

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-000851-WC

CHRIS BAKER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-11-96196

BAUMANN PAPER COMPANY, INC.;  
HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE  
LAW JUDGE; and WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Chris Baker appeals from an Opinion of the Workers' Compensation Board which vacated and remanded an Order and Award of Administrative Law Judge ("ALJ") Hon. William J. Rudloff awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and

medical benefits to Baker. Baker argues that the Board improperly substituted its judgment for that of the ALJ and erred in vacating and remanding the ALJ's decision. We find no error, and accordingly affirm the Opinion on appeal.

On February 9, 2011, and during the course of his employment with Baumann Paper Company, Inc. ("Baumann"), Baker slipped and fell in the parking lot at work resulting in a broken bone in and dislocation of his right ankle. Baker was taken to a local hospital, and later transferred to the University of Kentucky Medical Center where he underwent surgery to repair the fracture. He was released the following day.

Baker missed five months of work, and followed up with visits to his surgeon, Dr. Daniel Primm, until May, 2012. During his period of recovery, Baker wore a brace on his right ankle up to his knee, and underwent two months of physical therapy.

Baker returned to work at the same position on June 26, 2011, where he stands for most of the day while using a forklift. He earns the same hourly wage as before the injury, though his hours have been slightly reduced due to the employer's loss of business which has affected all employees.

On August 3, 2012, Baker filed a Form 101. The parties stipulated that the defendant/employer paid Baker's medical expenses in the amount of \$20,400.39, and that Baker was paid TTD benefits from February 20, 2011, to June 29, 2011, at the rate of \$522.72 per week. The matter proceeded before the ALJ, where the contested issues were Baker's entitlement, if any, to benefits under

Kentucky Revised Statutes (KRS) 342.730, and any unpaid or contested medical expenses. After taking proof, the ALJ rendered an Opinion and Order on December 17, 2012, awarding PPD benefits based upon a 16% permanent impairment, as well as TTD and medical benefits. The award was based in part on the medical report of Dr. Robert Johnson, who concluded that Baker did not retain the physical capacity to return to the type of work which he previously performed, and that although Baker had returned to that type of work his condition was likely to deteriorate over time. Dr. Johnson assessed a 16% whole body impairment, and placed restrictions on Baker including no running, climbing or repetitive strenuous activities. Dr. Johnson would later acknowledge that his assessment was not based on the AMA Guides.

Dr. Primm also filed a report, and opined that Baker achieved a very good clinical result, could return to work without restrictions, may develop arthritis in the ankle at some point in the future, and assessed to Baker a 3% impairment to the body as a whole. Baumann's subsequent Motion for Reconsideration was addressed by way of an Opinion and Order on Reconsideration rendered on January 11, 2013.

Baumann then sought review from the Board. On April 12, 2013, the Board rendered an Opinion Vacating and Remanding. As a basis for the Opinion, the Board determined that this ALJ determined that Baker was entitled to an award of PPD benefits based upon the 16% impairment rating assessed by Dr. Johnson, without providing an explanation or analysis for doing so. The Board noted that

Dr. Johnson expressly admitted during a heated exchange with Baumann's counsel that his impairment rating was not made in accordance with the AMA Guides. The Board concluded from this that Dr. Johnson's medical opinion did not constitute substantial evidence in support of the ALJ's decision. The Board further noted with interest Dr. Johnson's repeated assertion that he was not providing expert testimony.

The Board went on to conclude that the ALJ failed to properly perform an analysis pursuant to *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), in applying the three multiplier pursuant to KRS 342.730(1)(c)(1). It noted that where both the three multiplier and the two multiplier apply under the given facts of a claim, *Fawbush* and its progeny require the ALJ to make three essential findings of fact: 1) whether the claimant can return to the type of work performed at the time of the injury, 2) whether the claimant returned to work at an average weekly wage equal to or greater than his pre-injury average, and 3) whether the claimant can continue to earn that level of wages into the indefinite future. The Board concluded that the ALJ only determined that Baker could not continue to earn his level of wages into the indefinite future based on the evidence from both Baker and Dr. Johnson, but did not perform a complete analysis under *Fawbush*.

Finally, the Board addressed Baumann's contention that the ALJ failed to consider all of the evidence in rendering his decision. Specifically, the Board noted that Dr. Primm's deposition testimony was scanned into the Department of Workers' Claims Filenet database on the same day that the ALJ's

decision was rendered - December 17, 2012. The Board made no determination as to whether the ALJ considered Dr. Primm's deposition in rendering his decision, but directed on remand that the ALJ shall review all applicable evidence in arriving at his determinations. Ultimately, the ALJ's Opinion and Award were vacated and remanded, and this appeal followed.

Baker now contends that the Board committed reversible error in vacating the decision of the ALJ. Baker's sole argument on this issue is his contention that the Board improperly substituted its judgment for that of the ALJ. In support of this argument, he notes that the ALJ specifically stated that he made "factual determinations" based upon the "credible and convincing evidence from both the plaintiff [Baker] and Dr. Johnson." He seeks an Order reversing the Board's Opinion and remanding the matter for reinstatement of the ALJ's decision.

In concluding that Dr. Johnson's assessment of Baker's impairment did not constitute substantial evidence in support of the ALJ's decision, the Board noted that Johnson had expressed disagreement with the AMA Guides and was "upset" with the book. The Board went on to find that Johnson's assessment of Baker was not based on the AMA Guides. This conclusion is supported by the record. After an exchange between Baumann's counsel and Dr. Johnson, wherein he repeatedly refused to answer the question of whether he was substituting his judgment for that of the guides, Dr. Johnson called counsel's questions "ridiculous" and then questioned counsel's basis for asking questions because counsel was not a medical doctor. The following exchange then occurred:

Q: I am just trying to understand if you are substituting your own opinion and own judgment against the expressed terminology of the AMA Guides? If you are, that's fine.

A: Yes.

A panel of this Court has previously held that an ALJ may not give credence to a physician's impairment rating if the rating is not based on the AMA Guides. *Jones v. Brasch-Barry General Contractors*, 189 S.W.3d 149 (Ky. App. 2006). Said the panel, "any assessment that disregards the express terms of the AMA Guides cannot constitute substantial evidence to support an award of workers' compensation benefits." *Id.*, 189 S.W.3d at 154. In reversing and remanding the ALJ's Opinion and Award for reconsideration of the record, the Board properly relied on the record and the law to conclude that the ALJ's decision was not supported by substantial evidence.

Our duty on appeal is to correct the Board where it has "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-688 (Ky. 1992). In the matter before us, we find no basis for concluding that the Board has misconstrued the law or committed an error in assessing the evidence so flagrant as to cause gross injustice. To the contrary, the Board properly recognized that Dr. Johnson's personal opinion does not constitute substantial evidence, since by Dr. Johnson's own admission it was not based on the AMA Guides. Accordingly, we find no error.

For the foregoing reasons, we affirm the Opinion of the Workers'

Compensation Board.

ALL CONCUR.

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