OPINION ENTERED: November 2, 2012

CLAIM NO. 200982591

BLUEGRASS OAKWOOD, INC. PETITIONER

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

KATHY A. DAVIDSON
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. Bluegrass Oakwood, Inc. ("Bluegrass") seeks review of the Opinion and Order rendered July 2, 2012 by Hon. William J. Rudloff, Administrative Law Judge

("ALJ")[1] awarding Kathy Davidson ("Davidson") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits based upon a 14% impairment rating and increased by the three multiplier pursuant to KRS 342.730(1)(c)1 for a work-related right knee injury. Bluegrass also appeals from the Opinion and Order on Reconsideration rendered July 19, 2012.

On appeal, Bluegrass argues the ALJ erred as a matter of law by awarding the three multiplier. Bluegrass argues at the Benefit Review Conference ("BRC"), the parties stipulated Davidson retains the physical capacity to return to her former employment and the stipulation was never withdrawn or rescinded pursuant to 803 KAR 25.010 §16(2). Therefore, whether Davidson retains the physical capacity to return to her former employment is not a contested issue and not subject to further proceedings under 803 KAR 25.010 §13(14). Similarly, Bluegrass argues the ALJ erred in performing a Fawbush analysis since one is only necessary when an employee's ability to return to her pre-injury work is at issue. In the alternative, Bluegrass argues the ALJ

[1] This claim was originally assigned to Hon. Richard Joiner, Administrative Law Judge. The claim was later reassigned to Hon. William J. Rudloff, Administrative Law Judge, by Order dated May 21, 2012.

failed to rely upon substantial evidence in applying the three multiplier.

Davidson testified by deposition on February 27, 2012 and at the hearing held June 25, 2012. Davidson is a resident of Nancy, Kentucky, and was born October 12, 1967. Davidson completed high school and one and a half years of college. Her work history includes working as an attendant at a laundromat, as a certified nursing assistant in a nursing home, and in medical records and billing at a healthcare facility.

Davidson testified she began working for Bluegrass in 1998 as a residential aide ("RA"), and continued in this capacity until she injured her right knee on July 1, 2009. She continues to work full duty as an RA, with no restrictions. As an RA, Davidson checks on residents, provides direct patient care and assists patients with everyday needs, such as bathing, transporting and going to the bathroom. Her job consists of heavy manual labor and she is required to lift residents of all sizes, which may be done with or without assistance of another person.

On July 1, 2009, Davidson testified she was on her way to the hospital to sit with a client. As she was stepping from the pavement to the grass, her foot got caught in a hole causing her to fall and land on her right knee.

Davidson testified she left work and went to the emergency room at Lake Cumberland Regional Medical Center, where she received an injection for pain. She also received treatment from an urgent medical care facility and then she treated with Dr. Yasser Nadim.

Dr. Nadim performed a medial meniscal repair on her right knee in October 2009 and she subsequently attended physical therapy. Davidson testified the surgery did not resolve her knee symptoms, but she returned to full duty work on November 23, 2009. Upon returning to work, she continued to experience occasional knee pain and took prescription medication.

Davidson testified she returned to Dr. Nadim in February 2010. His request for a right knee MRI was denied by the workers' compensation insurer. Thereafter, Davidson continued her regular duty work despite continuing knee symptoms. Davidson testified from February 2010 to September 2011, she did not receive any treatment for her knee despite continued pain, swelling and locking. Davidson next saw Dr. Nadim in September 2011. He requested another MRI and subsequently performed a second right knee procedure in October 2011. Dr. Nadim recommended Davidson attend physical therapy, which was also denied by the workers' compensation insurer. After missing a couple of weeks of

work due to the second procedure, Dr. Nadim released Davidson to return to work with no restrictions in November 2011. She has not treated with Dr. Nadim, or anyone else, since she was released in November 2011.

When asked if she is having trouble performing her current job duties at Bluegrass due to her work-related injury, Davidson replied "No." Davidson testified she is performing her job the same as she was prior to the work-related injury. She is earning the same or greater wages, and working the same hours, as she was at the time of her work-related injury. Davidson testified she currently experiences swelling, pain and giving way in her right knee. Davidson takes over-the-counter pain medication. She denies any prior right knee problems or treatment.

Regarding her ability to continue working at Bluegrass as an RA, Davidson testified as follows:

> Q: Do you believe that you will be able to continue to maintain your employment with Bluegrass Oakwood if this medical procedure is not given to you so you can finally get a physical resolution of your injury?
>
> A: If it's not done - - -
>
> Mr. Morgan: (Interrupting) Yes.
>
> A: - - is what you're saying? Yes.
>
> Q: Will you be able to do your job effectively and continuously?

A: I hope so.

Q: Okay. That indicates to me, you're - - you may be struggling, is that true?

A: Uh-huh (affirmative). Yes.

On cross-examination, Davidson testified as follows:

Q: And like you said, I understand that you're experiencing pain while working. Is that actually affecting your ability to work? Is that something that you have complained to your supervisors about or anything like that?

A: No, I usually don't complain to them. Like I said, I work - - you know, do what I can. When it starts to hurt, I usually just take a break and then go on back to work.

Q: And that's fine with your employer - -

A: (interrupting) Uh-huh (affirmative). Yes.

Q: - - that you're able to take a break and rest before going back to work?

A: Yes.

Q: Are you making the same wage wise and working the same hour wise as you were previous to your injury?

A: Yes.

Q: So your continued pain and swelling isn't affecting how many hours you're working or anything like that?

A: You know - - you know - - well, like - - you know, if I have to work, like, double shifts and we end up working

> double shifts and stuff, I can do that. It’s a little bit more painful - -
>
> Ms. MacGregor: (interrupting) Okay.
>
> A: - - where I’m having to stand a lot more.
>
> Q: But you’re able to take breaks - -
>
> A: (interrupting) Yeah.
>
> Q: - - during your workday to make it a little bit easier for you?
>
> A: Yes.

Davidson filed the Form 101, Application for Resolution of Injury Claim on December 19, 2011 alleging she injured her right knee on July 28, 2009. Davidson indicated she was an RA at the time of her injury and is currently working in that same capacity. She noted her current weekly wage is the same as the wage she earned at the time of the injury.

Davidson attached the medical records of Dr. Nadim, her treating physician, to the Form 101. Davidson began treating with Dr. Nadim on September 2, 2009 for right knee pain resulting from a fall outside work. Davidson reported knee pain, swelling and weakness, as well as her knee locking and giving way. A right knee MRI was performed on September 18, 2009, revealing a tear in the posterior horn of the medial meniscus. On October 2, 2009, Dr. Nadim

performed an arthroscopic debridement and partial resection with repair of the posterior horn of the medial meniscus. Medical records indicate Davidson improved following surgery and physical therapy and she was released to work with no restrictions on November 23, 2009.

Davidson returned to Dr. Nadim on February 24, 2010, four months post surgery, complaining of knee pain and an episode of knee locking a month prior. An MRI performed September 23, 2011 indicated a small focal area of increased signal in the posterior part of the medial meniscus. Dr. Nadim subsequently performed a right knee arthroscopic debridement on October 14, 2011 and postoperatively diagnosed "fibrous adhesions with mild degenerative changes." He noted the menisci were found to be intact.

Bluegrass filed a medical dispute and motion to join medical providers on February 14, 2012 disputing the compensability of the second October 14, 2011 knee surgery and subsequent physical therapy. In support of the medical dispute, Bluegrass attached the October 11, 2011 utilization review by Dr. Bart Goldman who had recommended a right knee arthroscopy with possible partial medial meniscectomy be approved. He then noted any other procedure performed should be denied for lack of relatedness to the injury in question. Bluegrass also attached the October 28, 2011

Medical Consultation Review by Dr. Goldman who concluded the October 14, 2011 surgery and subsequent physical therapy are unrelated to the medial meniscal tear on July 1, 2009. Therefore, he recommended the second procedure be denied.

Bluegrass submitted the job description of an RA which listed the physical demands of repeated bending, reaching above shoulder, grasping, walking, standing, sitting, twisting, kneeling, pushing, stooping, and climbing stairs. Among other things, an RA assists residents with completing personal care tasks, provides meal time support, accompanies residents to work, assists them with attending community functions, and uses various equipment and devices.

Bluegrass submitted a medical report by Dr. Nadim, dated March 1, 2012. Pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Nadim assessed a 1% impairment rating and indicated "no" when asked if there were any need for permanent restrictions. He also indicated "probably" when asked if some or all of the impairment was attributable to Davidson's work-related injury on July 1, 2009.

Bluegrass also submitted the April 11, 2012 medical report of by Dr. Philip Corbett. Davidson reported she is working full-time without restriction, but cannot

kneel or crawl on her right knee. She also reported right knee swelling after prolonged standing and pain, as well as give-away weakness when descending stairs. Dr. Corbett diagnosed status post partial medial meniscectomy right knee, and contusion patellofemoral joint right knee, with residual restriction of range of motion presumably due to scar tissue formation. Pursuant to the AMA Guides, Dr. Corbett stated the Diagnosis Based Estimate would yield a 1% impairment rating. He also assessed an 8% impairment rating based on a flexion contracture. Dr. Corbett opined the 8% impairment rating cannot be combined with her Diagnosis Based Estimate. Dr. Corbett noted the torn medial meniscus was acutely aroused on July 1, 2009. He opined Davidson obtained medical maximum improvement ("MMI") two months after her second operative procedure. Dr. Corbett noted it is impossible to say whether, based on the available documentation, the second operative procedure was necessary. He opined permanent restrictions are not required. Dr. Corbett stated Davidson "is and has been capable of returning to her original employment" and further medical treatment is unnecessary. In a largely illegible hand-written letter dated May 15, 2012, Dr. Corbett assessed a 3% impairment rating pursuant to the AMA Guides.

Davidson submitted the medical report of Dr. Robert Johnson, who evaluated her on February 22, 2012. Dr. Johnson noted complaints of right knee swelling and giving way. Davidson reported her right knee gives out every two to three weeks, but no more than twice a week. She can no longer get down on her right knee and has trouble accomplishing household chores. Dr. Johnson noted Davidson "is currently performing her usual duties without work interruption." Dr. Johnson recommended her medical management be continued, including further knee rehabilitation. Assuming there is no further management by workers' compensation, Dr. Johnson noted Davidson has obtained MMI. He also opined Davidson's injuries are the cause of her complaints. Dr. Johnson assessed a 14% impairment rating for Davidson's right knee pursuant to the AMA Guides. When asked whether Davidson retains the physical capacity to return to the type of work performed at the time of injury, Dr. Johnson marked the "yes" box, but went on to state:

> Ms. Davidson is performing her usual duties at this time. However, this is somewhat risky in my opinion because of the giving out and because of the functional defect of not being able to "lock the knee."
>
> In my opinion, it is reasonable to assume that the flexion contracture of

> the right knee could be improved at least to the point where the joint can be locked even if there is a slight flexion contracture. This would eliminate the risk of unexpected giving out of the right knee. If it should give out under certain circumstances during her work, it could be hazardous to herself and to her clients.

Dr. Johnson permanently restricted Davidson from climbing, unprotected heights, hazardous surfaces, squatting, twisting or other repetitive strenuous activities upon the right knee.

Both parties and the ALJ signed the BRC Order and Memorandum on May 16, 2012. Under the heading "Stipulations," the following pertinent stipulations were made:

> 8. Does plaintiff retain the physical capacity to return to former work. **AGREED YES, RETAINS CAPACITY**
>
> 9. Plaintiff returned to work on: **11/8/11.** Wages currently earned: **Same or greater wage**

On the same page under the heading "Contested Issues," the following issues were indicated by an "X" mark to the side: Benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, exclusion for pre-existing disability/impairment and TTD.

Both parties submitted "position statements" to the ALJ. Among other arguments, Bluegrass noted the above

stipulations made at the BRC and therefore argued the statutory multipliers are not applicable. In turn, Davidson noted her continued knee symptoms and Dr. Johnson's statement should her knee give out under certain circumstances during her work it could be hazardous to herself and clients. However, she did not specifically request an award of PPD benefits be enhanced by any multiplier. The effects of the BRC stipulations were raised at oral arguments following the final hearing.

Bluegrass also filed a motion to strike the three multiplier issue raised at the final hearing on July 12, 2012, based upon the stipulation agreed to by the parties at the BRC that Davidson retains the physical capacity to return to her former work. Bluegrass cited to 803 KAR 25.010 §13(14) and §16(2) in support of its argument.

In his Opinion and Order rendered July 2, 2012, the ALJ identified among others "extent and duration including multipliers" as a contested issue. He also noted the BRC stipulations, including Davidson retains the capacity to perform her pre-injury job and returned to work on November 8, 2011 at the same or greater wage.

The ALJ determined Davidson had no active, pre-existing condition and found her knee injury arose out of and in the course of her employment with Bluegrass. The ALJ

found Dr. Johnson's opinion regarding impairment persuasive and adopted his 14% impairment rating for Davidson's knee injury. The ALJ found Bluegrass responsible for the second knee surgery, noting it was reasonable, necessary and related to Davidson's work injury. The ALJ also found there has been an underpayment in TTD benefits. The ALJ did not address whether the stipulations contained in the BRC Order rendered moot the application of multipliers and stated as follows in awarding the three multiplier:

> Next, the ALJ addresses the question of enhancement. *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.
>
> In the present case the plaintiff continues to perform her pre-injury job. She testified that she does not currently have difficulty performing her job. However, she continues to have pain and swelling, and her knee frequently gives out in spite of two surgical procedures. Dr. Johnson opined that continuing to perform this job puts both the plaintiff and her clients at risk. The ALJ finds this opinion persuasive. She has returned to work after each

> surgery at the same or greater wages. I find, however, that she cannot continue to do so for the indefinite future. With her knee giving out as often as several times per week, it seems likely that, as opined by Dr. Johnson, the plaintiff's knee will go out while she is working and moving a patient. I therefore find that she is entitled to the three multiplier.

In its Petition for Reconsideration, Bluegrass argued the ALJ erred in awarding Davidson the three multiplier. Bluegrass noted the award is in direct contradiction to the stipulations made at the BRC regarding Davidson's capacity to return to work. Bluegrass cited to 803 KAR 25.010 §13(14), which permits only contested issues summarized at the BRC to be subject to further proceedings. It also noted Davidson failed to seek the proper relief from the stipulation pursuant to 803 KAR 25.010 §16(2). Therefore, the three multiplier was not at issue.

Bluegrass also noted the ALJ relied upon the opinion of Dr. Johnson in awarding the three multiplier. However, Dr. Johnson responded "yes" to the question of whether Davidson retains the physical capacity to return to the type of work performed at the time of injury. In the alternative, Bluegrass requested additional findings of fact stating all evidence relied upon, and all inferences drawn in awarding the three multiplier.

Davidson requested several typographical and clerical errors be corrected in its petition for reconsideration. Davidson also argued the stipulation of work capacity did not prevent the ALJ from performing a Fawbush analysis, particularly in light of Dr. Johnson's opinion. Davidson also noted "Benefits per KRS 342.730" was identified as a contested issue in the BRC Order and is sufficient to preserve the three multiplier issue.

In his Opinion and Order on Reconsideration rendered July 19, 2012, the ALJ corrected and amended the errors pointed out by Davidson. The ALJ overruled and denied Bluegrass' Petition and Motion to Strike Issue Raised at Final Hearing and stated as follows:

> 6. 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 remaining patent errors here and the defendant's Petition for Reconsideration is an improper attempt to reargue the case.
>
> 7. 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).

8. 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.

9. As noted in the Opinion and Order dated July 2, 2012, the plaintiff continues to work at her pre-injury job.

> However, she continues to have pain and swelling in her right knee and it frequently gives way. Dr. Johnson stated in his medical report that Ms. Davidson's continuing to work at her pre-injury job is risky and hazardous to both her and her clients, since her right knee frequently gives out and because of the functional defect of being unable to lock her knee. In addition, Dr. Johnson placed upon Ms. Davidson work restrictions, recommending against climbing, unprotected heights, hazardous surfaces, squatting, twisting or other repetitive strenuous activities involving the right knee. Based upon the plaintiff's sworn testimony and the credible and convincing medical report of Dr. Johnson, I made the factual determination that Ms. Davidson cannot continue to earn her pre-injury level of wages for the indefinite future, thereby entitling her to recover enhanced permanent partial disability benefits under KRS 342.730 as preserved as an issue in the Benefit Review Conference Order.

On appeal, Bluegrass presents the same arguments regarding the ALJ's award of the three multiplier. It also argues the ALJ erred in performing a Fawbush analysis since one is only necessary when an employee's ability to return to her pre-injury work is at issue. Here, Davidson's capacity to return to work was stipulated and is therefore not at issue. Also, Bluegrass argues the fact "entitlement to benefits per KRS 342.730" was checked as a contested issue on the BRC order, does not leave the issue of physical

capacity open for decision by the ALJ, especially in light of the stipulations listed on the same BRC order.

Davidson, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including entitlement to the three multiplier pursuant to KRS 342.730(1)(c)1. KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Davidson was successful in her burden, the question on appeal is whether the ALJ's finding 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).

We vacate and remand the Opinion and Order rendered July 2, 2012 regarding the application of the three multiplier. We also note this issue has squarely been addressed by the Board recently in Mann Chrysler Dodge Jeep Daewoo Inc. v. Larry Esteppe, Claim Number 200996965, rendered July 25, 2012. In the case *sub judice*, the May 16, 2012 BRC order indicates the following stipulations were made:

> 8. Does plaintiff retain the physical capacity to return to former work. **AGREED YES, RETAINS CAPACITY**
>
> 9. Plaintiff returned to work on: **11/8/11.** Wages currently earned: **Same or greater wage**

The BRC order also indicates with an "X" the following contested issues: Benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, exclusion for pre-existing disability/impairment and TTD.

The BRC's stated purpose is to expedite the processing of a claim and avoid the need for a hearing, if possible. 803 KAR 25:010 §13(1). Representatives of all parties shall have authority to resolve disputed issues and settle the claim at the BRC. 803 KAR 25:010 §13(8). At the BRC, parties are directed to attempt to resolve controversies and disputed issues, narrow and define the disputed issues and facilitate a prompt settlement. 803 KAR 25:010 §13(11)(a)(b)(c). If an agreement cannot be made as to all issues, the ALJ shall prepare a summary stipulation of all contested and uncontested issues, signed by the ALJ and all representatives of the parties, and schedule a final hearing. 803 KAR 25:010 §13(a)(b). Only contested issues shall be the subject of further proceedings. 803 KAR 25:010 §13(14).

Regarding stipulations, imposition of sanctions are warranted for refusal to stipulate facts which are not genuinely in issue. 803 KAR 25:010 §16(1). A party may be relieved of a stipulation upon cause shown and if the motion for relief is filed at least ten days prior to the hearing date, or as soon as practicable after discovery of an erroneous stipulation. 803 KAR 25:010 §16(2). Stipulations of fact are an essential aspect of workers' compensation litigation. In Osborne v. Pepsi-Cola Co., 816 S.W.2d 643, 644 (Ky. 1991)(*superseded by statute on other grounds as stated in* Smith v. Dixie Fuel Co., 900 S.W.2d 609 (Ky. 1995)), the Kentucky Supreme Court instructed as follows:

> Initially we note KRS 342.270 encourages stipulation of facts not in dispute to aid in the disposition of workers' compensation claims in a summary and efficient fashion. The regulations of the Workers' Compensation Board infuse stipulations with strength. One may obtain relief from a stipulation only by motion and showing good cause. 803 KAR 25:011.
>
> Neither party moved to set aside the stipulation. Thus, the parties and the administrative law judge were bound by the stipulation. *Wagoner v. Hopkins,* Ky., 531 S.W.2d 511 (1975).

The Kentucky Court of Appeals reaffirmed this view in an unpublished opinion, Casper v. Superior Care Home, Inc., 2003 WL 1227216, (Ky. App. 2003) and stated as follows:

> On appeal, Casper frames the sole question presented for our consideration as "whether the parties and the [ALJ] are bound by a stipulation of a work-related injury, or [ ] the ALJ is free to disregard such a stipulation and find to the contrary."
>
> As we agree with the Board's reasoning as to this dispositive legal issue, we adopt the following portion of its opinion as our own:
>
> We agree wholeheartedly with Casper that stipulations of fact are an integral part of the workers' compensation decision making process. . . .
>
> In the instant case, the ALJ clearly did not overlook the stipulation and Casper has at all times properly preserved his argument for appellate review. Further, Superior never properly moved to set aside the stipulation of work-related injuries. Thus, "the parties and the administrative law judge were bound by the stipulation." (citation omitted)

Stipulation number eight reads as follows on all BRC orders: "Does plaintiff retain the physical capacity to return to former work." By virtue of the fact "**AGREED YES, RETAINS CAPACITY**" appears next to this question, we conclude entitlement to the three multiplier was not an issue. The language in this stipulation mirrors the language found in KRS 342.730(1)(c)(1) which reads as follows:

> If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments.

We believe the purpose of stipulation number eight is to resolve by agreement whether an issue remains as to entitlement to the application of the three multiplier. We arrive at this conclusion by comparing the plain language of the statute with the corresponding language of the stipulation, and considering the purpose served by stipulations in general. Although Davidson argues there is evidence in the record supporting the ALJ's application of the three multiplier, namely her own testimony and the opinion of Dr. Johnson, we simply cannot ignore the fact no party moved to set aside the stipulation. We also note while "Benefits per KRS 342.730" is marked under contested issues in the BRC order, there is no mention of multipliers. Consequently, the ALJ's award of the three multiplier in the July 2, 2012 Opinion and Order must be vacated.

The May 16, 2012 BRC order also indicates the following under stipulation number nine: "Plaintiff

returned to work on: **11/8/11.** Wages currently earned: **Same or greater wage**". It is therefore also clear the application of the two multiplier was stipulated at the BRC since the language of this stipulation mirrors the language in KRS 342.730(1)(c)(2) which states, in relevant part, as follows:

> If an employee returns to work at a weekly wage equal to or greater than the average 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.

Since Davidson returned to work at the same weekly wage she was earning at the time of the injury, as stipulated to in the BRC order, KRS 342.730(1)(c)(2) is applicable subject to the conditions set forth in Chrysalis House v. Tackett, 283 S.W.3d 671 (Ky. 2009) and Hogston v. Bell South Telecommunications, 325 S.W.3d (Ky. 2010).

At some point during the 425 weeks Davidson receives income benefits, her employment may cease due to reasons which relate to the disabling injury or a previous

work-related injury. *See* Chrysalis House, Inc., supra, and Hogston, supra. If so, she is entitled to have her income benefits enhanced by the two multiplier upon a properly filed motion to reopen. *See* Chrysalis House, Inc., supra, and Hogston, supra. This is consistent with KRS 342.730(1)(c)4 which allows a claim to be reopened in order to modify or "conform" the "award payments" with the "requirements of subparagraph 2," i.e., the two multiplier. Therefore, the ALJ's failure to provide for enhancement of the award by the two multiplier in the July 2, 2012 Opinion and Order, subject to the conditions set forth in Chrysalis House, Inc., supra, and Hogston, supra, is in error.

On remand, the ALJ must include this language regarding applicability of the two multiplier in the amended opinion. While neither party has raised this issue on appeal, this Board may raise it *sua sponte*.

Accordingly, the July 2, 2012 Opinion and Order and the July 19, 2012 Opinion and Order on Reconsideration are **AFFIRMED** to the extent the ALJ determined Davidson sustained a compensable injury and is entitled to TTD benefits, PPD benefits, and medical benefits. The ALJ's award enhancing Davidson's benefits by the three multiplier is **VACATED** and the case is **REMANDED** for entry of an amended opinion consistent with the views expressed herein.

ALL CONCUR.

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