Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 21, 2022

CLAIM NO. 201857869

JUAN PRICE PETITIONER

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

HAIER US APPLIANCE SOLUTIONS, INC.
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING

* * * * * *

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

STIVERS, Member. Juan Price ("Price") seeks review of the July 2, 2022, Opinion, Award, and Order of Hon. Chris Davis, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits based on a combined 11% impairment rating for injuries to both shoulders.[1] Price also appeals from the July 9, 2022, Order

[1] The ALJ made no finding regarding the impairment rating attributable to each work-related shoulder condition.

sustaining the Petition for Reconsideration filed by Haier US Appliance Solutions, Inc. ("Haier") granting it a credit for any income benefits already paid and overruling his Petition for Reconsideration.

On appeal, Price asserts the ALJ erred by not calculating Price's post-injury average weekly wage ("AWW") prior to engaging in an analysis of whether he is entitled to either the three or two-multiplier contained in KRS 342.730(1). Price also argues Haier had the burden of proving his post-injury weekly wages exceeded his AWW since he successfully proved his AWW and his inability to return to the type of work he performed at the time of injury. Price maintains the ALJ should have enhanced his PPD benefits by the three-multiplier.

Because the issue on appeal encompasses the applicability of the two and three-multipliers contained in KRS 342.730(1)(c)1 and 2, we will only discuss the evidence relating to those issues.

BACKGROUND

Price's Form 101, filed August 26, 2021, alleged a February 21, 2018, injury to both shoulders while in the employ of Haier. The nature of the alleged injuries is "left and right shoulder tears" while lifting at work. The alleged cause of injury is strain or injury by repetitive motion.

Price testified at a February 3, 2022, deposition and at the May 11, 2022, hearing. At the time of his deposition, Price was 43 years old, 6' 2", and weighed 320 pounds. He has an associate's degree in Business Management. When injured he was working an end cap job. He offered the following testimony regarding the wages he earned performing the end cap job:

Q: Okay. How many hours per week were you normally working that end cap job?

A: At least 40; at the least.

Q: Was it pretty common for you to work overtime?

A: Yes.

Q: And I have that – let's see. Your hourly wage went up from $15.52 to $15.82 in that first part of 2018; does that sound right?

A: Yes.

Price provided the following description of his injuries:

Q: You're claiming an injury that occurred in February of 2018; is that a fair assessment?

A: Yes.

Q: When did your shoulders start bothering you? Was it sometime before February of 2018?

A: Yes. The injury – yes, yes.

Q: Okay. When did you first start noticing symptoms in your shoulders, I guess how long before then?

A: Maybe a few weeks before.

Q: And was it something that you just kept working and you thought they'd get better?

A: Yes.

Q: So then I think towards the end of February 2018 is when you finally sought treatment at G.E.; is that right?

A: Yes.

Q: Okay. So let me ask you, how do you feel that you injured your shoulders?

A: I feel like the way the job is set up is how I injured my shoulders.

Q: Like is there a specific aspect of that job that you would notice your shoulders were bothering you more, or was it just the job as a whole?

A: Reaching for the end caps. The way the job was set up, the end caps are behind you, so reaching for them and then popping the plastic into the sheet metal. Excuse me.

Q: And are the end caps, is that the plastic that you pop in?

A: Yes.

Q: So you said you have to reach behind you to get end caps?

A: Yes.

Q: Okay. Are they in like at a tote or something?

A: They were in boxes, cardboard boxes.

Q: And was one shoulder worse than the other initially? Was there one that was more bothersome?

A: The right one.

Q: Okay, and did you report the issues you were having with your shoulders to one of your supervisors?

A: Yes, in February.

Q: And they sent you to medical?

A: Yes.

After receiving some minor treatment from Haier, Price continued to perform his regular job. At the request of Haier, he began seeing Dr. Kevin Harreld in August 2018. In December 2018, Dr. Harreld performed surgery on the left shoulder. Price was off work after the surgery, and he underwent physical therapy. Price believed the surgery on his left shoulder was beneficial as he only had slight pain, and his range of motion was "pretty good." The first surgery performed on his

right shoulder occurred in May 2019. Following this surgery, Price returned to work after undergoing physical therapy. Because the right shoulder continued to be symptomatic, he underwent a second MRI which Dr. Harreld interpreted as establishing a re-injury while undergoing physical therapy. Consequently, Price underwent a second right shoulder surgery in February 2020. He again underwent physical therapy. His right shoulder condition improved but he was never pain free. Price also continued to have issues with range of motion. When Dr. Harreld released him to return to work, Price did not return to the end cap job. For a period of time, he performed light duty and then successfully bid on a tugger job. This job entailed delivering parts and almost exclusively lifting, and Price performed this job for two to three weeks. He explained why he decided he could no longer perform the tugger job:

> Q: And did you have, I guess, issues doing that job?
>
> A: Yes. There's a lot of – it's all lifting.
>
> Q: Like once you get the parts to the line, you have to lift them, or what type of lifting was involved?
>
> A: Well, you – I'm sorry. You have to lift the parts, put them on the tugger, take the tugger to the line and then unload the tugger, and then you just keep doing that repeatedly.
>
> Q: How long – about how long did you try to do that job before you just decided you couldn't do it anymore?
>
> A: I did that job for two to three weeks.
>
> Q: And I guess was it causing – was it mainly the issues with your right shoulder you were having? Was your left feeling okay or …
>
> A: The left was bearable pain. The right was unbearable pain.

Q: So it was causing issue with both essentially?

A: Yes.

Q: And is that when you went back to Dr. Harold [sic]?

A: Yes.

Price returned to Dr. Harreld who performed a third surgery on the right shoulder in June 2021. Price testified that although he felt better after the surgery, he still experiences range of motion problems and persistent pain. He stopped undergoing physical therapy in November or December 2021. After Dr. Harreld reviewed a Functional Capacity Examination, he imposed permanent physical restrictions in December 2021. Price was released to work the Tuesday before his deposition.

When Price met with Haier, the conclusion was reached that he is medically disqualified from performing the tugger job. Thereafter, he bid on and was denied the following jobs: compressor ground test, back checker, hexacomb, Q.A. final assembly, Q.A. replacement operator, and recoup. At the time of his deposition, there were three bids on jobs still pending. All of the jobs on which he bid are less physically demanding than the end cap and tugger jobs. The three pending bids pertain to jobs which fit within his job restrictions. Price had not returned to work since the last surgery.

Price testified he has intermittent right shoulder pain which worsens with increased use. An item weighing 10 pounds is the heaviest he can comfortably lift. Pain limits his range of motion. Because his left shoulder is better, Price uses his left extremity more. However, he experiences discomfort when his left shoulder and

arm are in certain positions. Price estimated he could comfortably lift 15 or 20 pounds above his head using his left arm.

At the hearing, the ALJ addressed the parties:

> Thank you. We had the chance to discuss the claim prior to going on the record today. We just completed a BRC order, so we'll assume that's fine as written. It will be entered on to LMS today. So if you-all notice any mistakes I made, please let me know. I'm not going to read the evidence in the record today. I did go over that with the attorneys prior to going on the record today. It will be listed on the hearing order. The hearing order will be entered in LMS today too, so let me know if I made any mistakes. I will note that yesterday Mr. Morris filed some exhibits that he intended to discuss at today's hearing. We've discussed that with Ms. Enoch, and purely for purposes of admissibility, there is no problem with those. We're still going to discuss those as necessary. But we'll go ahead and deem those of record already. Mr. Price is going to testify today. So Ms. Williams, if you could swear the witness, please.

Without comment from either party, Price was then sworn and testified. He again reiterated he was injured performing the end cap job on the assembly line. Price agreed the job description set forth in Exhibit 1 at the hearing is accurate. He also agreed the description of the tugger line job in Exhibit 2 is accurate. That job did not require work on the assembly line but involved delivering and receiving parts. Price worked approximately one month performing the tugger job before returning to Dr. Harreld because he was unable to perform the job. Price testified he cannot return to the end cap job or the tugger job.

Upon being released after the last of four surgeries, Price bid on nine jobs which he believed were within his restrictions. He was placed in a packer job at which he currently works. That job encompasses packing plastic parts weighing one

to two pounds into crates. Price has no help performing this job. He believed the job he currently performs may be combined with another job. Price explained:

> Q: Okay. And I don't want you to tell me what anyone told you, but how do you know that it might be merged? Did someone tell – I guess, did someone in upper management tell you they might be merged? Do you know – how do you know that?
>
> A: When I come in if the machine's not running, and I get assigned other jobs continuously, in my eight years' experience that's what's going to happen.
>
> Q: Okay. So your supervisor or someone hasn't actually told you that?
>
> A: No.
>
> Q: Okay. When you are – and I guess, which shift are you working right now?
>
> A: I work third shift.
>
> Q: Okay. And you said the machine that you're current – I think you called it a press that you're currently operating, sometimes it's not running. That's what you said?
>
> A: Correct.
>
> Q: Okay. About – I mean, is – are there multiple days per week that it's not running?
>
> A: It hasn't – yeah. It hasn't ran this week.
>
> Q: Okay. And when you're being assigned other jobs, are those – what – are you still in Building 5?
>
> A: 4. I go –
>
> Q: 4. Okay.
>
> A: I go back and forth.
>
> Q: Okay. So the other jobs you're being assigned are also in Building 4?

A: Or 5.

Q: Or 5. Okay. What types of jobs are those? What are some examples?

A: Still packing jobs.

Q: And is that packing plastic parts into crates?

A: Correct.

Q: Okay. And you testified earlier that the job that you're supposed to be working, I think you said the parts weigh about one to two pounds. Is that right?

A: Correct.

Q: Is that – sorry. Is that consistent across the board, the other jobs you're being asked to fill in on –

A: No.

Q: -- are those parts? Okay.

A: No.

Q: How much do those weigh?

A: They're probably a little bit heavier. It just depends. There's – you know, it just depends on the actual job. There's three or four different jobs that I could be doing. I may go in tonight and do a job I've never done before, so –

Q: Okay.

A: -- it's hard to tell.

Q: Are any of those parts that you are packing over ten pounds?

A: No.

Q: Okay. You mentioned sometimes when you're asked to fill in on other packing jobs there might have been an occasion or two where you've worked outside your restrictions?

A: Yes.

If his job is merged with another position, he will lose his position because the person performing the other job has more seniority.

Price set forth all of the work restrictions Dr. Harreld imposed:

> Q: … And what I'm going to read – I'm going to read a line, and you tell me if you believe those are the restrictions Dr. Harreld gave you.
>
> A: Okay.
>
> Q: No lifting more than 45 pounds one time floor to waist with the right upper extremity?
>
> A: Yes.
>
> Q: No lifting more than 20 pounds floor to waist with the right upper extremity occasionally?
>
> A: Yes.
>
> Q: No lifting more than 20 pounds one time waist to shoulder with the right upper extremity?
>
> A: Yes.
>
> Q: No lifting more than ten pounds occasionally waist to shoulder with the right upper extremity?
>
> A: Yes.
>
> Q: No lifting more than ten pounds one time above the shoulder level with the right upper extremity?
>
> A: Yes.
>
> Q: No lifting more than five pounds occasionally above the shoulder level with the right upper extremity?
>
> A: Yes.
>
> Q: And you have a maximum bilateral or both shoulder or upper extremity carry of 25 pounds?
>
> A: Yes.
>
> Q: Is that your understanding of your restrictions?

A: Yes.

Q: Do you – did you have any restrictions as far as you know regarding repetitive movement?

A: Yes. Repetitively nothing over ten pounds repetitively.

Q: Okay. With your right shoulder?

A: Correct.

On cross-examination, Price admitted he had not been told by a supervisor his job would be combined with another job. However, he testified the jobs he sometimes performs when his machine is not operating requires him to work outside his restrictions.

Price offered the following testimony regarding his wages:

Q: Okay. And in 2018, just before your injury, I think that you were earning somewhere between – I think it was $15.50, and then you got a raise to, I think it was, $15.82. Does that sound right?

A: Probably. I guess. I don't ---

Q: Okay.

A: That's seven years ago.

Q: How much are you currently earning per hour?

A: More than that.

Q: Okay.

A: I don't know the exact number.

Q: Let's see. Does $20.75 sound about right?

A: Somewhere around there.

Q: Okay. Do you – how does GEA do raises? Are you up for a yearly raise?

> A: No. They basically – the level of your job will increase your pay, and depends on what kind of contract the union signs is basically how we get our raises.
>
> Q: Okay. Do you know if you will be up for any type of raise this year?
>
> A: I don't think so.
>
> Q: Okay.
>
> A: I don't know for sure, but I don't think so.
>
> …
>
> Q: Juan, I have just a couple of follow-ups. Just to be sure, the wages you earn now and the wages you earned in the past, those are all contingent upon the collective bargaining agreement. Correct?
>
> A: Yes. That is our – what the union signed.
>
> Q: Right. And that's what the union signs as opposed to what you're able to earn. You're part of the union, you get whatever the union and GE agrees to.
>
> A: Agrees to. Absolutely.
>
> None of the twelve jobs upon which he bid entails assembly line work.

Haier filed an AWW calculation along with the wage records supporting its calculation. Haier also filed wage records reflecting Price's post-injury wages along with its calculation of a post-injury AWW for four separate 52-week periods. The first period pertains to wages earned from March 4, 2018, through February 24, 2019. The calculations for the first 13-week post-injury period yielded an AWW of $696.97 and for the second 13-week period yielded an AWW of $674.83. Both exceed Price's stipulated AWW. The second 52-week calculation pertains to wages earned from March 3, 2019, through February 23, 2020. None of the AWW calculations during this second 52-week period yielded an AWW greater

than the pre-injury AWW. The next 52-week period calculation spanned from March 1, 2020, through February 21, 2021. The third 13-week period within that 52-week period yielded a higher AWW than Price's stipulated AWW. The fourth 52-week period calculation of a post-injury AWW spanned from February 27, 2022, through February 19, 2023. Except for a 3-week period during the first 13-week period, Price did not work for Haier during any of the 52-week period.

The Benefit Review Conference Order and Memorandum ("BRC Order") dated the same day as the hearing, May 11, 2022, contains the following relevant stipulations:

> 3. Plaintiff sustained a work-related injury or injuries on 02/21/2018
>
> 4. The defendant-employer received due and timely notice of plaintiff's injury(ies): Yes.
>
> 5. TTD benefits were paid at the rate of $432.11 a week from 10/23/18 – 09/30/19, 12/11/19 – 01/01/20 – 09/22/20 and 06/10/21 – 12/06/21 in the total amount of $47,161.72.
>
> 7. The Plaintiff's Average Weekly Wage is $586.14
>
> 8. Does Plaintiff retain the physical capacity to return to the type of work performed at the time of the injury: No.
>
> 9. Did Plaintiff return to work at a wage (-/≤/≥) his/her AWW: Yes
>
> 10. Are Plaintiff's current wages equal or greater than the AWW: Yes

The contested issues were identified as benefits per KRS 342.730, TTD, and KRS 342.165. Under "Other" is post-injury AWW.

After summarizing the evidence, the ALJ provided, in relevant part, the following findings of facts and conclusions of law *verbatim*:

> II. Post date of injury average weekly wage
>
> It is Price's uncontradicted testimony that he currently earns $20.75 per hour and that he earned $15.50 per hour on his date of injury. There is no proof or indication that his hours have decreased. He is working a regular job for USAS, that he had to bid into and was placed into it. There is no proof or indication that his current wages are not greater than his pre injury average weekly wage.
>
> III. Benefits under KRS 342.730
>
> I have a great deal of respect for Dr. Grossfeld. That being said I find Price to be a very honest and hard-working individual. He has had a left shoulder surgery and three right shoulder surgeries. He states that his shoulders continue to bother him and cause symptoms. I believe him. Because he has had surgeries to both shoulder and remains symptomatic, I select the 11% impairment rating assigned by Dr. Harreld as more reflective of Price's medical history and symptoms.

With respect to the applicability of KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2, the ALJ found as follows *verbatim*:

> Price is currently earning wages greater than on his date of injury, so he does not currently qualify for KRS 342.730(1)(c)2 to be applied to his award. If he should cease earning at least $586.14 a week in the future, he may qualify for that. I make no findings at to what would trigger that if a Motion to Re-Open would need to be filed or who would bear the burden of proof.
>
> Price asks me to enhance his award under KRS 342.730(1)(c)1. The only way that I can do that, as he acknowledges, is if I find that in the foreseeable future, he will cease to earn a wage equal to or greater than $586.14 a week. However, Price has been in his current position for several months. Although he testifies that he is sometimes asked to do work outside his restrictions I have no evidence as to how often or to what degree and whether or not this is something he can, or will, tolerate to continue to work. It is not argued that his primary job as a packer is outside his restrictions. While I accept that he has pain and symptoms in the shoulders I believe that

> his appropriate remedy, in this situation, should he ever not be able to work, would be a Motion to Re-Open.

Relying upon Haier's calculation of Price's AWW, the ALJ set the AWW at $586.14 and awarded PPD benefits of $42.98 per week.

Significantly, there is no finding by the ALJ as to the applicability of KRS 342.730(1)(c)1 and the award does not delineate Price is entitled to enhancement of the award by the two-multiplier in the event he ceases to earn the same or greater wages in the future. The ALJ awarded TTD benefits with "Price taking credit for any benefits paid" and PPD benefits for 425 weeks in the amount of $42.98.

Haier's Petition for Reconsideration requested it or its insurance carrier be granted a credit for any previous income benefits paid.

Price's Petition for Reconsideration primarily asserted the same arguments made on appeal. Maintaining he is entitled to PPD benefits enhanced by the three-multiplier due to his inability to return to work in the same capacity, Price requested the ALJ reconsider his decision.

The ALJ sustained Haier's Petition for Reconsideration and overruled Price's Petition for Reconsideration, reasoning as follows *verbatim*:

> This matter comes before me on both parties' Petitions for Reconsideration. The Defendant's Petition is SUSTAINED and the Opinion is AMENDED to reflect that the Defendant is entitled to a credit for any benefits already paid to Price. The Plaintiff's Petition is OVERRULED. The Plaintiff bears the burden of proof as to all issues. To support his argument that he is entitled to have his awarded modified by KRS 342.730(1)(c)1 he points to specific weeks in which is AWW drops below $586.14 rather than the overall consistent pattern of his post date of injury wages, which

> reflect weekly wages greater than $586.14. Further, he stipulated, on line 10 of the stipulations, at the May 11, 2022 BRC that his current wages are greater than his AWW.

On appeal, Price cites the ALJ's finding that Price is currently earning wages greater than what he earned on the date of injury, and he does not currently qualify for enhanced income benefits pursuant to KRS 342.730(1)(c)2. Price argues this is error since the ALJ failed to provide a post-injury AWW calculation even though pre-injury and post-injury wage records were available. Therefore, the ALJ incorrectly stated there is no proof or indication his hours decreased and proof that his wages are not greater than his AWW.

Price also complains the ALJ found he bore "the burden of proof as to all issues." According to Price, he was not obligated to present proof of higher post-injury weekly wages after establishing his entitlement to income benefits enhanced by the three-multiplier. Price complains the ALJ referenced a "consistent pattern of post-injury wages" but did not calculate the post-injury weekly wage as he was required.

Notably, Price contends he never stipulated his post-injury weekly wage was greater than his AWW. Rather, he stipulated "his wages were greater than his pre-injury wage." According to Price, in either event, "a stipulation that wages were greater, post-injury, is not tantamount to a stipulation his post-injury AWW was greater."

Price complains since he cannot return to work in the same capacity, enhancement by the three-multiplier is mandatory. Price insists he can only be

denied the three-multiplier enhancement upon Haier proving his weekly wage is equal to or greater than his AWW.

Price again insists he did not stipulate to a post-injury AWW. In support of this argument, he references both his and Haier's proposed stipulations and the ALJ's BRC Order. Price maintains the correct analysis in this case requires the ALJ to first determine whether he has the capacity to return to the same work performed at the time of the injury. Since the answer to that question is no, the ALJ must determine whether he returned to work at a weekly wage which is the same or greater after the injury. Price asserts the ALJ never made that calculation. Since the ALJ did not resolve the second prong of the analysis, Price maintains the ALJ erroneously moved to the third inquiry provided by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), whether the three-multiplier is more appropriate under the facts. In Price's view, the ALJ jumped to determining which multiplier is more appropriate without resolving the second prong of the analysis by calculating his post-injury AWW. Price complains the ALJ provided no calculation of his post-injury weekly wage. This calculation must be based on the directives of KRS 342.140. Price seeks remand for a post-injury weekly wage calculation and directions to resolve who bears the burden of establishing the applicability of KRS 342.730(1)(c)2 when there is a stipulation the three-multiplier is applicable.

In a related argument, Price asserts Haier bore the burden of proving his post-injury weekly wage since he proved his AWW and inability to return to work in the same capacity. Price complains the ALJ required him to prove a

negative, as once he proved the three-multiplier is applicable, Haier bore the burden of proving he is not entitled to the three-multiplier. Price argues as follows:

> Naturally, the post-injury AWW was an issue in the case since GEA's AWW-1 post-injury was unreliable. There record is replete with Price's references to the unreliability of the AWW-POST filing made by GEA, and equally devoid of any reliable calculation for Price's post-injury AWW. The purpose of the AWW-1 certification is to provide certified (or sworn) proof. Evidence is not reliable unless it is sworn to, and GEA failed to do so. Therefore, there is no proof of post-injury AWW. It is impossible to stipulate to such a calculation.

Price seeks remand for a calculation of his post-injury AWW "prior to conducting the remainder of the Fawbush analysis." Further, the Board should direct that since Price established his AWW and entitlement to enhancement via the three-multiplier, Haier has the burden of proving an equal or greater post-injury weekly wage.

ANALYSIS

For the following reasons we vacate the award of income benefits and remand for additional analysis and findings.

As an initial matter, we point out that neither the Opinion, Award, and Order nor the Order ruling on the Petitions for Reconsideration contain a finding Price does not retain the capacity to return to the type of work he performed at the time of the injury thereby implicating the three-multiplier. Thus, the Opinion, Award, and Order and Order ruling on the Petitions for Reconsideration provide no basis for an analysis pursuant to Fawbush v. Gwinn, supra. Further, the BRC Order is not signed by the parties and the ALJ. Consequently, this Board is unable to determine the stipulations entered into by the parties. Notably, the BRC was held

and the Order prepared on the day of the hearing, but the transcript provides no insight as to the agreed upon stipulations. At the hearing, the ALJ merely referenced the fact that a BRC Order "was just completed" and "we'll assume that's fine as written." The ALJ further stated it would be entered in LMS that same day. There was no response from either party. Further, the unsigned BRC Order lists under the heading "Other," post-injury AWW as a contested issue. We also note in the Opinion, Award, and under the heading "Summary of the Evidence," the ALJ listed the facts stipulated to and/or proven by the parties but did not reference a stipulation that Price does not have the capacity to return to the type of work performed at the time of the injury and stipulations he had returned to work at a wage equal or greater than his AWW and his current wages are equal to or greater than the AWW. Thus, remand is necessary for entry of a signed BRC Order setting forth the stipulations. If, on remand, the signed BRC Order mirrors the unsigned BRC Order prepared on May 11, 2022, particularly the same answers to numerical questions 8, 9, and 10, then the ALJ must conduct an analysis pursuant to Fawbush.

The unsigned BRC Order indicates the parties agreed Price sustained work-related injuries and received TTD benefits. The parties also agreed to Price's AWW.[2] More importantly, the unsigned BRC Order reflects the parties agreed response to numerical question 8 establishing Price did not retain the capacity to return to the type of work performed at the time of the injury mandates a finding the three-multiplier set forth in KRS 342.730(1)(c)1 is applicable. Further, the affirmative

[2] Haier asserts in its brief the parties stipulated Price's AWW. Haier makes no reference to any other stipulation.

answers to numerical questions 9 and 10 of the unsigned BRC Order establishing Price returned to work at a wage equal to or greater than his AWW and current wages are equal to or greater than his AWW mandate a finding the two-multiplier is applicable.

However, we must address Price's argument concerning the burden of proving the applicability of the two-multiplier and what must be shown in order to establish the two-multiplier is applicable absent a stipulation that Price returned to work at the same or greater wage and his current wages are equal to or greater than his AWW. An AWW as contemplated by the statute pertains to Price's AWW at the time of his injury. Chapter 342 does not reference a post-injury AWW. KRS 342.140 provides directions as to how to calculate Price's AWW at the time of injury. However, the Kentucky Supreme Court in Ball v. Big Elk Creek Coal Co., 25 S.W.3d 115, 117-118 (Ky. 2000) introduced the concept of post-injury AWW determining the applicability of the two-multiplier, absent a stipulation that the employee returned to work at a weekly wage equal to or greater than his AWW, must be established in the following manner:

> The method which the legislature has chosen to determine a worker's income from a particular employment is the average weekly wage, the computation of which is set forth in KRS 342.140. Rather than focusing upon a particular week which may or may not accurately reflect the worker's earning capacity in the employment, KRS 342.140 requires the computation of an average of the worker's earnings over a period of 13 consecutive calendar weeks.
>
> In view of the foregoing, we read KRS 342.730(1)(c)2. as providing that the pre-and post-injury average weekly wages should be compared and that, in those instances where the post-injury average weekly wage equals or

> exceeds the pre-injury average weekly wage, benefits for permanent, partial disability should be reduced by one half for so long as that post-injury employment is sustained.[3]

The ALJ's findings regarding Price's post-injury wage are insufficient to establish the applicability of the two-multiplier. In order to implicate the provisions of KRS 342.730(1)(c)2, there must be proof that Price's post-injury wages are equal to or greater than his AWW at the time of injury. The ALJ found Price's uncontradicted testimony establishes he now earns $20.75 per hour and had earned $15.50 per hour on the date of injury. The ALJ stated there was no proof or indication that Price's hours decreased. He also found Price was working at a job for which he had bid and was placed. However, the ALJ stated there was no proof or indication that his current wages are not greater than his pre-injury AWW. A finding the two-multiplier is applicable cannot be based upon a finding there is no proof Price's current wages are not greater than his pre-injury AWW. Rather, there must be an affirmative showing his current wages are equal to or greater than his AWW which may be demonstrated either by stipulation or pursuant to the directives of Ball v. Big Elk Creek Coal Co., Inc., supra. Significantly, the post-injury wages introduced by Haier and its calculation of Price's post-injury AWW present evidence the ALJ must address in determining whether the provisions of KRS 342.730(1)(c)2 apply.

[3] KRS 342.730(1)(c)2 was subsequently amended to allow the employee double benefits during any period of cessation of the employment for any reason with or without cause. Thus, obviating the provision that the payment of PPD benefits would be reduce by one-half so long as the post-injury employment is sustained.

Further, Price's assertion Haier did not file a proper calculation of his post-injury AWW is meritless as Price raised no objection to the introduction of documentary evidence revealing his post-injury wages and providing Haier's calculation of his post-injury AWW. Consequently, the ALJ enjoys the discretion to rely upon those records and calculations. Certainly, Price is free to point out any errors or inaccuracies on remand.

On remand, in the event the ALJ finds the parties did not stipulate the answers to numerical questions 8, 9, and 10 contained in the unsigned May 11, 2022, BRC Order, he will be required to provide findings regarding Price's capacity to return to the type of work performed at the time of the injuries and his post-injury AWW. We note that in the July 9, 2022, Order the ALJ stated "[Price] stipulated, on line 10 of the stipulations, at the May 11, 2022, BRC that his current wages are greater than his AWW." That statement is contested by Price. As previously noted, since the BRC Order is unsigned by the parties and there was no affirmative statement by the parties that they entered into the stipulations set forth in the unsigned May 11, 2022, BRC Order, the ALJ must determine the stipulations entered into at the BRC.

Should the ALJ conclude KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 are applicable, he must determine pursuant to Fawbush which "provision is more appropriate on the facts." Id. at 12. In Fawbush, the Supreme Court explained:

> Although the employer maintains that paragraph (c)2 modifies the application of paragraph (c)1 and, therefore, takes precedence, we note that the legislature did not preface paragraph (c)2 with the word "however" or otherwise indicate that one provision takes precedence over the other. We conclude, therefore, that

> an ALJ is authorized to determine which provision is more appropriate on the facts. If the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future, the application of paragraph (c)1 is appropriate.

Id.

In Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006), the Supreme Court provided further guidance:

> The court explained subsequently in *Adkins v. Pike County Board of Education,* 141 S.W.3d 387 (Ky. App. 2004), that the *Fawbush* analysis includes a broad range of factors, only one of which is the ability to perform the current job. The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income. The application of KRS 342.730(1)(c)1 is appropriate if an individual returns to work at the same or a greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage.

Based on the Supreme Court's directive, the ALJ's analysis on remand must comply with Fawbush and Adams v. NHC Healthcare, supra.

Moreover, if the ALJ performs the Fawbush analysis, the amended decision must provide for enhancement of the income benefits by either factor. Should the ALJ determine enhancement by the two-multiplier is more appropriate, then the award must contain a provision that during any period of cessation of the employment at the same or greater wages, temporary or permanent, and within the guidelines of Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015), Price is entitled to enhanced income benefits by the two-multiplier. Absent such a provision, Price would not be entitled to enhanced benefits during any cessation of his employment at equal or greater wages. However, should the ALJ determine KRS

342.730(1)(c)1 is more appropriate, then Price's PPD benefits must be enhanced by the three-multiplier.

Although not raised by either party, on remand, the ALJ must also set forth the impairment rating attributable to each shoulder injury. Such a finding is necessary in the event of a reopening.

Accordingly, the award of PPD benefits and the findings related to the applicability of Price's entitlement to enhanced benefits contained within the July 2, 2022, Opinion, Award, and Order and the July 9, 2022, Order are **VACATED**. This claim is **REMANDED** to the ALJ for a determination of the stipulations entered into by the parties. If the ALJ finds the parties entered into the stipulations as set forth in the unsigned May 11, 2022, BRC Order, the ALJ shall perform an analysis pursuant to Fawbush. In the event the ALJ determines the parties did not enter into the stipulations, he shall make separate determinations concerning the applicability of KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2. If both provisions are found to be applicable, then the ALJ shall determine which statutory provision is appropriate pursuant to Fawbush and enhance Price's income benefits in accordance with his findings. The ALJ shall also enter a finding as to the impairment rating attributable to each shoulder injury.

ALL CONCUR.

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