OPINION ENTERED: May 2, 2012

CLAIM NO. 201100210

CLEMENT INEZA PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

UNITED PARCEL SERVICE
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Clement Ineza ("Ineza") seeks review of the opinion and order rendered November 18, 2011 by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), dismissing his claim for benefits against United Parcel Service ("UPS") for being untimely filed pursuant to the statute of

limitations provided in KRS 342.185(1). Neither party filed a petition for reconsideration.

The claim was bifurcated on the issue of statute of limitations. On appeal, Ineza argues UPS is estopped from asserting a statute of limitations defense because it failed to comply with its notification obligation pursuant to KRS 342.040(1) and the company physician provided a missed or failed diagnosis of Ineza. Ineza also argues the ALJ erred by "misinterpreting the medical evidence of Dr. Caborn and determining an issue which was not submitted by the parties for present adjudication." We affirm.

Ineza filed the Form 101 on February 14, 2011, stating he injured his right knee when he fell down stairs while working for UPS on January 7, 2011. The parties later agreed the correct date of injury was January 16, 2009. Ineza attached a MR arthrogram taken on August 13, 2010, at the request of Dr. Caborn. The report noted Ineza injured his knee in 2002 playing soccer and reinjured his knee in January 2009 when he fell at work. The impression on the MR arthrogram report stated as follows:

> 1) 3 mm focus of deep fissuring within the lateral patellar facet; 2) lateral subluxation of the patella with excessive lateral patellar tilt and mild trochlear dysplasia; 3) mild laxity within the medial patellar retinaculum, though no acute injury identified; 4)

> small popliteal cyst containing several loose bodies; and 5) menisci, posterior cruciate and posterolateral corner appears intact.

UPS filed a Notice of Claim Denial on March 9, 2011. The DWC issued a scheduling order on March 15, 2011. UPS filed an Amended Notice of Claim Denial and a Special Answer on April 25, 2011, raising as a defense the claim was not timely filed pursuant to the applicable statute of limitations. UPS also moved to dismiss Ineza's claim as being time-barred pursuant to KRS 342.185 and 342.270. In support, UPS attached the First Report of Injury noting Ineza slipped on stairs on January 16, 2009, causing him to twist his knee.

Ineza testified by deposition on April 11, 2011, and at the hearing held September 20, 2011. Ineza, a native of Rwanda, was born April 16, 1986. He came to the United States in July 2005 and now resides in Louisville, Kentucky. He completed high school in Kenya, Africa where he played soccer. In the United States, he earned his GED and is currently attending Jefferson Community College where he studies mechanical engineering. His work history includes employment as a cook, bagger/checker at a grocery store and an assembly technician at an electronics warehouse. He

began working for UPS in May 2007 and, at all relevant times, worked part-time as a sorter.

Ineza initially testified he injured his right knee on January 7, 2011, but later clarified the date of injury to be January 7, 2009. Later, the parties stipulated Ineza sustained a work-related injury on January 16, 2009. Ineza testified he sustained a previous knee injury in 2002 when he pulled a ligament while playing soccer. Ineza received brief medical treatment and testified the 2002 injury subsequently resolved. Ineza testified he did not have any other knee problems, including issues with his knee cap, prior to January 16, 2009. This was the first time his knee cap "popped out."

Ineza testified on January 16, 2009, he was going down some steps when he slipped and fell hitting his right knee. He thought his knee cap had popped out rendering him unable to stand. Ineza went to Baptistworx the same day where his knee was examined. He was provided a knee brace and prescribed pain medication. He followed up with Baptistworx approximately two times. Ineza initially testified Baptistworx did not place him on any restrictions "because they said the knee was fine." At the hearing, he testified Baptistworx returned him to light-duty work for

approximately one week, after which he was returned to regular duty without restriction.

Ineza testified he next sought medical treatment for his right knee in June or July 2010 with Dr. Caborn because his “knee kept bothering [him] from time to time.” Dr. Caborn ordered an MRI and eventually performed knee surgery in January 2011. Ineza testified Dr. Caborn restricted him from work beginning in August 2010 and returned him to regular duty with UPS on May 10, 2011. During this time, Ineza did not receive any workers’ compensation benefits; however, he received short term disability benefits beginning in December 2010 or January 2011 “after a long run around between Workers’ Comp and insurance.” Ineza testified the knee surgery was a success and he has no problems with his right knee. Ineza is currently working at UPS as a sorter with no restrictions.

When asked why he waited so long in seeking a second opinion after being treated by Baptistworx, Ineza testified he was unsure whether to file the claim with the workers’ compensation insurance or with his personal health insurance. He had called the workers’ compensation insurer who advised him he had a pre-existing injury due to the 2002 injury. He used his health insurance with a note saying he hurt his knee working and was referred to workers’

compensation. He also testified he had to wait to get a doctor's opinion regarding the cause of his injury. His health insurance has paid the majority of his medical expenses.

UPS submitted the medical records of Baptistworx, Dr. David Caborn and Dr. Arthur Malkani. In a medical note dated January 16, 2009, Baptistworx stated Ineza had missed a step and twisted his right knee at work. Baptistworx diagnosed a right knee sprain with edema, requested an x-ray, provided a knee brace, ordered Ineza to keep his knee elevated, and alternate in application between ice and heat. Pain medication was prescribed. Baptistworx returned Ineza to work but restricted him to sit down duty when needed, with no prolonged standing or walking, no squatting or kneeling with his right knee and avoidance of repetitive stairs. Ineza followed up on January 23, 2009 with Baptistworx which noted his right knee felt much better but still ached, was sore when walking and was stiff in the morning. Ineza was released to return to regular duty without restrictions and with instructions to follow up if symptoms persisted.

Ineza next treated with Dr. Caborn and Dr. Malkani of Shea Orthopedic Group starting on June 9, 2010 for right

knee pain. On June 9, 2010, more than a year and a half later, Dr. Caborn noted the following:

> He has a significant history which suggests recurrent patellar dislocation. This started at the age of 17 years, following which it has occurred multiple number of times. The knee would swell up and stay like that for a few days. He has an increased feeling of instability and weakness in the lower right extremity, and he has been pretty much favoring it because of this. He wants to get it addressed.

Dr. Malkani noted no sign of arthritis or injuries. He diagnosed recurrent patellar dislocation with patellofemoral instability, ordered a right knee MRI, recommended exercises and a follow-up with Dr. Caborn. The right knee MRI taken on June 21, 2010 impressed minimal effusion, a popliteal cyst with several loose bodies, patella alta, mild lateral patellar subluxation, patellar tilt, femoral trochlear-dysplasia, deep full-thickness articular cartilage fissure/ defect medial aspect lateral patellar facet with adjacent medial cartilage superficial delamination and attenuation of posterior aspect of medial patellofemoral ligament. There was no evidence of recent sprain or tear.

In a medical note dated July 16, 2010, Dr. Caborn noted Ineza's continued complaints of recurrent patellar dislocation with patellofemoral instability, and "this episode of dislocation started when he was 17 years old, and

this occurred multiple times." Dr. Caborn stated "This is not a worker's compensation claim or disability claim." Dr. Caborn noted Ineza's difficulties with stairs, getting out of a chair and recurrent dislocations are due to his patellofemoral malalignment. Dr. Caborn ordered a CT scan and recommended distal patellar realignment with a De Novo procedure.

In a medical note dated August 3, 2010, Dr. Caborn stated:

> We reviewed his history closely. His injury occurred when he was 17 or 18 years old while playing soccer. He refers that he fell and landed on his knee; and once he recovered from that injury, four weeks after that, he had a distal patellar dislocation while kicking the ball."

Dr. Caborn noted the CT scan revealed patellar malalignment and increased Q-angle, and ordered a MR arthrogram.

In an opinion and order rendered November 18, 2011, the ALJ dismissed Ineza's claim since it was not timely filed. In support of his conclusion, the ALJ found as follows:

> The sole issue for determination is whether or not Mr. Ineza filed his claim within the two-year statute of limitations. KRS 342.185 (1) states in pertinent part, "no proceeding under this chapter for compensation for an injury or death shall be maintained… unless an application for adjustment of

claim for compensation with respect to the injury shall have been made with the department within two years after the date of the accident. If payment of income benefits have been made, the filing of an application for adjustment of claim with the department within the period shall not be required, but shall become requisite within two years following the suspension of payment or within two years of the date of the accident, whichever is later."

KRS 342.270 (1) states in pertinent part, "the application for resolution of claim must be filed within two years after the accident, or in the case of death, within two years after the death, or within two years after the cessation of voluntary payments, if any had been made."

In this case there is no question but that the work-related injury occurred on January 16, 2009, according to the first report of injury and the testimony of Mr. Ineza. There is also no question but that the Form 101, *Application for Resolution of Injury Claim* was filed on February 14, 2011, with the Department of Worker's Claims as indicated by the Department's stamp date noting receipt of the document. Therefore, it is clear that if[sic] *Application for Resolution of Injury Claim* was filed more than two years after the date of the injury.

UPS argues that this claim was barred by the statute of limitations and has not been timely filed. UPS argues that Mr. Ineza has not proven entitlement to the payment of income benefits that would have tolled the statute of limitation pursuant to statute.

UPS argues that while he was taken off work in August of 2010 by Dr. Caborn and not released to return to work until May of 2011, Dr. Caborn took him off work and he underwent surgery to correct a non[sic]work-related[sic] right knee condition as evidenced by the medical records submitted from Dr. Caborn so reflecting.

UPS further argues that they[sic] were not estopped from asserting a statute of limitations defense by telling Mr. Ineza that his condition had resolved when in fact it had not.

Mr. Ineza argues that the surgery performed by Dr. Caborn is causally related to the January 16, 2009, work-related slip and fall. He argues that he is entitled to TTD benefits commencing in August of 2010, when he was taken off work by Dr. Caborn which would have tolled the statute of limitations, therefore making his filing of the *Application for Resolution of Injury* on February 14, 2011, timely. In addition, Mr. Ineza argues he was told by UPS that the effects of his right knee condition as a result of the January 16, 2009, work-related incident had resolved and therefore when he found out that they had not and surgery was indicated, the Defendant Employer was estopped by their[sic] own actions, from relying upon the statute of limitations defense.

In this specific instance, the Administrative Law Judge finds that UPS did not advise Mr. Ineza his condition had resolved, when in fact, it had not necessitating the surgery he underwent in January of 2011. In fact, the medical evidence from Dr. Caborn, Mr. Ineza's treating surgeon, indicates that Mr. Ineza recovered from the work-related slip and fall injury of January 16,

2009, and four weeks after that and [sic] had distal patellar dislocation while kicking the ball. This history appears to come directly from what Mr. Ineza told Dr. Caborn.

In addition, the Administrative Law Judge finds that the medical treatment for the right knee condition beginning in June of 2010 and culminating in the January 2011 surgery that Mr. Ineza underwent at the hands of Dr. Caborn is not causally related to the effects of the January 16, 2009, work-related slip and fall incident thereby entitling him to temporary total disability benefits commencing in August of 2010 and thereby tolling the statue limitations. It is clear from reviewing Dr. Caborn's medical records that the surgery and the time that Mr. Ineza was taken off work was to treat recurrent patellar dislocation that started at the age of 17 years and that had occurred a multiple number of times.

In fact, Dr. Caborn's medical records reflect that he reviewed his history closely and Mr. Ineza's injury occurred when he was 17 or 18 years old while playing soccer. He refers he fell and landed on his knee, and once he recovered from that injury, four weeks later he had a distal patellar dislocation while kicking the ball. The records further reflect that Dr. Caborn clearly indicated this is not a Worker’s Compensation or disability claim.

Therefore, the Administrative Law Judge finds that the Plaintiff has not met his burden of proving that he was entitled to temporary total disability benefits as a result of the January 16, 2009, work-related incident that would have tolled the statute of limitations beyond January 16, 2011. In addition,

> the Administrative Law Judge finds the Plaintiff has not met his burden of proving that the Defendant Employer should be stopped[sic] from asserting a statute of limitations defense likewise tolling the statue limitations the [sic] on January 16, 2011. See *City of Frankfort vs. Rogers*, 765 SW 2d 579 (KY App. 1988), and *Parrish vs. Briel Industries, Inc.*, 445 SW 2d 119 (KY 1969).
>
> Therefore, the Administrative Law Judge finds that the Plaintiff's *Application for Adjustment of Claim* was filed in violation of KRS 342.185 and KRS 342.270 and therefore shall be dismissed.
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> Due to the foregoing finding the remaining issues herein are deemed moot.

As the claimant in a workers' compensation proceeding, Ineza had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Ineza was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether

the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

In the case *sub judice*, no petition for reconsideration was made. Therefore, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

As the fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the

same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

KRS 342.185(1) provides:

> Except as provided in subsection (2) of this section, no proceeding under this chapter for compensation for an injury or death shall be maintained unless . . . an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident, or in case of death, within two (2) years after the death, whether or not a claim has been made by the employee himself or herself for compensation. . . . If payments of income benefits have been made, the filing of an application for adjustment of claim with the department within the period shall not be

> required, but shall become requisite within two (2) years following the suspension of payments or within two (2) years of the date of the accident, whichever is later.

In the case *sub judice*, the evidence does not compel a finding the medical treatment sought beginning in June 9, 2010 culminating in surgery in January 2011 was causally related to the January 16, 2009 knee injury, thereby entitling Ineza to temporary total disability ("TTD") benefits beginning in August of 2010 and tolling the statue limitations. The medical records of Dr. Caborn submitted by UPS provided a reasonable basis for the ALJ to find the surgery and resulting time he missed from work was to treat recurrent patellar dislocation which had started at the age of 17 years and had subsequently occurred on multiple occasions. It was not unreasonable for the ALJ to conclude, based upon the medical evidence, Ineza's injury occurred when he was 17 or 18 years old while playing soccer. It is also important to note on July 16, 2010, Dr. Caborn stated Ineza's condition was not a workers' compensation or disability claim.

Since the ALJ found Ineza's January 2011 knee surgery and resulting time off work was unrelated to the January 16, 2009 injury, and he was not entitled to TTD benefits, the notice requirements pursuant to KRS 342.038

and KRS 342.040(1) were not triggered. It is undisputed Ineza sustained a work-related injury to his right knee on January 16, 2009. It is likewise undisputed Ineza filed the Form 101 for this injury on February 14, 2011. As noted by the ALJ, the application was filed more than two years after the date of the injury. Ineza argues UPS is estopped from asserting a statute of limitations defense because it failed to comply with its notification obligation pursuant to KRS 342.040(1). We disagree.

KRS 342.038 requires every employer to keep a record of all injuries received by its employees in the course of their employment. The statute also states:

> Within one (1) week after the occurrence and knowledge, . . . of an injury to an employee causing his absence from work for more than one (1) day, a report thereof shall be made to the office in the manner directed by the executive director through administrative regulations.

KRS 342.040(1) states in part:

> If the employer's insurance carrier or other party responsible for the payment of workers' compensation benefits should terminate or fail to make payments when due, that party shall notify the executive director of the termination or failure to make payments *when due* and the executive director shall, in writing, advise the employee or known dependent of right to prosecute under this chapter.

J & V Coal Co. v. Hall, 62 S.W.3d 392 (Ky. 2001) held an employer's failure to provide notice did not bar it from asserting a statute of limitations defense as the claimant was not entitled to notice of the applicable statute of limitations since he had not missed work due to his work-related injury for more than two weeks before the period of limitations expired. In the case *sub judice*, UPS was not required to prepare a report pursuant to KRS 342.038 since Ineza did not miss work for more than one day due to his January 16, 2009 fall. Ineza testified he fell on a Friday, January 16, 2009, returned to work the following Monday with restrictions for a week. Similarly, the notification requirement pursuant to KRS 342.040(1) was not required since Ineza was not entitled to TTD benefits as a result of the January 16, 2009 injury. Therefore, the statute of limitations is not tolled beyond January 16, 2011.

The ALJ did not err in finding UPS did not advise Ineza his condition had resolved, when in fact, it had not, thereby estopping UPS from asserting statute of limitations. Substantial evidence exists in the record supporting the ALJ's findings.

Ineza's reliance upon Toyota Motor Manufacturing v. Czarnecki, 41 S.W.3d 868 (Ky. App. 2001) is misplaced.

Czarnecki only applies in a cumulative trauma case, when a worker is informed by an employer's physician his or her condition is resolved and not progressing. In the case *sub judice*, Ineza alleged an acute traumatic injury, not one due to a culmulative trauma.

We find no merit in Ineza's remaining arguments the ALJ erred by misinterpreting the medical evidence of Dr. Caborn and in determining the issue of causation since the claim was not submitted by the parties for present adjudication. The ALJ properly determined the issues necessary to address all arguments presented by Ineza and UPS in their briefs to him. We also note Ineza failed to file a petition for reconsideration raising the argument of misinterpretation of the medical evidence. We have already found substantial evidence exists in the record to support the ALJ's findings of facts regarding Dr. Caborn's medical notes.

Based upon the foregoing, we believe the ALJ's decision in dismissing this claim is supported by substantial evidence and a contrary result is not compelled.

Accordingly, the decision of Hon. R. Scott Borders, Administrative Law Judge, dated November 18, 2011, is hereby **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON CHED JENNINGS
455 S 4TH ST, STE 1450
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON CHRISTOPHER G NEWELL
10503 TIMBERWOOD CR, STE 213
LOUISVILLE, KY 40223

ADMINISTRATIVE LAW JUDGE:

HON R SCOTT BORDERS
8120 DREAM STREET
FLORENCE, KY 41042