping, and his left hip pain progressed. He sought treatment at an urgent care center in Genesee, Michigan. He then returned to Kentucky where he treated at Baptistworx in Louisville. His condition improved with physical therapy, and he returned to his regular job.

On May 22, 2012, Wigginton delivered a truck to a dealership in Centralia, Illinois. He experienced low back pain as he lifted a ramp. He notified his supervisor, and finished his shift. He eventually returned to Kentucky and was again sent to Baptistworx for treatment. He received physical therapy, and was eventually referred to Dr. Ellen Ballard for treatment. At the time he treated with Dr. Ballard, he had no problems with his right lower extremity. Dr. Ballard released him to return to work with no restrictions on August 13, 2012. He returned to his regular job, which he stated required no heavy lifting.

In March 2013, Wigginton sought treatment with Dr. Stacie Grossfeld for an unrelated right knee condition. He followed up with her in May 2013 for complaints of low back pain radiating into his right lower extremity. Dr. Grossfeld ordered epidural steroid injections for his low

back and right leg complaints. Although he is still employed by Jack Cooper, he last worked on July 17, 2013. Although his back and right leg continue to bother him, he has no current difficulty with his left hip. He stated he has difficulty with sitting for extended periods of time.

Wigginton filed records from Baptistworx for treatment from April 27, 2012 through June 22, 2012 when he was referred to Dr. Ballard. Those records reflect complaints of left hip pain, strain and bursitis. The May 11, 2012 note reflects improvement of the left hip. The May 25, 2012 note reflects complaints of low back pain, for which temporary restrictions were imposed on lifting, pushing, climbing, standing and sitting. X-rays from Baptist Hospital East noted a mild loss of disk height, and degenerative disk disease at L4-L5 and L5-S1.

Wigginton submitted the April 20, 2012 record from Genesee Urgent Care which notes his complaint of left hip pain after climbing in a truck bed. He was diagnosed with a left hip sprain, and prescribed non-steroidal anti-inflammatory medication. He was also advised to perform stretching and range of motion exercises.

Wigginton submitted multiple records from Dr. Grossfeld. On March 25, 2013, she noted unrelated right knee pain due to chondromalacia for which a cortisone shot

was administered. Her notes of May 8, 2013, and July 19, 2013 reflect complaints of low back pain radiating to the right lower extremity. She diagnosed multi-level disk degeneration with grade 3 changes at L5 and S1. She recommended use of a TENS unit, physical therapy, epidural steroid injections, a brace, and Meloxicam. In a subsequent questionnaire, Dr. Grossfeld stated Wigginton had not reached MMI for the May 22, 2012 incident.

Wigginton also submitted the August 13, 2013 note from Dr. Thomas Alstadt. He noted low back pain with paresthesias in the right leg. He diagnosed degeneration of the lumbosacral intravertebral disk; mild stenosis of the lumbar region; cigarette abuse; diabetes mellitus; hypertension; and sleep apnea. He ordered an updated MRI, which was denied.

Dr. Jules Barefoot evaluated Wigginton on March 8, 2013 at the request of his attorney. He noted Wigginton's April 19, 2012 injury from climbing into a truck bed. He also noted a "May 21, 2012" [sic] acute onset of low back pain from lifting a ramp. Dr. Barefoot noted Wigginton's complaint of low back pain which was worse in the morning, and radiated into the left leg, which had improved. He diagnosed degenerative disk disease of the lumbar spine, and assessed an 18% impairment rating pursuant to the AMA

Guides, of which he apportioned 8% due to prior active conditions stemming from the 2007 injury, and 10% due to the May 2012 work injury. Interestingly, Dr. Barefoot made no statement regarding when Wigginton reached MMI. Dr. Barefoot also stated, "He reports that he was able to return to work in August 2012. He notes he is now back at work and is not working under any type of restrictions."

Jack Cooper submitted records from Dr. Ballard for treatment dates of July 10, 2012; July 24, 2012 and August 8, 2012. She noted the complaints of back pain with left leg dysesthesias. She ordered an MRI which demonstrated left sided disk bulges in the lumbar spine. Wigginton complained of problems in his left leg, but his straight leg raising tests were normal. On August 8, 2012, she noted his range of motion was normal, and he had a normal neurological evaluation. She released him to return to work on August 13, 2012, with no follow-up appointments.

Dr. Ballard testified by deposition on June 19, 2013. She first saw Wigginton on July 10, 2012. He reported low back pain with numbness, and symptoms in the left, not right, lower extremity. When she saw him on July 24, 2012, his low back and left lower extremity pain had improved. She noted straight leg raising tests were negative. She stated there was no difference in the

findings from the 2007 MRI, and the one she ordered in 2012. She agreed an impairment rating based upon DRE category II for the 2007 injury was appropriate. She stated the August 8, 2012 examination was normal. She stated she imposed no restrictions because he had no complaints. She stated the May 22, 2012 incident was a temporary exacerbation which resolved by August 8, 2012. She stated any new symptoms in 2013 would be unrelated to the 2012 incident.

Jack Cooper also submitted records from Jewish Hospital & St. Mary's Healthcare. Those records reflect treatment for a lumbar strain in 2003. The records also indicate treatment for low back and right hip pain in December 2008.

Dr. Martin Schiller evaluated Wigginton at Jack Cooper's request on May 29, 2013. Dr. Schiller stated Wigginton's current diagnosis is the same as it was in 2008, chronic low back pain secondary to degenerative disk disease. He reviewed lumbar MRI's taken in 2008 and 2012, which he stated demonstrated no change. He saw no evidence of a left hip problem on examination. He opined Wigginton's occasional complaints of right leg pain and numbness are unrelated to his work injury. He stated Wigginton did not sustain either a work-related low back or left hip injury in April or May 2012. He stated at worst, Wigginton sustained

temporary soft tissue injuries with no permanent anatomical change. He stated Wigginton would have no impairment in addition to the 5-8% due to the 2007 injury. He stated Wigginton needs no additional treatment or diagnostic testing, other than an evaluation with an ERGOS system to determine his restrictions. He noted Wigginton exhibited no symptom magnification, and demonstrated no positive Waddell's signs. He stated he disagreed with Dr. Barefoot's findings. In a subsequent note, he indicated treatment with epidural steroid injections is inappropriate. He also stated Wigginton should return to work with no restrictions as opined by Dr. Ballard.

On October 31, 2013, the ALJ rendered an opinion, award and order. He found Wigginton's left hip injury sustained on April 19, 2012 was a temporary injury, for which an award of permanent income or medical benefits was inappropriate. Regarding the May 22, 2012 low back injury, the ALJ relied upon the 18% impairment rating assessed by Dr. Barefoot. He found 8% due to pre-existing active conditions (the 2007 claim), which he carved out of the 18% rating, and found 10% due to the May 22, 2012 work injury. He found Wigginton had reached MMI on March 8, 2013, the date of Dr. Barefoot's examination. The ALJ enhanced the award of PPD benefits by the multipliers contained in KRS

342.730(1)(c)1 because he noted Wigginton was no longer working. The ALJ also awarded TTD benefits from May 25, 2012 through March 8, 2013.

Both Jack Cooper and Wigginton filed petitions for reconsideration. Jack Cooper argued the ALJ erred in awarding TTD benefits from August 13, 2012 through March 8, 2013 because Wigginton had in fact returned to work at his regular job during that time period. Jack Cooper next argued the ALJ erred in awarding PPD benefits based upon a 10% impairment rating rather than a 2% rating. Finally, Jack Cooper argued the ALJ erred in enhancing the PPD benefits pursuant to KRS 342.730(1)(c)1. Wigginton stated he had no objection to amending the award of TTD benefits to exclude the period he had actually returned to work. Wigginton also noted clerical errors on the ALJ's decision which should be corrected. Wigginton also noted the ALJ failed to address the issues of recommended medical treatment or testing, including another lumbar MRI, and entitlement to additional TTD benefits.

In the order on reconsideration rendered December 13, 2013, the ALJ corrected the clerical errors pointed out by Wigginton. The ALJ found the MRI compensable for diagnostic purposes, but he did not amend his finding of

when Wigginton reached MMI. The ALJ also declined to amend the award of TTD benefits.

Jack Cooper filed a second petition for reconsideration on December 23, 2013, again addressing the award of TTD benefits. Wigginton filed a response on January 6, 2014, again agreeing he was not entitled to TTD benefits from August 13, 2012 through March 8, 2013. These appeals followed. On January 22, 2014, this Board issued an order placing the appeal in abeyance, and partially remanding for the ALJ to address the second petition for reconsideration. The ALJ issued an order on the second petition for reconsideration on January 21, 2014 finding Wigginton was not entitled to TTD benefits from August 13, 2012 through March 8, 2013 "as he was performing full time work and earning a greater wage during that time."

Since Wigginton was successful before the ALJ regarding the award of PPD benefits, and enhancement pursuant to KRS 342.730(1)(c)1, the question on appeal is whether his determination is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons.

Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

We note the Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street

Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

First, regarding the award of PPD benefits, and the appropriate carve-out for pre-existing active disability, the ALJ's decision is supported by the record and we affirm. As noted by the ALJ, Jack Cooper had the burden of proof on the issue of pre-existing active disability. The ALJ, relied upon the 18% impairment rating assessed by Dr. Barefoot, which he was clearly allowed to do. He then determined a portion of that impairment was due to Wigginton's previous low back injury he sustained in 2007, and excluded 8% as pre-existing active, and awarded PPD benefits based only upon the remaining 10% impairment. This was an appropriate analysis pursuant to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). Therefore, the ALJ's determination regarding the award of PPD benefits based upon the remaining 10% impairment is supported by the evidence and will not be disturbed.

Next, MMI is a term which refers to the time at which the worker's medical condition has stabilized so that any remaining physical impairment and occupational disability can be viewed as being permanent. Clemco

Fabricators v. Becker, 62 S.W.3d 396, 397-98 (Ky. 2001). *See also* Pierson v. Lexington Public Library, 987 S.W.2d 316, 319 (Ky. 1999).

Temporary total disability is defined as the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement permitting a return to employment. KRS 342.0011(11)(a). The above definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated generally:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

Both prongs of the test in W.L. Harper Const. Co., Inc. v. Baker, supra, must be satisfied before TTD benefits may be awarded. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Court further explained that "[i]t would not be reasonable to terminate the

benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court stated as follows:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement **and** not have improved enough to return to work.
>
> . . . .
>
> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the

> employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), the Supreme Court elaborated as follows:

> As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment.
>
> . . . .
>
> Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

Here, the ALJ specifically found Wigginton did not reach MMI until March 8, 2013, relying upon Dr. Barefoot's opinion of that date, despite having been released to return to work without restrictions on August 13, 2012, and having worked his regular job thereafter. Again, it is noted Dr. Barefoot provided no determination as to when Wigginton reached MMI. In his October 31, 2013 decision, the ALJ

awarded TTD benefits during the time Wigginton had actually returned to work at his regular job. This was pointed out in the petition for reconsideration, and Wigginton acknowledged he was not entitled to TTD benefits from August 13, 2012 through March 8, 2013 as awarded. In his order on reconsideration, the ALJ reiterated his award of TTD benefits. After the appeal was filed, and on partial remand, the ALJ amended his award of TTD benefits; however, his determination regarding the date Wigginton reached MMI was not modified. Because it is unclear why the ALJ chose March 8, 2013 as the date Wigginton reached MMI, we vacate the ALJ's determination on that issue. On remand, we direct the ALJ to make a determination of when Wigginton reached MMI in light of the fact he was released without restrictions in August, 2012, and in fact returned to his regular job. We direct no particular result, however the ALJ is requested to determine when Wigginton reached MMI in light of the amendment of his award of TTD benefits, and provide the rationale or basis for his determination.

Regarding the application of the multipliers contained in KRS 342.730(1)(c)1, the ALJ's determination is likewise vacated. The ALJ determined the application of these multipliers was appropriate due to the fact he lacked the capacity to return to the type of work done on the date

of injury and was not earning any wages. However, Wigginton did in fact return to his regular job in August 2012, and continued to perform that job until July 2013. Because Wigginton did in fact return to work, at apparently the same or greater wages, the ALJ is directed to perform an analysis pursuant to Fawbush v. Gwinn, supra.

Pursuant to Fawbush v. Gwinn, supra, an ALJ must determine which multiplier contained in KRS 342.730(1)(c) is "more appropriate on the facts" when awarding permanent partial disability benefits. Fawbush at 12. KRS 342.730(1)(c)1 states, in relevant part, as follows:

> 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. . .; or

KRS 342.730(1)(c)2 further provides:

> If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of

> cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection.

When a claimant satisfies the criteria of both (c)1 and (c)2, "the ALJ is authorized to determine which provision is more appropriate on the facts and to calculate the benefit under that provision." Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 211 (Ky. 2003). As a part of this analysis, the ALJ must determine whether "a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future." Fawbush v. Gwinn, supra. In other words, is the injured worker faced with a "permanent alteration in the …ability to earn money due to his injury." Id. "That determination is required by the Fawbush case." Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004). If the ALJ determines the worker is unlikely to continue earning a wage that equals or exceeds his or her wage at the time of the injury, the three multiplier pursuant to KRS 342.730(1)(c)1 applies.

Fawbush, supra, articulated several factors an ALJ can consider when determining whether an injured employee is likely to be able to continue earning the same or greater wage for the indefinite future. These factors include the claimant's lack of physical capacity to return

to the type of work that he or she performed, whether the post-injury work is done out of necessity, whether the post-injury work is done outside of medical restrictions, and if the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Id. at 12. As the Court in Adkins, supra, stated, it is not enough to determine whether an injured employee is able to continue in his or her current job. The Court stated:

> 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.
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> Id. at 30.

Because Wigginton had returned to work at his regular job, and in fact continued to work at that job for several months after his examination by Dr. Barefoot, the ALJ's award of the enhancing multipliers is vacated, and on remand, he must perform an analysis pursuant to Fawbush, supra.

That said, should the ALJ determine enhancement by the three multiplier is not appropriate, the amended opinion and order on remand must contain the appropriate language regarding the potential applicability of the two multiplier at some point during the 425 week award of PPD benefits

subject to the requirements of Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009) and Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010).

Finally, while this claim was pending appeal, Wigginton filed a motion for an award of additional TTD benefits. The basis for the motion is the same as argued before the ALJ and on appeal regarding ongoing TTD benefits. It is further noted Jack Cooper filed a medical dispute. On remand, the ALJ is directed to consider these motions, and conduct any proceedings necessary, including allowing the parties to introduce evidence regarding these issues as necessary to render his decision.

Accordingly, the opinion, award and order rendered October 31, 2013 and the December 13, 2013 order on reconsideration by Hon. Chris Davis, Administrative Law Judge, are **AFFIRMED IN PART, VACATED IN PART** and this claim is **REMANDED** for entry of an amended opinion, award, and for resolution of the pending issues in conformity with the views expressed herein.

ALL CONCUR.

COUNSEL FOR JACK COOPER TRANSPORT:

HON STEPHANIE L KINNEY
1315 HERR LANE, STE 210
LOUISVILLE, KY 40222

COUNSEL FOR RICKY D WIGGINTON:

HON JESSICA J LOGSDON
429 W MUHAMMAD ALI BLVD, STE 1102
LOUISVILLE, KY 40202

RESPONDENT:

DR STACIE GROSSFELD
4001 KRESGE WAY, STE 330
LOUISVILLE, KY 40207

ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601