OPINION ENTERED: December 28, 2012

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
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

* * * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. St. Joseph Hospital ("St. Joseph") seeks review of a decision rendered August 31, 2012, 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 September 24, 2012 denying its petition for reconsideration.

On appeal, St. Joseph argues the ALJ erred in relying upon the report of Dr. James Owen, contending it does not constitute substantial evidence. St. Joseph next argues the ALJ failed to perform a proper analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Finally, St. Joseph argues the ALJ did not adequately set forth whether he had reviewed all of the evidence of record in arriving at his decision. We affirm in part, vacate in part 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.

Prince testified by deposition on July 17, 2012. No hearing was held by agreement of the parties. She was born on December 23, 1957. She currently resides in Petersburg, Alaska, where she works in a light duty capacity performing limited nursing duties, consisting primarily of dispensing medication to patients. Prince is a registered nurse ("R.N."), and holds an associate's and bachelor's degrees in nursing. She later obtained a

master's in business administration ("MBA") degree, and attended numerous nursing and medical training courses.

Prince began working as a nurse in 1987. She has worked in various nursing positions in Huntington, West Virginia; Ann Harbor, Michigan; Lexington, Kentucky; Louisville, Kentucky; and currently in Petersburg, Alaska. She began working for St. Joseph in July 2008, where she assisted patients recovering from open heart surgery. She noted the patients were sometimes combative in recovery, especially when coming out of anesthesia. She last worked at St. Joseph on April 9, 2010, and began working for the Veteran's Administration ("VA") on April 12, 2010.

Prince stated she first injured her back in 2002 while working at the University of Michigan Hospital. She missed several months of work after the injury, which eventually resolved. She was able to return to work with no limitations, and subsequently worked for various employers. She sustained a low back injury at St. Joseph on February 14, 2009, while attempting to restrain an intubated patient who was attempting to crawl out of bed. She received treatment, and the strain eventually resolved. She sustained another low back strain in August 2009 while assisting a patient. She again received treatment, and eventually recovered with no residual effects. Despite

resolution of the August 2009 low back strain, Prince testified she was fearful she would be unable to continue to perform her job at St. Joseph on a sustained basis, so she applied for work at the VA.

Despite applying for a job at the VA, Prince continued to work at St. Joseph. On April 5, 2010, she again sustained an injury to her low back while assisting in positioning a patient who was attempting to crawl out of bed. The patient grabbed the side rails of the bed as she was being pulled into position, and pushed against Prince, causing a low back strain. Prince reported the incident, and first sought treatment on April 9, 2010. She did not return to work for St. Joseph after that injury. She began working for the VA on April 12, 2010, but left employment there in September 2010 because she was physically unable to perform the job.

Prince has followed up with her physician in Michigan, but stated she is currently under no active treatment regimen for her back. She works in a limited capacity with her current employer. She stated she is unable to do the job she had with St. Joseph prior to the April 2010 injury due to her physical limitations.

Prince supported her claim with the Form 107-I, medical report completed by Dr. Owen subsequent to the

evaluation performed on October 4, 2011. Dr. Owen noted Prince first complained of back pain in 2002 when she sustained an injury while lifting a patient at the University of Michigan Medical Center. He noted she missed work for eight months, then subsequently did well until February 2009 when she injured her back while lifting a patient. He noted another incident occurred two months after she recovered from that episode, also while assisting a patient. He noted another incident occurred in March 2010[1], again while assisting a patient. She subsequently left her employment with St. Joseph, and worked briefly with the VA.

Dr. Owen diagnosed Prince with significant back pain, and noted an MRI showed a broad-based disk bulge at L4-L5 with a focal broad-based protrusion paracentral to the left with moderate canal stenosis, effacement of the proximal left nerve root with minimal bilateral neural foraminal stenosis and non-verifiable radicular symptomatology. Dr. Owen stated Prince's work-related injury was the cause of her complaints, and he assessed an 8% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent

[1] Although Dr. Owen stated March 2010, section E of the Form 107-I he prepared notes Prince was seen on April 9, 2010 for an injury which occurred on April 5, 2010.

Impairment, 5th Edition ("AMA Guides"). He then apportioned 25% of the impairment rating assessed to a pre-existing active condition.

Finally, Dr. Owen opined Prince does not retain the physical capacity to perform the work she was doing on the date of her injury. He stated she should have restrictions of no lifting, handling or carrying greater than twenty pounds, and she should avoid recurrent bending, squatting or stooping.

St. Joseph submitted records from Medworks located in Lexington, Kentucky, authored by Drs. Stella Staley and Vicki Hawes. The treatment records reflect Prince first sought treatment for the April 5, 2010 work injury on April 9, 2010 when she was diagnosed with a lumbosacral strain, and restricted to sedentary duty. The April 12, 2010 record notes the back strain was improving, and Prince's activities were still restricted. On April 22, 2010, Prince reported her back was chronically tight, and she was released to return to work.

St. Joseph also submitted the report of Dr. John Vaughn who evaluated Prince on July 18, 2012. Prince complained of low back pain, and advised she had sustained work-related injuries while working for St. Joseph on February 14, 2009, in August 2009, and in April 2010. He

noted she began working for a medical center in Petersburg, Alaska in December 2011. Prince also advised she had previously sustained a back injury in 2002 while working in Michigan.

Dr. Vaughn opined Prince predominantly has symptoms of axial/mechanical low back pain, with some radicular pain in her left leg. He diagnosed chronic lumbar strain and lumbar spondylosis, and stated her low back complaints are primarily age-related. He assessed a 5% impairment pursuant to the AMA Guides. Dr. Vaughn further opined Prince needs no active medical treatment, and he would not restrict her activities.

St. Joseph also filed records from the University of Michigan Medical Center for Prince's treatment from September 4, 2002 through February 27, 2003. Those records reflect she sustained a low back strain, from which she made good recovery.

St. Joseph also filed additional records from Medworks, and treatment records from its own facility, from February 21, 2009 through April 27, 2010. Those records document the three injuries Prince sustained while working there. The August 26, 2009 note reflects Prince's low back strain had resolved. The next treatment record was April 9, 2010 reflecting an injury occurring April 5, 2010.

In his decision rendered August 31, 2012, the ALJ found as follows:

> **1. Is the plaintiff's claim barred by the statute of limitation?** The defendant argues that any injury prior to April 3, 2010 is barred by the statute of limitation. The defendant further argues that the alleged date of injury is unclear. The plaintiff seeks recovery for an injury that occurred on April 5, 2010.
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> KRS 342.185 requires that a claim for benefits must be filed within two years of the claimed injury. In the present case the plaintiff filed her claim two days before the expiration of the statute of limitations. She does not ask for benefits relating to the prior injuries she sustained while employed by the defendant. On the question of the specific date, the ALJ relies on Dr. Owen's notation that the plaintiff's medical records indicate treatment on April 10, 2010 for an injury occurring on April 5, 2010. The ALJ therefore finds that the claim is not unclear and is not time-barred.
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> **2. Did the plaintiff sustain an injury as defined by the Act on April 5, 2010?** The plaintiff argues that she sustained a permanent injury to her low back on April 5, 2010. The defendant argues that the plaintiff sustained no new or permanent injury on that date.
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> KRS 342.0011(1) defines injury as any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. In the

present case the ALJ finds most persuasive the opinion of Dr. Owen, as supported by treatment records. I therefore find that the plaintiff did sustain an injury as defined by the Act on April 5, 2010.

Further pursuant to Dr. Owen's opinion, I find that the April 5, 2010 work injury caused 75% of the plaintiff's permanent impairment. As he noted, the plaintiff did sustain prior injuries while working for the defendant. She was, however, able to return to the same job duties after each of those injuries.

3. Did the plaintiff have an active pre-existing impairment prior to the April 5, 2010 work injury? The parties seem to agree that the plaintiff had some degree of active impairment. The plaintiff argues, per the opinion of Dr. Owen, that 25% of her injury resulted from an active pre-existing condition. The defendant argues that the plaintiff's symptoms relate entirely to the active pre-existing condition.

When there is a conflict in the evidence, it is for the ALJ to resolve that conflict. *Millers Lane Concrete Co., Inc., vs. Dennis*, 599 S.W.2d 464 (Ky. App. 1980). The ALJ, as fact finder and the ultimate arbiter of the extent and duration of occupational disability, has the authority to draw reasonable inferences from the record. *Jackson vs. General Refractories Co.*, 581 S.W.2d 10 (Ky. 1979). When, as here, the evidence is conflicting, it is up to the ALJ to resolve the conflict. *Codell Constr. v. Dixon*, 478 S.W.2d 703 (Ky. 1972). In the present case, the ALJ finds that the plaintiff had an active pre-existing impairment

that constituted 25% of her permanent impairment. The condition related back to the 2002 work injury.

4. What is the extent and duration of the plaintiff's permanent impairment? 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.

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.

5. Is the plaintiff entitled to future medical care? KRS 342.020 requires the employer to pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability. I have found that the plaintiff sustained an injury as defined by the Act. She is therefore

> entitled to reasonable and necessary medical treatment for the cure and relief of the effects of the injury.

In its petition for reconsideration, St. Joseph argued the ALJ erred by failing to address and summarize all evidence of record in his opinion, and requested he provide an analysis of the impact of that evidence upon his finding of a permanent injury. Next, St. Joseph argued the ALJ misstated Dr. Owen's report in support of the decision, and requested the ALJ provide an analysis of how that report impacted his decision regarding injury, impairment and causation. St. Joseph next requested further findings regarding the correct injury date. Finally, St. Joseph argued the ALJ failed to perform a proper analysis pursuant to Fawbush, supra.

In his order denying the petition for reconsideration 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.

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.

On appeal, St. Joseph argues the ALJ erred in relying upon Dr. Owen's report, asserting it does not constitute substantial evidence. St. Joseph next argues the ALJ failed to perform a proper analysis pursuant to Fawbush, supra. Finally, St. Joseph argues the ALJ did not adequately set forth whether he had reviewed all of the evidence of record in arriving at his decision.

We find St. Joseph's appeal, in part, to be nothing more than a re-argument of the evidence before the ALJ. St. Joseph impermissibly requests this Board to engage in fact-finding and substitute its judgment as to the weight and credibility of the evidence for that of the ALJ. That is not our function. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Since Prince was successful before the ALJ, the question on appeal is whether the ALJ's 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).

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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 that 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, 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 with regard to permanent partial disability are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

St. Joseph's assertion Dr. Owen's report does not constitute substantial evidence merely because it provides opinions harmful to its position is disingenuous. Dr. Owen's report clearly addresses the injury alleged by Prince, and recites the history of injury occurring in Michigan in 2002. In fact, he carved out a portion of the

impairment rating he assessed due to that previous injury. Likewise, Dr. Owen addressed all of the key factors necessary for the ALJ to render his decision including causation, diagnosis, impairment, and restrictions. Therefore Dr. Owen's report constitutes substantial evidence upon which the ALJ could rely.

We likewise find no merit in St. Joseph's argument the ALJ's decision did not include a complete review of the evidence, primarily the records it had submitted from its own facility and from the University of Michigan Medical Center.[2] He was not required to do so. We find the ALJ's analysis to be sufficiently adequate to apprise the parties of the basis for his decision and to permit meaningful review on appeal. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

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

[2] We note the ALJ listed the records from the University of Michigan Medical Center at the top of page three of his opinion.

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.

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.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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