OPINION ENTERED: November 30, 2012

CLAIM NO. 200879374

DONNA SEBASTIAN PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

COMMUNITY BASED SERVICES
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

ALVEY, Chairman. Donna Sebastian ("Sebastian") seeks review of the Opinion, Order and Award on Remand rendered May 4, 2012, and the Order on Reconsideration rendered June 18, 2012 by Hon. Chris Davis, Administrative Law Judge ("ALJ").

In an Opinion, Order and Award dated September 1, 2011, the ALJ awarded Sebastian temporary total disability ("TTD) benefits, medical expenses and permanent partial disability ("PPD") benefits for a work-related left knee injury. The ALJ also determined the multipliers pursuant to KRS 342.730(1)(c)1 or 2 are not applicable. This Board subsequently vacated in part and remanded the ALJ's decision in an opinion dated February 28, 2012, finding the analysis concerning the applicability of the multipliers to be deficient as a matter of law. The claim was remanded for the correct analysis. In the Opinion, Order and Award on Remand rendered May 4, 2012, the ALJ found the three multiplier applicable pursuant to KRS 342.730(1)(c)1. Following a petition for reconsideration filed by Community Based Services ("CBS"), in the Order on Reconsideration dated June 18, 2012, the ALJ reinstated the September 1, 2011 "Order" section awarding PPD benefits. The ALJ also ordered that if Sebastian ever ceases earning wages equal to or greater than her average weekly wage at the time of her injury, and if she otherwise complies with the requirements to demonstrate an entitlement to such benefits, she shall be entitled to benefits pursuant to KRS 342.730(1)(c)2.

On appeal, Sebastian argues the ALJ exceeded his authority when he decreased her PPD benefits which he had

enhanced by the three multiplier in response to CBS' Petition for Reconsideration. We vacate and remand.

A review of this claim's long procedural history is necessary. Sebastian filed a Form 101, Application for Resolution of Injury Claim, alleging she injured her left knee while working for CBS on August 1, 2008 when she slipped in water on the floor and fell. She later amended the Form 101 to include a cervical spine injury. A benefit review conference Order and Memorandum dated July 21, 2011 identified extent and duration, multipliers and underpayment of total temporary disability benefits as contested issues. It also noted "at issue" next to "Does plaintiff retain the physical capacity to return to former work."

In an Opinion, Order and Award dated September 1, 2011, the ALJ summarized Sebastian's testimony as follows:

> 2. Donna Sebastian Donna Sebastian is a fifty-four year high school graduate. Her work experience has been as customer service representative, deputy county clerk, retail associate, MRI technician, and office assistant. Sebastian began working for the Defendant-Employer in December, 2005. Her job duties included answering telephones, assisting people at the front desk, and making copies.
>
> On August 1, 2008, Sebastian was walking in the kitchen when she slipped on water in the floor. She fell to the floor, landing on her knees. She immediately felt pain in her knee and in her neck. She was helped up by a co-

> worker and taken by ambulance to Taylor County Hospital. Sebastian followed-up with her primary care physician before seeing Dr. Nazar for her neck injury and Dr. Mehta and Dr. Norman for her knee injury. Sebastian has had physical therapy for her neck and her knee and epidural injections for her neck condition.
>
> Sebastian stated she has constant pain in her knee and neck. She has limited motion of her neck. Sebastian returned to restricted work after being off work for approximately one month. The Defendant-Employer has provided work within Sebastian's restrictions.

The ALJ then summarized the medical evidence from Taylor Regional Hospital, Tri-County Open MRI, Crossroads Family Medicine, Dr. Gregory B. Nazar, Dr. Kenyatta Norman, Dr. James C. Dodds, Dr. Warren Bilkey and Dr. Robert F. Baker.

The ALJ found Sebastian did not suffer a work-related cervical injury, permanent or temporary, and dismissed that portion of her claim. The ALJ found Sebastian sustained a work-related left knee injury and awarded benefits based upon the 9% impairment rating assessed by Dr. Bilkey. In awarding no multipliers, the ALJ stated as follows:

> As for multipliers as a matter of law if an employer permanently modifies an injured worker's job duties due to the effects of a work injury then the injured worker lacks the capacity to return to the type of work done on the date of injury. It is immaterial if

> they hold the same job title or classification or even if they retain a majority of their job duties.
>
> What also must be considered, as in this case, is if an injured worker who does not retain all of their pre-injury physical abilities nonetheless retains the ability to continue to earn a wage equal or greater than on the date of injury and is likely to retain that capacity for the foreseeable future. *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003)
>
> Despite the fact that job modifications have been made for the Plaintiff she has received no complaints from her supervisor. There is no indication that given the nature of the modifications, i.e. other people in the office, on an irregular rotating basis have to sporadically carry packages within the office, the office has been thrown into turmoil. The Plaintiff has testified that she expects to be able to continue to work until she qualifies for social security retirement and retires. The Administrative Law Judge is not convinced that she is merely "toughing it out" for the short run. She currently earns a wage equal or greater than on the date of injury and is likely to do so for the foreseeable future. There will be no multipliers to her award.

The ALJ awarded Sebastian TTD benefits, PPD benefits in the sum of $22.04 per week for 425 weeks and medical expenses for her work-related left knee injury.

Sebastian subsequently filed a petition for reconsideration requesting the ALJ reconsider his dismissal

of her claim for benefits for her cervical spine condition. Her petition did not include an argument regarding multipliers pursuant to KRS 342.730(1)(c)1 or 2. Sebastian's petition was denied by order dated October 31, 2011.

Sebastian appealed to this Board arguing the ALJ erred in dismissing her cervical spine claim and in not applying any multipliers to her award of PPD benefits. She also requested an "Order from the Board directing the ALJ to amend the award to include the 2X multiplier of KRS 342.730(1)(c)2 for any period of cessation of her employment at her current wage."

In an opinion rendered February 28, 2012, this Board affirmed the dismissal of Sebastian's cervical spine injury claim. Regard the application of multipliers, the Board noted the following evidence of record:

> Sebastian testified at the July 21, 2011, hearing. At that time, Sebastian was still working at Community Based Services. Sebastian testified that at the time of the injury, she worked as a "basic administrative assistant." She described her pre-injury job duties as follows:
>
> > Answer the phone and wait on clients and maintain the office equipment-- the copiers, refill paper, take boxes back and forth to the supervisor's office-- just

> various office-- office duties, as they say in government, as assigned.

Concerning the physical aspects of her pre-injury job duties, Sebastian testified as follows:

> Q: Going back to your job description, job requirements, from a physical standpoint-- obviously a lot of walking around during the day, a lot of moving...
>
> A: Yes.
>
> Q: In regards to any type of lifting or physical movements, what on an average day would be maybe the heaviest item that you would lift?
>
> A: Probably a box of paper or a case, and that's just depending on how large it is. We're all familiar with the case files, so it just depends on whether it's full or not.
>
> Q: Let's say one was full, about how much would that weigh?
>
> A: I don't know, it's probably between five and ten pounds.
>
> Q: Okay.
>
> A: I don't really know. I know they're heavy enough that you have to-- when I could lift those I would have to kind of heave it up a little bit and turn it it [sic] sideways to hold it.

Regarding Sebastian's current duties at work, she testified as follows:

Q: And I-- I think as far as your job duties currently, I think your IME physician Dr. Belkin [sic] had indicated those were pretty much sedentary, is that right?

A: Yes.

Q: Okay, in other words, just mainly sitting in a chair, is that right?

A: Up and down-- I am up and down all day long with new copying, and it's about a hundred yards to my supervisor's office so I-- I do quite a bit of walking to the back.

Q: And as far as lifting, is any of that required currently?

A: I don't lift anymore.

Q: Okay, and you had testified earlier that there was some lifting before you got hurt...

A: Uh-huh.

Q: Is that something that coworkers do now?

A: Uh-huh-- yes, I'm sorry.

Q: Then I think at your deposition you testified you were working at a front desk, is that right?

A: Yes, I'm a-- I'm the first person, the front line.

Q: So does that mean, I guess, your desk would be closest as far

> as deliveries into the office and stuff like that?
>
> A: Uh-huh, yes.
>
> Q: And as far as prior to your-- your injury, was that a lot of lifting as far as just deliveries coming to-- into the office in boxes?
>
> A: Yes, yes.
>
> Q: And I guess not another coworker from further away from the front door comes and does that?
>
> A: Any other-- any other warm body.

At the time of the hearing, Sebastian was paid the same as before the August 1, 2008, work injury. Sebastian testified as follows:

> Q: And if I remember correctly you were off work for about one month following the work injury, is that right?
>
> A: Yes.
>
> Q: And after going back to work are you paid the same that you were before?
>
> A: Yes, we have not gotten a raise in three years.

Regarding to applicability of multipliers, the Board stated as follows:

> We emphasize Sebastian's argument regarding the application of any multipliers to her claim for an alleged

injury to her cervical spine has been rendered moot by our decision herein.

KRS 342.730(1)(c)1 states as follows:

> If, due to any 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....

KRS 342.730(1)(c)2 states 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.

Pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky., 2003), the ALJ must determine which of the multipliers contained in KRS 342.730(1)(c)1 and (c)2 is applicable to the facts of the case. If the ALJ determines both multipliers are potentially applicable, the ALJ must then determine if the worker is likely to be able to

"continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future." Fawbush v. Gwinn, supra, at 12. Should the ALJ determine the claimant is unable to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future, "application of paragraph (c)1 is appropriate." Id. If, however, the ALJ determines the employee is able to earn a wage equal to or greater than the wage at the time of injury for the indefinite future, at any point when his or her employment earning such a wage ceases for a reason that "relates to the disabling injury," enhancement via the two multiplier is applicable. Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671, 674 (Ky. 2009).

We find the ALJ's analysis concerning the applicability of the multipliers to be deficient as a matter of law. In the September 1, 2011, opinion, order, and award the ALJ determined Sebastian "currently earns a wage equal to or greater than on the date of injury." Despite the ALJ stating otherwise, KRS 342.730(1)(c)2, then, is applicable. Citing Fawbush v. Gwinn, supra, the ALJ also determined Sebastian is likely to earn a wage equal to or greater than the wage at the time of injury for the "foreseeable future." It is clear from the language of the September 1, 2011, opinion, order, and award the ALJ partially engaged in a Fawbush v. Gwinn, supra, analysis. However, the ALJ failed to explicitly determine whether Sebastian retains the physical capacity to return to the type of work she performed at the time of the injury, the first prong of a Fawbush analysis. See KRS 342.730(1)(c)1. Interestingly, the ALJ

states as follows regarding the three multiplier:

> As for multipliers as a matter of law if an employer permanently modifies an injured worker's job duties due to the effects of a work injury then the injured worker lacks the capacity to return to the type of work done on the date of injury. It is immaterial if they hold the same job title of classification or even if they retain a majority of their job duties.

Since we are unable to determine from the above language whether the ALJ believes the three multiplier applies in the case *sub judice*, and because Sebastian's income benefits must be enhanced by the two or three multiplier, we vacate the award of income benefits and remand for the appropriate award of income benefits.

All parties, including this Board, are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). Therefore, on remand, the ALJ must set forth a clear analysis regarding the applicability of KRS 342.730(1)(c)1 pursuant to applicable statutory and case law. This means the ALJ must "analyze the evidence to determine what job(s) the claimant performed at the time of injury and to determine from the lay and medical evidence whether she retains the physical capacity to return to those jobs." Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004). The ALJ's commentary that there

is no indication modifications made within Sebastian's work duties have thrown the office into "turmoil" misses the mark. If the ALJ determines KRS 342.730(1)(c)1 is applicable, based on the facts and applicable law he must resolve the issue of which statutory provision is more appropriate.

If the ALJ determines KRS 342.730(1)(c)1 is inapplicable, since he has already determined Sebastian "currently earns a wage equal or greater than on the date of injury and is likely to do so for the foreseeable future," the ALJ must, in the amended opinion, order, and award explicitly set forth KRS 342.730(1)(c)2 is applicable. He must then order enhancement of Sebastian's benefits by the two multiplier during any period Sebastian's employment at such a wage ceases for a reason that "relates to the disabling injury." Chrysalis House, Inc., supra, at 674.

We acknowledge Sebastian's September 14, 2011, petition for reconsideration failed to address the multiplier issue. However, the ALJ's failure to conduct a complete Fawbush analysis is an error of law; thus, a petition for reconsideration is unnecessary. We note, too, the issue of multipliers was adequately preserved at the July 21, 2011, BRC and thoroughly discussed within Sebastian's brief to the ALJ.

Accordingly, regarding the dismissal of Sebastian's cervical spine injury claim, the September 1, 2011, opinion, order, and award, and October 31, 2011, order ruling on the petition for reconsideration are **AFFIRMED**. Since the September 1, 2011, opinion, order, and award reflects no

> multipliers are applicable to the award for Sebastian's left knee injury, the award of income benefits is **VACATED** and the case is **REMANDED** to the ALJ. On remand, the ALJ shall determine whether KRS 342.730(1)(c)1, is applicable. If the ALJ determines KRS 342.730(1)(c)1 is applicable, he shall conduct an analysis pursuant to Fawbush v. Gwinn, supra, and enter an amended opinion, order, and award in conformity with the views expressed herein. Should the ALJ determine KRS 342.730(1)(c)1 is not applicable, the ALJ will order KRS 342.730(1)(c)2 applies and Sebastian's income benefit shall be enhanced by the two multiplier during any periods of time her employment at a wage equal to or greater than her average weekly wage at the time of injury ceases due to a reason that "relates to the disabling injury." Id.

Subsequently, in an Opinion, Order and Award on Remand rendered May 4, 2012, the ALJ stated as follows:

> This matter is on Remand from the Kentucky Workers' Compensation Board. The Board has upheld the Administrative Law Judge's finding and Order[sic] that the Plaintiff has returned to work at equal or greater wages than on the date of injury and is likely to continue to do so for the foreseeable future. They have Ordered[sic] that as a matter of law the Plaintiff must be awarded either the "2" or the "3" multiplier and have Ordered the Administrative Law Judge to conduct an analysis on which multiplier is appropriate.
>
> Since the Plaintiff is earning equal or greater wages than on the date of injury she cannot, as a matter of **statute**, which trumps case law, receive the multiplier pursuant to KRS

> 342.730(1)(c)2. As such she shall receive the multiplier under KRS 342.730(1)(c)1.

The ALJ awarded Sebastian PPD benefits in the sum of $70.53 per week for 425 weeks, in addition to TTD benefits and medical expenses.

CBS filed a petition for reconsideration on May 17, 2012. After citing the Board opinion, CBS argued the ALJ erred on remand by not making findings regarding whether Sebastian retained the physical capacity to return to the type of work performed at the time of injury as mandated by the February 28, 2012 Board Opinion. CBS also argued the ALJ erred in applying the three multiplier pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), by stating as follows:

> In addition, the ALJ erred in the Opinion and Order on Remand by misapplying the analysis set forth by the Board, namely in the discussion of *Fawbush* and its progeny. The ALJ appeared to interpret the Board as holding that the claimant's *ongoing* benefits must be enhanced by either the 2x or 3x multiplier during all periods, even during those periods she continues earning equal or greater wages. Therefore, it appears the ALJ reasoned that because the plaintiff is earning equal or greater wages currently, the 2x multiplier cannot be applied per the language of the statute, such that the 3x multiplier must automatically apply. However, this misinterprets the Board's discussion of Fawbush and its orders on

> remand. The Board clearly indicated that if the ALJ found the plaintiff had lost the physical capacity to perform the type of work performed on the date of injury, but also found that the claimant is able to earn equal or greater wages for the indefinite future, then the 2x multiplier should apply, **but only for any period where the claimant's work at equal or greater wages ceases due to the effects of the work injury.**
>
> Applying this standard, the ALJ's finding in the Opinion and Order on Remand were that the plaintiff has returned to work at equal or greater wages and is able to do so for the indefinite future (ALJ Opinion on Remand dated May 4, 2012.) As such, pursuant to the Board's instructions, as well as *Fawbush* and its progeny, the ALJ must order benefits enhanced by the 2x multiplier **for those periods where the plaintiff has ceased working at equal or greater wages due to the effects of the work injury.**
>
> . . . .
>
> Therefore, based on the ALJ's findings that the claimant has returned to work at equal or greater wages and remains capable of doing so for the indefinite future, the ALJ must enter a finding that no enhancement is applicable, except that "at any point where his or her employment earning such a wage ceases for a reason that relates to the disabling injury, enhancement via the two multiplier is applicable." (Board Decision at 18.) Therefore, the ALJ's application of the 3x multiplier was in error.

On June 18, 2012, the ALJ stated as follows in the Order on Reconsideration:

This matter comes before the Administrative Law Judge on the Defendant's Petition for Reconsideration and the Plaintiff's Response thereto. The Administrative Law Judge having reviewed the pleadings and being otherwise sufficiently advised the following findings of fact and law are made.

1. This claim has a long history, with the original Opinion having been issued on September 1, 2011. That Opinion was appealed to the Workers' Compensation Board. The Board found, essentially, that the Administrative Law Judge made no errors of fact or law but Remanded this matter to the Administrative Law Judge to affirm the Plaintiff's statutory rights regarding Re-Opening of this claim.

2. Despite careful and repeated reviews of this Board's Opinion the Administrative Law Judge misconstrued it and this resulted in a patent error appearing on the face of the May 4, 2012 Opinion on Remand.

3. To fully conform to the Board's Order on Remand and the facts and law as they apply to this claim the "Order" section of the Opinion of September 1, 2011 Opinion remains the final Award in this claim. However, should the Plaintiff ever cease earning wages equal to or greater than her average weekly wage at the time of her injury, and should she otherwise comply with the requirements to demonstrate an entitlment to such benefits, she shall be entitled to all benefits pursuant to KRS 342.730(1)(c)2. as she may then otherwise be entitled to, in the future.

On appeal, Sebastian argues the ALJ exceeded his authority in the June 18, 2012 Order on Reconsideration by decreasing Sebastian's award from $70.53 per week to $22.04 per week. Sebastian argues the ALJ made a specific finding on the merits in the case in finding the three multiplier pursuant to KRS 342.730(1)(c)1 applied in his Opinion, Order and Award on Remand. The ALJ then changed these specific findings in response to CBS' Petition for Reconsideration. Therefore, Sebastian argues the ALJ exceeded his authority pursuant to KRS 342.281 by making additional findings and decreasing the award. Sebastian requests this Board vacate the June 18, 2012 Order on Reconsideration with directions to reinstate the ALJ's Opinion, Order and Award on Remand dated May 4, 2012.

We find the ALJ did not exceed his authority in the June 18, 2012 Order on Reconsideration. KRS 342.281 governs petitions for reconsideration and states in pertinent as follows:

> Within fourteen (14) days from the date of the award, order, or decision any party may file a petition for reconsideration of the award, order, or decision of the administrative law judge. . . . The administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision and shall overrule the petition for reconsideration or make

> any correction within ten (10) days after submission.

In ordinary cases, a petition for reconsideration is filed in cases where a mathematical mistake or error in computation of time periods or dates appears in an award, order or decision of an ALJ. However, this statute is to be liberally construed and is not intended to merely address clerical errors but *all* patent or "apparent" errors. Wells v. Beth-Elkhorn Coal Corp., 708 S.W.2d 104, 106 (Ky. App. 1985); Francis v. Glenmore Distilleries, 718 S.W.2d 953 (Ky. App. 1986). The petition may not be granted if it appears the ALJ has reconsidered the case on its merits or has changed its factual findings. Wells v. Beth-Elkhorn Coal Corp., supra.

In the case *sub judice*, in the September 1, 2011 Opinion, Order and Award, the ALJ noted an injured worker lacks the capacity to return to the type of work performed on the date of injury if an employer permanently modifies the injured worker's job duties due to the effects of a work injury. He then found Sebastian currently earns a wage equal or greater than on the date of injury and is likely to do so for the foreseeable future. However, he declined to award any multipliers pursuant to KRS 342.730(1)(c)1 or 2.

In the opinion rendered February 28, 2012, the Board reversed and remanded finding the ALJ's analysis regarding the multipliers deficient as a matter of law. The Board noted KRS 342.730(1)(c)2 is applicable since the ALJ found Sebastian "currently earns a wage equal to or greater than on the date of injury." The Board also noted the ALJ attempted a partial Fawbush v. Gwinn, supra, analysis when he determined Sebastian is likely to earn a wage equal to or greater than the wage at the time of injury for the "foreseeable future." However, this Board further found the ALJ failed to explicitly determine whether Sebastian retains the physical capacity to return to the type of work she performed at the time of the injury, the first prong of a Fawbush analysis. Therefore, the Board vacated in and remanded since it was unable to determine whether the ALJ believes the three multiplier applies in the case *sub judice*, and because Sebastian's income benefits must be enhanced by the two or three multiplier.

On remand, the Board directed the ALJ to set forth a clear analysis regarding the applicability of KRS 342.730(1)(c)1, meaning the ALJ must "analyze the evidence to determine what job(s) the claimant performed at the time of injury and to determine from the lay and medical evidence whether she retains the physical capacity to

return to those jobs." Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004). The Board further directed if the ALJ determines KRS 342.730(1)(c)1 is applicable, based on the facts and applicable law, he must resolve the issue of which statutory provision is more appropriate pursuant to Fawbush v. Gwinn, supra. If the ALJ determines KRS 342.730(1)(c)1 is inapplicable, since he has already determined Sebastian "currently earns a wage equal or greater than on the date of injury and is likely to do so for the foreseeable future," the ALJ must, in the amended opinion, order, and award explicitly set forth KRS 342.730(1)(c)2 is applicable. He must then order enhancement of Sebastian's benefits by the two multiplier during any period Sebastian's employment at such a wage ceases for a reason that "relates to the disabling injury." Chrysalis House, Inc., supra, at 674.

Thereafter in the Opinion, Order and Award on Remand rendered May 4, 2012, the ALJ awarded Sebastian the three multiplier pursuant to KRS 730(1)(c)1 since Sebastian "is earning equal or greater wages than on the date of injury she cannot, as a matter of **statute**, which trumps case law, receive the multiplier pursuant to KRS 342.730(1)(c)2." Following a petition for reconsideration filed by CBS, the ALJ rendered an order on reconsideration noting the Board

remanded the claim to affirm Sebastian's statutory rights regarding re-opening. The ALJ then stated he misconstrued the Board's opinion which resulted in a patent error appearing on the face of the May 4, 2012 Opinion on Remand. Therefore, in order to conform to the Board's opinion, the ALJ directed the "Order" section of the opinion of September 1, 2011 to remain the final award. However, he added if Sebastian should ever cease earning wages equal to or greater than her average weekly wage at the time of her injury, and if she should otherwise comply with the requirements to demonstrate an entitlement to such benefits, she shall be entitled to all benefits pursuant to KRS 342.730(1)(c)2 as she may then otherwise be entitled to, in the future.

We find the ALJ did not exceed his authority in the Order of Reconsideration dated June 18, 2012. As noted by the ALJ, he misconstrued the Board opinion and resulting directions rendered February 28, 2012. He then attempted to remedy the error by preserving Sebastian's right to re-open her claim and receive an enhancement of benefits by the two multiplier during any period Sebastian's employment ceases for reasons relating to the disabling injury. An attempt to correct errors made by the ALJ in following the direction this Board on remand qualifies as a patent or apparent

error. The ALJ did not reconsider the case on its merits or change his factual findings.

Despite the ALJ's attempt, we find he did not comply with this Board's February 28, 2012 opinion in either the Opinion, Order and Award on Remand rendered May 4, 2012 or the Order on Reconsideration rendered June 18, 2012. The ALJ's mandate to direct the "Order" section of his original opinion to remand the final award and include the additional language regarding Sebastian's entitlement to the two multiplier in the event she ceases earning wages equal to or greater than her average weekly wage at the time of her injury due to the disabling effects of her work-related injury in the future does not comport with this Board's opinion. This Board specifically directed as follows:

> We find the ALJ's analysis concerning the applicability of the multipliers to be deficient as a matter of law. In the September 1, 2011, opinion, order, and award the ALJ determined Sebastian "currently earns a wage equal to or greater than on the date of injury." Despite the ALJ stating otherwise, KRS 342.730(1)(c)2, then, is applicable. Citing Fawbush v. Gwinn, supra, the ALJ also determined Sebastian is likely to earn a wage equal to or greater than the wage at the time of injury for the "foreseeable future." It is clear from the language of the September 1, 2011, opinion, order, and award the ALJ partially engaged in a Fawbush v. Gwinn, supra, analysis. However, the ALJ failed to

explicitly determine whether Sebastian retains the physical capacity to return to the type of work she performed at the time of the injury, the first prong of a Fawbush analysis. See KRS 342.730(1)(c)1. Interestingly, the ALJ states as follows regarding the three multiplier:

> As for multipliers as a matter of law if an employer permanently modifies an injured worker's job duties due to the effects of a work injury then the injured worker lacks the capacity to return to the type of work done on the date of injury. It is immaterial if they hold the same job title of classification or even if they retain a majority of their job duties.

Since we are unable to determine from the above language whether the ALJ believes the three multiplier applies in the case sub judice, and because Sebastian's income benefits must be enhanced by the two or three multiplier, we vacate the award of income benefits and remand for the appropriate award of income benefits.

All parties, including this Board, are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). Therefore, on remand, the ALJ must set forth a clear analysis regarding the applicability of KRS 342.730(1)(c)1 pursuant to applicable statutory and case law. This means the ALJ must "analyze the evidence to determine what job(s) the claimant performed at the

time of injury and to determine from the lay and medical evidence whether she retains the physical capacity to return to those jobs." Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004). The ALJ's commentary that there is no indication modifications made within Sebastian's work duties have thrown the office into "turmoil" misses the mark. If the ALJ determines KRS 342.730(1)(c)1 is applicable, based on the facts and applicable law he must resolve the issue of which statutory provision is more appropriate.

If the ALJ determines KRS 342.730(1)(c)1 is inapplicable, since he has already determined Sebastian "currently earns a wage equal or greater than on the date of injury and is likely to do so for the foreseeable future," the ALJ must, in the amended opinion, order, and award explicitly set forth KRS 342.730(1)(c)2 is applicable. He must then order enhancement of Sebastian's benefits by the two multiplier during any period Sebastian's employment at such a wage ceases for a reason that "relates to the disabling injury." Chrysalis House, Inc., supra, at 674.

We acknowledge Sebastian's September 14, 2011, petition for reconsideration failed to address the multiplier issue. However, the ALJ's failure to conduct a complete Fawbush analysis is an error of law; thus, a petition for reconsideration is unnecessary. We note, too, the issue of multipliers was adequately preserved at the July 21, 2011, BRC and thoroughly discussed within Sebastian's brief to the ALJ.

Accordingly, regarding the dismissal of Sebastian's cervical spine

> injury claim, the September 1, 2011, opinion, order, and award, and October 31, 2011, order ruling on the petition for reconsideration are **AFFIRMED**. Since the September 1, 2011, opinion, order, and award reflects no multipliers are applicable to the award for Sebastian's left knee injury, the award of income benefits is **VACATED** and the case is **REMANDED** to the ALJ. On remand, the ALJ shall determine whether KRS 342.730(1)(c)1, is applicable. If the ALJ determines KRS 342.730(1)(c)1 is applicable, he shall conduct an analysis pursuant to Fawbush v. Gwinn, supra, and enter an amended opinion, order, and award in conformity with the views expressed herein. Should the ALJ determine KRS 342.730(1)(c)1 is not applicable, the ALJ will order KRS 342.730(1)(c)2 applies and Sebastian's income benefit shall be enhanced by the two multiplier during any periods of time her employment at a wage equal to or greater than her average weekly wage at the time of injury ceases due to a reason that "relates to the disabling injury." Id.

It appears the ALJ determined KRS 342.730(1)(c)1 is inapplicable when he granted the petition for reconsideration and enhanced Sebastian's benefits by the two multiplier during any period her employment at such a wage ceases for a reason that relates to the disabling injury. However, this Board cannot make such an assumption. The ALJ reached an end result without conducting a proper Fawbush analysis as directed in the February 28, 2012 Board opinion.

Accordingly, the May 4, 2012 Opinion, Order and Award on Remand and the June 18, 2012 Order on Reconsideration rendered June 18, 2012 by Hon. Chris Davis, Administrative Law Judge are **VACATED**. This claim is **REMANDED** for an opinion consistent with the direction set forth in the opinion rendered by this Board on February 28, 2012, which shall provide findings sufficient to inform all parties of the basis for his decision to allow for meaningful review. Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON LARRY D ASHLOCK
122 NORTH MAIN ST, STE 105
ELIZABETHTOWN, KY 42701

COUNSEL FOR RESPONDENT:

HON MATTHEW J ZANETTI
300 EAST MAIN ST, STE 400
LEXINGTON, KY 40507

ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS
410 WEST CHESTNUT ST, STE 700
LOUISVILLE, KY 40202