Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 22, 2021

CLAIM NO. 201981761

MARK DOUGLAS JONES PETITIONER

VS. **APPEAL FROM HON. W. GREG HARVEY, ADMINISTRATIVE LAW JUDGE**

KENTUCKY TRANSPORTATION CABINET
and HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS, Member, and VACANT.

STIVERS, Member. Mark Douglas Jones ("Jones") seeks review of the July 2, 2021, Opinion, Award, and Order of Hon. W. Greg Harvey, Administrative Law Judge ("ALJ") finding he sustained a left wrist and elbow injury on April 17, 2019, while in the employ of the Kentucky Transportation Cabinet ("KTC"). The ALJ awarded temporary total disability ("TTD") benefits with KTC to receive a credit for overpayment, permanent partial disability ("PPD") benefits unenhanced by a

multiplier, and medical benefits. Jones also appeals from the August 2, 2021, Order sustaining in part, and overruling in part, his Petition for Reconsideration.

On appeal, Jones asserts the stipulated post-injury average weekly wage ("AWW") is not correct since it is not based on all post-injury wages. Jones requests the claim be remanded and all his post-injury wages be provided and reviewed for an accurate determination of his correct post-injury AWW. He also contends he is entitled to application of the two-multiplier since he returned to work at the same or greater weekly wages following his work injury.

BACKGROUND

The Form 101 alleges Jones sustained an April 17, 2019, injury when he was involved in a motor vehicle accident ("MVA") while working for KTC. The alleged injuries were to the left upper extremity at the shoulder, elbow, wrist, and fifth finger. As the medical evidence is not relevant to the issues on appeal, it will not be discussed further.

Jones testified at a January 26, 2021, deposition and at the May 7, 2021, hearing. Jones' deposition reveals that at the time of the MVA his position was Highway Technician I which entailed "sign maintenance and traffic, flagging of traffic." He also pushed snow off and salted highways in the winter. He was paid hourly at the rate of $18.09. At the least, he averaged working forty hours per week. He sporadically worked overtime. He was not allowed to work overtime after the April 17, 2019, injury.

After the MVA, he went to the district office in Manchester and then went home. He worked the day following the MVA and thereafter continued to perform his regular duties.

Jones was first treated for the work injury by Richmond Baptist Health. On January 28, 2020, Dr. Steven Umansky performed surgery on his left wrist.[1] Jones last saw Dr. Umansky on April 8, 2020. He testified his work duties never changed from the date of the MVA until he retired. He retired based on the advice of Dr. Emmanuel Yumang, his family physician. He provided the following concerning the nature of his post-accident work:

> Q: I want to talk a little bit about your work post-accident. You said earlier you had returned to work doing your regular job duties. Was there any time since that time and up to the time you retired in August that you did something different, modified work, for example?
>
> A: No.
>
> Q: Okay. At the time you retired, you were working your regular job, I assume, correct?
>
> A: Yes. But them guys was taking care of me. I was working with three other guys. You see what I'm saying?
>
> Q: Fair enough.
>
> A: Yeah.

At the hearing, the ALJ advised the parties as follows:

> Judge Harvey: All right. The only other thing I'm aware of that needs to be noted on the record this morning is that I'm going to leave the record open for filing of any

[1] Dr. Umansky's January 28, 2020, surgical note reveals he performed arthroscopic debridement left wrist and TFCC, arthroscopic excision of loose body left wrist, arthroscopic debridement left mid carpal ligament, and arthroscopic excision proximal pole hamate.

> wage records, or in the event the parties can reach a post-hearing stipulation on average weekly wage, I will gladly receive that after the hearing. So that – let's note that procedurally for the record. If there's nothing else, Mr. Jones, here's what I'm going to do. …

Jones again provided a description of his pre-injury job. He testified he injured his left wrist, elbow, and shoulder. He returned to work the day after the MVA. Because he experienced continuing left arm symptoms, he used his right arm more than the left. He was placed on light duty after being seen by Dr. David Waespe who referred him to Dr. Umansky for possible left wrist surgery. After the January 28, 2020, surgery, Jones remained off work for three months during which he received his regular check.[2]

He believed he returned to work on or near April 1, 2020. Although he was restricted to light duty, Jones returned to his regular job with the same crew. The other crew members engaged in all heavy lifting and he flagged traffic and occasionally drove the truck. Jones confirmed he retired because his primary physician informed him the work could worsen his condition. He offered the following regarding the amount of overtime he worked after the April 17, 2019, work injury:

> Q: Okay. Now, you had mentioned in your deposition you were getting overtime prior to your injury, correct?
>
> A: Before – before I was hurt, I got all kinds of overtime. They let you work it all. After I got hurt, they cut it off completely.
>
> Q: When you say they, who are you –
>
> A: (Interrupting) State.

[2] The parties' stipulated Jones received TTD benefits from January 14, 2020, two weeks before his surgery through April 8, 2020.

Q: Okay. Your employer?

A: My employer.

Q: Okay. And as far as your wages, and we'll – we're going to stipulate those later and – and get those lined out for the benefit of the Administrative Law Judge. But what were you making an hour? What was your wages?

A: I think it was 18.09 at that time.

Q: Okay. And were those wages the same after you went back?

A: Yes.

Q: Okay. Other than the overtime, when you were working light duty, you were still being paid the same amount?

A: Yeah, regular pay.

Q: Is that correct?

A: Yes.

Q: Okay. They didn't reduce your pay. You just didn't get overtime?

A: Right, exactly.

Q: And how – how much was the overtime? I mean, was it – how many hours?

A: About two or three hours over.

Q: Each week?

A: Yes.

Q: Okay. Was that routine?

A: Pretty much. Maybe a little more.

Q: Okay. And that was prior to the injury, but after, you didn't have overtime?

A: No.

> Q: Were other people getting overtime?
>
> A: Oh, yeah, they was working wide open all – all the time. Yeah.

Jones recounted the difficulties he experienced in performing his post-injury job.

Three days after the hearing on May 10, 2021, KTC filed a Form AWW-I regarding Jones' pre-injury AWW and another Form AWW-I relating to Jones' post-injury AWW. The post-injury document provided Jones' wages from April 12, 2020, through July 26, 2020, which spanned sixteen weeks of earnings. The thirteen-week period upon which KTC calculated Jones' post-injury AWW spanned the period from April 12, 2020, through July 5, 2020.[3]

On June 18, 2021, the parties filed a document styled "Post-Hearing Stipulation" which reads as follows:

> Comes now the Plaintiff, by and through counsel, and the Defendant/Employer, by and through counsel, and hereby stipulate to the following:
>
> 1. Plaintiff's pre-injury AWW was $883.30.
>
> 2. Plaintiff's post-injury AWW was $785.64.
>
> 3. Plaintiff agrees that Defendant is entitled to an appropriate credit for overpayment of TTD as to rate per the dates and amounts set forth in the BRC Order and Memorandum. TTD for the period from 1/14/20 through 4/8/20 was paid at the weekly rate of $620.85. Using an AWW of $883.30, said benefits should have been paid at the weekly rate of $588.90, resulting in an overpayment of $346.73.
>
> 4. The parties agree that the issue of the extent of Defendant's subrogation claim is preserved and need not be decided at this time, as it is not yet ripe for

[3] Jones' earnings on July 12, 19, and 26, 2020, were not utilized in arriving at an AWW.

> adjudication given the current status of Plaintiff's civil action.

Even though the "Post-Hearing Stipulation" was not signed by Jones' counsel but was twice signed by KTC's counsel, on appeal, Jones does not contend he did not enter into the stipulation.

Jones submitted the records of Baptist Health Richmond, the independent medical evaluation ("IME") of Dr. Frank Burke, and the records of Dr. Umansky with Lexington Clinic. Both parties introduced the records of Dr. Waespe. KTC introduced Dr. Ronald Burgess' IME report.

The April 13, 2021, Benefit Review Conference Order & Memorandum ("BRC") reflects the parties stipulated Jones sustained an April 17, 2019, work injury and due and timely notice was given. TTD benefits were paid at the rate of $620.85 from January 14, 2020, through April 8, 2020, for a total of $7,119.08. The pre-injury and post-injury wages were at issue. The contested issues were "extent and duration, permanent income benefits per KRS 342.730, including multipliers, AWW (pre and post-injury), TTD benefits, subrogation, unpaid medical expenses, future medical benefits-KRS 342.020, and conformity with the AMA Guides." Under "Other contested issues" is Anthem BCBS lien.

In the July 2, 2021, decision the ALJ noted as follows: "Jones received his regular pay through the employer from January 28, 2020 through his return to work in April 2020. Post-hearing the parties stipulated he had a pre-injury AWW of $883.30 and post-injury AWW of $785.64."

Relying on Dr. Burgess' impairment rating, the ALJ found Jones retained a 4% impairment rating due to the work injury. Since Jones' treating

physicians did not restrict his activities, the ALJ reasoned Jones is capable of performing the tasks performed at the time of injury. Under the heading "TTD Overpayment and Subrogation," the ALJ noted as follows:

> Post-hearing, the parties stipulated Jones' pre-injury AWW was $883.30 and his post-injury AWW was $785.64. The parties also stipulated the Defendant overpaid TTD from January 14, 2020 through April 8, 2020 at the rate of $620.85 instead of the correct TTD rate of $588.90 and that the Defendant is entitled to a credit for the $346.73 overpayment.

As previously noted, PPD and medical benefits were awarded along with TTD benefits. Jones filed a Petition for Reconsideration pointing out typographical errors and requesting clarification of certain findings. He also asserted KTC did not submit all of his post-injury wage records, specifically his wage records from the date of injury until he was taken off work on January 14, 2020, in anticipation of wrist surgery. Jones observed that the wage records filed by KTC only included his wages after his TTD benefits terminated on April 8, 2020, until he retired on July 31, 2020. Consequently, the parties' stipulation of a $785.64 post-injury AWW is inaccurate since it was only based on wages received after TTD benefits ceased on April 8, 2020. Jones also contended there was an incorrect return to work date. Jones complained the wage records spanning the period from April 17, 2019, through January 14, 2020, were not considered in calculating his post-injury AWW. Jones' asserted the correct post-injury AWW should be addressed and confirmed as the submitted stipulation "is likely not correct as submitted and therefore not an accurate determination of Plaintiff's post-injury AWW." Jones requested the parties be permitted to confirm the correct post-injury AWW or, in the

alternative, determine from relevant wage records the correct post-injury AWW. Jones also requested "the ALJ review and determine in an Opinion, Award, and Order whether an application of the two multiplier is appropriate."

The ALJ sustained Jones' Petition for Reconsideration to the extent he corrected errors and clarified his findings. However, with respect to the relief requested regarding the post-hearing stipulation, the ALJ overruled the Petition for Reconsideration reasoning as follows:

> Third, Jones seeks relief from the post-hearing stipulation as to his post-injury AWW. He argues the post-injury wage records filed by the Defendant represent wages from the date he returned to work following surgery and do not include wages earned from the day after the injury until he was taken off work for the procedure. Jones and the Defendant stipulated he earned a pre-injury AWW of $883.30 and a post-injury AWW of $785.65. The ALJ does not believe there is any basis to abrogate the stipulation. Even if the undersigned were inclined to do so, Jones testified he made the same rate of pay after his injury but that he worked less overtime. Based on his own testimony the record does not support a finding that he earned the same or greater wages after the accident. For that reason the Plaintiff's Petition is OVERRULED with respect to the request to find an alternate post-injury average weekly wage and to consider awarding the two multiplier.

On appeal, Jones represents that he could not locate any wage records and had to rely upon the wage records provided by KTC. Thus, the pre-injury and post-injury AWW remained at issue at the BRC and the hearing. This resulted in the ALJ leaving the record open to allow wage records to be submitted by the parties. Jones states that on May 10, 2021, KTC filed his post-injury wages. However, those wage records did not include all wages earned following the April 17, 2019, work injury. Rather, KTC provided his wages earned from April 8, 2020, when he

returned to work following surgery until he retired on July 31, 2020. Thus, his wage records spanning the period from the day after his work injury on April 17, 2019, until he was placed off work on January 14, 2020, for the surgery were not provided. Jones observes the stipulation regarding his post-injury wages is based on incomplete records as thirty-eight weeks of his post-injury wages from April 18, 2019, until January 14, 2020, were not available for review and consideration by the ALJ. According to Jones, the failure of KTC to include the wages for the period in question resulted in the parties arriving at the post-injury AWW stipulation that "is not valid, correct, or based on his total post-injury wages." In Jones' view, complete and accurate post-injury wage records should include the thirty-eight weeks of wages not provided.

Jones also alludes to his hearing testimony that even though he received no overtime after his injury, the limited post-injury wage records provided indicate some weeks he earned overtime and at least one week of wages were greater than his pre-injury AWW. According to Jones, his post-injury wages were greater than his pre-injury wages for at least the week of May 17, 2020, when he earned $1,062.71. Jones insists the missing thirty-eight weeks of post-injury wages are relevant and necessary for an accurate and correct determination of his post-injury AWW. He argues since the wage records did not include all of his post-injury wages, the stipulation is not valid on its face and not based on all evidence or proof of his post-injury wages. Notably, Jones does not dispute he voluntarily entered into the stipulation.

Jones references 803 KAR 25:010 §16(2) as grounds for the relief he seeks. He asserts when a stipulated fact is found to be in error and not factual, a party should be relieved of the stipulation. He cites the Board's Opinion in Springate v. Four Roses Distillery, WCB Claim No. 2014-87092, rendered February 19, 2016, holding that a misunderstanding existed and there was no agreement between the parties since the stipulation did not correctly include the Plaintiff's concurrent wages.

In a companion argument, Jones contends his post-injury wages were greater than his pre-injury wages for at least one week on May 17, 2020, when he earned $1,062.71. He argues "his return to work after the work injury is consistent with the intent of the statute and application of the two-multiplier should be considered." Jones seeks remand to the ALJ with instructions to review all post-injury wages for calculation of a correct post-injury AWW. Finding no merit in Jones' arguments, we affirm.

ANALYSIS

The ALJ specifically left the record open to allow the parties to enter into a stipulation regarding Jones' pre-injury and post-injury AWW. Shortly thereafter, KTC filed the Forms AWW-I regarding Jones' pre-injury and post-injury wages. The parties later entered into a stipulation in accordance with KTC's filings. Although the undated stipulation filed in the record is signed twice by KTC's counsel, Jones does not dispute he entered into the stipulation. Thus, we must conclude Jones freely entered into the stipulation based on the wage records supplied. Jones testified he returned to work on April 18, 2019, and worked shortly before he underwent surgery performed by Dr. Umansky. Yet, Jones did not at any

time seek to have those wage records utilized in calculating his post-injury AWW. Jones does not allege he entered into the stipulation as a result of coercion or a misrepresentation of his wages by KTC. For the first time, in a Petition for Reconsideration, Jones objected to the ALJ's reliance upon the parties' stipulation regarding his post-injury AWW in finding Jones was not entitled to enhancement via the two-multiplier as he had not returned to work following the injury at the same or greater wages. Jones complains the post-injury AWW was calculated based on wages earned between April 12, 2020, through July 31, 2020, the date of retirement. Jones represents he returned to work following his injury through January 14, 2020, when he was placed off work for surgery and the payment of TTD benefits commenced. According to Jones, the AWW must be recalculated. Even though he entered into the stipulation concerning his post-injury AWW, Jones seeks re-computation of his post-injury AWW after the ALJ's decision. This argument is unavailing.

> 803 KAR 25:010 §16 reads as follows:
>
> > (1) Refusal to stipulate facts that are not genuinely in issue shall warrant imposition of sanctions as established in Section 26 of this administrative regulation. An assertion that a party has not had sufficient opportunity to ascertain relevant facts shall not be considered "good cause" in the absence of due diligence.
> >
> > (2) Upon cause shown, a party may be relieved of a stipulation if the motion for relief is filed at least ten (10) days prior to the date of the hearing, or as soon as practicable after discovery that the stipulation was erroneous.
> >
> > (3) Upon granting relief from a stipulation, the administrative law judge may grant a continuance of the hearing and additional proof time.

Jones did not seek to be relieved of the stipulation at any time prior to entry of the ALJ's decision. Therefore, Jones cannot now be heard to complain about the stipulation in which he entered into knowingly and voluntarily. Jones is bound by the stipulation. Moreover, even though the ALJ treated his Petition for Reconsideration as a motion for relief from the stipulation, Jones did not specifically request such relief. Rather, he asserted the post-injury AWW was incorrect and should be recalculated based on his earnings between April 18, 2019, and January 14, 2020.

The Kentucky Supreme Court has consistently held that a claimant is not entitled to remand for taking additional proof regarding the calculation of his AWW. In Nesco v. Haddix, 339 S.W.3d 465, 471-472 (Ky. 2011), the Board had remanded the claim for the taking of additional proof concerning the claimant's AWW. The Kentucky Court of Appeals affirmed. The Supreme Court reversed holding additional proof was unnecessary, reasoning as follows:

> We are not convinced that the circumstances warrant the taking of additional proof. An injured worker bears the burden of proof and risk of non-persuasion before the fact-finder with regard to every element of a claim, including her average weekly wage. [footnote omitted] This is not a case in which the claimant was uncertain about which section of KRS 342.140(1) applied to her claim. She argued from the outset that KRS 342.140(1)(e) governed the calculation and had the burden to submit the necessary evidence within the time for taking proof.
>
> The claimant relied on KRS 342.140(1)(e) and *Huff v. Smith Trucking* to argue that she would have been able to work at Star for the 13 weeks immediately preceding her injury, earning an average weekly wage of $320.00. She offered no alternative argument. To permit additional proof under the circumstances would amount to giving

> her a "second bite at the apple." That said, we are convinced that the record contains sufficient evidence to permit a proper analysis under KRS 342.140(1)(e) but are not convinced that it compels the ALJ to adopt the analysis that either party offered.

Nothing in the record indicates Jones was uncertain as to the period of time he worked following the injury. Jones was clearly aware he worked from April 18, 2019, through January 14, 2020, before he underwent surgery. Jones chose to enter into the stipulation of his post-injury AWW without securing those records. Jones does not contend he could not obtain those records during the proceedings. Thus, as found by the ALJ, Jones did not provide a basis for relief from the stipulation.

The Supreme Court reinforced its decision in Haddix, in Com., Uninsured Employers' Fund v. Rogers, 396 S.W.3d 292, 295-296 (Ky. 2012). There, the Supreme Court held the matter could not be remanded for taking additional evidence to establish an AWW. The Supreme Court explained:

> The UEF appealed, raising the same arguments that it raised before the ALJ. Although the claimant acknowledged that roofing work depended on non-rainy weather, he argued that it was not exclusively seasonal work as demonstrated by the fact that his injury occurred in February. He argued that ample evidence supported the $400.00 per week figure and that the defendants offered no contrary evidence. To support the argument he noted his application for benefits, which alleged a 40–hour week; the absence of evidence that he was hired for only one roofing job; Rogers' testimony that he continued to have a roofing business; and Jones' testimony that he continued to perform roofing for Rogers.
>
> The Board found no error in the ALJ's decision to reject the calculation proposed by the UEF but agreed with the UEF's assertion that the record contained insufficient

evidence to apply KRS 342.140(1)(e) properly. Convinced that the claimant should not be denied income benefits simply because he failed to submit sufficient proof, the Board relied on KRS 342.285(2)(c) to vacate the average weekly wage finding and remand the claim to the ALJ for additional proceedings to include the taking of additional proof.

The UEF appealed and the claimant cross-appealed, but the Court of Appeals affirmed the Board's decision. Appealing, the UEF continues to maintain that the Board lacked the authority to remand the claim for additional proof taking simply because the claimant failed to meet his burden of proof. We agree.

Benito Mining Co. v. Girdner was decided under a previous version of Chapter 342 and does not control the proof requirements in this claim. KRS 342.140(1)(e) bases the average weekly wage of an individual who was employed by a defendant for less than the full 13 weeks preceding a work–related injury on the amount that the individual would have earned had he been employed for the full 13 weeks and worked when work was available to other employees in a similar occupation. The statute's objective is to obtain a realistic estimate of the individual's probable earning capacity in the employment. [footnote omitted]

An injured worker has the burden to prove every element of a claim for income benefits, including the applicable average weekly wage. [footnote omitted] A finding that favors the party with the burden of proof must be reasonable, *i.e.,* supported by substantial evidence. The Board determined that the record would not support a reasonable finding that the claimant's average weekly wage under KRS 342.140(1)(e) was $400.00. We agree.

The claimant's Form 110 alleged 40 hours of work per week, but he admitted that roofing is not performed in rainy weather. Moreover, Jones testified in June 2009 that his own employment as a roofer was almost nonexistent during the previous winter. Such evidence precluded a reasonable finding that there would have been 40 hours' work available to a roofer during each of the 13 weeks immediately preceding February 27, 2009. [footnote omitted] Having failed to offer evidence of all

> of the required elements under KRS 342.140(1)(e), the claimant failed to meet his burden of proving his average weekly wage. Although KRS 342.285(2)(c) permits the Board to review an ALJ's decision to determine whether it conforms to the provisions of Chapter 342, the Board exceeded its authority under the statute by directing the ALJ to order additional proof and then reconsider the issue.
>
> 803 KAR 25:010 specifies the periods within which parties may take proof. Although 803 KAR 25:010, § 15 allows the time for taking proof to be extended, it requires the filing of a motion "no later than five (5) days before the deadline sought to be extended" and "a showing of circumstances that prevent timely introduction." This is not a case in which an injured worker lacked guidance concerning the manner in which to prove an essential element of his claim for income benefits. The claimant argued correctly from the outset that KRS 342.140(1)(e) governed the calculation because his employment was of less than 13 weeks' duration when his injury occurred. Moreover, numerous judicial decisions addressed the proof requirements under KRS 342.140(1)(e) Jong before his injury occurred. Having failed to submit adequate proof within the time allowed and absent any evidence of circumstances that prevented him from doing so, the claimant was not entitled to a second opportunity to prove his average weekly wage. [footnote omitted]

As in Rogers, Jones did not demonstrate circumstances prevented the timely introduction of those wage records. Again, we note Jones does not contend he could not have secured those records during the proceedings.

Moreover, we conclude the ALJ did not err in overruling Jones' Petition for Reconsideration seeking to recalculate his post-injury AWW. The ALJ did not believe there was a basis to set aside that stipulation and noted that even if he was inclined to do so, Jones acknowledged that even though he was working at the same wage rate, he worked less overtime. Consequently, the ALJ concluded Jones'

testimony did not support a finding he earned the same or greater wages after the MVA. We are unable to conclude the ALJ's ruling constitutes an abuse of discretion.

Springate v. Four Roses Distillery, WCB Claim No. 2014-87092, rendered February 19, 2016, is inapplicable to the case *sub judice*. In Springate, the BRC Order contained conflicting information regarding the calculation of the claimant's AWW. One paragraph of the BRC Order set forth the claimant's AWW. However, at the bottom of the BRC Order, AWW was preserved as a contested issue. At the hearing, the ALJ noted there was a caveat to the AWW stipulation. Consequently, he granted the parties thirty days after the hearing to arrive at an AWW. In his decision, the ALJ stated the parties stipulated Springate's AWW. In his Petition for Reconsideration, Springate argued the ALJ mistakenly stated the parties had stipulated his pre-injury wages and cited to the wage record filed subject to the hearing. Springate argued the parties agreed the pre-injury AWW was different than that found by the ALJ. We held the record demonstrated the ALJ and the parties were not in accord regarding whether there was a stipulation concerning Springate's AWW. Thus, because the parties addressed the pre-injury and post-injury AWW in their briefs and the Petitions for Reconsideration, no stipulation had been reached.

Here, there is no question the parties freely entered into a stipulation from which Jones sought relief after the ALJ rendered his decision. Unlike in Springate, there is no mistake as to whether the parties had reached an agreement regarding Jones' post-injury AWW.

Finally, although not addressed by the parties, we point out the period Jones worked after his injury through the time he was taken off work in anticipation of surgery may not be used for calculating post-injury AWW for purposes of determining whether he was entitled to enhanced PPD benefits via the two-multiplier. In Bryant v. Jessamine Car Care, 2018-SC-000265-WC & 2018-SC-000269-WC, rendered February 14, 2019, Designated Not To Be Published, the Supreme Court held the two-multiplier was not applicable in cases where the worker misses no work following his injury. Thus, Jones was not entitled to income benefits enhanced by the two-multiplier during the period immediately following his injury from April 18, 2019, through January 14, 2020, as he had missed no work during that period. The only time Jones may have been entitled to enhanced PPD benefits would be from the time he was placed off work in anticipation of surgery until the date he retired. Consequently, the reliance upon Jones' post-injury AWW as stipulated by the parties was appropriate. The Supreme Court held:

> Additionally, the ALJ erred in determining the 2 multiplier applied under KRS 342.730(1)(c)(2). That multiplier only applies if the claimant returns to work after the injury. After Bryant was terminated, he did not *return* to work. ALJ Coleman cited to Bryant's June 2013 injury but that he continued to work until September. However, this *continuation* of work is not a return to work under KRS 342.730(1)(c)(2). To qualify as such a "return," there must be a cessation followed by a resumption. Bryant simply continued on in his regular employment until he was discharged. Since that time, ALJ Coleman made no finding of a "return" to employment at a wage equal to or greater than his average weekly wage at the time of injury. [footnote omitted] The multiplier has no bearing on Bryant's case.

Slip Op. at 7.

Since there was no cessation of Jones' employment following his injury until the time he was taken off work in anticipation of surgery, his PPD benefits could not be enhanced based upon his earnings between April 18, 2019, through January 14, 2020. Because the stipulation establishes Jones did not return to work earning the same or greater wages after January 14, 2020, the ALJ did not err in finding the two-multiplier is not applicable.

Accordingly, for the reasons stated herein, the July 2, 2021, Opinion, Award, and Order and the August 2, 2021, Order ruling on the Petition for Reconsideration are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

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