Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 19, 2014

CLAIM NO. 201296595

KINGSBROOK LIFECARE CENTER PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

RICK ALLEN SCHENK
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Kingsbrook Lifecare Center ("Kingsbrook") appeals from the June 18, 2014, Opinion and Award and the July 29, 2014, Order on Reconsideration of Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"). Based on his January 31, 2012, work injury, the ALJ awarded Rick Allen Schenk ("Schenk") temporary total disability ("TTD")

benefits, permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1 and a 30% safety penalty pursuant to KRS 342.165. Medical benefits were also awarded.

On appeal, Kingsbrook puts forth four arguments. First, Kingsbrook asserts the ALJ erred by not taking judicial notice of the 5th Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Second, Kingsbrook asserts the ALJ erred by relying on an impairment rating which is not in accordance with the AMA Guides. Third, Kingsbrook asserts the ALJ erred by awarding the three multiplier. Finally, Kingsbrook asserts the ALJ erred in applying a 30% safety penalty pursuant to KRS 342.165.

The Form 101 alleges Schenk sustained injuries to his left ankle and leg on January 31, 2012, in the following manner:

> The Plaintiff states that he was climbing a ladder attached to of a wall in the storage closet and was unlatching door to flip it open to go onto the roof when his hand and foot slipped off the ladder wrung. The Plaintiff fell 13 feet.

The Form 101 describes the medical treatment Schenk received after his fall as follows:

> He was taken immediately to King's Daughter Medical Center and then was transferred to UK Hospital where he underwent reduction surgery for left pilon fracture with external fixator placement. A second surgery was performed one week later wherein two plates and screws were placed to provide external fixation. Eventually he underwent extensive physical therapy.

The April 7, 2014, Benefit Review Conference ("BRC") order reflects the parties stipulated a work-related injury occurred on January 31, 2012, and the following contested issues were: benefits per KRS 342.730 and KRS 342.165 violation. Handwritten under "other" is the following: "Whether the AMA Guidelines are appropriately applied."

Schenk introduced the July 9, 2013, report of Dr. James A. Amis who examined Schenk on March 5, 2013 and July 9, 2013. Dr. Amis rendered the following diagnosis:

> Within a reasonable degree of medical probability, Mr. Schenk incurred a right distal tibial fracture or a pilon fracture of the tibia with an intact fibula. This could be interpreted as an ankle fracture since it is intraarticular into the ankle, but a pilon fracture is different and more severe. Again, within a reasonable degree of medical probability, this injury was incurred at his fall January 31, 2012.

Dr. Amis assessed a 21% impairment rating pursuant to the AMA Guides calculated in the following manner:

> Using the AMA Guides of Functional Impairment, Fifth Edition, table 17-5, patient has an impairment of his gait that is mild under A- Antalgic gait with shortened stance phase and documented moderate to advanced arthritic changes of the hip, knee or ankle, he comes to a 7% whole person impairment. Table 17-31 under the ankle, the loss of joint cartilage is down to 2 mm, giving him a 6% whole body impairment. This is particularly noted on the lateral joint line. Table 17-11 concerns ankle motion impairment estimates and under plantar flexion capability, he goes down to near 20 degrees and therefore gives him a 3% impairment rating whole body. The extension is to about 5 degrees which gives him a mild rating or [sic] 3%, as well. Finally, the superficial and deep peroneal nerves are affected, of which only the superficial peroneal nerve in a sensory fashion is rated at 2% whole body. These ratings added together give him a rating of 21% whole body impairment.

Dr. Amis imposed the following restrictions:

> I would place Mr. Schenk under restrictions of probably less than 15 minutes of walking per hour and standing 15 minutes or less, as well, carrying or lifting less than 25 pounds at any one time, and limited pushing and pulling and virtually no stooping or bending. These restrictions would indicate the Mr. Schenk is not capable of going back to his pre-injury work

> activities and performing them on a regular basis.

Kingsbrook introduced the February 27, 2014, report of Dr. Daniel Primm which was based solely on a records review.[1] Dr. Primm was presented with the following question: "Does the 21% impairment rating provided by Dr. Amis constitute a correct application of the AMA Guides, 5th Edition? Please explain." Dr. Primm disagreed with the impairment rating explaining as follows:

> I do not feel that Dr. Amis correctly applied the tables and recommended methods of evaluating impairment for this injury. As stated above, I am at a loss to understand the additional 5% impairment he added to his final impairment rating. Also, I believe he was in error when he added the 'lower limb impairment due to gait derangement.' i.e., Table 17-5. The AMA Guide clearly states on page 529, 'Whenever possible, the evaluator should use a more specific method. When the gait method is used, a written rationale should be included in the report. The lower limb impairment percents shown in Table 17-5 stand alone and are not combined with any other impairment evaluation method.' In my opinion, the 7% then should be deducted from his 21% impairment, and I

[1] Kingsbrook introduced the report and impairment rating of Dr. Primm which it is now contesting. However, the record reveals Kingsbrook also introduced and ultimately relied upon the March 14, 2014, Independent Medical Evaluation ("IME") report and the April 2, 2014, supplemental report of Dr. Thomas Bender. The record indicates Kingsbrook attempted to introduce a supplemental report by Dr. Primm in which he modified his 14% impairment rating. The the ALJ admitted this supplemental report into evidence at the final hearing but ultimately struck it from the record by order dated June 3, 2014.

> feel a more appropriate and accurate impairment would be a 14% impairment, based on Table 17-31 for the posttraumatic arthritic changes combined with his range of motion. Those I feel are the more specific and accurate methods, as recommended by the AMA Guide on page 529.

Schenk testified by deposition on February 20, 2014. Schenk explained that Kingsbrook is an upscale nursing home facility and at the time of the work injury, he worked in the maintenance department. He testified his duties were as follows:

> Anything from fixing plumbing to looking at electrical problems to- to painting, lawn care, a little bit of everything. It would involve crawling around some, climbing some, looking at air conditioner units. Just anything that would- you know, would kind of go wrong in a facility. We would have a maintenance department that takes a look at the issues and see if we can fix them. If not, we would call in a professional, okay. But normally we would be able to take care of most things there.

Schenk testified that on January 31, 2012, he was injured climbing a ladder in a supply closet. He explained:

> A: Okay. So I lifted up my right hand to grab the next rung. My hand slipped off of the rung. And when that happened, I started falling backwards. Okay. Then when I did that, my- my foot also slipped off the rung. I fell down. Hit the floor. Was a little dazed at the time. I knew that I had broken something. I mean, you know, because

> it- you know, the pain was, you know, pretty bad. That happened in a supply closet. That- the ladder is in a supply closet. Right outside the supply closet is what we call the therapy room. That's where all of the- the people go- come for therapy. They- they heard it. They heard me hit the ground. So I had two people from therapy come and see what had happened.
>
> ...
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> Q: - just to back up to the story. You mentioned that you were on the ladder. How high up the ladder were you when you slipped?
>
> A: Approximately 12 to 13 feet. I was almost at the top of the ladder and that ladder is about 12-foot, I believe.
>
> Q: And you were heading up to the roof, correct?
>
> A: Yes.
>
> ...
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> Q: So you described that you were on the ladder, that you lost your grip of your right hand and then you slipped. Do you recall how you landed?
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> A: Yes. When I landed, I landed- most of my- 90 percent of my body weight landed on my left leg. Okay. And, of course, that made the tibia, the front bone of my leg, come down through the ankle bone and broke the ankle bone and shattered the bottom of the tibia.

Schenk went by ambulance to King's Daughters Medical Center where x-rays were performed. He was then

transported to the University of Kentucky Medical Center where he went underwent surgery. Schenk described the surgery as follows:

> And during that surgery, they- they put on an external fixator, which basically separates all the bones and let's [sic] the swelling go down before they can put everything back in place. I was in the hospital during that surgery for three to four days. I'm not exactly sure, but it was three to four days. Then I was released to go home with the external fixator on. Then approximately, I believe, about 10 days later, I come [sic] back for a second surgery. And in that procedure, they took the external fixator out, took it off, and went in surgically and put in- I believe it was 3 plates, 12 screws, and kind of just put everything back together. Okay. And then I was in a sort of soft cast and they sent me home. And then I did followups with the- with UK after that and seen the doctor. And- and then he- I went- it was a process. I went from that cast to a walking- to what they call, like, a walking boot. And then he took me out of that. And then I was on a cane for a while. That's about it, I mean....

At the time of his deposition, Schenk was still employed at Kingsbrook. His current duties entailed the following:

> Now, I'm in a central supply role. I order all of their medical equipment, all of the supplies that the nursing staff uses, a lot of the supplies- you know, we have hundreds of supplies we order, okay. We order everything from wheelchairs to syringes, bandages. I

> mean, you know, everything that's used in the facility- other than office supplies, that pretty much falls on us. And we order that- we place orders every week. We get, you know, a truck in every week and- you know, that kind of falls on us. I've been responsible to help get them, you know, on a computer- on the computer side of thing ordering things now. The person that I answer to now, is my supervisor now, wasn't really used to that. Okay? He was what I would call old school- kind of old school, if I can use that term. And so I'm actually teaching him some computer skills and teaching him how to order things online, be more efficient, you know, in ordering things and trying to do- we're trying to go paperless in the whole facility, so that's kind of gearing toward that direction. And he's coming a long pretty good, so...

Schenk testified he is earning greater wages than he was making at the time of his accident, is not taking any medication, and currently does not experience any difficulties performing his job. He is currently unable to walk long distances and hike, both of which he did once a week before the work injury. Additionally, he has difficulty with steps and he cannot climb a ladder. His ankle aches a lot on rainy days. He takes Advil for pain.

Schenk testified at the hearing that he experiences pain and swelling in his ankle on a daily basis, particularly in the evenings after work. He also experiences "foot rolling" which he described as follows:

> That's actually gotten a little worse. That started a few months back. And, even my boss has noticed it. I mean, I can just be walking along and it just gives out and, you know, just rolls to the side. And, then if I'm not next to something to catch myself, you know- but, yeah. He's- He's noticed it and we've noticed it getting, you know, a little worse than what it used to be.

Kingsbrook's first argument on appeal is the ALJ erred by not taking judicial notice of the AMA Guides. Specifically, Kingsbrook argues, in relevant part, as follows:

> Table 17-2, attached to the Motion to Take Judicial Notice and to the Petitioner's brief, is clear. It states that certain methods of rating impairment cannot be 'combined.' It prohibits combining gait derangement with any other method. It prohibits combining range of motion with arthritis. At the foot of the table, the following sentence makes a further clarification: 'X = Do not use these methods together for evaluating a single impairment.' Consequently, the ALJ was supplied with facts to judicially take notice that impairment ratings for arthritis and range of motion could not be combined, and facts to notice that gait derangement could not be combined with another impairment rating.
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> ...
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> The ALJ passed the Motion to Take Judicial Notice to the decision on the merits of the case. (Order 18/3/14 [sic]). At the hearing, the ALJ assured counsel she would include a decision in

> her opinion. (T.H. p.8). The ALJ did not mention the motion in her opinion. Subsequently, in a Petition for Reconsideration, Kingsbrook requested a determination. (PFR p. 1). The ALJ stated she saw no reason to rule on the motion. (Order on PFR pp 1-2). Thus, the Motion to Take Judicial Notice was not properly considered, and the situation is like that in Watkins.
>
> The ALJ erred in not ruling on its motion when KRE 201(d) clearly makes it mandatory. Had the ALJ judicially noticed that Table 17-2 prohibits combining the aforementioned ratings, the parties would have been spared the expense of litigating on the merits of Dr. Amis' rating. Had the ALJ taken judicial notice, she would not have relied on the rating of Dr. Primm, which incorrectly combines ratings for arthritis and range of motion (Opinion p. 18). Because the ALJ erred in not taking judicial notice, Petitioner requests this matter be remanded. Because a taking of judicial notice necessitates a finding that the ratings of Dr. Primm and Dr. Amis contravene the AMA Guides, Petitioner requests this matter be remanded for an entry of an award based upon an impairment rating of 8%, the figure assigned by Dr. Bender, and the figure Dr. Primm would have assigned if his questionnaire were allowed into evidence. (Order 3/6/14).

Kingsbrook filed a March 11, 2014, "Motion to Take Judicial Notice" in which it asserted the same argument recounted above. A March 18, 2014, Order passed Kingsbrook's March 11, 2014, motion to the merits of the claim.

In the June 18, 2014, Opinion and Award, the ALJ provided the following findings of fact and conclusions of law regarding her reliance upon Dr. Primm's impairment rating:

> After considering the testimony of lay witnesses, Mr. Carter and the Plaintiff as well as the medical evidence in this case, including the opinions of Dr. Primm, Dr. Amis, and Dr. Benton and the medical records of the treating physicians Dr. Moghadamian and the records of the ER, I find that as a result of the January 31, 2012 work-related injury Plaintiff suffered a functional impairment and occupational disability to his left lower extremity. I also find Plaintiff sustained a 14% permanent impairment pursuant to the AMA Guides, 5th edition, as a result of this work injury. In making this finding I rely on the opinion of Dr. Primm.
>
> I find Dr. Primm, more accurately reflects the Plaintiff's residual condition and impairment under the AMA Guides and is therefore more persuasive. While Dr. Amis evaluated Plaintiff, Dr. Primm was one of Plaintiff's treating surgeons. Dr. Primm in his February 27, 2014 report reviewed Dr. Amis' evaluation and pointed to what he believed was a misapplication of the AMA Guides. Dr. Primm apparently accepted the physical and clinical findings of Dr. Amis (when he examined Plaintiff in March 2013) and applied them to the AMA Guides. I found his opinion more persuasive than either Dr. Amis or Dr. Benton. It is noted that Dr. Benton examined Plaintiff but did not x-ray him. It is my opinion that an injury as severe as

> Plaintiff's was from an orthopaedic standpoint, it is crucial to consider the radiographic evidence. Dr. Primm's application of the AMA Guides to the opinion and findings of Dr. Amis' functional impairment most persuasively results in an impairment rating of 14%. Accordingly, this 14% functional impairment rating, pursuant to KRS 342.730(1)(b), is converted to a 14% permanent partial disability.
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> ...
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> **5. Whether the AMA Guidelines were appropriately applied**
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> The undersigned has carefully reviewed the doctor's opinions regarding the impairment of the Plaintiff pursuant to the AMA Guidelines, including reading the specific provisions of the Guides upon which the various doctors relied. As discussed above, I relied upon Dr. Primm's opinion that Plaintiff's impairment was 14% to the whole person. I find no reason to believe Dr. Primm did not appropriately apply the AMA Guidelines. While there was an attempt by the Defendant/employer to introduce an addendum to Dr. Primm's initial opinion, for reasons that appear in a separate Order dated June 3, 2014, that evidence was struck from the record and was not considered by the undersigned.

In its July 8, 2014, Petition for Reconsideration, Kingsbrook requested the ALJ rule on its Motion to Take Judicial Notice. Additionally, Kingsbrook requested a specific finding of fact as to whether the 14% rating assigned by Dr. Primm "for the posttraumatic

arthritic changes combined with his range of motion" represents a correct application of the AMA Guides.

In the July 29, 2014, Order on Reconsideration, the ALJ denied the petition for reconsideration stating:

> The Defendant/employer petitions for reconsideration of the undersigned's Opinion and Award rendered on June 18, 2014. The Defendant/employer requests the undersigned "make a determination on its Motion to Take Judicial Notice filed March 7, 2014". The Motion to Take Judicial Notice was a reiteration of selected portion of the AMA Guidelines to Permanent Impairment, 5th Edition. The Defendant/employer's argument in its brief before this ALJ essentially reiterated and incorporated the same selected portions of the Guides. The undersigned considered the arguments and the Guides at the time the Opinion and Award was rendered. The motion was passed to the merits of the claim. The issues were argued and a determination was made regarding same. I see no reason to now specifically rule on the March 7, 2014 motion as it is essentially a reiteration of the Defendant/employer's previous arguments before the ALJ. Accordingly, the Defendant's petition to reconsider same is **DENIED**.
>
> The Defendant/employer next "requests" the undersigned make a specific finding of fact as to whether the 14% rating assigned by Dr. Primm . . . represents a correct application of the AMA Guides, Fifth Edition, and more specifically, Table 17-2.
>
> In reviewing the Opinion and Award it is noted the ratings of the various evaluators were considered at length.

> Indeed, the review is noted to entail 5 1/2 pages of the Opinion and discusses the evaluation of the three physicians who proffered an opinion regarding impairment under the AMA Guides, 5th edition. I find no error in the review or the selection of Dr. Primm's impairment rating as being the most persuasive.
>
> The undersigned was faced here with conflicting medical opinions regarding Plaintiff's impairment rating. Under such circumstances, the undersigned must decide which physician's opinion to believe and to select an impairment rating. KRS 342.0011(35) and (36). Except under compelling circumstances, the issue of which physician's impairment rating is most credible is a matter of discretion for the ALJ. *See* REO Mechanical vs. Barnes, 691 SW2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock vs. Hopkinsville Coating Corp., 62 SW3d 387 (Ky. 2001). Dr. Primm's opinions are set out on pages 19 and 20 of the Opinion and Award. It is explained on page 28 of the Opinion and Award why I found Dr. Primm's opinion the most persuasive of the impairment ratings presented. I find no error in this determination and therefore the Defendant/employer's petition for reconsideration is **DENIED**.

The ALJ may not rely upon an impairment rating derived in contravention of the AMA Guides. *See* Central Baptist Hospital v. Hayes, Not Reported in S.W.3d., 2013 WL 4623489 (Ky. 2013). As articulated by the Supreme Court,

> Usually an ALJ may not question a medical expert's interpretation of the Guides, but may only determine which

> expert's findings he finds to be most credible. [citations omitted]. But once an ALJ is presented with overwhelming evidence that the impairment rating calculated by the medical expert is in contravention of the Guides, he has the responsibility to assigned a different rating.

Slip Op. at 2.

In his February 27, 2014, report, Dr. Primm stated he combined impairment ratings for arthritic changes with a range of motion impairment. However, Kingsbrook has consistently argued that pursuant to Table 17-2 on page 526 of the AMA Guides, impairment ratings for arthritis and range of motion cannot be combined. This was brought to the attention of the ALJ by Kingsbrook in its March 11, 2014, "Motion to Take Judicial Notice," in its May 27, 2014, "Brief to Administrative Law Judge," and in its July 8, 2014, Petition for Reconsideration. However, neither the June 18, 2014, Opinion and Award and the July 29, 2014, Order on Reconsideration, indicates the ALJ carefully reviewed Table 17-2 on page 526 of the AMA Guides and specifically addressed Kingsbrook's assertion. Instead, in the June 18, 2014, Opinion and Award, the ALJ concluded she found "no reason to believe Dr. Primm did not appropriately apply the AMA Guidelines." In the July 29, 2014, Order on Reconsideration, the ALJ concluded she found "no error in

the review or the selection of Dr. Primm's impairment rating as being the most persuasive." Consequently, the ALJ has not sufficiently addressed Kingsbrook's specific argument regarding Dr. Primm's combination of impairment ratings for arthritis and range of motion in light of the mandates set forth in Table 17-2 of the AMA Guides.

As a result, the award of PPD benefits shall be vacated. On remand, the ALJ must review Table 17-2 on page 526 of the AMA Guides and make a specific finding as to whether Dr. Primm's combination of impairment ratings for arthritis and range of motion is consistent with Table 17-2. Should the ALJ determine Dr. Primm's impairment rating is in contravention of Table 17-2 of the AMA Guides, the ALJ must determine the applicable impairment rating and enter the appropriate award of PPD benefits.

Our holding concerning Kingsbrook’s first argument fully addresses and resolves Kingsbrook's second argument on appeal- i.e. the ALJ erred in relying on an impairment rating in violation of the AMA Guides.

Kingsbrook's third argument is the ALJ's analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) is incomplete, as the ALJ allegedly failed to consider all the factors and failed to determine whether Schenk is likely to continue earning the same or greater wages into the

indefinite future. Kingsbrook requests that, on remand, the ALJ properly consider all of the necessary factors and determine KRS 342.730(1)(c)(1) does not apply.

Concerning this issue, the ALJ determined as follows in the June 18, 2014, Opinion and Award:

> In determining whether the Plaintiff, as a result of the January 31, 2012 2010 [sic] work-related injury, is entitled to any statutory enhancement per KRS 342.730(1)(c), also commonly known as the "multipliers", the following analysis was made. Under KRS 342.730(1)(c)(1), an injured employee who lacks the physical capacity to return to the work performed on the date of the injury may receive a triple income benefit, while KRS 342.730(1)(c)(2) encourages those who retain the physical capacity to return to the same type of work and earn the same or greater wage to receive a double income benefit during any period of time that employment at that wage level ceases. If both sections of KRS 342.732(1)(c) are applicable, an Administrative Law Judge is required to make a further determination.
>
> In determining whether the 3 multiplier is appropriate to apply in this case, I turn to the principles dictated by Kentucky Supreme Court's decision in Fawbush vs. Gwinn, 103 SW3d 5 (Ky. 2003). The principles enunciated in Fawbush require an ALJ to make three essential findings. First, the ALJ must determine, based on substantial evidence, that a claimant cannot return to the type of work performed at the time of the injury; second, the claimant has returned to work at an average weekly wage equal to or greater

than his pre-injury wage; and, third, it is unlikely the claimant can continue to earn that level of wages into the indefinite future.

In considering the first of these three required findings, I find that the Plaintiff cannot return to the type of work performed at the time of the injury. This finding is supported unanimously by the medical evidence in the case. All of the doctors, Dr. Primm, Dr. Benton and Dr. Amis opined Plaintiff could not return to his job as a maintenance man. There is conclusive medical testimony that he cannot return to the same type of work as he performed his "regular job" – that of maintenance. When Plaintiff returned to work at Kingsbrook, it was to an entirely different job, one that required less standing, walking and allowed him to use his newly gained computer skills.

The second prong of the Fawbush inquiry is met in this case. I find that Plaintiff has returned to work at an average weekly wage equal to or greater than his pre-injury wage. I rely on Plaintiff and the stipulations of the parties in making this finding.

It is the third prong of this three prong test that pursuant to Fawbush, the ALJ is authorized to determine which of the multipliers contained in KRS 342.730(1)(c)1 and (c)2 is more applicable to the facts of the case. In Fawbush, the Court took several factors into consideration, including the claimant's unrebutted testimony that he was working, post-injury, out of necessity, that his post-injury work was outside of his medical restrictions, and he was only able to perform said work when he took more

narcotic pain medication than what was prescribed. The Court concluded based on the evidence, the claimant would be unable to maintain his employment indefinitely. The Supreme Court of Kentucky then reached the following conclusion in Fawbush:

If the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future, the application of paragraph (c)(1) [the three multiplier] is appropriate. Fawbush at 12.

The Kentucky Supreme Court again discussed this issue in Kentucky River Enterprises, Inc. vs. Elkins, 107 SW3d 206 (Ky. 2003). The court stated in pertinent part:

In Fawbush v. Gwinn, Ky., 103 S.W. 3d 5 (2003), we determined that where the evidence in a post-July 14, 2000, claim would support applying both KRS 342.730(1)(c) 1 and 2, the ALJ is authorized to determine which provision is more appropriate on the facts and to calculate the benefit under that provision. We explained that the application of paragraph (c)1 is appropriate if the evidence indicates that the worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future. Id.

In Adkins vs. Pike County Board of Education, 141 SW3d 387 (Ky. App. 2004) the Court of Appeals noted a claimant's ability to perform his or her current job is but one factor that must be considered when determining the claimant's ability to earn the same or greater wage, and a broad range of

factors must be considered. The Court stated as follows:

The Board in this case, while it was correct in remanding the case for a further finding, incorrectly stated that upon remand the ALJ was to determine whether Adkins could continue to perform his current job as opposed to whether he could continue to earn a wage that equals or exceeds his pre-injury wages.

These two determinations, though ostensibly equivalent in this case, are quite different in their long-term ramifications. Between two similarly situated claimants not returning to the same type of work, if one gets a job fitting his restrictions and paying the same wage, but unexpectedly ending after only a year, and the other does not, then it is likely that, under a determination such as that ordered by the Board, only the second would receive benefits based on a multiplier of three. If, however, the ALJ makes a determination under the *Fawbush* standard as to the "**permanent alteration in the claimant's ability to earn money due to his injury,"** then it is likely both claimants would be treated the same.

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. (Emphasis ours).

In Adams vs. NHC Healthcare, 199 SW3d 163 (Ky. 2006), the Supreme Court refined the analysis of the application of the three multiplier even further by stating the following:

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 greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage. Adams at 168-169. (Emphasis ours).

In applying the above-stated judicial standards to the substantive evidence in Plaintiff’s claim, I find he does not have the ability to perform his prior work. In making this finding I rely on the opinion(s) of Dr. Benton and Dr. Amis who both opined Plaintiff lacked the physical ability to return to the work he was performing at the time of this injury. The medical restrictions placed on Plaintiff would not allow him to do any type of laboring jobs and would eliminate many

of the jobs he has performed in the past. The restrictions of standing or walking for no more than 15 minutes per hour (by both doctors) essentially places [sic] in a sedentary job. No bending, stooping or lifting greater than 25 pounds per Dr. Amis and 50 pounds by Dr. Bender also limits the jobs he has performed in the past. Dr. Amis limits Plaintiff's pushing and pulling. Both doctors completely eliminate stooping or bending. There is no question Plaintiff does not have the physical capacity to perform the work he was performing at the time of the injury.

When Plaintiff returned to work, he was offered and accepted a supply clerk job. It is also obvious that he is only able to perform the supply clerk job because it is a sedentary job. He is allowed to rest his left leg when needed and much of his work is performed at a desk in front of a computer. However, he still has pain and has developed a problem of his foot "rolling" several times a day when walking. He has pain, swelling and most definitely requires special accommodations by the defendant. The Defendant/employer should be commended for their willingness to place Plaintiff in a job which allows him essentially the same wage and accommodates most of his restrictions. However, the legal standard is not whether he is able to perform his current job but **whether the injury has permanently altered the worker's ability to earn an income**. (Adams vs. NHC Heathcare, supra). Based upon the medical evidence of permanent restrictions particularly the restriction of no standing or walking longer than 15 minutes per hour, no bending or stooping, and limited

> lifting of 25 pounds or more and limited pushing or pulling, as well as the testimony of the Plaintiff that he still has pain and swelling, rolling of the foot, requires pain medication, and must sit and elevate his foot at work, it is unlikely Plaintiff can continue to earn that level of income into the indefinite future. As enunciated in Adkins, supra, the test is not whether Plaintiff will be able to maintain this specific employment, but rather whether as a result of the injury he is would be likely to "work making an equal or greater wage . . . for the indefinite future." I find that he is unlikely to work making an equal or greater wage that equals or exceeds the wage at the time of the injury for the indefinite future. Accordingly, I find the Plaintiff is entitled to the 3 multiplier per KRS 342.730(1)(c)(1). (emphasis added).

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. 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 meets 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 at 12. 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). When the ALJ determines that the worker is unlikely to continue earning a wage that equals

or exceeds his or her wage at the time of the injury, enhancement by the three multiplier pursuant to KRS 342.730(1)(c)1 is appropriate.

The Fawbush Court 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. As the Court in Adkins, supra, stated, 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.

Id.

As evidenced by the above-cited language from the June 18, 2014, Opinion and Award, the ALJ analyzed whether Schenk will be able to continue earning equal or greater

wages into the indefinite future, the third prong of the three-part Fawbush analysis. The ALJ ultimately resolved this question by concluding that based upon his physical condition, symptoms, and medical restrictions, Schenk "is unlikely to work making an equal or greater wage that equals or exceeds the wage at the time of the injury for the indefinite future." Thus, in light of the ALJ's explicit findings resolving the third prong of the Fawbush analysis, we find Kingsbrook's arguments on this issue to be without merit. The ALJ's Fawbush analysis is sufficient.

Concerning Kingsbrook's request that, on remand, the ALJ determine Schenk is not entitled to the three multiplier, we first observe we have no such authority. Further, substantial evidence supports the ALJ's determination that Schenk is unlikely to be able to continue earning equal or greater wages into the indefinite future.

Schenk, as the claimant, in a workers' compensation case, bears the burden of proof and risk of non-persuasion regarding every element of his claim. *See* Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). Since he met his burden of proof regarding enhancement by the three multiplier, the question on appeal is whether there was substantial evidence to support the ALJ’s decision.

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 making her determination Schenk is unable to continue earning equal or greater wages into the indefinite future, the ALJ relied upon the restrictions of Drs. Amis and Bender which are accurately set forth in the ALJ's analysis. Additionally, the ALJ relied upon Schenk's testimony he still experiences pain and swelling, requires pain medication, and must sit and elevate his foot at work. This evidence comprises substantial evidence in support of the ALJ's determination Schenk will be unable to continue earning equal or greater wages into the indefinite future and, is entitled to PPD benefits enhanced by the three multiplier. The ALJ's determination will not be disturbed.

Finally, Kingsbrook asserts the ALJ erred by enhancing the award pursuant to KRS 342.165. Kingsbrook asserts as follows:

> The ALJ applied KRS 342.165 as if it imposes strict liability on employers with OSHA citations. In doing so, the ALJ misinterpreted the statute and committed reversible error.

> Here, the testimony of the plaintiff and other witnesses establishes that Kingsbrook was extraordinarily safety-conscious and did not intentionally violate any safety law. Perhaps the most important unusual circumstance in this case is that the specific safety regulation that was referred to by KOSHA, and which the ALJ relied upon for imposition of the penalty, *was not actually violated*! That statute says a ladder should be so designed that the foot cannot slip off *the end* of the rung. The ladder in question met that requirement. Each rung was attached to the ladder's frame at both ends. Schenk's foot did not slip off the end of a rung. KOSHA apparently just used that regulation because it came closest to covering the situation, but the employer can hardly be blamed for failing to interpret that regulation as requiring non-skid tape on the rungs to keep the climber's foot from slipping off backward or forward, as opposed to sideways off the end of a rung. So a finding of requisite intent, based on the applicability of a specific safety rule, simply cannot be made.

Concerning this issue, the ALJ provided the following summary of the evidence in the June 18, 2014, Opinion and Award:

> Keith Carter, Risk Manager for the Defendant/employer, was deposed March 19, 2014. He testified as to the details/location of the yellow-painted metal ladder from which Plaintiff fell on January 31, 2012. Mr. Carter testified that he personally had climbed that ladder in the past. Mr. Carter testified he and his employer had previously/proactively used a

service provided by OSHA. In the spring of 2011, they had asked OSHA to visit the facility and perform a Full Service Safety Survey. (See Exhibit 1 to Carter's Depo.). The OSHA representatives (Chris Vest, Industrial Hygienist; and Mark Houghton, Safety) visited, August 29, 2011 and spent that entire day (8:30 a.m. to 4:30 p.m.) inspecting and evaluating the facility. The inspectors spent another full day inspecting Kingsbrook Lifecare Center on August 30, 2011, until their task was completed. (Carter's Depo., p. 66). Mr. Carter testified that the Defendant/employer's Environmental Manager, Randy Payne, made the rounds with the inspectors 100% of the time during that two day visit; he accompanied the three men about 75% of the time. (Carter's Depo., p. 12). Occasionally the group split-up into pairs, as the hygienist was touring the food-prep and laundry areas and the other man was checking for safety hazards. Keith Carter testified he personally conducted the safety consultant, Mark Houghton, into the physical therapy department. Mr. Carter testified they went into the closet and viewed that fixed-ladder, and Mark asked whether it was the sole-access to the roof. He replied "yes" and that was the extent of the conversation. Mark Houghton did not mention the ladder in his report. (Carter's Depo., pp. 14-15, p. 41, & pp. 52-54). The consultants rendered their Health Consultation Report which identified some miscellaneous safety hazards. (See Exhibit 2 to Carter's Depo., -- Health Consultation Report with five Attachments.) Mr. Carter testified the Defendant/employer corrected some of the problems immediately while the inspector watched; the other issues were corrected as soon as possible

after the visit. He received OSHA's Safety Consultation Report and documents attached, including photocopies of photographs of the hazards identified. (Exhibit 8 to Carter's Depo.). He reported to OSHA when the remediation work was finished. On November 29, 2011 OSHA acknowledged receipt of his abatement notices. (See Exhibit 4 to Carter's Depo.). The facility was deemed by OSHA to be in compliance.

Mr. Carter testified that after Plaintiff fell, he promptly reported the incident to the Defendant/employer's workers' compensation insuror [sic], KESA. (See Exhibit 5 to Carter's Depo., Form IA1.) Keith Carter testified the law also required him to report the incident to OSHA within 72-hours of Plaintiff's admission to the hospital. He failed to meet the 72-hour deadline -- he notified OSHA about 80 hours, post-hospital admission. The reason he was late reporting was because the Inspector General's Office had chosen to begin their annual, four-five day survey of Kingsbrook. That IGO Survey commenced the day after Plaintiff fell. Mr. Carter testified he was so absorbed in facilitating that inspection of the files and premises, he simply got "sidetracked." He reported Plaintiff's injury to OSHA on February 3, 2012; which resulted in imposition of a citation for tardy reporting and a site visit. The inspector arrived on Valentine's Day and conducted the inspection; and subsequently issued two citations (for tardiness in reporting and for the deficit pertaining to the ladder). OSHA's citation pertaining to the ladder, stated:

Citation 1 Item I, Type of violation: Serious. 29 CFR 1910.27(b)(1)(v):

The rungs of an individual-rung ladder shall be so designed that the foot cannot slide off the end:

a. On or about 01-31-12, an employee of Ashland Nursing Home Corporation d/b/a Kingsbrook Lifecare Center, fell from a fixed ladder that did not have any type of slip resistant surface on the rungs, which shattered the employee's left ankle and tibia near the joint.

Mr. Carter testified the Defendant/employer had to order the anti-skid material. The order was delivered to Kingsbrook in about two days and then Defendant/employer's maintenance men applied the adhesive/anti-skid material to each of the 12 rungs of the ladder on February 17, 2012.

OSHA informed the Defendant/employer it had imposed fines: $6,300.00 for the ladder hazard and $3,250.00 for tardiness. (See the exhibit attached to Plaintiff's Notice of Filing Labor Cabinet Documents, specifically, the April 3, 2012 invoice which Anthony Long, Program Manager for Kentucky's OSHA Program, sent to Ashland Nursing Home Corporation d/b/a Kingsbrook Lifecare Center.) OSHA required the safety-violation to be corrected by April 13, 2012.

Mr. Carter testified he made photographs and submitted his report (Notification of Abatement of Apparent Violations) to OSHA. The Defendant/employer went a step further/took an action which OSHA had not suggested. Keith Carter noted on

the "Description of Corrective Action Taken:"

Citation 1: 02-17-12: Applied non-skid adhesives to the rungs on ladder. Also purchased a harness for maint. workers when on roof.

Citation 2: Corrected immediately. I am aware of reporting requirements. I have both posted in my Employee Incident/Accident Log Book as reminder of requirements. Also posted in OSHA Log Book. (See Exhibit 7 to Carter's Depo.).

After negotiations and an appeal, the Defendant/employer ultimately paid a reduced fine of $500.00 for tardiness, plus a reduced fine of $3,600.00 for the specific safety violation of "not having a non-slip-coating applied to the round rungs of the ladder." (See Exhibit 6 to Carter's Depo.).

The ALJ then entered the following findings:

The Plaintiff avers he is entitled to the enhancement of his income benefits by virtue of the Defendant/employer's violation of KRS 342.165(1) for failure to comply with a statute or regulation. The pertinent section of the statute provides as follows:

If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty

percent (30%) in the amount of each payment. KRS 342.165(1).

In the case at bar, there is no evidence contrary to the Plaintiff's testimony that the ladder's surface was slippery and caused first his hand to slip off of the rung and then his foot to slip causing his 13 foot fall, resulting in a severe injury to his left leg. It is also undisputed that the Kentucky Department of Labor – Occupational Safety and Health Program issued a citation against Kingsbrook for violating 29 Code of Federal Regulations (C.F.R.) § 1910.27(b)(1)(v), which requires rungs of an individual-rung ladder shall be so designed that the foot cannot slide off the end. The citation noted Plaintiff fell from a fixed ladder that did not have any type of slip resistant surface on the rungs. The Defendant/employer was also fined for a tardy report of the injury. The parties ultimately agreed to a reduced penalty after corrective actions were taken by the Defendant/employer. Accordingly, I find that: (1) there was a violation of state workplace safety statutes or regulations at the time of Plaintiff's injury; and (2) the violation caused Plaintiff's accident.
The Defendant/employer argues that Plaintiff has failed to prove intent given they had voluntarily requested KY OSH to inspect their facility just five months prior and the ladder was not cited as deficient.

While it may not appear the Defendant/employer "willfully" violated the safety regulation, the state of the law is such that it was undisputed that Kingsbrook was cited and fined for the violation of a safety regulation, and that the violation was a contributing

> cause of the injury, thus intent is inferred. See Chaney vs. Dags Branch Coal Co., 244 SW3d 95, 101 (Ky. 2008).
>
> Here, there is no argument that the safety violation occurred. The only evidence of substance is that the violation of the safety regulation caused the Plaintiff's accident and resulting injuries. Accordingly, "its intent is inferred from the failure to comply with a specific statute or regulation. If the violation 'in any degree' causes a work-related accident, KRS 342.165(1) applies". Id. at 101.
>
> The Court in Chaney notes that this scenario is different from the cases where KRS 338.031 the "general duty" provision applies. The analysis in those cases do not apply to the case at bar. See also the unpublished case of Abel Verdon Construction vs. Rivera, 2009-CA-000771-WC where the Court of Appeals quoted Chaney and reiterated:
>
> "An employer is presumed to know what specific state and federal statutes and regulations concerning workplace safety require; thus, its intent is inferred from the failure to comply. If the violation 'in any degree' causes a work-related accident, KRS 342.165(1) applies." Chaney, 244 S.W.3d at 96-97.
>
> Accordingly, I find that the Defendant/employer violated the provisions of KRS 342.165(1) and the Plaintiff is entitled to an enhancement of his income benefits of 30%.

KRS 342.165(1) provides in pertinent part:

> If an accident is *caused in any degree* by the *intentional failure* of the employer to comply with any specific statute or lawful administrative

> regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment.

(emphasis added.)

The goal of KRS 342.165(1) "is to promote workplace safety by encouraging workers and employers to follow safety rules and regulations." Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996). Application of the safety penalty against an employer requires proof indicating a worker's injury was caused "in any degree" by the employer's intentional violation of a specific safety statute or regulation. KRS 342.165(1). When an injured employee seeks imposition of a safety penalty for an employer's alleged violation of a specific statute or regulation, he or she must satisfy a three-part evidentiary test: 1) prove a violation of a safety statute or regulation; 2) establish the violation was "intentional" as defined by applicable law; and 3) prove the accident was, in any degree, caused by the intentional violation.

If a violation of a specific statute or regulation has occurred, an *intentional* violation of that statute/regulation on behalf of an employer is generally

inferred. In Chaney v. Dags Branch Coal Co., 244 S.W. 3d 95, 101 (Ky. 2008), the Supreme Court of Kentucky explained as follows:

> This case does not concern a violation of KRS 338.031, KOSHA's "general duty" provision…. KRS 342.165(1) does not require an employer's conduct to be egregious or malicious. Absent unusual circumstances such as those found in *Gibbs Automatic Moulding Co. v. Bullock,* 438 S.W.2d 793 (Ky.1969), an employer is presumed to know what specific state and federal statutes and regulations concerning workplace safety require. Thus, its intent is inferred from the failure to comply with a specific statute of regulation. If the violation "in any degree" causes a work-related accident, KRS 342.165(1) applies.

Defeating this presumption would be an unusual fact scenario where the applicable specific statute or regulation was enacted only shortly before the employee's injury. *See* Gibbs Automatic Moulding Co. v. Bullock, 438 S.W.2d 793 (Ky. 1969) (pertinent safety regulation became effective approximately ten days before injury).

In the case *sub judice*, in a detailed analysis the ALJ concluded Kingsbrook violated a specific safety statute, namely 29 CFR 1910.27(b)(1)(v), and was fined. This fact is not in dispute as the record contains the April 3, 2012, Citation and Notification of Penalty to Kingsbrook from the Kentucky Labor Cabinet's Division of

Occupational Safety and Health Compliance. Citation 1 is for a violation of 29 CFR 1910.27(b)(1)(v) which mandates as follows: "The rungs of an individual-rung ladder shall be so designed that the foot cannot slide off the end." The citation reads as follows:

> On or about 01-31-12, an employee of Ashland Nursing Home Corporation DBA Kingsbrook Lifecare Center, fell from a fixed ladder that did not have any type of slip resistant surface on the rungs, which shattered the employees [sic] left ankle and tibia near the joint.

Kingsbrook was fined $6,300.00 for this violation.

Despite Kingsbrook's arguments to the contrary, Kingsbrook was found to have violated 29 CFR 1910.27(b)(1)(v) and fined accordingly. Thus, the first part- i.e. proof that a violation of a safety statute or regulation occurred- of the above-cited three-part test for determining the applicability of KRS 342.165(1) has been satisfied.

The second part of the test is whether there is proof indicating the violation was "intentional." As correctly stated by the ALJ, intent is inferred by virtue of Kingsbrook's violation of a specific statute. Chaney vs. Dags Branch Coal Co., supra. As Kingsbrook has not introduced proof indicating there is an unusual fact

scenario such as in Gibbs Automatic Moulding Co. v. Bullock, supra, the second part of the test has been satisfied.

Finally, and as stated by the ALJ in the June 18, 2014, Opinion and Award, there is no evidence in the record rebutting the evidence establishing the defective ladder caused the accident. The uncontradicted medical and lay evidence establishes the rungs of the ladder in question did not have a slip resistant surface and were slippery, Schenk's hand and foot slipped off of the rungs of the ladder, and as a result Schenk fell thirteen feet seriously injuring his left ankle and leg.

As the findings concerning the applicability of the 30% penalty contained in KRS 342.165 are sufficient and supported by substantial evidence, enhancement of the award of income benefits by 30% shall be affirmed.

Accordingly, the ALJ's award of PPD benefits is **VACATED** and this claim is **REMANDED** to the ALJ to address Kingsbrook's allegation Dr. Primm’s impairment rating is not in conformity with Table 17-2 of the AMA Guides by combining impairment ratings for arthritis and range of motion. As stated herein, should the ALJ determine Dr. Primm's impairment rating is in contravention of Table 17-2 of the AMA Guides, she must determine the applicable

impairment rating in calculating the award of PPD benefits to be enhanced pursuant to KRS 342.730(1)(c)1 and KRS 342.165(1). Concerning all other issues raised on appeal by Kingsbrook, the June 18, 2014, Opinion and Award and the July 29, 2014, Order on Reconsideration are **AFFIRMED**.

ALL CONCUR.

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