OPINION ENTERED: March 19, 2012

CLAIM NO. 200978334

MIKE SARGENT
d/b/a SARGENT'S RACELAND WHOLESALE TIRE
AS INSURED BY PRAETORIAN INSURANCE COMPANY PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

PAUL BELLAMY
SARGENT'S RACELAND WHOLESALE TIRE
AS INSURED BY TRAVELERS INDEMNITY
COMPANY OF AMERICA
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Mike Sargent d/b/a Sargent's Raceland Wholesale Tire ("Sargent"), as insured by Praetorian Insurance Company ("Praetorian"), appeals the October 14, 2011, opinion, order, and award of Hon. Grant S. Roark,

Administrative Law Judge ("ALJ") determining Paul Bellamy ("Bellamy") sustained work-related injuries on July 17, 2007, and July 30, 2009, and awarding income and medical benefits as a result of each injury.

The ALJ determined Bellamy sustained a work-related lumbar injury on July 17, 2007, and awarded permanent partial disability ("PPD") benefits and medical benefits based upon a 5% impairment. As the carrier for Sargent on that injury date, Praetorian bore the liability for this injury.[1] The ALJ also determined Bellamy sustained work-related cervical and lumbar injuries on July 30, 2009. Based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") the ALJ determined the cervical injury resulted in a 5% impairment, and the lumbar injury resulted in a 14% impairment. Utilizing the combined values chart of the AMA Guides, the ALJ determined Bellamy had a total impairment rating of 18% for both injuries occurring on July 30, 2009. The ALJ enhanced the award of PPD benefits for the July 30, 2009, injury by the three multiplier pursuant to KRS 342.730(1)(c)1. Further, since Sargent was insured by Travelers Indemnity Company of

[1] Based on the Form 111, in the opinion, order, and award, the ALJ refers to Praetorian as Midwestern Insurance Alliance.

America ("Travelers") for the July 30, 2009, injury, the ALJ ordered Travelers is responsible for paying all PPD benefits for the July 30, 2009, injury, but only the "medical expenses relating to the cervical injury." The ALJ determined Praetorian is responsible "for all medical expenses associated with [Bellamy's] lumbar condition."

Praetorian filed a petition for reconsideration asserting Travelers is the carrier responsible for the medical expenses "related to treatment of the lumbar spine pursuant to Derr Construction v. Bennett, 873 S.W.2d 824 (Ky. 1994)." By order dated November 16, 2011, the ALJ summarily denied Praetorian's petition for reconsideration from which Praetorian also appeals.

Bellamy's July 17, 2007, injury occurred when a tire he was changing exploded. In his July 7, 2007, deposition, Bellamy described the occurrence of the injury as follows:

> A: A gentlemen brought in a rear tire off of it was either a backhoe or a tracker, one of the big tires, and needed a tube put in it. My boss told me to put a tube in it. So I took the sledgehammers and the bars and broke it down, got the old tube out, cleaned it up, put the new tube in. I went to air it back up, and had about 35 pounds of air in it, and it came apart.

Bellamy testified he injured his lower back, right elbow, eyes, and ears. Bellamy was off work for approximately ten weeks and returned to work at Sargent until approximately January 3, 2008. He then worked at a steel mill through August, 2008. After August, 2008, he returned to work for Sargent as a shop foreman, earning more money than when he first worked for Sargent.

In his November 17, 2010, deposition Bellamy described the occurrence of the July 30, 2009, injury as follows:

> A: I was mounting a set of 33-inch tires on a Jeep wheels. When I got the second tire on the wheel, I went to inflate it and when I went to jerk upon the tire like you do to get the tire to take air, it just – something felt funny in my neck all way down my back, just a lot of pain.

After introduction of the lay and medical evidence, a hearing was held on August 19, 2009, regarding the July 17, 2007, injury. On September 3, 2009, Bellamy filed a "Motion to Hold Claim in Abeyance and Reopen Proof on Issues of New or Reawakened Injury." Bellamy attached the medical records of Dr. Dante Oreta, his regular treating physician, covering the period from August 28, 2008, through August 31, 2009, as well as the August 10,

2009, MRI reports of the cervical and thoracic spine and right knee. Bellamy asserted as follows:

> Taken as a whole, these records indicate that [Bellamy's] multiple conditions originally alleged to be due to [sic] February 17, 2007 commercial tire explosion/injury at work are worse than previously thought [sic] are having a continuing and ever worsening effect upon [Bellamy] and may have been aroused, awakened or even possibly the subject of a new injury with the same employer on or about July 30, 2009.

Bellamy posited if he sustained a new injury on July 30, 2009, while working for Sargent, KRS 342.270(1) "might very well require that a Form 101 for the 'event' of July 30, 2009, be filed prior to the final resolution of this matter or be forever barred." Alternatively, Bellamy asserted his condition has deteriorated as of the hearing date more "than the evidence in the record would leave the ALJ to believe."

By Order dated September 30, 2009, the ALJ removed Claim No. 2007-81409 from the submission list and granted the parties seventy-five days to complete proof and provide status reports.

On October 15, 2009, Bellamy filed a "Motion to Place Claim in General Abeyance while [he] receives TTD." Bellamy stated the second injury he sustained while working for Sargent is covered by a different workers' compensation

carrier. Bellamy posited there would be a dispute between the carriers. Bellamy stated he was under the care of Dr. Oreta who referred him to Dr. Phillip Tibbs. Bellamy asserted he had “been placed on temporary total disability for the second injury” and could not conclude his proof until he reached maximum medical improvement (“MMI”) due to the second injury and is removed from TTD status.

In an Order dated October 29, 2009, the ALJ sustained Bellamy’s motion to place the claim in abeyance.

On July 22, 2010, Bellamy filed a “Motion to Amend 101 to State Additional Date of Injury,” asserting he sustained a “new or awakened injury” on or about July 30, 2009, while lifting a thirty-five inch commercial tire and “felt pain in both shoulders and arms and upper back pain.” Bellamy stated Travelers is the carrier for the July 30, 2009, injury. Accordingly, Bellamy requested the ALJ issue an order joining the two claims and setting a proof schedule for the new/additional injury. By Order dated September 9, 2010, the ALJ sustained Bellamy’s motion and ordered his Form 101 be amended “in accordance with the motion filed on July 22, 2010.” The ALJ further ordered Travelers be added as a party and granted the parties ninety days to complete proof. After the introduction of

lay and medical evidence, a hearing was held on August 15, 2011.

By Order dated October 31, 2011, the ALJ ordered Claim No. 2009-78334 consolidated with Claim No. 2007-81409.

Concerning whether Bellamy sustained work-related injuries on July 17, 2007, and July 30, 2009, in the opinion, order, and award the ALJ entered the following findings of fact and conclusions of law:

> Having reviewed the evidence of record, the Administrative Law Judge is persuaded by the opinions of Dr. Tibbs, Dr. Snider and Dr. Lowe that plaintiff suffered a permanent lumbar injury in 2007 and a new lumbar injury and a cervical injury in 2009. Despite Travelers' argument that no objective evidence of a cervical injury exists, the opinions of Drs. Tibbs, Snider and Lowe and the cervical and lumbar MRIs lead the Administrative Law Judge to conclude otherwise. Dr. Tibbs identified both cervical and lumbar abnormalities on the MRIs and Dr. Snider and Dr. Lowe each assigned permanent impairment ratings for the lumbar and cervical spine. Based on these factors, it is determined plaintiff suffered a compensable lumbar injury in 2007 and a compensable cervical injury in 2009 along with a new lumbar injury at that time as well.

After determining Bellamy was not permanently and totally disabled, the ALJ entered the following findings of fact and conclusions of law:

. . .

Accordingly, it is first determined that plaintiff has a 5% impairment due to the 2007 lumbar injury as assigned by both Dr. Snider and Dr. Rapier. Although plaintiff returned to work for the employer after the injury, plaintiff's testimony persuades the Administrative Law Judge that he was not physically able to return to [sic] same job duties he had prior to the 2007 injury as he required some accommodation and did not work on the heavier tires he did previously. However, plaintiff was earning a greater average weekly wage when he returned to work following the 2007 incident and he testified at the August, 2009 hearing that he planned to continue working in that job. Of course, the hearing was just a couple of weeks after the 2009 injury. For these reasons, it is determined that, but for the 2009 incident, plaintiff could have continued working for the indefinite future at a greater AWW. As such, plaintiff is not entitled to application of the 3x multiplier in KRS 342.730(1)(c)1 for the lumbar injury in 2007. His award of benefits for the 2007 injury is therefore calculated as follows:

$326.01 x 2/3 = $217.34 x .05 x .65 = **$7.06 per week**

With respect to the 2009 injury, the Administrative Law Judge is most persuaded by the opinions of Dr. Lowe and Dr. Snider. It is determined Dr. Snider's 5% cervical impairment is most accurate as it is most in keeping with plaintiff's objective findings and the fact he suffered only one cervical injury, as Travelers points out. As such, Dr. Snider's 5% rating is found

> more credible than the 9% assigned by Dr. Lowe. However, with respect to the lumbar injury, Dr. Lowe's impairment rating is considered most persuasive as it best accords with the objective findings pointed out by Dr. Tibbs and plaintiff's own continued complaints of pain. Dr. Lowe's use of the ROM method for the lumbar impairment is considered credible in that plaintiff did suffer a new, but recurrent, lumbar injury. As such, it is determined Dr. Lowe's 14% (19%-5%) rating is most credible. His total impairment rating, using the combined values chart, is 18%.
>
> Moreover, based on Dr. Tibbs' and Dr. Lowe's opinions, it is further determined that plaintiff does not retain the physical ability to return to the working foreman position he had with the defendant at the time of his 2009 injury. He is therefore entitled to application of the 3x multiplier for that injury and his award is calculated as follows:
>
> $426.46 x 2/3 = $284.31 x .18 x 1 x 3 = **$153.53 per week**.

With respect to apportionment of medical expenses, the ALJ entered the following findings of fact and conclusions of law:

> Based on the foregoing findings, it is determined that Travelers is responsible for all medical expenses relating to the cervical injury. Moreover, although the greater impairment rating is attributable to the 2009 incident, the Administrative Law Judge notes that plaintiff's lumbar treatment did not change significantly following the 2009 incident from that following the 2007 incident. In

> addition, the totality of evidence persuades the Administrative Law Judge that the 2007 injury was the instigating lumbar event for which plaintiff required ongoing treatment and was first entitled to permanent lumbar medical benefits. As such, it is determined Midwestern Insurance Alliance is responsible for medical expenses associated with plaintiff's lumbar condition.

On appeal, Praetorian asserts the ALJ erred in finding Derr Construction v. Bennett, supra, does not apply. Citing to this Board's decision in Letcher County Fiscal Court v. Brenda Hall, 2001-01694 and 1996-93008, rendered April 30, 2003, and the Court of Appeals' decision in CR & R Trucking Co., Inc. v. Newcomb, 2009-CA-000191-WC, rendered August 7, 2009, Designated Not to be Published, Praetorian asserts as follows:

> The Claimant's low back condition is the result of the cumulative effect of the 2007 and 2009 injuries. Thus, Derr Construction, *supra* requires that future medical treatment be the responsibility of the carrier for the 2009 injury. The ALJ's holding that the carrier for the 2007 injury remains liable for such treatment must be reversed and this claim remanded for entry of an appropriate award of medical benefits.

We agree with Praetorian that Derr Construction v. Bennett, supra, is controlling in the case *sub judice*. Where there are successive injuries to the same body part,

the general rule is that absent unusual circumstances establishing a "clear demarcation" between the treatment required as a result of successive injuries, the carrier at risk for the last injury is responsible for all the medical benefits for both injuries. We believe our decision in Kentucky Armature and Motor Works as Insured by Travelers v. James Partin, Claim No. 2002-74351, rendered June 26, 2009, explains the rationale for the rule and our holding in the case *sub judice*. In Kentucky Armature and Motor Works as Insured by Travelers v. James Partin, supra, we stated as follows:

> Because we agree that the second injury was of such significance and there is no substantive evidence supporting an apportionment of liability for the payment medical benefits in this case, we reverse. While the Supreme Court in Phoenix Manufacturing Company v. Johnson, supra, and the Court of Appeals in Sears Roebuck Company v. Dennis, supra, upheld an ALJ's apportionment of responsibility for medical benefits, both of those cases did not deal with the factual situation in the case sub judice. In Phoenix Manufacturing Company there was an agreement between the carriers as to apportionment of the medical expenses and in Sears Roebuck Company the claimant sustained injuries to two distinct body parts. For those reasons the apportionment between carriers was upheld. In Letcher County Fiscal Court, supra this Board while acknowledging the holding in Phoenix Manufacturing Company v. Johnson, supra

also cited to Derr Construction v. Bennett, 873 S.W. 2d 824 (Ky. 1994) saying:

> As pointed out by KEMI, the case of Derr Construction Co. v. Bennett, does not concern the apportionment of liability for medical expenses between successive insurance carriers. Instead, the issue therein was apportionment of liability between the employer and the Special Fund pursuant to KRS 342.120. It was clear the claimant had a degenerative condition, which existed prior to the work injury and, therefore, the employer sought relief from medical expenses for the portion of disability caused by the arousal of the previous condition. The supreme [sic] court [sic] held, however, that while KRS 342.120 exempts the employer from paying income benefits for prior active disability or disability resulting from the arousal of a previously dormant condition, KRS 342.020 contains no exemption regarding medical benefits. The court explained that where the work-related injury constitutes a progression or worsening of a prior active work-related condition, the employer was responsible for medical expenses necessary for the cure and relief of the claimant's arthritic condition.

KRS 342.020 mandates that the employer pay for the cure and relief from the effects of the injury as may reasonably be required at the time of the injury and thereafter during disability. Just as important, there is no statutory provision authorizing apportionment of medical expenses. In general the last employer, who under the statute is responsible for medical expenses in regard to a particular condition or body part, will have sole liability for medical expenses for ongoing problems with regard to that condition or body part unless the medical expenses can be clearly distinguished as resulting from distinct and separate causal changes. The policy consideration of this rule is one of a practical matter. Apportionment of medical expenses would encourage more and more complicated litigation that would require the claimant to file a claim against every employer who might possibly have liability as to causation and would result in subsequent litigation between consecutive employers and their insurance carriers on the issue of apportionment. When the last injury is one that is significant, it is generally determined to be an intervening cause significant enough to warrant imposition of the responsibility to pay all medical costs from the date of injury forward.

Board Member Gardner went on to point out that such rationale was just as applicable in cases dealing with successive insurance carriers. As pointed out by Travelers the Board set out three plausible scenarios concerning compensability of medical expenses stating:

> First, when the second injury is a mere temporary exacerbation of the first injury, the insurance carrier for the first injury remains saddled with the entire liability. Second, when the last injury is an intervening and superseding event significant enough to impose liability for income benefits, the second insurance carrier is responsible for all attendant medical expenses. Finally, if the facts and/or medical evidence are so conclusive as to require an apportionment of medical expenses, then of course apportionment between successive carriers may be authorized.

Member Gardner stated, as in the case *sub judice*, the situation in Letcher County Fiscal Court v. Hall was not a case where the second injury was a mere exacerbation of the first injury. Of great importance was the fact the second injury was a significant injury for which the subsequent insurance carrier was liable for all income and medical benefits. Finally, the medical expenses could not be clearly distinguished as resulting from distinct and separate causal changes. Therefore, the Board concluded the ALJ did not err in placing all the

liability for payment of medical expenses on the subsequent insurance carrier. In so holding the Board stated:

> In conclusion, though Derr Construction Co., supra, did not involve liability for medical expenses between successive insurance carriers, this Board has consistently held based on the reasoning contained in Derr, that liability for medical expenses fall solely on the second insurance carrier when medical evidence attributes causation to the cumulative effect of successive injuries.

There is no dispute, in the case *sub judice*, the second injury, was much more significant than the first. The evidence establishes that although Dr. Vaughn assessed a five percent (5%) impairment Partin was able to return to work making the same or greater wages. Although he had some intermittent back problems Partin continued to work for the next seven years. The uncontradicted medical evidence, as reflected in the notes of Dr. Menke and the report of Dr. Travis, establish the second injury resulted in a disc herniation at the L5-S1 level with nerve root compromise. Surgery was recommended which Partin declined. Further, Partin acknowledged he took most of his medications after the 2002 injury. Partin's testimony establishes that after the 2002 injury his wife had to help him get out of bed and put on his clothes. Further he was required to lie down at least two or three times per day. Significantly, the records of Dr. Vaughn reflect he merely diagnosed

degenerative disc disease which had been aroused into disabling reality. Dr. Vaughn believed that neurologically Partin was intact. Therefore, we believe the logic as set forth in Letcher County Fiscal Court v. Hall is controlling in the case *sub judice* and KEMI must be responsible for all unpaid medical expenses in dispute as well as all of Partin's future medical benefits.

Although the ALJ felt there was sufficient evidence to support the apportionment of liability based on Partin's testimony and the fact Dr. Barry continued to see Partin after the 1994 injury up until the time of the second injury, there is nothing in the record that establishes a clear line of demarcation in order to substantiate an apportionment of responsibility for the payment of the medical benefits. Contrary to the ALJ's finding we do not believe the fact Partin felt the effects of his 1994 injury continued up to the time of his 2002 injury is of sufficient import to support apportionment of medical benefits. Further, Dr. Barry's one isolated statement that Partin's back pain is from the 1994 injury combined with Partin's testimony is not sufficient to justify an apportionment of the responsibility for medical benefits.

Without question the ALJ apportioned responsibility for the payment of medical benefits based upon the percentage of impairment attributable of each injury. Thus, since three-fourth (3/4) of the total impairment rating was attributable to the subsequent injury the ALJ required KEMI to pay for seventy-five percent (75%) of Partin's medical benefits. As pointed out by Travelers, the Court of

Appeals in Res-Care, Inc. v. Fritz, supra rejected such a formula for apportionment of the responsibility for medical benefits saying:

> We believe that apportionment of a functional impairment rating standing alone is an insufficient basis for apportioning medical benefits. Id. at 4.

Citing Derr Construction Co. v. Bennett, supra, the Court of Appeals held:

> The basis for the ALJ's apportioning the medical expenses between the two employers was (as stated in the ALJ's order denying reconsideration) "medical expenses relating to the lumbar spine were apportioned because of the finding that the two injuries were equally responsible for the resulting low back impairment and subsequent disability." The Board found that this is not a legal basis for apportionment. We agree.

In Manufacturers Service Corporation v. Merida Flav-O-Rich, WCB No. 04-94116, (December 12, 2007) this Board stated:

> In Derr Construction v. Bennett, 873 S.W. 2d 824 (Ky. 1994), the Supreme Court stated:
>
> Because KRS 342.020 does not exempt an employer from liability from liability for any portion of a worker's

> medical expenses in those instances where the work-related injury constitutes a progression or worsening of a prior, active work-related condition, we hold that the employer is responsible for the medical expenses necessary for the cure and relief of the arthritic condition in claimant's knees.

Id. at 828. In Derr, the court rejected the notion that the Special Fund could be liable for some portion of medical expenses for a cumulative trauma injury that was incurred during successive employments. In Phoenix Manufacturing Co. v. Johnson, 69 S.W. 3d 64 (Ky. 2001), the court explained that "Derr v. Bennett did not address the liability of employer's successive insurance carriers." Id. at 69. In Johnson, the court sanctioned apportionment of equal medical expenses between an employer's successive insurers primarily because the carriers had formally agreed to that amount in a settlement.

Since the holdings in Derr and Johnson, the Board's unflagging position has been that apportionment of medical benefits may be had in only the most unusual circumstances, where there is a clear demarcation between the treatment required as a

> result of successive injuries.
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> In conclusion, the case *sub judice* does not have the requisite unusual circumstances where there is a clear demarcation between the treatment required as a result of successive injuries and, therefore, KEMI is responsible for all of Partin's medical benefits.

In CR & R Trucking Co., Inc. v. Newcomb, 2009-CA-000191-WC, rendered August 7, 2009, Designated Not To Be Published, the Court of Appeals affirmed this Board's decision holding the carrier for the second injury to the same body part, the back, wholly liable for all medical expenses for the back injuries. The Court of Appeals stated:

> The original opinion in this case awarded future medical expenses to Newcomb, but it did not apportion future medical expenses between the two insurance companies. On reopening, the ALJ concluded:
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> > It is clear from Judge McDermott's opinion that he considered the 1981 date of injury the more significant one. It is also clear from the record that the 1981 injury necessitated a surgery in December, 1986 (prior to the second date of injury). It is from this surgery, and its aftermath, that the Plaintiff's problems flow. The responsible party shall

be that party on the risk for the 1981 date of injury.

Liberty Mutual relies on *Phoenix Mfg. Co. v. Johnson*, 69 S.W.3d 64 (Ky. 2001), where the Kentucky Supreme Court approved equal apportionment of medical expenses between two insurance carriers. *Id*. at 69. Based upon our review, however, we believe Liberty Mutual has overlooked an important difference. In *Phoenix*, the ALJ approved a settlement agreement between two insurance carriers to split equally all future medical expenses. *Id*. at 66. The Court clearly emphasized this fact in concluding that apportionment was proper. *Id*. at 68-69. Consequently, we believe *Phoenix* is factually distinguishable.

Liberty Mutual also relies on *Sears Roebuck & Co. v. Dennis*, 131 S.W.3d 351 (Ky. App. 2004), where a panel of this Court approved the apportionment of medical expenses between two different insurers, "when the circumstances so warrant." *Id*. at 356. *Sears* addressed a claimant who suffered a back injury with one employer and a psychological injury with a subsequent employer. *Id*. at 353. In affirming, this Court noted that there were distinct, separate injuries and expert testimony specifically supported apportionment of medical expenses. *Id*. at 356.

Liberty Mutual asserts that *Sears* supports apportionment of all medical expenses to Old Republic because the original ALJ found Newcomb's 1981 injury was more severe, and Newcomb underwent back surgery prior to his second injury. We disagree.

The facts show that Newcomb sustained an injury to the same body part, his lower back, during both the 1981 and 1987 incidents. Although the original ALJ assigned 70 percent disability for the 1981injury, we are not persuaded that this translates to an apportionment of future medical expenses. Furthermore, the record on reopening contains no evidence to support the ALJ's conclusion that Old Republic was liable for future medical expenses. While the medical evidence provided opinions as to the necessity of the MRI, neither physician offered an opinion regarding whether one injury or the other was the cause of Newcomb's complaints. Although Liberty Mutual contends the circumstances of this case rendered Old Republic liable for future medical expenses, we conclude that, unlike in *Sears*, the record was devoid of evidence to support such an apportionment.

Finally, the Board, in addition to analyzing *Derr*, *Phoenix*, and *Sears*, quoted an unpublished decision of this Court, *Res-Care, Inc. v. Fritz*, 2004-CA-002167-WC (March 11, 2005). *Fritz* addressed facts very similar to the case at bar, and a panel of this Court concluded:

> While it is clear that the *Phoenix* and *Sears*, *Roebuck* cases set out exceptions to the general rule put forth in *Derr*, we find them to be factually distinguishable from this case. While the result may seem harsh as stated in *Derr*, that is the law and the legislature has not seen a reason to address this situation since *Derr* was rendered. We are bound by

> > *Derr* and fail to see any basis for reversing the Board. The Board's opinion did not overlook or misconstrue controlling statutes or precedent nor did it commit an error in assessing the evidence so flagrant as to cause gross injustice. *Western Baptist Hospital*, 827 S.W.2d at 687-88.
>
> *Fritz*, slip op. at 13. Although *Fritz* is not binding authority, we agree with the Court's analysis and resolution.2 Based upon our review of the statutes and cases relied upon by the parties, we conclude the Board neither erred in reversing the ALJ nor exceeded the scope of its review.
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> For the reasons stated herein, we affirm the decision of the Workers' Compensation Board.

Slip Op. at 4-6.

In the case *sub judice*, after sustaining the 2007 injury, Bellamy returned to work ten weeks after the accident and worked for Sargent until January 3, 2008. He left Sargent and worked at a steel mill through August, 2008. After August, 2008, Bellamy returned to work for Sargent, as a shop foreman making more money. As evidenced by the impairment rating attributable to the July 30, 2009, injury, the second injury was more significant. After the July 30, 2009, injury, Dr. Oreta referred Bellamy to a specialist, Dr. Tibbs, for treatment. Significantly, after

the first injury, Dr. Oreta did not refer Bellamy to a specialist for treatment. The ALJ determined that but for the July 30, 2009, injury, Bellamy could have continued working for Sargent for the indefinite future. As in Kentucky Armature and Motor Works as Insured by Travelers v. James Partin, supra, the case *sub judice* does not have the requisite unusual circumstances where there is a clear demarcation between the treatment required as a result of successive injuries. Therefore, from July 30, 2009, forward, Travelers is responsible for all of Bellamy's medical benefits for the lumbar injuries.

That said, KRS 342.285(2)(c) provides the Board may determine on appeal whether an order, decision, or award is in conformity to the provisions of KRS Chapter 342, and KRS 342.285(3) provides, in relevant part, the Board may, "in its discretion," remand a claim to an ALJ "for further proceedings in conformity with the direction of the board." These provisions permit the Board to *sua sponte* reach issues even if unpreserved in order to properly apply the law. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

In the October 14, 2011, opinion, order, and award the ALJ determined that as a result of the July 17, 2007, injury, Bellamy was not physically able to return to

his pre-injury job duties; thus, the three multiplier in KRS 342.730(1)(c)1 is applicable. The ALJ also determined Bellamy was "earning a greater average weekly wage when he returned to work following the 2007 injury;" thus, the two multiplier in KRS 342.730(1)(c)2 is also applicable. The ALJ then determined that "but for the 2009 incident, [Bellamy] could have continued working for the indefinite future at a greater AWW." Therefore, Bellamy's PPD benefits were not enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1 for the July 17, 2007, lumbar injury.

The ALJ's award contains an error of law. Since the ALJ found Bellamy had returned to work earning a greater average weekly wage following the 2007 incident, and determined the three multiplier is not applicable, the two multiplier is applicable. The Supreme Court of Kentucky, in Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671, 674 (Ky. 2009), held:

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

> benefit during any period that employment at the same or a greater wage ceases 'for any reason, with or without cause,' provided that the reason relates to the disabling injury.

In Hogston v. Bell South Telecommunications, 325 S.W.3d 314, 317 (Ky. 2010), the Supreme Court of Kentucky expanded the applicability of KRS 342.730(1)(c)2 by holding as follows:

> …KRS 342.730(1)(c)2 includes a cessation of employment due to the disabling effects of previous work-related injuries as well as the injury being compensated.

In Hogston, supra, the ALJ found there was no connection between the cessation of Hogston's employment and the work-related injury for which he sought compensation. However, since the medical testimony linked the reason for the cessation of Hogston's employment at the same or greater wages to a previous disabling work-related injury, he was entitled to enhancement of his benefits by the two multiplier from the date his employment ceased.

We believe the logical extension of Hogston v. Bell South Telecommunications, supra, is that a subsequent work injury which causes Bellamy's employment at the same or greater wages to cease, entitles him to enhancement of his income benefits for the July 17, 2007, injury by the

two multiplier from the date his employment at the same or greater wages ceased after the July 30, 2009, injury.

Accordingly, that portion of the October 14, 2011, opinion, order, and award directing that Praetorian be responsible for the medical benefits associated with Bellamy's lumbar condition and the November 16, 2011, order denying the petition for reconsideration are **REVERSED**. This matter is **REMANDED** to the ALJ for entry of an amended opinion, order, and award directing Travelers shall be responsible for all medical benefits for Bellamy's work-related lumbar injuries, and Praetorian is relieved of any further responsibility for the medical benefits for Bellamy's work-related lumbar injuries. In addition, the award of PPD benefits for the July 17, 2007, injury is **VACATED** in part. On remand, the ALJ shall enhance Bellamy's PPD benefits for the July 17, 2007, injury by the two multiplier beginning the day Bellamy's employment at the same or greater wages ceased.

ALL CONCUR.

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