OPINION ENTERED: May 24, 2013

CLAIM NO. 201200431

ST. JOSEPH HOSPITAL PETITIONER

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

DEBRA PRINCE
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. St. Joseph Hospital ("St. Joseph") seeks review of the Amended Opinion and Order on Remand rendered February 1, 2013, by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding permanent partial disability ("PPD") benefits and medical benefits to Debra Prince ("Prince") for a low back injury she sustained while

assisting a patient. St. Joseph also appeals from the order entered February 26, 2013 denying its petition for reconsideration.

On appeal, St. Joseph argues the ALJ did not perform the complete analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) as previously directed by this Board, and did not provide sufficient findings necessary to apprise the parties of the basis of his decision. Because the ALJ erred by determining the two multiplier pursuant to KRS 342.730(1)(c)2 is inapplicable, failed to perform an appropriate analysis pursuant to Fawbush v. Gwinn, supra, and failed to provide any factual basis for his conclusion, we vacate and remand.

Prince filed a Form 101 on April 3, 2012, alleging she injured her spine on April 5, 2010 while working for St. Joseph. The pertinent facts relevant to this appeal were previously outlined in the opinion entered by this Board on December 28, 2012, and will not be further reviewed.

In his decision rendered August 31, 2012, the ALJ found Prince sustained a work-related injury to her low back on April 5, 2010. The ALJ awarded PPD benefits based upon a 6% impairment rating assessed by Dr. James Owen. Dr. Owen determined Prince qualified for an 8% impairment

rating pursuant to the to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), of which he apportioned 2% to pre-existing active conditions, and 6% to the injury. The ALJ additionally found as follows:

> Based on this evidence and the restrictions recommended by Dr. Owen, I find that the plaintiff lacks the capacity to continue performing her pre-injury job and is therefore entitled to the triple multiplier. Due to her age at the time of injury, she is entitled to the further 0.2 multiplier.

The ALJ denied St. Joseph's petition for reconsideration in an order entered September 25, 2012. The ALJ found as follows:

> 1. Defendant has filed a Petition for Reconsideration and plaintiff has responded thereto.
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> 2. In Ford Furniture Company v. Claywell, 473 S.W.2d 821 (Ky. 1971), Kentucky's highest court held that KRS 342.281 limits the reviewing court to the correction of errors patently appearing on the face of the award, order or decision. There are no patent errors here and the defendant is attempting to reargue the case.
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> 3. All of the evidence filed by the parties was carefully reviewed and considered by the Administrative Law Judge.

4. In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, whether on reopening or at the time of an original proceeding, 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).

5. Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and its progeny require an Administrative Law Judge to make three essential findings of fact. First, the ALJ must determine whether a claimant can return to the type of work performed at the time of injury. Second, the ALJ must also determine whether the claimant has returned to

> work at an AWW equal to or greater than his pre-injury wage. Third, the ALJ must determine whether the claimant can continue to earn that level of wages for the indefinite future.
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> 6. The evidence from the plaintiff and from Dr. Owen was credible, convincing and persuasive. I, therefore, made the factual determination and again make the factual determination that the plaintiff cannot return to the type of work which she performed at the time of her work injuries and for that reason I awarded to her enhanced permanent partial disability benefits pursuant to KRS 342.730(1)(c)1.
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> WHEREFORE, in light of the above findings of fact and conclusions of law, defendant's Petition for Reconsideration is hereby overruled and denied.

St. Joseph appealed the ALJ's decision, and order denying the petition for reconsideration. In an opinion rendered December 28, 2012, the Board held as follows:

> We next turn to St. Joseph's argument the ALJ failed to properly perform an analysis pursuant to Fawbush, supra, in applying the three multiplier pursuant to KRS 342.730(1)(c)1. Prince did not return to work with St. Joseph after her April 2010 injury. She subsequently worked for the VA for a short period of time because she was unable to perform her job. Her current position is relatively sedentary, involving only walking and dispensing medication, and does not require the physical lifting and restraining required of her

employment with St. Joseph, which Prince testified she no longer retains the ability to perform.

In Fawbush, supra, the Kentucky Supreme Court concluded in those instances in which both KRS 342.730(1)(c)1 and (c)2 apply, an ALJ is authorized to determine which provision is more appropriate based upon the facts of the individual claim. *Id*. at 12. In Fawbush, the claimant, due to the effects of the work injury, no longer retained the physical capacity to perform the type of work he had been performing at the time of the injury. The claimant, however, had returned to work at a lighter job earning an average weekly wage equal to or exceeding his average weekly wage at the time of the injury.

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

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

See also Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004), where the Court held the Fawbush analysis includes a "broad range of

factors," only one of which is the ability of the injured worker to perform his pre-injury job.

Hence, where both the 3 multiplier and the 2 multiplier potentially apply under the given facts of a claim, the principles enunciated in Fawbush, supra, and its progeny, require an ALJ to make three essential findings of fact. First, the ALJ must determine, based on substantial evidence, that a claimant cannot return to the "type of work" performed at the time of the injury in accordance with KRS 342.730(1)(c)1; second, the claimant has returned to work at an average weekly wage equal to or greater than his pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and, third, whether the claimant can continue to earn that level of wages into the indefinite future.

In this instance, the ALJ determined Prince could not return to her pre-injury employment, but failed to perform the necessary second and third steps. Therefore, on remand, the ALJ must perform a complete analysis to determine whether KRS 342.730(1)(c)1 is applicable in this instance. In remanding, we are not requiring any particular result. All finding of fact lay within the discretion of the ALJ. (Emphasis added).

Accordingly, the decision rendered August 31, 2012, and the order denying the petition for reconsideration rendered September 25 2012, by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART, AND REMANDED** to the ALJ for entry of an amended opinion, order and award in conformity with the views expressed herein.

The ALJ rendered an Amended Opinion and Order on Remand on February 1, 2013, and determined as follows:

> **4. What is the extent and duration of the plaintiff's permanent impairment?**
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> The plaintiff argues that she has sustained a 6% whole person impairment (8%, of which 25% pre-existed the injury). The defendant argues that the plaintiff had a 5% whole person impairment prior to her first injury in the defendant's employ.
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> The ALJ finds more persuasive the opinion of Dr. Owen. I, therefore, find that on April 5, 2010 the plaintiff sustained a 6% impairment. The ALJ further finds, pursuant to the opinion of Dr. Owen, that the plaintiff lacks the capacity to continue performing her pre-injury job. She has moved to successively lighter work in the last two years, now working at a job that requires no lifting at all. Based on this evidence and the restrictions recommended by Dr. Owen, I find that the plaintiff lacks the capacity to continue performing her pre-injury job and is, therefore, entitled to the triple multiplier. Due to her age at the time of injury, she is entitled to the further 0.2 multiplier.
>
> This is a situation where both the 3 multiplier and the 2 multiplier potentially apply under the facts of this case within the principles enunciated in *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003). The *Fawbush* case requires a Judge to make three essential findings of fact. First, the Judge must determine, based on substantial evidence, that the plaintiff cannot return to the type of

work performed at the time of the work injury in accordance with KRS 342.730(1)(c)1; and second, the plaintiff has returned to work at an average weekly wage equal to or greater than her pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and third, whether the plaintiff can continue to earn that level of wages into the indefinite future. Based on the medical evidence from Dr. Owen, which I found to be very persuasive, and the testimony of the plaintiff, which I found to be credible and convincing, I made and again make the factual determination that the plaintiff cannot return to the type of work which she performed at the time of her work injuries and that she is entitled to enhanced permanent partial disability benefits under KRS 342.730(1)(c)1. Based on the sworn testimony of the plaintiff and the convincing medical evidence from Dr. Owen, I make the additional factual determination that although Ms. Prince has returned to work at an average weekly wage equal to or greater than her pre-injury average weekly wage, the 2 multiplier does not apply. In addition, it is important to remember that under the holding of the Court of Appeals of Kentucky in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky. App. 2004), the *Fawbush* analysis included a broad range of factors, only one of which is the plaintiff's ability to perform her current job. Under the *Adkins* case, the standard for the decision is whether the injury has permanently altered the workers' ability to earn an income and the application of KRS 342.730(1)(c)1 is appropriate, if the individual returns to work at the same or greater wage, but is unlikely to be able to continue for the indefinite

> future to do work from which to earn such a wage. Based upon the sworn testimony of the plaintiff and the persuasive medical evidence from Dr. Owen, I make the factual determination that the third prong of the *Fawbush* analysis applies here and that under that application the plaintiff is also entitled to the 3 multiplier.

St. Joseph filed a petition for reconsideration requesting additional findings of fact regarding why Prince was entitled to an enhancement of her award of PPD benefits by the three-multiplier pursuant to KRS 342.730(1)(c)1. Specifically, St. Joseph argued as follows:

> The ALJ stated on page 12 of the Opinion that the plaintiff had returned to work at an average weekly wage making the same or greater wages. Under the third prong of Fawbush then, the issue became whether the claimant would be likely to continue to earn the same or greater wages. The Opinion does not contain a factual finding stating one way or the other on that issue; the Opinion proceeds from a recitation of the law, to a conclusion that the three modifier applies, with no intervening analysis.
>
> Also, while the ALJ prefaces the statement that the plaintiff is entitled to the three modifier with the statement, "Based upon the sworn testimony of the plaintiff and the persuasive medical evidence from Dr. Owen," the reference to the evidence does not advise the parties of the specific evidence the ALJ references. The Opinion summarizes the plaintiff's testimony on this issue as "The

> plaintiff hopes she will be able to continue at this job for some time." (Amended Opinion and Order on Remand, 7). This was the plaintiff's only testimony on the issue. Also, while Dr. Owen's Form 107 addressed whether the plaintiff would be able to return to the type of work performed at the time of the injury, the report is silent on the issue of whether he believes she would be able to continue earning the same or greater wages. Indeed, the restrictions noted by Dr. Owen in his report would not prevent the claimant from performing the job as a Registered Nurse in Alaska.
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> The defendant respectfully requests that the Administrative Law Judge make a specific finding of fact in regard to whether, based upon the evidence of record, the plaintiff would likely be able to continue earning the same or greater wages in the future, and also to reference the evidence upon which the finding is based.
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> 4. Finally, the defendant requests clarification of the ALJ's findings in regard to the two modifier, as is it stated on page 12 of the Amended Opinion that the plaintiff returned to work making the same or grater wages but that the two modifier does not apply.

The ALJ denied St. Joseph's petition for reconsideration in the Opinion and Order on Reconsideration issued February 26, 2013. The ALJ specifically found as follows:

> 4. The plaintiff testified that she continues to have muscle spasms in

her low back and sometimes down her left leg, as well as some numbness in two toes of her left foot. She testified that her painful symptoms have gotten worse since she left her employment with the defendant. She stated that she can sit for about one hour and then needs to change position. She stated that she did not have leg pain or numbness with any back injury before the pertinent April, 2010 back injury while working for the defendant. Dr. Owen stated in his medical report that the plaintiff does not retain the physical capacity to return to the type of work which he performed at the time of her 2010 injury and that restrictions should be placed on the plaintiff's work activity as a result of her injury, consisting of restrictions on her lifting, handling and carrying objects to less than 20 pounds and avoidance of activity which requires recurrent bending, squatting or stooping.

5. On remand, the Workers' Compensation Board directed the Administrative Law Judge to perform a complete Fawbush analysis to determine whether KRS 342.730(1)(c)1 applies in this case. In the Amended Opinion and Order on Remand, the Administrative Law Judge followed the directions of the Workers' Compensation Board and performed the complete Fawbush analysis, concluding the 3 multiplier, or enhanced permanent partial disability benefits, applied to the plaintiff. The Administrative Law Judge concluded that the provisions of KRS 342.730(1)(c)1 applied here, basing that conclusion on the persuasive testimony of the plaintiff and the medical evidence from Dr. Owen, which was persuasive. The Administrative Law Judge also relied on the holding of the

> Court of Appeals of Kentucky in Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004). Therefore, the Amended Opinion and Order on Remand is hereby reaffirmed.

Although the ALJ stated he complied with this Board's direction, he in fact did not. Therefore, we are compelled to once again outline the requirements set forth in Fawbush, supra. There the Kentucky Supreme Court concluded in those instances in which both KRS 342.730(1)(c)1 and (c)2 apply, an ALJ is authorized to determine which provision is more appropriate based upon the facts of the individual claim. Id. at 12. In Fawbush, the claimant, due to the effects of the work injury, no longer retained the physical capacity to perform the type of work he had been performing at the time of the injury. However, he had returned to work at a lighter job earning an average weekly wage equal to or exceeding his average weekly wage at the time of the injury.

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

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

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

Hence, where both the 3 multiplier and the 2 multiplier potentially apply under the given facts of a claim, the principles enunciated in Fawbush, supra, and its progeny, require an ALJ to make three essential findings of fact. First, the ALJ must determine, based on substantial evidence, a claimant cannot return to the "type of work" performed at the time of the injury in accordance with KRS 342.730(1)(c)1; second, the claimant has returned to work at an average weekly wage equal to or greater than his pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and, third, whether the claimant can continue to earn that level of wages into the indefinite future.

Here the ALJ's analysis is incorrect. The ALJ determined Prince cannot return to the type of work she performed at the time of her injury. The ALJ next determined Prince had returned to work earning the same or greater average weekly wage than he earned at the time of the injury, albeit for a different employer. The ALJ then determined the two multiplier as set forth in KRS 342.730(1)(c)2 is inapplicable to the case *sub judice* which is simply incorrect as a matter of law. Since potentially both the two and the three multipliers are applicable to this claim, the ALJ must determine which is appropriate, and must provide an adequate basis to support his conclusion.

Step one of the Fawbush analysis requires the ALJ to determine whether the injured worker retains the physical capacity to perform the job she was performing at the time of the injury. As noted above, the ALJ made the determination Prince does not retain the physical capacity to return to the work she performed at the time of her injury. The ALJ next determined Prince is working at a job earning an average weekly wage equal to or exceeding her wage at the time of the injury. The ALJ then determined the application of the three multiplier pursuant to KRS 342.730(1)(c)1 was appropriate without determining whether

Prince can continue to earn that level of wages into the foreseeable future, which is the third prong of the Fawbush analysis.

By virtue of finding Prince returned to work at a greater or equal wage, the two multiplier is potentially applicable as a matter of law. The ALJ's determination the third prong or step of the Fawbush analysis "applies" and therefore Prince is entitled to the three multiplier misses the point. The third prong or step of Fawbush always applies, and must be considered in completing the analysis, which the ALJ failed to do. After determining the two multiplier and three multiplier are both applicable, the third prong or step requires a determination of whether Prince is unlikely or likely "to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future." Fawbush v. Gwinn, supra at 12. The ALJ failed to make such determination. Therefore, the ALJ's basis for enhancing Prince's benefits by the three multiplier was clearly erroneous. Accordingly, on remand, the ALJ must determine whether Prince is likely to be able to continue earning a wage equaling or exceeding her wages at the time of the injury for the indefinite future.

The ALJ's decision on remand, as well as the order on reconsideration, is bereft of any discussion of the basis for his decision, other than making the conclusory statement he relied on Dr. Owen's report. On remand, the ALJ must provide with more specificity the rationale supporting his determination. As noted previously, while the ALJ is not required to perform a detailed fact-finding, he is required to make findings sufficient to inform parties of the basis for his decision which would allow for meaningful review on appeal.

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

basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). We also find instructive the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004), where the claim was remanded to the ALJ "for further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review." Here the ALJ provided only conclusory statements without providing even a *de minimus* explanation for his determinations.

We may not, and do not direct any particular result, because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). On remand, the ALJ the ALJ must determine whether Prince can continue earning wages equal to or exceeding her wage at the time of the injury into the indefinite future, and must provide the bases for his determination rather than merely providing a conclusory statement.

Accordingly, the Amended Opinion and Order on Remand rendered February 1, 2013, and the order denying the petition for reconsideration rendered February 26, 2013, by Hon. William J. Rudloff, Administrative Law Judge, are hereby **VACATED.** This claim is **REMANDED** to the ALJ for

entry of an amended opinion, order and award in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

COUNSEL FOR PETITIONER:

HON RONALD J POHL
HON CRYSTAL L MOORE
271 WEST SHORT ST, STE 100
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT:

HON JOHN W MORGAN
163 WEST SHORT ST, STE 555
LEXINGTON, KY 40507

ADMINISTRATIVE LAW JUDGE:

HON WILLIAM J RUDLOFF
400 EAST MAIN ST, STE 300
BOWLING GREEN, KY 42101