OPINION ENTERED: January 25, 2013

CLAIM NO. 201070120

BLUEGRASS OAKWOOD, INC. PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

MARY DENNEY
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Bluegrass Oakwood Inc. ("Bluegrass") seeks review of the August 21, 2012, opinion and award of Hon. John B. Coleman, Administrative Law Judge ("ALJ") awarding Mary Denney ("Denney") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by the two multiplier pursuant to KRS

342.730(1)(c)2, and medical benefits. Bluegrass also seeks review from the September 21, 2012, order denying its petition for reconsideration. On appeal, Bluegrass argues the ALJ erred as a matter of law in finding the two multiplier applicable pursuant to Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009) and Hogston v. Bellsouth Telecommunications, 325 S.W.3d 314 (Ky. 2010).

Denney filed the Form 101 on January 17, 2012, alleging she injured her right shoulder on two occasions while employed with Bluegrass. Denney alleges on December 6, 2010, she injured her right shoulder while assisting a combative resident with a bath. Denney alleges on May 20, 2011, she sustained a second injury to her right shoulder when she removed clothing totes from storage and threw them into a van. She states she has not returned to work since the May 20, 2011, incident.

Denney testified by deposition on March 15, 2012, and at the hearing held June 28, 2012. Denney is a resident of Somerset, Kentucky and was born on February 22, 1965. She completed high school and attended one year of college. Denney's work history includes employment as an ambulance driver, dispatcher, cashier and pharmaceutical aide. Denney testified she began working at Bluegrass in 2005 as a residential aide. In 2010, she was promoted to senior

residential aide ("SRA") and was working in that capacity on both occasions when she sustained injuries to her right shoulder. As the SRA, Denney provided assistance to residents in dressing, bathing, eating, going to the toilet, and also assisted with transfers. She additionally took inventory, monitored trips, and became the acting supervisor in charge of the home in the absence of the regular supervisor. Denney testified she was required to lift "full grown men" either alone or with assistance. Denney earned $14.30 per hour as an SRA, and worked thirty-seven to forty hours a week at the time of her injuries.

On December 6, 2010, Denney experienced pain in her right shoulder when she and another aide were assisting a combative resident with a shower. She reported the incident to her supervisor and went to the clinic at Bluegrass. She was then referred to Urgent Care where x-rays were taken, medication was prescribed, and she was advised not to do anything. Denney returned to work for Bluegrass in March 2011, when she was released without restrictions. She returned to the same position she held prior to the December 6, 2010, incident, and performed the same duties with difficulty due to limitations of strength and motion.

Denney continued to work until May 20, 2011, when she experienced right shoulder pain while removing clothing stored in large totes and transferring them to a van. Denney testified the right shoulder symptoms she experienced were similar to those she experienced after the December 2010 incident. She reported the incident during the following shift and sought treatment at Urgent Care. Denny was referred to Dr. Catron, who referred her to Dr. Pace, who eventually performed surgery in October 2011.

Denney stated surgery improved movement in her arm; however, her right shoulder remains achy and weak. Daily activities and driving long distances aggravate her shoulder. She does not believe she can return to work as an SRA because her right shoulder is not strong enough to push wheelchairs, lift and transfer patients, or control combative patients.

Dr. Pace released Denney to work without restriction in December 2011 or January 2012, and she does not see a physician for her shoulder on a regular basis. Denney testified she did not return to work following the May 20, 2011, incident and was terminated in June 2011. Denney was not given a reason for her termination, but stated approximately one hundred people were let go at that

time. Denney is currently unemployed and receives unemployment benefits.

In support of her claim, Denney filed the medical records of Dr. Charles Catron, Dr. Jesse L. Pace, Lake Cumberland Regional Hospital, and the Imaging Center. In a note dated January 10, 2011, Dr. Catron stated Denney developed an acute onset of right shoulder pain “a little over a month ago” when she had to wrestle a patient who had become combative, and she has shown little improvement. He noted x-rays demonstrated degenerative changes in the A-C joint. He diagnosed right shoulder and neck strain with the majority of her symptoms arising from her shoulder.

On September 6, 2011, Dr. Pace noted conservative treatment for two injuries to Denney’s right shoulder, including physical therapy, two injections, and anti-inflammatories had been ineffective. Dr. Pace diagnosed a right shoulder rotator cuff tear and recommended surgical intervention. On October 6, 2011, Dr. Pace performed arthroscopic surgery consisting of rotator cuff and biceps debridement, subacromial decompression, and distal clavicle coplaning. The operative report from Lake Cumberland Regional Hospital indicates a post-operative diagnosis of 20% undersurface rotator cuff tear, 5% biceps tendon tear,

and impingement syndrome. Denney also submitted physical therapy notes from PT Pros.

A January 28, 2011, MRI of the right shoulder performed by the Imaging Center demonstrated partial full-thickness tear of the supraspinatus tendon, impinged between the humeral head and a laterally downsloping acromion with undersurface spurring, biceps tendon demonstrating split tear without retraction, and degenerative changes of the glenohumeral joint with osteophytosis noted posteriorly. A July 1, 2011, right shoulder MRI demonstrated mild tendinopathy of the infraspinatus tendon, partial undersurface tearing of the supraspinatus and infraspinatus tendon, and mild tendinosis of biceps tendon. A June 17, 2011, x-ray and a July 1, 2011, arthrogram were normal.

Bluegrass submitted return to work documents from Dr. Catron and Dr. Pace. On March 14, 2011, Dr. Catron noted Denney could return to work with no restrictions. On January 31, 2012, Dr. Pace noted Denney "is released to return to full duty without restriction as of 12/6/11." Bluegrass also filed the job description for a SRA.

Denney submitted a Form 107 medical report completed by Dr. Robert K. Johnson on March 7, 2012. Dr. Johnson noted Denney's employment as an SRA and the December 2010 and May 2011 injury incidents. Denney indicated her

condition had improved, but she complained of achiness, soreness, weakness, and stiffness in her right shoulder. Dr. Johnson noted Denney returned to work in March 2011 and did well because her co-workers performed most of her physical demands. He noted Denney was laid off after her second injury and prior to surgery. He stated Denney started to look for employment in late December or early January after Dr. Pace allowed her to return to work without restrictions. Dr. Johnson noted Denney has no restrictions to her physical activities related to the right shoulder.

Dr. Johnson opined Denney "sustained two separate incidents of trauma to the right shoulder while working at Oakwood. They both produced measurable trauma and eventually led to the surgery . . . ." Dr. Johnson found her injury to be the cause of her complaints noting overexertion traumatized her shoulder in both incidents. Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Johnson assigned a 7% impairment rating. He noted Denney has reached medical maximum improvement ("MMI"). He opined Denney does not retain the physical capacity to return to the type of work performed at the time of injury. He noted Denney is "incapable of performing all of the activities involved in her former job" which include

heavy lifting at times and dealing physically with combative residents. He restricted Denney from repetitive strenuous overhead activities of the right shoulder.

Bluegrass submitted the report of Dr. Philip Corbett dated April 24, 2012. Denney reported she was a resident aide and injured her right shoulder in December 2010 and May 2011. Denney reported as soon as she was taken off work from the May 2011 injury, her job was terminated. She continued treatment and was released to work in December 2011. Dr. Corbett noted Denney had significant improvement following surgery, but complains of loss of strength, discomfort, and fatigue of her right arm.

Dr. Corbett diagnosed status post debridement of the right shoulder with chronic impingement made acutely symptomatic. He found the acute elevation of symptoms would "conceivably be related to the 12/6/10 episode" and noted Denney has been satisfactorily surgically treated. Dr. Corbett assigned a 2% impairment rating pursuant to the AMA Guides. He noted Denney's symptoms would continue to improve in twelve to eighteen months after the surgery, and Denney had reached MMI.

In a supplemental report dated May 25, 2012, Dr. Corbett stated Denney attained MMI six months after her surgical procedure. He noted no further treatment is

indicated. He reviewed Denney's job description and found it is "something that she is just as capable of performing now as she was at the time she was hired, but as we all age we must find other ways to perform heavy lifting." He also noted his disagreement with Dr. Johnson's opinions.

The parties agreed to the following stipulations in the June 28, 2012, benefit review conference ("BRC") order: jurisdiction under the Act, the existence of an employment relationship at all relevant times, Denney sustained work-related injuries on December 6, 2010, and May 20, 2011, of which Bluegrass had due and timely notice, TTD benefits were paid at the rate of $376.69 per week from December 7, 2010, through March 14, 2011, and again from May 22, 2011, through January 3, 2012, for a total of $17,381.49, medical expenses paid by Bluegrass in the amount of $33,626.75 and, average weekly wage ("AWW") of $565.01.

In the August 21, 2012, opinion and award, the ALJ awarded TTD benefits from December 7, 2010, through March 14, 2011, and again from May 22, 2011, through December 6, 2011. He found Bluegrass was entitled to a credit for TTD benefits paid and for unemployment benefits received by Denney. He also awarded medical benefits. The ALJ stated as follows regarding impairment and multipliers:

2. The issue of benefits under *KRS*

342.730 involves the determination of the extent of plaintiff's permanent partial disability. This begins with a determination of the appropriate impairment rating under the *AMA Guides*. The issue here primarily relates to a determination of whether Dr. Johnson correctly assessed the plaintiff's impairment at 7% by including 6% impairment for distal clavicle resection. Dr. Johnson explained in his report that he included the impairment for distal clavicle resection as the plaintiff had undergone a process known as co-planing, which in his opinion, was the equivalent of a distal clavicle resection. Dr. Corbett disagreed with this explanation and argued that the impairment should not be included. In *Jones v. Brash-Barry General Contractors*, *189 SW3d 149 (Ky. App. 2006),* the Court of Appeals found that it was error for the Administrative Law Judge to rely on an impairment assessed by a physician who noted in his testimony that the impairment was outside the expressed terms of the AMA Guides. In making their decision the Court stated "therefore, Dr. Reasor's opinion that Jones is 26% disabled is not competent, substantial evidence because such a finding is greatly in excess of the expressed terms of the *AMA Guides* for the Category III injury Dr. Reasor found *Jones* to have." Id. at 154. In *Tokiko (USA), Inc. v. Kelly*, *281 SW3d 771 (Ky. 2009)*, the Supreme Court of Kentucky noted that the *Jones* decision concerned an Administrative Law Judge's authority to rely on a physician who conceded that a worker's back condition fell within a particular impairment category, but disagreed with the percentages called for in the *Guides,* see page 775. Unlike the decisions above, in this case, Dr.

Johnson clearly explained his reason for assessing the impairment and noted to be within the dictates of the procedure for which he assessed impairment was the equivalent of the procedure for which impairment is given under the G*uides*. While Dr. Corbett noted that a resection involves resetting between 6 mm and 12 mm of the distal clavicle, he does not indicate how much of the clavicle is removed in the shaving process involved in co-planing. Based upon this evidence, the Administrative Law Judge is convinced from a review of the evidence that Dr. Johnson correctly indicated the plaintiff would have an impairment under the *AMA Guides to the Evaluation of Permanent Impairment*, *Fifth edition* of 7% attributable to the this injury. Under *KRS 342.730 (1)(b),* a 7% impairment carries a multiplication factor of .85 for a 5.95% permanent partial disability. However, the analysis does not end there as the Administrative Law Judge must also determine whether the provisions of KRS *342.730 (1)(c) 1 or 2* apply. Subparagraph 1 applies when the plaintiff lacks the physical capacity to return to the type of work being performed at the time of the injury and has not returned to earning same or greater wages. If the plaintiff is earning same or greater wages a determination must be made as to whether the plaintiff will be able to continue doing so for the indefinite future. If employment is found to be not likely, then the 3 multiplier would apply. See *Fawbush v. Gwynn, 103 S.W. 3d 5 (Ky., 2003)*, *Kentucky River Enterprises Inc. v. Elkins, 107 S.W. 3d 206 (Ky., 2003*) and *Adkins v. Pike County Board of Education*, *141 S.W.3d 387 (Ky.App. 2004).* Subparagraph 2 applies only in the limited instance

> where the plaintiff returns to work earning same or greater wages but then ceases to do so by reason of a work injury. *Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009*) and *Hogston v. Bellsouth Telecommunications, 325 S.W. 3d 314 (Ky 2010).* It does not apply so long as the plaintiff is earning same or greater wages regardless of whether the wages are earned at the same job or even with the same employer. *Toy v. Coca Cola Enterprises, 283 S.W.3d 433 (Ky. 2008)*. In this instance, the plaintiff was finally released to return to full duty work by her treating physician and Dr. Corbett agrees the plaintiff does not need any restrictions on her work activities. In fact, Dr. Johnson only restricted the plaintiff from strenuous overhead activities using the right shoulder. Therefore, subparagraph 1 does not apply. However, I am convinced from the evidence that the multiplier of two does apply in this instance as the plaintiff was taken off work on May 22, 2011 by reason of her work injury. In fact, she was off work by reason of her work injury when she was terminated from her employment. The fact that the termination was unrelated to her injury is irrelevant in this instance as she was[sic] already ceased work by reason of the injury. Therefore, the plaintiff is entitled to have for benefits increased by a factor of two pursuant to the provisions of KRS 342.730 (1) (c) 2.

Relying upon Dr. Johnson’s opinions, Denney filed a petition for reconsideration requesting the ALJ reconsider his finding she is not entitled to the three multiplier.

Bluegrass also filed a petition for reconsideration requesting the ALJ to rule on whether it was entitled to a credit for the overpayment of TTD benefits from December 7, 2011, through January 3, 2012. Bluegrass also argued it was a patent error "to assign the entirety of Dr. Johnson impairment rating all the way back to the original date of injury on 12/6/10" and requested the ALJ find "6% WPI out of Plaintiff's 7% WPI rating is attributable to the second injury on 5/20/11 . . . as the surgery that resulted in the 6% rating was performed as a result of the second injury." In essence, Bluegrass maintained a 1% impairment should be assessed for the December 6, 2010, injury and a 6% impairment should be assessed for the May 20, 2011, injury. Finally Bluegrass argued it was a patent error to award the two multiplier, stating as follows:

> The case at bar is distinguishable from Chrysalis House and Hogston, based upon the fact that the reason for the cessation of Ms. Denney's employment with the Defendant was solely due to a ***completely new injury on May 20, 2011,*** and not due to any prior injury, work related or not. She was taken off work due to a new injury on 5/20/11 and ***never returned to work.*** Therefore, at least with regard to the 5/20/11 injury, the analysis under Chrysalis House and its progeny does not come into play because of Plaintiff's failure to return to work after her second injury.

By Order dated September 21, 2012, the ALJ denied both petitions for reconsideration noting them to be re-arguments of the evidence.

On appeal, Bluegrass argues the ALJ erred as a matter of law in finding Denney entitled to the two multiplier. Bluegrass asserts this claim is distinguishable from Chrysalis House, Inc. v. Tackett, supra, and Hogston v. Bellsouth Telecommunications, supra. Bluegrass argues, unlike the claimant in Hogston, Denney had no permanent restrictions when she returned to work from the December 6, 2010, injury and after the May 20, 2011, injury. Bluegrass also argues:

> Second, the specific finding in *Hogston* is that the 2x multiplier only applies when employment ceases for ***reasons relating to the compensable injury or previous work related injuries.*** *Id.* Respondent's initial work injury was on December 6, 2010, and the ALJ applied all of her impairment back to that event. She was then released ***without restrictions*** by her treating physician on March 13, 2011. (Opinion, p. 5). She returned to the same job, without restrictions, earning the same or greater wages, until May 20, 2011 when she suffered a ***new*** injury to her shoulder, and was taken off work and was placed on TTD for several months. (*Id.* at 1). The reason Respondent stopped working was due to the initial (but temporary) effects of a subsequent, separate injury; she did not stop working on May 22, 2011 due to the

> December 6, 2010 injury (again, she was working without restrictions), or any other prior injury. Respondent's work cessation on May 22, 2011 was ***solely due to the occurrence of the intervening injury*** on May 20, 2011 (from which Respondent was later released without restrictions). ***But for*** the new injury on May 20, 2011, there is no evidence to indicate that Respondent would not have continued working fully duty indefinitely, and the ALJ did not so find. To the contrary, he found that the 3x multiplier did not apply at all. This is not the situation contemplated by the Court in *Hogston*, which permits the 2x multiplier for the disabling effects of prior injuries or the current injury. On its face, that case does not apply to subsequent injuries.

Bluegrass also asserts even if some of Denney's impairment was attributable to the second injury, she did not have permanent restrictions which prevented her from returning to her job. Rather, she was temporarily disabled due to a subsequent, separate injury, unlike the claimant in Hogston. Finally, Bluegrass argues even if the May 20, 2011, incident was considered to be the compensable injury, Denney was taken off work, never returned, and therefore did not trigger the application of KRS 342.730(1)(c)2.

It is well established a claimant in a workers' compensation proceeding bears the burden of proving each of the essential elements of her cause of action, including the application of statutory multipliers. Durham v. Peabody Coal

Co., 272 S.W.3d 192 (Ky. 2008); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Denney was successful before the ALJ, the question on appeal is whether substantial evidence supports the ALJ's decision, including application of the two multiplier pursuant to KRS 342.730(1)(c)2. 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).

The extent of an ALJ's discretion and authority in deciding disputed issues in workers' compensation proceedings is both wide ranging and well established. In rendering a decision, KRS 342.275 and KRS 342.285 grant 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). The 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. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence that would have supported 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, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

KRS 342.730(c)2 reads as follows:

> 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. This provision shall not be construed so as to extend the duration of payments.

When applying the two multiplier pursuant to KRS 342.730(1)(c)2, the Supreme Court held in Chrysalis House,

Inc., supra, the reason for cessation of employment must be related to the disabling injury in order for the double income benefit to apply. There, the Supreme Court stated:

> KRS 342.730(1)(c)2 appears at first blush to provide clearly and unambiguously for a double benefit during a period of cessation of employment at the same or a greater wage 'for any reason, with or without cause.' It is however, a subsection of KRS 342.730(1), which authorizes income benefits to be awarded for 'disability' that results from a work-related injury. We conclude for that reason that, when read in context, KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases 'for any reason, with or without cause,' **provided that the reason relates to the disabling injury.** (emphasis added)
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> Id.

Subsequently, the Supreme Court in Hogston v. Bell South Telecommunications, supra, rejected the claimant's argument Chrysalis House, Inc., supra, should be limited to those instances where an employee would otherwise profit from an illegal act and affirmed KRS 342.730(1)(c)2 permits a double income benefit during any period of employment at the same or a greater wage ceases for any reason, with or without cause, provided that the reason relates to the disabling injury. Id. at 317. The Court further held KRS 343.730(1)(c)2 includes a cessation of employment due to

the disabling effects of previous work-related injuries as well as the injury being compensated. Id.

The wage records introduced by Bluegrass and the medical evidence directly point to the December 6, 2010, injury being the only injury justifying the award of future income and medical benefits. Dr. Corbett's April 24, 2012, independent medical evaluation ("IME") report reflects the following diagnosis:

> Status post debridement of right shoulder with chronic impingement made acutely symptomatic. The acute elevation of the symptoms would conceivably be related to the episode of 12/6/10. Patient has been satisfactorily surgically treated.

Accordingly, he assessed a 2% impairment for the injury of December 6, 2010. The top of each page of Dr. Corbett's IME report has "Date of Injury: 12/6/210."

The report of Dr. Johnson is somewhat confusing as it references a first and second injury, and in the diagnosis section of his Form 107 he states Denney sustained two separate instances of trauma to the right shoulder while working at Bluegrass which produced measurable trauma and eventually led to surgery. However, Dr. Johnson marked "NA" or not applicable in response to the following question: "If the employee sustained more than one injury, which is the cause of her complaints?".

He then answered questions relative to a work-related injury and did not indicate Denney sustained multiple shoulder injuries. In addition, Bluegrass' January 3, 2010, AWW-I provides Denney's wages prior to the December 6, 2010, injury. Bluegrass did not provide any of Denney's wage records between the period of December 6, 2010, and May 20, 2011. Thus, it is apparent that in spite of their stipulations the parties believed the December 6, 2010, injury was the injury justifying the award of PPD benefits.

Significantly, in its petition for reconsideration, Bluegrass requested a finding Denney sustained two separate injuries on December 6, 2010, and May 20, 2011. Bluegrass maintained a 1% impairment should be assessed for the December 6, 2010, injury and a 6% impairment should be assessed for the May 20, 2011, injury. Bluegrass also asserted the same argument regarding the inapplicability of the two multiplier it makes on appeal. Denney contended that the three multiplier was applicable in this case. The ALJ overruled both petitions for reconsideration.

Also significant is the fact that Bluegrass' appeal does not assert the ALJ erred in determining only one injury merited an award of future income and medical

benefits. Thus, the sole issue is the nature and significance of the second injury or event of May 20 2011.

For purposes of this appeal, the significance of the ALJ's September 21, 2012, order overruling the petitions for reconsideration is that the ALJ specifically rejected Bluegrass' position there were two separate injuries, and the May 20, 2011, injury was "a completely new injury." Bluegrass insisted Denney suffered a December 6, 2010, right shoulder injury, was released without restrictions on March 14, 2011, and suffered a new injury. Therefore, Chrysalis House, Inc., supra, and Hogston, supra, were not applicable because the cessation of Denney's employment at a weekly wage equal to or greater than her AWW at the time of the injury was due to a completely new injury and not due to any prior work injury. Significantly, in its petition for reconsideration, Bluegrass did not request additional findings of fact regarding the ALJ's determination of only one compensable injury. Likewise, Bluegrass did not request the ALJ to further explain why he enhanced the PPD benefits after the occurrence of the May 20, 2011, incident.

In overruling Bluegrass' petition for reconsideration, the ALJ stated the petitions for reconsideration were re-arguments of the evidence and

rejected Bluegrass' assertion the May 20, 2011, incident was a new injury which caused the cessation of Denney's employment. Based on the ALJ's September 21, 2012, order, we believe the only logical conclusion to be drawn is the ALJ determined the event occurring on May 20, 2011, was merely an aggravation or exacerbation of the December 6, 2010, work injury. Thus, enhancement by the two multiplier was justified since the reason for the cessation of Denney's employment at the same or greater wages related to the disabling work injury of December 6, 2010.

In overruling Bluegrass' petition for reconsideration, the ALJ rejected Bluegrass' contention Denney's cessation of employment at the same or greater wages was due to the effects of a new injury on May 20, 2011, and not due to the December 6, 2010, injury. Although the ALJ could have provided further explanation in the September 2, 2012, order, based on Bluegrass' argument in its petition for reconsideration, the ALJ concluded Denney did not sustain a separate injury on May 20, 2011, but merely an aggravation or exacerbation of the December 6, 2010. We note Bluegrass voluntarily paid TTD benefits after the May 20, 2011, injury. Apparently, the ALJ did not believe the fact Denney subsequently underwent surgery and was released without restrictions had any bearing on

her entitlement to the two multiplier. Further, as stated in the opinion, the ALJ concluded the fact Denney was off work when her employment was terminated had no bearing on her entitlement to enhanced benefits by the two multiplier, as she had ceased work "on May 22, 2011, by reason of her work injury." As the December 6, 2010, injury was the only work injury justifying the award of future income and medical benefits, the reason for Denney's cessation of employment must relate to the disabling injury of October 6, 2010.[1]

We feel compelled to address the significance the dissent places upon Denney alleging two injuries and the parties' stipulation Denney sustained two injuries. Because two injuries were alleged and the parties stipulated Denney sustained two injuries does not require the ALJ to award TTD or PPD benefits for one or both injuries. Based on the evidence, the ALJ concluded Denney sustained one compensable injury and awarded PPD and TTD benefits for that injury which is within his discretion. Significantly, neither party has appealed the ALJ's determination of only one compensable injury.

[1] Page thirteen of the ALJ's opinion and award.

Accordingly, that portion of the August 21, 2012, opinion and award and the September 21, 2012, order ruling on the petition for reconsideration as it relates to the ALJ's award of PPD benefits enhanced by the two multiplier commencing on May 22, 2011, is **AFFIRMED**. However, that portion of the August 21, 2012, opinion and award and the September 21, 2012, order ruling on the petition for reconsideration as they relate to the award of PPD benefits from December 7, 2010, are **VACATED**. This claim is **REMANDED** to the ALJ for correction of the award to reflect the PPD benefits in accordance with Sweasy v. Wal-Mart Stores, Inc., 295 S.W. 3d 835 (Ky. 2009) should begin on the date of injury which is December 6, 2010, rather than the day after the injury on December 7, 2010. December 7, 2010, is the commencement date of the initial period of TTD benefits.

SMITH, MEMBER, CONCURS.

ALVEY, CHAIRMAN, DISSENTS AND FILES A SEPARATE OPINION.

CHAIRMAN, ALVEY. I respectfully dissent from the majority decision. In the Form 101, Denney alleged two distinct injuries to her right shoulder. The first occurred on December 6, 2010 when she was assisting a co-worker with bathing a combative patient. She was released to return to

work with no restrictions, and resumed her usual employment on March 15, 2011. The second occurred on May 20, 2011, while transferring large totes of clothing into a van. She underwent right shoulder surgery in October 2011, and was eventually released to return to work with no restrictions. While she was off work for the second injury, she and approximately one hundred other employees were terminated.

At the June 28, 2012 benefit review conference ("BRC"), the parties stipulated *inter alia* Denney sustained work-related injuries on December 6, 2010 and May 20, 2011 of which Bluegrass had due and timely notice. Denney testified she was released to return to work without restriction in March 2011 following the December 6, 2010 incident and indeed returned to her position as a SRA.

KRS 342.730(1)(c)1 and 2 state as follows:

> (c) 1. 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, but this provision shall not be construed so as to extend the duration of payments; or
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> 2. 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. This provision shall not be construed so as to extend the duration of payments.

When applying the two multiplier pursuant to KRS 342.730(1)(c)2, the Supreme Court held in Chrysalis House, 283 S.W.3d at 674, the reason for cessation of employment must be related to the disabling injury in order for the double income benefit to apply. There, the Supreme Court stated:

> KRS 342.730(1)(c)2 appears at first blush to provide clearly and unambiguously for a double benefit during a period of cessation of employment at the same or a greater wage 'for any reason, with or without cause.' It is however, a subsection of KRS 342.730(1), which authorizes income benefits to be awarded for 'disability' that results from a work-related injury. We conclude for that reason that, when read in context, KRS 342.730(1)(c)2 permits a double income benefit during any period that employment at the same or a greater wage ceases 'for any reason, with or without cause,' **provided that the reason relates to the disabling injury.** (Emphasis added)

Id.

Subsequently, the Supreme Court in Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010) rejected the claimant's argument Chrysalis House should be limited to those instances where an employee would otherwise profit from an illegal act and affirmed KRS 342.730(1)(c)2 permits a double income benefit during any period of employment at the same or a greater wage ceases for any reason, with or without cause, provided that the reason relates to the disabling injury. Id. at 317. The Court further held KRS 343.730(1)(c)2 includes a cessation of employment due to the disabling effects of previous work-related injuries as well as the injury being compensated. Id.

Because Denney sustained two distinct injuries, as acknowledged in both the Form 101 and the stipulations entered into at the BRC, I do not believe the two multiplier is applicable. Denney returned to the same job, at the same or higher rate of pay. She subsequently left employment because of a new injury, not the injury she sustained in December 2010. Therefore, I do not believe she left work for a reason related to her disabling injury, and an enhancement of her award was not warranted. She was later released to return to work after the second injury with no restrictions, but was prevented from doing so for reasons

not proven to be related to her work injury. Therefore I do not believe any enhancing multiplier would be applicable for the second injury.

In the opinion, while acknowledging the stipulation of two injuries, the ALJ referred to "the injury" as a singular event rather than two. The ALJ failed to provide an analysis regarding the applicability of the statutory multipliers for each injury date to the right shoulder. I would therefore vacate and remand the ALJ's decision pertaining to the application of the statutory multipliers pursuant to KRS.730(1)(c)1 and 2. On remand, I believe the ALJ should provide an analysis regarding whether Denney sustained two separate work injuries, or an injury with subsequent exacerbation. The ALJ should then determine the applicability of the multipliers for both the December 6, 2010 injury and the March 20, 2011 injury.

Accordingly, I would vacate those portions of the August 21, 2012 opinion and award and the September 21, 2012 order on reconsideration relating to the application of the statutory multipliers and remand this matter to the ALJ for entry of an opinion consistent with the analysis required in the application of the multipliers for both injuries.

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