OPINION ENTERED: July 25, 2012

CLAIM NO. 200996965

MANN CHRYSLER DODGE JEEP DAEWOO INC. PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

LARRY ESTEPPE
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Mann Chrysler Dodge Jeep Daewoo Inc. ("Mann Chrysler") appeals from the January 13, 2012, Amended Opinion of Hon. Otto Daniel Wolff, Administrative Law Judge ("ALJ"). Mann Chrysler and Larry Esteppe ("Esteppe") filed petitions for reconsideration which were denied by order dated February 27, 2012. Mann Chrysler

also appeals from the February 27, 2012, order ruling on the petitions for reconsideration.

Mann Chrysler asserts two arguments on appeal. First, Mann Chrysler asserts the ALJ erred by amending his original order and finding Esteppe sustained an injury. Second, Mann Chrysler asserts the ALJ erred by enhancing Esteppe's benefits by the three multiplier contained in KRS 342.730(1)(c)1.

We recite the necessary procedural history in order to frame the issues on appeal, including the factual summary set forth in the Board's August 31, 2011, opinion reversing and remanding which is as follows:

> Larry K. Esteppe ("Esteppe") appeals the March 10, 2011, opinion and order rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"), finding Esteppe did not prove an "injury" as defined by the Workers' Compensation Act and dismissing his claim. Esteppe filed a petition for reconsideration asserting the ALJ erred in reaching this conclusion. Esteppe argued, in part, as follows:
>
>> That objective findings as defined by the Act as well as current case law, are not required to be shown by sophisticated tests, but can be shown through observation and physical examination.
>>
>> That even the Defendant/Employer's medical expert assigned a 2%

> impairment rating due directly to Plaintiff's February 10, 2009 [sic] injury, which proves that he found sufficient objective findings upon physical examination to qualify for an impairment rating under the *Guides*.
>
> That since it is probable that the ALJ overlooked the fact that the Defendant/Employer's expert also made a diagnosis attributable to the February 10, 2009 [sic] injury and also assigned an impairment rating directly related to the injury, it is Plaintiff's position that it is a patent error and properly correctable upon Petition for Reconsideration.

Esteppe's petition for reconsideration was denied by order dated May 4, 2011. On appeal, Esteppe asserts two physicians, Dr. Richard Menke and Dr. James C. Owen, assigned impairment ratings, and both attributed a portion of the impairment rating to the work injury. Esteppe asserts for that reason, the ALJ's dismissal of his claim is erroneous.

Esteppe's Form 101 alleges on February 10, 2009, while working for Mann Chrysler Dodge Jeep ("Mann Chrysler") he injured his back and left leg pulling a torque wrench while working on a differential.

Regarding whether Esteppe sustained a work-related injury, the ALJ determined, in part, in the March 10, 2011, opinion and order as follows:

> Having scoured several times all the available Forms 107, and the records, reports, and Forms 107 of Drs. Tibbs, Wright, Owen, Norelle, Kiefer, Menke, Troutt, Knepper, Linton Spine Center and several x-ray and MRI reports, this ALJ has not found any documentation setting forth objective medical findings confirming a harmful change to Plaintiff's low back anatomy as a result of the work incident of February 10, 2009. The only suggestion of change comes from Plaintiff's saying he experiences greater and different pain that [sic] before the work incident. But these subjective symptoms do not confirm an anatomal [sic] change in Plaintiff's low back. There is no objective medical evidence that Plaintiff has sustained a change in his anatomy that would provide an explanation for his complaints. Unfortunately, though Plaintiff may experience different subjective symptoms, there are not any 'objective medical findings' to prove a change in Plaintiff's anatomy.
>
> Even if Plaintiff's symptoms were in themselves sufficient to constitute a harmful change, there would be a problem finding material changes from Plaintiff's pre-work incident condition. Since 2005 Plaintiff has basically had the same

> complaints regarding his low back, left buttock and leg. His pre-injury records are filled with symptoms and treatment documenting constant, stabbing, sharp low back pain with radiation. Prior to the work incident he was on many medications and he had undergone ESI treatment, medication treatment, TENS unit treatment, physical therapy treatment, facet joint injections treatment and surgical treatment. His complaints are the same before and after the incident, his medications are basically the same before and after the incident, and his diagnostic findings were basically the same before and after the incident. There is simply no objective medical evidence indicating a change in his anatomy. Therefore, he cannot meet the definition of an 'injury' as defined by the Act. It having been determined that Plaintiff has not sustained an injury as defined by the Act, all remaining issues are moot, including the issue of whether there was a cumulative trauma injury.

. . .

The record contains the October 13, 2009, report of Dr. Menke. As a result of his physical examination, Dr. Menke noted Esteppe was "[t]ender over the lumbosacral junction." Dr. Menke's diagnosis is as follows:

> Post laminectomy syndrome from the 5-05-06 work injury. The patient sustained a lumbar strain as a result of the 2-10-09 work injury but did not sustain any structural damage to his lumbar spine.

Dr. Menke opined as follows regarding causation:

> The patient's symptoms are worse as a result of the 2-10-09 incident, but this is subjective. There has not been any structural change in his lumbar spine and I think the incident of 2-10-09 would have just led to a lumbar strain which would have been temporarily symptomatic if it weren't for the prior low back problems and prior low back surgery of 5-05-06.

Dr. Menke opined Esteppe reached maximum medical improvement ("MMI"), and assessed an impairment rating based on the following:

> According to the AMA Guidelines, 5th Edition, page 385, table 15-3, the patient does qualify for DRE lumbar category 3. I would currently assign a 13% whole person impairment rating.
>
> Prior to the work injury of 2-10-09, the patient qualified for a DRE lumbar category 3. He was more functional and did not have as much pain. However, the patient was requiring some narcotic medication. At that

> point, I would have assigned a DRE lumbar category 3 and specifically an 11% impairment rating. I would, therefore, say that the increase from 11% to 13% would be due to the work injury of 2-10-09 for a total of 2% whole person impairment rating.

The Form 107-I of Dr. James C. Owen reflects the following diagnosis: “The diagnosis, therefore, is persistent low back pain with two-level involvement associated with recent exacerbation 2-10-2009.” During the physical examination, Dr. Owen noted Esteppe “got on and off the table and in and out of the room with mild difficulty, holding his low back on occasion.” Dr. Owen also noted “[p]araspinal muscle spasm of the low back was obvious.” Dr. Owen opined Esteppe had reached MMI and assessed a 21% impairment rating. Regarding the existence of an active impairment prior to February 10, 2009, Dr. Owen opined as follows:

> Yes. I would place that at 66 2/3% in this situation. Clearcut prior surgery, prior low back problems, and is under active treatment all the way up until the time of this most recent exacerbation.

A February 16, 2009, MRI report of Esteppe’s lumbar spine revealed the following:

> 1. Facet hypertrophy at the levels of L3/4, L4/5, and L5/S1.

> 2. Postoperative changes from a prior laminectomy at the level of L4/L5 with a recurrent/residual left lateral disc herniation resulting in left neural foraminal stenosis.
>
> 3. Bulging discs and osteophytes at the level of L5/S1 with a left paramedian disc herniation resulting in impingement of the left S1 nerve root.

Records from Dr. Phillip A. Tibbs at the University of Kentucky Chandler Medical Center dated May 29, 2009, indicate Esteppe's pain level was seven on a scale from one to ten with fifty percent of the pain in his back and fifty percent in the leg. Dr. Tibbs noted Esteppe underwent a lumbar microdiscectomy (LMD) in 2006 performed by Dr. Alexis Norelle, and degenerative disc disease was seen on an MRI. Dr. Tibbs noted a myelogram was "negative for recurrent herniation," and there was no indication for surgery.

A medical record generated by Dr. Steven P. Kiefer on April 29, 2008, indicates, in part, as follows:

> Data Reviewed: Plain films of his neck are unrevealing despite his chiropractor's assessment that he had an abnormal curvature. His MRI reveals some very modest degenerative disc disease and spondylosis. I don't see root or canal compromise.
>
> Impression: Mr. Estepp [sic] has chronic low back pain. He has been to pain clinics and

> such. I doubt that there is a simple solution for that.
>
> Treatment Options: His current neck symptoms are a likely manifestation of musculoligamentous strain. He is improving and I think he will continue to heal over time. There is no surgical intervention. If his neck difficulties persist, then referral to physical therapy might well be considered.

A medical record generated by Dr. Kiefer on March 10, 2009, states, in part, as follows:

> Data Reviewed: An MRI of his lumbar spine from 2/16/09 is reviewed. There is degenerative signal change within the L4-5 and L5-S1 discs. Laminotomy defects are noted on the left at L4-5 and L5-S1. There is a bit of granulation tissue. There is no evidence of recurrent disc herniation.
>
> Impression: Mr. Esteppe is having a flare up of his underlying degenerative disc disease.
>
> Treatment Options: There is no role for surgical intervention. Treatment should be symptomatic. He should continue working with Dr. Linton, and he does have an appointment with his pain management physician later this week.

Dr. Ballard Wright generated a February 19, 2007, report in which he set forth the following diagnoses after conducting an examination:

1. Low back pain.
2. Status post discectomy.
3. Bilateral lumbar facet arthropathy.
4. Degenerative disc changes.

Records dated April 18, 2007, also generated by Dr. Wright, indicate Esteppe underwent bilateral lumbar facet injections with fluoroscopy, and the postoperative diagnoses were lumbar facet arthropathy, lumbar radiculities, and lumbar degenerative disc and joint disease. Records dated July 25, 2007, indicate Esteppe underwent bilateral lumbar facet injections with fluoroscopy and the diagnoses were lumbar facet arthropathy, lumbar radiculitis, lumbar degenerative disc and joint disease, and myofascial pain syndrome. A September 19, 2007, note indicates Esteppe underwent a left sacroiliac joint injection with fluoroscopy. Dr. Wright's diagnoses were lumbar sacroiliitis, lumbar facet arthropathy, lumbar degenerative joint disease, and myofascial pain syndrome. A November 19, 2007, note indicates Esteppe underwent right lumbar radiofrequency thermocoagulation. Dr. Wright's diagnoses were lumbar spondylosis, lumbar facet arthropathy, and lumbar degenerative joint disease.

Records generated by Dr. Norelle on April 13, 2006, indicate an August 22, 2005, MRI was reviewed revealing "a foraminal disk herniation at L4-5 on the left along with a central and left-sided disk herniation at L5-S1." Dr. Norelle noted Esteppe expressed his

> desire to undergo surgery. A record dated May 19, 2006, indicates Esteppe underwent an L4-L5 hemilaminotomy with a L4-L5 discectomy and a left L5 hemilaminotomy with an L5-S1 discectomy on May 5, 2006. Records generated October 19, 2006, by Dr. Norelle indicate Esteppe was still experiencing low back pain and some left leg pain. Dr. Norelle gave Esteppe samples of Lidoderm patches and started him on Diclofenac.
>
> Records generated by Dr. Terry Trout from August 20, 2005, through November 17, 2006, indicate Esteppe consistently complained of low back pain with radicular pain down his left leg and received treatment for this pain. A record dated November 17, 2006, notes the following assessment: "Degenerative changes to lumbosacral spine with facet joint mediated pain and also history of disc disease with status post surgical intervention."

In our August 31, 2011, opinion, we concluded as follows:

> KRS 342.0011(1) defines "injury," in relevant part, as follows:
>
> > "Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.
>
> KRS 342.0011(33) defines "objective medical findings" as "information

gained through direct observation and testing of the patient applying objective or standardized methods." In Gibbs v. Premier Scale Co./Indiana Scale Co., 50 S.W.3d 754 (Ky. 2001), the Kentucky Supreme Court, in addressing this definition, held "objective medical findings" are not limited to findings obtained by diagnostic tools such as x-ray, CAT scan, and MRI. The Court explained as follows:

> In the instant case, the claimant has focused upon the shortcomings of the sophisticated diagnostic tools. However, in addition to testing which utilizes the aforementioned [sic] diagnostic tools, a wide array of standardized laboratory tests and standardized tests of physical and mental function is available to the medical practitioner. Although there may not be a standardized test which would apply to every conceivable symptom of which a patient might complain, or every symptom which cannot be directly observed, such tests are capable of confirming the existence and extent of a number of symptoms. We know of no reason why the existence of a harmful change could not be established, indirectly, through information gained by direct observation and/or testing applying objective or standardized methods that demonstrated the existence of symptoms of such a change.

Gibbs at 762.

The Court further instructed "a diagnosis based upon a worker's complaints of symptoms but not supported by objective medical findings is insufficient to prove an 'injury' for the purposes of Chapter 342." Id.

In the case *sub judice*, the ALJ concluded the record does not contain "documentation setting forth objective medical findings confirming a harmful change to Plaintiff's low back anatomy as a result of the work incident of February 10, 2009." The ALJ further concluded the only "suggestion of change" comes from Esteppe's subjective complaints of pain. Consequently, the ALJ reasoned there is no proof of an "injury" as defined by the Workers' Compensation Act. We conclude the ALJ's legal and factual determinations on this issue are erroneous and are neither based on the facts nor a correct reading of the law. It is important to note that while a wealth of medical records were filed in the record, only two physicians- Drs. Menke and Owen- were asked to address the issue of an "injury" as defined by the Act and the existence of a permanent impairment stemming from the February 10, 2009, work injury.

Both Drs. Menke and Owen performed physical examinations of Esteppe before expressing their opinions and assessing impairment ratings. During his physical examination of Esteppe, Dr. Menke noted Esteppe was "[t]ender over the lumbosacral junction." Dr. Owen noted "obvious" muscle spasm in Esteppe's lower back during his physical examination. These observations comprise objective medical evidence as defined by the applicable

statutory and case law. While both physicians who addressed the issue of an impairment noted there were no structural changes in Esteppe's lumbar spine, the fact remains both physicians concluded Esteppe sustained a work-related injury and assessed an impairment rating which was in part attributable to that injury. As articulated by the Court in Gibbs, supra:

> [w]e know of no reason why a diagnosis which was derived from symptoms that were confirmed by direct objective and/or testing applying objective standardized methods would not comply with the requirements of KRS 342.0011(1). Id.

In the case *sub judice*, it is clear the ALJ believed a test result indicating an anatomical change in Esteppe's lower back was necessary to establish Esteppe sustained a work-related injury. However, Gibbs v. Premier Scale Co./Indiana Scale Co., supra, clearly indicates test results are not the sole forms of objective medical findings.

The record clearly reveals the physicians asked to address whether Esteppe sustained a work injury on February 10, 2009, answered in the affirmative, opined Esteppe reached MMI, and assessed an impairment rating attributable to the injury. Dr. Menke opined while Esteppe did not sustain any structural damage to his lumbar spine as a result of the February 10, 2009, work incident, he did sustain a "lumbar sprain." Dr. Menke explained the February 10, 2009, work incident *would have led* to a "temporary

symptomatic" lumbar strain if it were not for Esteppe's prior lower back problems and surgery of May 5, 2006. In other words, as a result of the February 10, 2009, event, Esteppe sustained a *permanent* lumbar strain due to the fact Esteppe had pre-existing lumbar problems on the day of the work incident. Dr. Menke assessed an 11% impairment rating for Esteppe's pre-existing condition and opined the February 10, 2009, incident increased that impairment rating to 13%. Dr. Owen opined the February 10, 2009, incident is the cause of Esteppe's current low back complaints, and the mechanism of injury is the "excessive torsion and torque" occurring on February 10, 2009. His diagnosis is persistent low back pain associated with a "recent exacerbation" on February 10, 2009. Dr. Owen assessed a 21% impairment rating two-thirds of which were pre-existing.

The opinions of Drs. Owens and Menke establish Esteppe experienced a *worsening* of his pre-existing impairment due to the February 10, 2009, work injury in the form of a lumbar sprain. While this Board understands the ALJ's concern regarding Esteppe's pre-existing lumbar condition and pre-existing complaints of pain, this issue was adequately addressed by Drs. Owens and Menke. Even though a pre-existing condition is present, it is possible for a subsequent injury to worsen that condition. Derr Construction Company v. Bennett, 873 S.W.2d 824 (Ky. 1994). Obviously, both Drs. Menke and Owen believed the event of February 10, 2009, worsened Esteppe's low back condition as reflected by their impairment ratings. The ALJ cannot reject these impairment ratings without providing his reasons

> for rejecting the uncontradicted medical evidence on this issue. The ALJ's statement there are no objective medical findings supporting an "injury" as defined by the Workers' Compensation Act is clearly erroneous as the statement is not in accordance with the statutory definition of "injury" as explained by the case law.

We reversed and remanded providing the following instructions:

> Accordingly, the ALJ's March 10, 2011, opinion and order dismissing Esteppe's claim for failure to prove an injury under the Act is **REVERSED**, and this case is **REMANDED** for entry of an amended opinion determining whether Esteppe sustained an injury as defined by the statute. On remand, the ALJ must determine whether an "injury" occurred as defined by the Workers' Compensation Act based on a correct understanding of the medical evidence and the law. If the ALJ determines Esteppe sustained an injury as defined by the Act he shall address all remaining contested issues. However, if the ALJ rejects the opinions and impairment ratings of Drs. Menke and Owen, he must provide the reasons for rejecting these uncontradicted medical opinions and impairment ratings. In either case, the ALJ shall support his decision with sufficient findings of fact.

Significantly, no appeal was taken of the Board's August 31, 2011, opinion.

Concerning whether Esteppe sustained an injury as defined by the Act in the amended opinion, the ALJ determined as follows:

> In its Opinion Reversing and Remanding the Board directed the ALJ to reconsider the input of Defendant's Dr. Menke and Plaintiff’s Dr. Owen on the issue of whether there was an 'injury.' These two physicians are the only two involved physicians who addressed the issue of an injury as defined by the Act. These two physicians also assessed Plaintiff permanent impairment ratings.
>
> In his physical examination of Plaintiff, Dr. Menke noted Plaintiff was 'tender over the lumbar sacral junction'; and, Dr. Owen noted muscle spasm in Plaintiff’s low back. As noted by the Board, these observations constitute objective medical findings as defined by applicable statutory and case law.
>
> In the case sub judice the ALJ dismissed Plaintiff's claim explaining there were no objective findings to support a determination of Plaintiff having sustained an injury. It having been brought to the attention of the ALJ that there were objective medical findings in the record to support a determination that Plaintiff sustained an injury as that term is defined in the Act, it is determined Plaintiff did present objective medical findings of an injury and, therefore, it is determined Plaintiff sustained a work injury in his February 10, 2009 work incident.

In its appeal, Mann Chrysler's first argument is as follows:

> By its Opinion dated August 31, 2011 reversing and remanding, the Workers' Compensation Board substituted its own opinion for that of the ALJ. KRS 342.285(2) provides that the Board shall not reweigh the evidence and substitute its judgment for that of the ALJ with regard to a question of fact.
>
> ....
>
> At pages 16 and 17 of its Opinion, this Board reversed and remanded the ALJ's original Opinion for determination by the ALJ whether Esteppe suffered an injury as defined by the statute. The ALJ was required to either find that an injury occurred based upon 'a correct understanding of the medical evidence and law' and address the other issues, or reject 'uncontradicted medical opinions and impairment ratings of Drs. Menke and Owen' providing 'sufficient findings of fact' that support his decision. Essentially, the ALJ was ordered to find an injury occurred by the Board. It appears to the petitioner that the Board impermissibly replaced its own judgment for that of the ALJ and in response the ALJ impermissibly reweighed the evidence and changed his conclusion.

Mann Chrysler also asserts as follows:

> The ALJ he [sic] did not reject uncontradicted medical evidence as the Board claimed in its August 31, 2011 Opinion. The Board's decision could not be appealed at that time because, though it strongly encourages the ALJ to find that an injury occurred and assess impairment, the remand to the ALJ offered an option for the ALJ to confirm his original determination that no injury occurred if he could adequately explain his rejection of the

> 'uncontradicted medical opinions' with findings of fact. As the ALJ could still affirm his original opinion, no appeal could be made by the petitioner at that time. However, the petitioner would now point out that the record is full of examples of the so-called objective medical findings supporting an injury documented by Dr. Owen throughout the pre-injury medical records. Likewise, the opinions of Drs. Owen and Menke were not 'uncontradicted' as stated by the Board in its Opinion due to the fact that Dr. Keifer evaluated the claimant and did not find any permanent harmful change, but only a flare-up of the pre-existing condition. No treatment other than the chiropractic services and pain management visits Esteppe had been pursuing for years was recommended. Also, the definition of an injury, by statute and subsequent Court decision, requires objective medical findings. The report of Dr. Menke only supports subjective complaints of pain.

Mann Chrysler incorrectly argues it was unable to appeal this Board's August 31, 2011, opinion. If Mann Chrysler believed this Board committed error in its August 31, 2011, opinion by "impermissibly replac[ing] its own judgment for that of the ALJ," Mann Chrysler had thirty days after entry of the Board’s opinion to appeal to the Kentucky Court of Appeals. CR 76.25(2). As Mann Chrysler failed to appeal the August 31, 2011, opinion, its argument regarding alleged overstepping by this Board is of no avail since this Board's opinion is now the law of the case. The

case most commonly cited as to what constitutes the law of the case is Inman v. Inman, 648 S.W. 2d 847 (Ky. 1982). The Supreme Court instructed as follows:

> The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions and law and not questions of fact. "As the term 'law of the case' is most commonly used, and as used in the present discussion unless otherwise indicated, it designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate. The term 'law of the case' is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court." 5 Am. Jur.2d, Appeal and Error, Sec. 744.

Id. at 849.

Under "the law of the case doctrine", when an appellate body passes on a legal question and remands the cause to the fact-finder below for further proceedings, the

legal question determined by the appellate body cannot be decided differently on subsequent appeal in the same case. Whittaker v. Morgan, 52 S.W.3d 567 (Ky. 2001); Inman v. Inman, 648 S.W.2d 849 (Ky. 1982). Thus, in the case *sub judice*, since Mann Chrysler is asserting this Board, in its August 31, 2011, opinion "substituted its own opinion for that of the ALJ" concerning whether Esteppe sustained an injury as defined by the Act, a purely legal error and issue, Mann Chrysler's *only* recourse was to appeal to the Court of Appeals. By failing to timely appeal the Board's opinion, Mann Chrysler fully surrendered its ability to claim error in the August 31, 2011, opinion. Since the ALJ determined Esteppe sustained an injury as defined by the Act, Mann Chrysler cannot now assert the Board's August 31, 2011, opinion is erroneous.

Mann Chrysler's argument the ALJ "impermissibly reweighed the evidence and changed his conclusion," is without merit. The ALJ was carrying out the instructions of this Board, as set forth in the August 31, 2011, opinion, to re-examine and re-weigh the evidence and render further findings of fact. This Board’s instructions gave the ALJ the option of changing his original determination that Esteppe did not sustain an injury after re-examining the evidence.

Mann Chrysler's second argument on appeal is the ALJ erred by awarding the three multiplier. Mann Chrysler asserts, in part, as follows:

> By the Benefit Review Conference Order and Memorandum dated January 11, 2011, Esteppe stipulated that he retained the physical capacity to return to his former work. Specifically, Esteppe stipulated that the February 10, 2009 incident was a 'no lost time' injury, he was earning the same or greater wages, and he **retained the physical capacity to return to former work.** A true and correct copy of the Order & Memorandum is attached hereto as Exhibit A for the Board's convenience. That Order also lists the contested issue of 'extent and duration' but does not state that Esteppe was seeking any enhancement multipliers.
>
> If an issue is stipulated, the ALJ concedes his authority to decide that issue. [citations omitted]. In other words, the ALJ cannot make a finding contrary to the stipulation of the parties. In the present case, then, a finding that the plaintiff 'is no longer able to do the type of work he was doing when injured' is impermissible. See Amended Opinion (January 13, 2012), pg. 5. The ALJ had no authority to decide the issue which had been determined by stipulation.

The January 11, 2011, benefit review conference ("BRC") order indicates a checkmark next to stipulation number eight: "Does plaintiff retain the physical capacity to return to former work." Further, stipulation number

nine reflects Esteppe lost no work as a result of the injury. Also, the following contested issues are listed: "1) occurrence & injury 2) S/L if cumm tra claim 3) pre ex active 4) ex & duration."

Stipulations of fact are an essential aspect of workers' compensation litigation. The stated purpose of the BRC is to “expedite the processing of the claim and to avoid if possible the need for a hearing.” 803 KAR 25:010 §13(1). At the BRC, the parties are directed to “attempt to resolve controversies and disputed issues” and “narrow and define disputed issues.” 803 KAR 25:010 §13(11). If the parties have not reached agreement on all issues at the close of the BRC, the ALJ is directed to prepare a “summary stipulation of all contested and uncontested issues.” 803 KAR 25:010 §13(13). As stated clearly in the regulation, “[o]nly contested issues shall be the subject of further proceedings.” 803 KAR 25:010 §13(14). As instructed by the Kentucky Supreme Court in Osborne v. Pepsi-Cola Co., 816 S.W.2d 643 (Ky. 1991):

> 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).

Id. at 644.

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 a check mark appears out from this and other sentences under the heading “stipulations,” 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 it is sufficiently clear that the purpose of stipulation number eight is to resolve by agreement whether the claimant is entitled to the three multiplier enhancement. We arrive at this belief not only by comparing the plain language of the statute with the corresponding language of the stipulation, but also by considering the purpose of stipulations in general. We

acknowledge there is evidence in the record addressing the issue of Esteppe's ability to return to the work he was performing at the time of the injury, which include Esteppe's testimony upon which the ALJ ultimately relied in awarding the three multiplier in the January 13, 2012, Amended Opinion. However, we are unable to ignore the fact that no party moved to set aside stipulation number eight. In addition, while "extent and duration" is listed under contested issues in the January 11, 2011, BRC order, there is no mention of multipliers. Consequently, the ALJ's award of the three multiplier in the January 13, 2012, Amended Opinion must be vacated.

The January 11, 2011, BRC order also indicates as follows under stipulation number nine: "Date(s) plaintiff returned to work: yes no lost time; Wages currently earned: same greater." There is a checkmark indicated by "same." It is clear that application of the two multiplier was stipulated at the January 11, 2011, BRC, as 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 Esteppe returned to work at the same weekly wage he 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). Therefore, the ALJ's failure to provide for enhancement of the award by the two multiplier in the January 13, 2012, Amended Opinion, subject to the conditions set forth in Chrysalis House, Inc., supra and Hogston, supra, is error.

At some point during the 425 weeks Esteppe receives income benefits, his 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. This may have already transpired. If Esteppe's employment ceases due to reasons which relate to the disabling injury or a previous work-related injury, he

is entitled to have his 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. 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 January 13, 2012, Amended Opinion is **AFFIRMED** to the extent the ALJ determined Esteppe sustained a compensable injury under the Act. The ALJ's award enhancing Esteppe's benefits by the three multiplier is **VACATED** and the case is **REMANDED** for entry of a second amended opinion and order awarding the two multiplier subject to the conditions set forth in Chrysalis House, Inc., supra and Hogston, supra.

ALL CONCUR.

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