

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 29, 2016

CLAIM NO. 201465846

JAMES MCDOWELL

PETITIONER

VS.

APPEAL FROM HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

ANN TAYLOR, INC.
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
REVERSING IN PART,
VACATING IN PART, AND REMANDING

* * * * *

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

STIVERS, Member. James McDowell ("McDowell") appeals from the February 15, 2016, Opinion, Award, and Order and the March 11, 2016, Order on Petition for Reconsideration by Hon. Steven Bolton, Administrative Law Judge ("ALJ"). The ALJ awarded permanent partial disability ("PPD") benefits in the amount of \$3.92 per week commencing on October 2,

2014; temporary total disability ("TTD") benefits of \$301.79 per week from October 6, 2014, to March 18, 2015; and medical benefits for a right elbow injury.

On appeal, McDowell asserts the ALJ erred in dismissing his claim for a right shoulder injury against Ann Taylor, Inc. ("Ann Taylor") due to a lack of due and proper notice and failed to make adequate findings of fact on the issue of causation regarding the right shoulder.

The Form 101 alleges on October 2, 2014, McDowell injured his right elbow and shoulder in the following manner: "Client was loading a truck. The boxes began falling and he injured his shoulder. He also injured his elbow when he was trying to get out of the way." Regarding notice, the Form 101 alleges as follows: "The client's supervisor was notified the same day and he went to the doctor the next day."

On August 3, 2015, McDowell filed a Motion to Bifurcate requesting the ALJ to first decide the issues of entitlement to medical treatment and TTD benefits. By order dated August 24, 2015, the ALJ overruled McDowell's motion.

The December 15, 2015, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation; notice; unpaid or contested medical expenses; injury as

defined by the ACT; TTD [handwritten: "duration/rate"]. Under "other" is the following: "incl. extent & duration w/multipliers; compensability of right shoulder." The BRC order indicates TTD benefits were paid from October 6, 2014, and March 29, 2015.

McDowell was deposed on September 3, 2015, and testified regarding the October 2, 2014, accident:

A: Okay. We was [sic]- we was [sic]- I was telling you about the- about the boxes coming down the- the conveyor.

Q: Uh-huh.

A: And they was [sic] coming down the conveyor, and I told you I was over there. And it [sic] was [sic] another-two more guys.

And it started coming down. And we went in there, and they start come [sic]- we start stacking. So, you know, we have one- we have one guy on this side and one guy on that side in the middle, and I'm on the very end.

And we- and everybody's grabbing. He's grabbing. He's grabbing. I'm grabbing. We put them up. We [sic] throwing them on up. We [sic] throwing them up.

And as we [sic] stacking them, they're getting to be a wall. We [sic] pushing them because they [sic] all different sizes. We try to keep them uniform.

...

A: So as we was [sic] putting them, you know, on there and- you know, one of us

was hitting the button so the conveyor could come back, because, you know, we got to where they was [sic] going so much that we was [sic] stacking them up- up so far, then, all of a sudden, I don't know what happened, one of the rows, one of them started to come- started to come at us.

And everybody tried to back- everybody's starting to back up. And instead of it coming, the whole thing, it [sic] just one side of it came. And as they was [sic] ducking- and I had my back turned. I'd [sic] come [sic] to and I turned around to it, it was coming at me.

And the only thing I could do, them [sic] boxes was [sic] hitting me, and I hit my elbow on the conveyor. As I hit the elbow-

...

A: I said one of them started coming, but it wasn't the own- it was the only one that started. One of them started coming. If one started, the other one- other ones started coming.

And as it was, I had my back turned. They was [sic] ducking. Some of them was [sic]- the guys was [sic] ducking.

...

A: And I turned around, and it was right on me. So I fell back and hit my elbow on there, and then my shoulder hit the side of the truck going down.

...

Q: Okay. So one of- one of the stacks starts falling on you, and you said you

hit your elbow on the conveyor belt;
right?

A: Right.

Q: Did you fall to the ground?

A: I fell to the ground with the boxes.

Q: Did the boxes fall on top of you?

A: Two or three did.

Q: Where did they fall on you?

...

A: Oh, they- it fell- chest, shoulder,
leg-

Q: Okay.

A: - like that. I- I blocked- I blocked
my face, but, you know-

Q: What part of your body hit the
ground?

A: My elbow- elbow hit- my shoulder hit
the side of the truck.

Q: So your shoulder hit the side of
[sic] truck, and your elbow hit what?

A: The conveyor.

...

Q: You hit the side of the truck, but
you didn't hit the ground?

A: Well, I ended up on the ground, but
it- it kind of caught my- it kind of
caught my fall.

Q: The side of the truck?

A: Yeah.

Q: Okay. And what- what side caught-caught your fall? Your left or your right side?

A: My right side.

...

Q: So did it hit the boxes itself or the wall?

A: My- my shoulder?

Q: Yeah.

A: No, it hit the wall.

Q: Any other body parts come into contact with anything?

A: No.

Q: So your right shoulder hits the wall of the truck, and your right elbow hits the conveyor. Anything else?

A: No.

McDowell explained what occurred directly after the incident, including the filling out of the injury report:

A: Well, we got up and every- every- we straightened all the boxes back up. We kept on working.

I said- they asked me if I was all right. And right then I said I was okay, and I- but, I guess, I was working, and I kept feeling my elbow, you- you know.

And I said something to the supervisor about it, and- and then they told me to let me know if I-

Q: Who was the supervisor?

A: It was- well, Laura's the supervisor, but Gene is the- is the lead. He's the lead. He's the lead man, so he's the-

Q: What's Gene's-

...

Q: -Gene's last name?

A: Gene Lilly.

Q: Lilly?

A: Uh-huh.

Q: Okay.

A: And he said, 'If you want to' - he told me to report it to her. And she said if I wanted to go see about it - and I told her right then that, 'I'm okay. You know, I'm okay' right- you know. I didn't want to go see about it, but as the day progressed, it started getting- it starts swelling up and getting stiff.

Q: Your elbow.

A: Correct. So- so that- that evening she asked me about it, and I said 'I'm going to go home, and I'm just going to- I'm going to soak it, you know, and ice it down, and see if it'll be all right.' And so-

Q: That's on Thursday, the 2nd.

A: That's on Thursday.

Q: Okay.

A: And so I said, 'We're fine- we'll see.' She said, 'Well, if you come in tomorrow and it's still bothering you, we're going to send you over to the- we're going to send you over across the street.' I said, 'Fine.'

I went home. I had ice packs at home, and I iced it down and rubbed it down real good. And, you know, this was kind of stiff, but, really, all the pain was right in the elbow.

Q: Okay.

A: So when I got up the next morning, it's still kind of stiff- because I drive to work, and, you know, I could feel it, you know, driving. So I got to work and- and she said how did it look? She looked at it and said, 'It's still kind of swollen.'

...

A: And we was [sic] working, like, ten-hour shifts, and so we was [sic] riding overtime. So I kept on working.

We started working. And- and about break time, which- about 9:20, it was swollen up some more. And I kept saying, 'It's getting stiffer and stiffer.' By then, it just started swelling. It was all the way up my arm.

So what we did, we took- me and a couple coworkers took two ice bags, and we put them right on my elbow. And we taped them with duct tape all the way like this. And I- and I worked like that until about 11:30.

And she came down, because Gene had called her up- from upstairs, office,

and told her, 'You need to come down, because he's- keeps- he's getting worse and worser [sic].'

I was- by then, I was still doing the boxes, but I wasn't doing half the speed. So when she came down about 11:30, she said, 'I'm sending you across the street.' I did not-

Q: This was on Friday-

A: Yeah.

Q: -the 3rd?

A: Uh-huh.

Q: Okay. So that would have been BaptistWorx.

A: Yeah.

Q: Sir, are you telling me that you went to BaptistWorx on Friday, the 3rd?

A: Oh, I didn't go that Thursday. I went there Friday.

Q: Okay. So the records that I have show that you went the following Monday. Do you know anything about that?

A: Well, I probably had to go- I-probably [sic] a Monday.

...

Q: And you- your testimony here today is that you think you told Laura about the incident the day that it happened, that Thursday; right?

A: Right.

...

Q: Okay. Do you know if you ever had to fill out a re- and incident report?

A: We filled out an incident report, but- she filled out the incident report.

Q: Were you around her when she did that?

A: Yeah, I was sitting in the- I was sitting in the office when she filled it out.

Q: Did you see it?

A: I mean, did I see what she wrote? No, I didn't.

Q: Okay. And do you remember when that incident report was filled out- or when she filled it out when you were in office with her?

A: She filled it out right after- right after I came back from Baptis- I mean, BaptistWorx.

Q: So it would have been the 6th, because we just established you went to BaptistWorx on the 6th-

A: It would have to be.

Q: -right?

A: Yeah, it would have had to be.

Q: Okay. So the incident report was filled out on the 6th; right?

A: Right.

Q: And you did not get an opportunity to see what she filled out; right?

A: Right.

Q: So you didn't sign it or anything; right?

A: I don't know. I don't know it I- I don't know if I signed it or not. I had to. I would have had to sign it; wouldn't I?

Q: I don't know the answer to that. I'm- that's why I'm asking you. So let me ask you this: Do you remember signing an incident report?

A: I signed one once before when I had that- my knee-

Q: Okay.

A: -but I don't- you know, I- I could have. I don't know.

Q: All right. And-

A: You're talking almost a year.

Q: Right. When you reported the incident to Laura and when- and- and subsequent- subsequently when you filled out- or when she filled out an incident report while you were with her in the room, do you recall what body part you told her you injured?

A: Yeah, I told her I- I told her that I- I told her that I hurt my elbow, but I said I had pain all the way up to my shoulder.

Q: So you told her you hurt your right elbow and that you had pain all the way up-

A: all the way up to-

Q: -to your shoulder.

A: -the shoulder.

Q: Is that pretty much the words that you used when you explained-

A: Pretty much.

...

A: It could be either/or-

Q: Okay.

A: -but I know I mentioned my shoulder, too.

. . . .

Q: Okay. Now, you also told Aida that part of the protocol was to talk to Laura Whitlock about the injury.

A: Correct.

Q: Okay. So you're sitting in the room with her, and you tell her what happened.

A: That's correct.

Q: Okay. And- but this is after you had been to BaptistWorx.

A: Correct.

Q: So at that point, you had already been diagnosed with a broken elbow- oh- and I'm not a doctor, and I'm not going to say that correctly, but a broken elbow.

A: A fracture; yes.

Q: Okay. And did you bring her that paperwork?

A: Yes, I did.

Q: Okay. So she was talking to you, but she also had to be- she was also referencing the record from BaptistWorx.

A: Correct.

Q: Does that sound right? Okay.

So when- when you talked to Laura, you- did you tell her the same things that you told us earlier that, you know, you had pain in the elbow but it went to the right shoulder?

A: It was going up- yeah, it was going to my shoulder.

Q: Okay. So as you're telling her this, and she's reviewing the BaptistWork's [sic] report, she's typing it into the computer.

A: Well, she- yeah, she- yeah, she's typing it, because she couldn't- she couldn't make a report until after I went over there and I came back with the paperwork-

Q: Okay.

A: -saying what was wrong.

Q: All right. After she filled out this injury report, at any point did you see the report she filled out?

A: Not as I remember.

Q: Okay. You don't remember signing anything.

A: I ain't [sic] saying I didn't sign it-

Q: Uh-huh.

A: -but I don't remember reviewing it.

When presented with the injury report, McDowell testified:

Q: Okay. Well, I have this. And it's been filed into evidence, but I'll probably just attach it to the deposition just because your referencing it.

This is the First Report of Injury. Is this the first time that you've ever seen this document?

A: [examines document]

Q: Does this look familiar to you at all?

A: Oh, yeah, it looks familiar.

Q: Okay. Have you seen this before or does the form itself, or does this specific incident report, when you're talking about October 2nd, 2014, have you seen this specific incident report regarding that injury?

A: This is the elbow?

Q: Yeah, this is for your elbow.

A: I don't remember-

Q: Okay.

A: -but I know I've seen- I've had to fill one out. I- I had to fill one out like this before, but this- this was what- I think this here is a- a new- we changed workmen's- I think we changed

insurance companies. And the first time when I hurt my knee, it was under a different one. So this was different.

Q: Okay. So as you're sitting here today, is this the first time you've reviewed the actual injury report from October 2nd of 2014 where you hurt your elbow and your shoulder?

A: To me, it is.

Q: Okay. So- and you- looking at this form, you- you're not seeing your signature anywhere.

A: [examines document]

Q: And there's three different pages, so I probably shouldn't spread it out. You don't see your signature on any one of these three pages that we're looking at right now.

A: [examines document] Unless you see it and I don't.

Q: Okay. I don't see it, but I'm just wonder- I just wanted to make sure you- you know, you didn't sign this report; correct?

A: Not that I know of.

...

Q: Now, I'm going to read a line to you regarding- on this incident report, and it says- and I'll- this "EE" stands for employee. It's just shorthand.

[reads] Employee was working loading a trailer when he hit his elbow in the conveyor causing a right olecranon process fracture to the right elbow.

Does that accurately describe the injury that you had on October 2nd, 2014, or is she missing something?

A: Okay. When she was ask- when she- when she was doing it, I told her that when it hit- hit the elbow, and she typed it up, I said, 'I hit the elbow, but I had pain all the way up to my shoulder,' she didn't put the shoulder down there, but I sure- I'm sure I said it.

...

A: -I mean, since my elbow was so swollen, although that I said that my- you know, that the pain was going all the way to my shoulder, and what BaptistWorx was sending her back, they didn't put nothing in there about my shoulder. So they- she didn't put nothing on the paperwork about the shoulder.

Q: And- and, obviously, this isn't a co- you didn't talk to her about this. You're just assuming that that's what happened.

A: That's what I'm saying.

Q: Okay. Because I don't want the judge to think that this is a conversation you [sic] with Laura, you know, because it's- you didn't talk to her about this. This is what you're assuming based on the-

A: What I see-

Q: -description of the injury.

A: -what I see, yeah.

Q: Okay. So she doesn't mention the shoulder, but, you know, had you had

the opportunity to review this, would you have corrected her?

A: I probably would have.

Q: Okay. And you would have told her about your right shoulder.

A: Right.

Q: Okay. But you didn't get that opportunity; is that true?

A: That's true.

McDowell testified when his right shoulder pain first began:

Q: Okay. When did you first start experiencing right-shoulder pain?

A: The first week.

Q: The first week of physical therapy?

...

Q: Is that a yes?

A: Yes. I'm sorry.

Q: That's all right. And what did you do at that point?

A: Well, I- I told the- the guy that was working with me, I said, 'I keep feeling- I keep feeling something funny in my shoulder.' And that's when he start- he started working with it and stuff like that.

And then I told him it was- felt kind of sore. Then he start- when he was icing this part down, he started putting heat-

Q: When he was icing your right elbow down?

A: He started putting heating pads on the shoulder.

Q: Okay. And then what?

A: And- and then he- that's what he was doing every time I came. He was doing it every time. And then he kept saying he was kind of concerned about the shoulder, although the elbow was getting somewhat better.

And then when we got ready, when- you know, I was having to- he was having me lift up certain stuff, and I was having problems lifting.

Q: During physical therapy?

A: And that's- that's when he was getting concerned. He said, 'The elbow seems to be working, but you're not- you're not lifting up,' because I had to be able to- to go overhead. I had to be able to lift overhead, and I couldn't do them [sic].

When he- when he got a- a small- a little small ball, and I couldn't throw it up- I couldn't throw it up into the- the bin, and that's when he said, 'You need to tell the doctor about your shoulder.'

Q: Okay. So is it fair to say that your right-shoulder pain and symptoms developed during physical therapy?

A: I don't know if it developed during there, but it started.

Q: It started during physical therapy?

A: In pain- it started paining [sic] more during physical therapy, but I wasn't doing anything in extreme in order to make it- it was- I was just doing regular ice and heat and- and this stim- and this stuff they put on there that- I forget what it is, that stimulates the-

Q: Uh-huh.

A: -the arm and stuff. They was [sic] doing stuff like that.

...

Q: So when the elbow pain started to-resolving [sic], that's when you really noticed what- that something was wrong with your right shoulder.

A: Yes, it was.

Q: Okay. But was there ever a doubt in your mind that the shoulder wasn't related to your fall at work?

A: No.

Q: Okay. So you- you, from the beginning, attributed the pain in your shoulder to the fall at work.

A: Yes.

Q: Okay. But you- and you're not a doctor, so you didn't know at the time of your fall, you know, that you had an injury to your shoulder. You just knew you had pain there.

A: Correct.

Q: Okay. And the pain in your shoulder really didn't start to bother you until the elbow had resolved.

A: Right.

Q: Okay. And you didn't notice the- the real pain in your shoulder until physical therapy was making you use that shoulder.

A: Right.

After four weeks of physical therapy, McDowell saw Dr. Frank Bonnarens a second time:

Q: And during that second evaluation with Dr. Bonnarens, is that when you started telling him about right-shoulder pain?

A: I told him about the problems I was having with it. And he examined me further, and he stopped the physical therapy.

Q: Okay. What about your elbow at that time? Had that kind of resolved, or were you still having problems with your elbow?

A: I was still having some problems with my elbow.

Q: What kind of problems?

A: It was still kind of- it was still- it was still sore. It was still tender, but not like it was.

...

Q: Okay. So then Dr. Bonnarens sent you to an MRI of your shoulder; right?

A: Yes, he did.

Q: Did you ever get an MRI of your elbow?

A: No, I think they just x-rayed it.

Q: Okay.

A: Then- I don't know bene- I don't know whether they- if they MRIed [sic] both of them at the same time or not.

Q: Okay.

A: I can't say.

Q: And then he started treating you for your shoulder in December. Does that sound right to you?

A: Yes.

Q: Okay. In December he had recommended a surgery to you, is that right-

A: That's correct.

Q: -for your right shoulder? Prior to that recommendation for surgery in December of 2014, had you had any physical therapy for your shoulder specifically?

A: No.

Q: Did you have any injections in- to your right shoulder?

A: No.

McDowell underwent shoulder surgery in May 2015.

McDowell testified regarding when he gave notice of his shoulder injury:

Q: Okay. So, to your knowledge, do you think that the employer knew that you had right- a right-shoulder injury?

A: Yeah, I told them that it was bothering me real bad.

Q: Do you remember when the first time you told them of the right shoulder was?

A: I think I told them when I was getting the heating pad on there, and they was [sic] asking me about it. I said, 'My shoulder had been both' - I told them, 'My shoulder had been bothering me.' And he said, 'It doesn't sound- that doesn't sound good.'

Q: So this would have been during physical therapy when you were getting the heating pad; right?

A: Right.

Q: So you don't think you told Lynn Womack about your right shoulder on Thursday, October 2nd?

A: What are you talking about? My primary-care doctor?

Q: I'm sorry. I-

A: You're talking about-

Q: Laura Whitlock.

A: No, I just told her about- you- oh, you're talking about when I initially got hit- hit- got hurt?

Q: Yes.

A: Oh, no, I just told her that- you know, that- my elbow, and it was- pain was going all the way up to my shoulder.

Q: Okay.

A: Of course, I was telling everybody that at work, because I was going-walking around.

Q: Sure. So you think the first time you told Laura Whitlock about your right shoulder specifically was during physical therapy after; right?

A: Right.

...

Q: Okay. And then as soon as you started feeling the- your right shoulder, you know, you're- you're really hurting in it, did you re- who did you report that to?

A: I told them at physical therapy. And then I told them at work, also, when I went over- when I went over and turned [sic] the paperwork over there, I told them I was having pain in my shoulder. And they said, 'You probably ought to have it looked at.'

Q: I mean, you know, I know you said that to Aida, but there's no paperwork. You didn't fill out any additional paperwork about when you're- you know, you're telling us that you're taking your paperwork over there and you're saying, 'Oh, my shoulder hurts.' And they're-

A: Right. Right.

Q: - whatever was said.

A: Yeah.

Q: There's no documentation of that.

A: That's true.

Q: Okay. You didn't write anything down. You don't have your employer write anything down.

A: That's true.

Q: Okay. But then, again, you never reviewed the first report of injury, so if there were paperwork, would you even know that there was?

A: No.

McDowell disagreed with Dr. Bonnarens' summary of the work incident in his March 19, 2015, report:

Q: Okay. So on his March 19th, 2015 note- I'm going to read this to you; okay- he says, [reads] The patient said that when he hit his elbow on the conveyor, that was because he was actually falling backwards. And he fell backwards into the conveyor striking his elbow.

Does that sound like an accurate description of what happened on October 2nd, 2014?

A: No, it doesn't.

...

Q: -description of your medical condition; but that description right there, is there any mention of a fall onto the ground?

A: No, there's no mention of a fall on the ground.

Q: And is there any mention of a fall onto the ground of the tractor-trailer?

A: No, there isn't.

Q: Okay. So is it your testimony that this is an inaccurate description of what happened on October 2nd, 2014?

A: Yeah, it's an inaccurate description. See, when I was talking- when he told me- he- he had said something to me about this, the reason why that they did not want to cover the- the workmen's comp is not wanting to cover the surgery.

And I told him- I told him, then, when he- when he brought up the- when he read that part to me, I told him that I hit my shoulder, too. And he said he wasn't told- he said he wasn't told that.

And I told him that- and then he dir-redirected it. I don't know. He said he was- he- well, he has one of those- well, he- you know what I mean? He has a recorder, and he was speaking into it, and he redirected it.

I don't know if he sent it to them or what he did. And he told them about me- about me falling to the floor.

...

Q: You, as his patient, isn't it your responsibility to describe to him how you got hurt?

A: Yes, it is.

Q: Okay. And so the information that he's gathering about what happened on October 2nd, 2014 is coming from you; is that correct?

A: That's correct.

Q: Okay. So this description that he has that you just read to us from March 29th, are you saying you disagree with that description?

A: What- what I just read there?

Q: Yes.

A: Yeah, I do disagree with it.

Q: Okay. So you still maintain that you actually fell to the floor on October 2nd, 2014, the floor of the tractor-trailer.

A: Yes.

Q: Okay. But that's not something that Dr. Bonnarens documented, to your knowledge; is that right?

A: That's right.

Q: And that's not something that any of the doctors at BaptistWorx [sic] documented, to your knowledge; right?

A: Right.

Later in his deposition, McDowell was asked again to explain how he sustained his alleged shoulder injury:

A: I hit the shoulder right against the side, just- just below- just below the floor. That's how I ended up on the floor.

Q: Just below the floor?

A: What I mean is- here's the wall. Here's the wall.

...

A: In other words, like scraping the wall. It's going to the floor.

Q: Okay. So-

A: Maybe that'll make you understand a little bit better.

Q: So, basically, the- the wall was kind of slowing the fall, but the brunt of the full [sic]-

A: Oh, it didn't stop it. It didn't stop it.

Q: Okay. So the brunt- you- like so your- did your shoulder-

A: In other words-

Q: -hit the ground and take the brunt of the fall on the ground, or did the brunt of the fall- was the wall taking the brunt of your fall?

A: It hit the wall coming down.

Q: Okay. So your shoulder eventually hit the ground.

A: Oh, it took enough of it hitting the wall.

Q: Okay. All right. All right. So- because when we sent you to Dr. Roberts, he indicated that you fell back striking your elbow on the conveyor belt and then striking the shoulder on the ground. Was he wrong when he says it like that?

A: Well, I'm trying to explain it the best I can-

Q: Uh-huh.

A: -but I told him- I told him the same as I told you, that I ended up- I- when I ended up on the ground- ended up on the ground.

Q: Okay.

A: But I was-

Q: So what-

A: -trying- but, basically, what I was trying to- I was trying to tell you exactly how it happened, you know.

Q: Okay.

A: It took a lick there, and it took a lick on the ground, too.

Q: Okay. So when you hit the ground, what body part hit the ground first?

A: My shoulder.

Q: The right shoulder?

A: Yes.

Q: Okay. All right. So that's why it was confusing to me, because when [sic] were explaining it to Aida, it sounded like the brunt of that fall on your shoulder was the wall and not the ground.

A: Well, really, I could say my head, too, because all of it hit.

Q: Okay. But you're not having any head problems.

A: No.

...

Q: Okay. All right. So your shoulder hit- the right shoulder hit the ground. Is that the-

A: Yeah.

Q: Okay. But on the way down it hits the wall.

A: Yes.

Q: Okay. All right. That's what I was confused about, because I- I was trying to make sure that Dr. Roberts wasn't wrong when he reported that-

A: Okay.

Q: - your shoulder hitting the ground; okay. So after this happens, you're- you said, and you told Aida this, that you had pain in your- your elbow and it went up to the shoulder; is that right?

A: Correct.

Q: Okay. Did you report- when you reported the injury, did you say, 'I have- I- you know, I have pain in my elbow, but it's up to my shoulder. I have pain up to my shoulder'?

A: Yes, I did.

Q: Okay. And that was to Gene Lilly?

A: I told him, but when I made the report to Laura, she had- I told her about it, too.

Q: Okay.

A: Well, you know, they pass- you know, the buck doesn't stop there. He told me to report it to her- or he called her on this- his radio, and she came down-

Q: Okay.

A: -and talked to me.

McDowell testified that his shoulder was causing him "stiffness" after the incident. When he went to BaptistWorx on October 6, 2014, he allegedly was experiencing pain "slightly."

Q: Do you know why they didn't document that- well, let me take that back.

Do you remember telling them that you were experiencing slight pain in your right shoulder?

A: Well, I told them that- when I was there, that it was hurting for- for my arm all the way up to my shoulder. Whether they documented it or not, that's what I told them.

Q: Okay. So you told them that your pain was in your right elbow, and it was going up-

A: Going up to the-

Q: -to your shoulder.

A: -shoulder.

Q: Do-

A: That's correct.

McDowell did not remember telling BaptistWorx about specific pain in his shoulder or that he fell to the floor of the tractor-trailer.

McDowell also testified at the December 15, 2015, hearing. Concerning the work incident, McDowell testified:

A: Okay. We was [sic] working inside the truck. We had a conveyor there and there was [sic] proceeding down the line, and we was [sic] going at a rapid speed because we was [sic] doing internet. And it started to pile up, so we was [sic] stacking pretty rapidly and they started to come back. There was [sic] about two or three of us in the truck. And everybody started to back up and it came forward and was trying to block them and then I hit my elbow and when I fell back I hit my shoulder against the side of the truck.

Q: Okay. What kind of- did you have immediate pain?

A: No. I got up, you know, that's when I felt a little bit funny and I got up and then we went to break. And then after break then, you know, it started feeling kind of funny and started swelling. By lunchtime it had swollen [sic] up.

Q: Okay. Swelling where?

A: In my elbow.

Q: Okay. And were you feeling any pain by then?

A: Yes, I was feeling pain.

Q: Okay. And where were you feeling the pain?

...

A: Up through the elbow.

Q: Okay. And you're pointing above your elbow?

A: Yeah. But it wasn't all the way up to my shoulder. Because see, I did not- in other words I went home. You know, I reported it, but I went home and then came back the next day and by that [sic], you know, it was worse.

Q: Okay. And what was the pain like the next day?

A: Oh, it was excruciating. It was coming up.

Q: Okay. And where was the pain located?

A: It was located from my wrist all the way up to my shoulder.

Q: Okay. So by the day after your shoulder was hurting as well?

A: Yes, it was.

...

McDowell was asked to provide a timeline of events following the work-related incident:

Q: Okay. Now, after the incident that happened on Thursday, October 2nd, which I do want to talk about in a second, but just to get a time line, that Friday, so October 3rd, 2014, you came to work?

A: Yes, I did.

Q: Okay. And you did work your full shift that Friday; right?

A: Yes, I did.

Q: Okay. Now, that Saturday, October 4th, 2014, that was a mandatory overtime day that you did not want to miss; is that right?

A: That's correct.

Q: So you come into work that Saturday, October 4th, and worked your full shift; correct?

A: Yes.

Q: Okay. Sunday, October 5th you were off; is that right?

A: Right.

Q: And then Monday, October 6th, 2014 you came into work again; is that right?

A: Right.

Q: But at that time did the employer send you to BaptistWorx [sic] to be checked out?

A: Right about 11- about 11:15, 11:20.

McDowell testified he reported his injury to a supervisor, Laura Whitlock, the same day it happened. "I told her I fell and hit my elbow and stuff, just like that."

The October 6, 2014, Baptist Health Occupational Medicine/BaptistWorx report under the heading "complaint," reads: "right elbow pain." Under "diagnosis" is "right olecranon process failure."

Regarding the injury mechanism, the October 6, 2014, First Report of Injury or Illness reads: "EE WAS WORKING LOADING A TRAILER, WHEN HE HIT HIS ELBOW IN THE COVEYOR [sic], CAUSING R OLECRANON PROCESS FRACTURE TO R ELBOW." Importantly, the injury report indicates it was not signed by McDowell.

Attached to the Form 101 is the October 9, 2014, record of Dr. Bonnarens in which he provided the following "history":

The patient is a 59-year-old white male who presents [sic] complaining of pain in the right elbow. He said he was loading things on to [sic] conveyor when he struck the elbow. He said it hurts when he bends it. He describes the pain as 9/10. Keeping it still makes it hurt less. Bending it makes it hurt more. The patient has had no testing done other than the x-rays he presents with. Patient did not report any falls.

Under "impression" is the following: "Overall impression is that we are dealing with olecranon bursitis, early."

Also attached to the Form 101 is Dr. Bonnarens' November 6, 2014, record which states as follows:

The patient presents today complaining of pain in both his right elbow and shoulder. He said the elbow actually feel like it is doing better where he struck it, but he has noticed that he is having a lot more pain in the right shoulder with difficulty moving it and

difficulty with his activities of daily living. He describes it as an aching pain. He said the medicines do help sometimes. He demonstrates good passive range of motion of the shoulder, but limited active range of motion. He has significant weakness with abduction and external rotation against resistance. Neuro is intact. Pulses are present. No evidence of lymphadenopathy. No warmth, erythema, or drainage is present. in [sic] regards to his elbow, he has a good range of motion. Minimal, if any, tenderness. Neuro is intact. [sic] Pulses are present. [sic] No evidence of lymphadenopathy. It looks like the elbow is doing much better but in the shoulder it looks like we are dealing with a rotator cuff tear. The plan is to obtain an arthrogram MRI of the right shoulder and see him return with results.

The December 16, 2014, MRI report, attached to the Form 101, sets forth the following impression:

1. Full-thickness anterior supraspinatus insertion tear measures 9-10 mm in maximal AP dimension.
2. Rotator cuff tendinosis.
3. Undermining and partial detachment of the superior to posterosuperior labrum with adjacent pitting and cystic change in the superior glenoid.
4. Moderate acromioclavicular joint arthrosis.
5. Rotator cuff muscle atrophy, as described.

Dr. Bonnarens' December 18, 2014, medical record, attached to the Form 101, states, in relevant part, as follows:

The patient returns today in followup on his right shoulder saying he is continuing with pain. It is 8/10. He feels a little bit better since the arthrogram, but he found that rather painful. Range of motion, etc., are unchanged. Still has the weakness. This was discussed in detail with the patient. MRI does show a tear of the supraspinatus tendon, shows partial tearing of the labrum, and AC joint arthropathy. It looks like we are dealing primarily with a rotator cuff tear. This is consistent with the injury that he describes.

Dr. Bonnarens' March 19, 2015, medical report, also attached to the Form 101, states as follows:

The patient returns today in following on his elbow and on his shoulder. The history of [sic] clarified. The patient said that when he hit his elbow on the conveyor that was because he was actually falling backwards and he fell backwards into the conveyor, striking his elbow. He said that they have been stacking boxes up to five high and the boxes were actually falling on him and fell, pushing him backwards into the conveyor. He said that his elbow is doing fine, but he is still having weakness in the shoulder. He said the elbow had been hurting so much that he had not noticed the shoulder as a problem, until the pain left his elbow and he realized he was left with the pain in the shoulder. Examination of the elbow shows that he has full range

of motion. No laxity. No warmth or erythema is present. No tenderness. Neuro is intact. It looks like the elbow is doing great. The patient still has the weakness in the shoulder with limitations in active range of motion secondary to pain consistent with his tear. Based on the information and the history provided by the patient, it does look like that the rotator cuff tear was reasonably related to his fall and the elbow looks like it is at maximum medical improvement and the patient is doing well with that. Plan at this point is to proceed with the surgery. As far as his elbow is concerned, no further treatment is needed. The patient should be considered at MMI for his right elbow.

Also attached to the Form 101 is the April 23, 2015, medical record of Dr. Bonnarens which reads:

The patient returns today in followup [sic] on his shoulder saying that he is still having pain, difficulty with his activities of daily living. The patient now has the medical clearance in order to proceed with surgery. Evaluation and history are completely unchanged. Still has weakness in the same pattern, but good range of motion. In view of the fact the history, evaluation, and examination are all unchanged. [sic]. The patient continues to be symptomatic. He said that he would like to proceed with the surgery. He understands risks, benefits, and potential complications associated with this. He said he will be doing this under his private health insurance since it has been denied as a work injury and we will go ahead and get him scheduled for that.

Also attached to the Form 101 is the Baptist Eastpoint Surgery Center Operative Report concerning the May 13, 2015, surgery on McDowell's right shoulder, performed by Dr. Bonnarens.

Ann Taylor introduced questionnaires completed by Dr. Bonnarens on March 6, 18, and September 11, 2015. In the March 6, 2015, questionnaire, Dr. Bonnarens responded as follows:

Thank you for your continued care to Mr. McDowell. You requested Rotator [sic] cuff surgery for this employee. This employee injured his elbow at work after hitting it on a conveyor belt.

Please answer the following questions so we can handle our claim accordingly.

1) Is the major contributing cause and need for surgery related to this WC accident? [Dr. Bonnarens checked "no."]

2) Is the recommended rotator cuff surgery causality [sic] related to the work injury of 10/2/14? [Dr. Bonnarens checked "no."]

3) But for the work event would he require the rotator cuff surgery? [Dr. Bonnarens checked "no" and wrote the following: "pt was asymptomatic prior to work incident."]

In the March 18, 2015, questionnaire response, Dr. Bonnarens opined McDowell reached maximum medical improvement for his elbow.

In the September 11, 2015, questionnaire response regarding McDowell's right shoulder, Dr. Bonnarens opined:

5. You have reviewed Mr. McDowell's deposition transcript taken on 9/3/15. Is the mechanism of injury that Mr. McDowell describes in his deposition transcript consistent with the mechanism of injury he described to you during the office visit on March 19, 2015? Why or why not?

[handwritten: "No- It would have required a 180° spin"]

6. Do you believe that Mr. McDowell's right shoulder condition was caused by the mechanism of injury as he describes during his deposition?

[handwritten: "No if he had to spin Yes if he did hit shoulder on the wall"]

7. Do you believe that the right shoulder surgery performed on May 13, 2015 was related to the work injury occurring on October 2, 2014?

[handwritten: "Based on he [sic] yes" and "Based on reconstruction of accident no"]

In the February 15, 2016, Opinion, Award, and Order, the ALJ set forth the following "Analysis":

There is little doubt that James McDowell, a 60-year-old employee of Ann [sic], Inc. sustained some sort of work-related injury on Thursday, October 2, 2014. The Defendant maintains that the only reported injury was to his right elbow. The Plaintiff maintains that he also suffered an injury to his right shoulder, which was later confirmed by

the necessity for rotator cuff surgery by his treating orthopedic surgeon.

On the date of injury, Mr. McDowell continued working and subsequently returned to work again on Friday, October 3, Saturday, October 4, and Monday, October 6, 2014. He did not report his injury until that following Monday, complaining to his supervisor of right elbow pain. Four (4) pieces of evidence recorded within a short period of time after the work event corroborate that the Plaintiff sustained a right elbow injury only. Thus, the crux of the case is whether the Plaintiff has carried his burden to show that he suffered a work-related injury to his right shoulder while working for the Defendant and that he gave due and timely notice of same.

The burden of proof in a Workers' Compensation claim is on the claimant (Plaintiff herein) to prove each and every essential element of his claim. Snawder v. Stice 576 S.W.2d 276 (Ky. App. 1978). Specifically, the Plaintiff must establish a causal relationship between the work incident and the condition. Jones v. Newburg, 890 S.W.2d 284 (Ky. 1994).

Pursuant to KRS 342.0011, an injury must be work-related and be the **"proximate cause"** producing a harmful change in the human organism in order to be compensable. (Emphasis ours). Black's Law Dictionary defines "proximate cause" as "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred."

The Court discussed the statutory requirement of objective medical findings in the case of Gibbs v. Premier Scale Co., 50 S.W. 3d 754 (Ky. 2000). The Court held that "a diagnosis based upon a worker's complaints of symptoms but not supported by objective medical findings is insufficient to prove an injury for the purposes of Chapter 342." The courts have held that in order for an injury to be work related, it must arise out of and in the course of employment. Armco Steel Corp. v. Lyons, 561 S.W.2d 676 (Ky. App. 1978). Furthermore, the burden is on the claimant to establish that the injury is work connected. Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969).

Even if a finding of work-relatedness is merited, due and timely notice of the injury must be given to the employer by the injured employee. When a worker must provide notice to an employer is explicated in KRS 342.185(1):

[N]o proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and 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.

Hence, the statute requires notice of an accident to be given to the employer as soon as practicable after the accident. Moreover, the employee has the burden of proving that notice

was given. Church v. Turner Elkhorn Coal Co., 492 S.W.2d 877, 878 (Ky. 1973). The determination of whether the notice was timely is a circumstantial determination based on the facts of the case. Marc Blackburn Brick Co. v. Yates, 424 S.W.2d 814, 816 (Ky. 1968). I am aware of the facts and holding in the case of Autozone, Inc. v. Brewer, 127 S.W. 3d 653 (Ky. 2004). However, I believe that decision to be distinguished on its facts. Notice of an alleged injury to the right shoulder is a substantial issue in this claim.

In this case, the facts are critical to a determination of both issues.

First, there are multiple versions of when the employer was notified of the Plaintiff's work-related injury. Upon presenting to Baptist Worx [sic] on October 6, 2014 to seek medical treatment for the first time following the work incident, Plaintiff completed a "New Injury Patient Information" Form. This form is required by all patients of Baptist Worx, [sic] who sustain on-the-job injuries and was completed independently by Plaintiff as admitted by him at the formal hearing. He described the visit as being for "a hurt elbow." Mr. McDowell also indicates that the injury occurred while he was "loading boxes in trailer, hit elbow on conveyor." Nowhere on the "New Injury Patient Information Form" completed by the Plaintiff himself does he allege any right shoulder injury symptoms or complaints.

Second, the First Report of Injury or Illness, Form IA-1 (FROI) completed by shipping supervisor, Laura Whitlock in the presence of Plaintiff reports a specific injury to the right elbow

occurring while, "EE was working loading the trailer, when he hit his elbow in the conveyor causing a right olecranon process fracture to right elbow." No right shoulder injury or symptoms are recorded, and this is the only FROI relevant to the October 2, 2014 work incident. The Defendant asserts that Plaintiff failed to report a right shoulder injury or any falls on Monday, October 6, 2014 while providing notice of the October 2, 2014 work incident to his employer.

Upon referral to orthopedic surgeon, Dr. Frank Bonnarens, Plaintiff presented for his initial appointment on October 9, 2014, exactly one (1) week post-injury. Dr. Bonnarens describes the patient's history as follows:

"...presents complaining of pain in the right elbow. He said he was loading things on to conveyor when he struck the elbow. He said it hurts when he bends it. He describes the pain as 9/10. Keeping it still makes it hurt less. Bending it makes it hurt more. The patient had no testing done other than the x-rays he presents with. Patient did not report any falls."

Based upon this documented history, I can only conclude that Plaintiff failed to report a right shoulder injury, symptoms or any falls occurring on October 2, 2014 to Dr. Bonnarens one week after the now alleged occurrence of a fall or collision with the wall of the truck at the time he also injured his left elbow. This is significant because the statute does not necessarily require an injured worker to be aware of, and report each injury resulting from an accident, but must report the accident itself. Reliance Diecasting Co. v. Freeman, 471 S.W.2d 311 (Ky. 1971).

Here, the employer was only timely apprised of an accident involving harmful contact of the employee's right elbow with a conveyor. There was no report of a fall that caused injury or a potential injury.

On February 6, 2015, the insurance adjuster assigned to this claim, Jessica Whitmire, obtained a recorded statement from Plaintiff. In the statement, the Plaintiff failed to mention any specific right shoulder injury or falls occurring on 10/2/2014. He vaguely references arthritis and pain developing in the right shoulder post-physical therapy.

Despite the consistent reporting of right elbow pain after injury to the right elbow only, Plaintiff now presents with claims of right shoulder pain and a right shoulder injury. Of significance is that he is not only claiming a new body part that sustained an injury on Thursday, October 2, 2014, but also a separate mechanism of injury.

It was only on 12/16/2014, some 2 ½ months after the supposed date of injury that Dr. Bonnarens was presumably informed of the alleged right shoulder injury as that is when he ordered an arthrogram MRI of right shoulder, arthroscopic repair of rotator cuff and physical therapy. The MRI of right shoulder dated 12/16/2014 revealed a tear of the supraspinatus tendon, also showing partial tearing of the labrum, and AC joint arthropathy.

The Plaintiff now reports that not only did he hit his right elbow on the conveyor, but also falling boxes caused him to completely fall backward onto the side of the truck and as a result, he struck his right shoulder on the truck wall. Plaintiff's reporting of the new

mechanism of injury and body parts injured months after it occurred is inconsistent.

In his report dated 03/06/2015, Dr. Bonnarens determined that the right shoulder injury and need for subsequent surgery is not related to the events of October 2, 2014.

In his subsequent report dated 09/11/2015, Dr. Bonnarens concluded that the mechanism of injury described by the Plaintiff in his deposition transcript was physically impossible and would require a 180-degree spin. As such, Dr. Bonnarens determined that the event described by the Plaintiff in his deposition transcript, inconsistent with his initial reporting of the incident, did not cause his current right shoulder condition or the subsequent need for right shoulder arthroscopic surgery.

What is also compelling to the undersigned is the fact that the Plaintiff insists that he reported his alleged fall to supervisor Gene Lilly. The compelling fact is that although the Plaintiff claimed that three other employees were working with him at the time of his accident and he immediately reported the accident to Mr. Lilly, no lay testimony was produced to corroborate anything he said. No statement from Gene Lilly appears in the record.

Mr. McDowell changed his story several times during his deposition and testimony at the final hearing. He claimed that he fell to the ground as 2 to 3 boxes fell on him and when he hit the ground, his elbow and his shoulder hit the side of the truck. He also claimed that he did not fall to the ground but rather hit the side of the

truck, which caught his fall, striking the right side of his entire body.

He added more confusion to the history of mechanism of injury during his various testimonies. He claimed that he was on the back of the tractor-trailer loading boxes from a conveyor that was running through the middle of the tractor-trailer on to the right side of the truck. He claimed his back was turned to the boxes and he was facing the left side of the truck and the conveyor belt. As the boxes behind him began to fall, he turned around fully, hit his right elbow on the conveyor in the middle of the truck, and somehow hit the remaining right side of his body on the side of the truck itself. He then changed his answer and claimed that he hit his right shoulder against the side just below the floor.

At the time of the injury he states that he did not feel pain in his right shoulder. He didn't even feel stiffness in the right shoulder immediately after the incident. His "focus" was on his elbow because it was the source of his pain. Yet, if he suffered a contemporaneous torn rotator cuff, it is difficult to understand why he would not notice pain from that condition until 2 ½ months post-trauma.

He didn't recall why he waited until the following Monday to report the incident. He thought he had reported the elbow injury to Laura on Friday, the 3d. He didn't recall what he did during the weekend of October 4-5, 2014 and then, he didn't recall if he worked on October 3, 2014. He then testified that he had told Gene Lilly, the supervisor on the late afternoon of the 2d [sic] and apparently told Laura that he didn't

want to go see about his injury that day, which would mean that he reported the injury on 10/02/2014, but did not seek treatment until four days later and that his supervisor Laura did not fill out a first Report of Injury until four days later. But then he testified that Laura made him go to Baptist Worx [sic] on the 3rd of October, which is demonstrably not true by the records of Baptist Worx [sic]. Those records prove that he did not present to Baptist Worx [sic] with his elbow injury until 10/06/2014.

The contradictory versions concerning how and when the alleged injury to Plaintiff's right shoulder occurred, coupled with the medical evidence in the record creates serious concerns regarding the Plaintiff's credibility as a witness. This lack of credibility compels a conclusion that Plaintiff's current post-injury condition to his right shoulder is wholly unrelated to the Thursday, October 2, 2014 work incident and should be dismissed for his failure to establish work-relatedness between a very real rotator cuff tear and what seems to be a completely fictitious version as to how and when that condition occurred.

The Defendant/Employer also asserts that the Plaintiff's claim should be dismissed for failure to give due and proper notice of the alleged right shoulder injury.

The Kentucky Supreme Court has held that notice must be given as soon as practicable after the occurrence of an accident under the theory that its purpose is: 1) to give the employer to place the employee under the care of a competent physician in order to

minimize his disability and employer's subsequent liability; 2) to enable the employer to investigate at an early time the facts pertaining to the injury; and 3) to prevent fictitious claims where lapse of time makes proof of lack of genuineness difficult. Smith v. Cardinal Construction Co., 13 S.W.3d 823 (Ky. 2000); Harlan Fuel Co. v. Burkhart, 296 S.W.2d 722 (Ky. 1956); Buckles v. Kroger Grocery and Baking Co., 134 S.W.2d 221 (Ky. 1939). Whether notice is due and timely depends upon the facts and circumstances of the individual case and a question solely within the province of the ALJ as the trier of fact. Furthermore, notice of an injury is mandatory and, if there is a delay giving notice, the burden is upon the injured party to explain why he did not give notice. Buckles v. Kroger Grocery and Baking Co., 134 S.W.2d 221 (Ky. 1939); Sexton v. Black Star Coal Corp., 296 S.W.2d 450 (Ky. 1956).

The Defendant/Employer asserts that it has been prejudiced with respect to all three prongs identified in the Smith and Harlan Fuel Co. claims *supra* because Plaintiff told Defendant explicitly, on multiple occasions, that he had injured right elbow only as a result of the incident on Thursday, October 2, 2014. In fact, not only did he emphasize an injury to the right elbow to his employer, he also failed to report any right shoulder injury to anyone, including his treating providers at Baptist Worx [sic] as well as Dr. Bonnarens, until over one month after the injury. More importantly, the Plaintiff also did not report a work-related accident involving his right shoulder.

The mechanism of injury that was repeatedly reported to the employer, medical providers, and adjuster during the recorded statement obtained in February, 2015 does not corroborate with Plaintiff's current reporting of the incident and alleged mechanism of injury of an alleged fall. The Defendant asserts that Plaintiff has failed his burden under Buckles supra to establish due and proper notice and that he has likewise failed in his burden to prove a reasonable explanation as to why notice was not given.

As I have noted previously, his current allegations of reporting a right shoulder injury to his employer immediately following the incident is not consistent or corroborated in the employer's records, First Report of Injury, medical records, or recorded statement obtained in February, 2015, over four months post-injury. His current version of events is simply not credible in comparison to the version of events that was presented on several occasions within a temporal proximity to the incident in question. Consequently, I find that Plaintiff's claim of right shoulder injury should also be dismissed for failure to give due and timely notice to the employer.

I do find that the Plaintiff has proven by competent evidence that he has sustained a work-related injury to his right elbow as the direct and proximate result of the work-related accident of 10/02/2014.

Dr. Bonnarens, the treating orthopedic surgeon affirmed that the Plaintiff reached MMI as to his right elbow on 3/18/2015. He also opined that Mr. McDowell does not retain a whole

person impairment for his right elbow and that his rating for the elbow according to the *AMA Guides, 5th Edition* is 0%. Dr. Roberts, on the other hand, assigned a permanent whole person rating for the elbow of 2% due to deficits in range-of-motion. I cannot find that Dr. Bonnarens conducted any range of motion studies on Mr. McDowell's right elbow.

As to Mr. McDowell's right elbow injury, I find the testimony of Dr. Roberts to be persuasive as it is based on objective criteria pursuant to the *AMA Guides, 5th Edition*.

Although Mr. McDowell has not returned to employment, that is due to the ongoing problem with his right shoulder condition, which I have deemed to be non-compensable. There is no evidence in the record that Mr. McDowell's right elbow condition would physically prevent him from performing the same or similar job duties as he was engaged in at the time of his work injury, so I do not believe that he is entitled to a statutory multiplier pursuant to KRS 342.730 (1) (c) 1 or 2.

As to the issue of TTD, Plaintiff argues the Defendant/Employer paid TTD benefits consistent with the elbow claim only as Dr. Bonnarens had Mr. McDowell at MMI for the elbow on March 18, 2015. Mr. McDowell is requesting the shoulder claim be awarded as compensable and additional TTD awarded.

Since I have determined that the shoulder claim is not compensable, my only remaining inquiry is limited to whether the TTD paid is sufficient in rate and duration.

The parties stipulated that temporary total disability benefits were paid at the rate of \$290.67 per week from October 6, 2014 to March 29, 2015 for a total of \$7,266.75.

Plaintiff's average weekly wage has been stipulated at \$452.68. My calculations show that by dividing the stipulated AWW by 3, then multiplying the product of that calculation by 2, one arrives at a figure of \$301.79 as being 2/3 of Plaintiff's AWW. As that figure comes within the parameters of KRS 342.730 (1) (a), Mr. McDowell would be entitled to an award of \$301.79 per week from October 6, 2014 to March 18, 2015. The Defendant/Employer would be entitled to a credit for TTD paid.

McDowell filed a petition for reconsideration requesting additional findings concerning the issues of notice and causation regarding his right shoulder injury. In the March 11, 2016, Order on Petition for Reconsideration, the ALJ stated as follows:

Plaintiff complains of a lack of findings of fact as to how the employer was harmed by the notice on the right shoulder injury, additional findings of fact on the evidence of record as to notice given by McDowell "was against the policy of employer," and how plaintiff was required to give notice of a medical condition he was not aware of.

If the plaintiff will direct his attention to Finding of Fact and Conclusion of Law No. 2 on page 24 of the Opinion, Award and Order of February 15, 2016, the following

language will be noted: "Findings of fact and conclusions of law made by the undersigned ALJ as set out in the foregoing "Analysis" which are incorporated by reference herein, the same as if set out in words and letters."

Beginning on page 14 and continuing through page 22, I rendered a thorough explanation of the findings of fact and conclusions of law that I relied upon in concluding that plaintiff's claim for a right shoulder injury should be dismissed. I am only required to adduce such facts and conclusions as support my ultimate finding, whatever that may be. I am not required to parse out the evidence to the satisfaction of a particular party if I am of the opinion that the evidence is not relevant or material to my decision.

To my understanding, the employer does not have a burden to establish how it has been harmed by a failure to give timely notice and plaintiff has provided no authority to the contrary. Nevertheless, that harm (or potential harm) is or should be apparent. Failure to give timely notice of an injury deprives that defendant of the opportunity to investigate the circumstances surrounding the alleged injury, get a proper and timely medical evaluation of the alleged injury or consider the proper treatment and employment status of the employee, e.g. should he be on restrictions, etc.

Plaintiff's argument is also not well taken because he fails to distinguish between the reporting of the accident/injury and the reporting of causation. This is not a cumulative trauma situation. The plaintiff claims

to have been, and on the evidence was, involved in a traumatic incident while unloading freight. He had no obligation to report a specific medical condition until that condition was diagnosed and causation established. However, he did have an obligation to timely report an alleged injury to a body part. He had the presence of mind to report that he had struck his elbow and it hurt. He made no such report as to his shoulder, not even that it had been struck in the same incident.

The employer is harmed because two to four months down the road there is absolutely no way to determine the source of that torn rotator cuff. As our law recognizes, the burden of proof in a Workers' Compensation claim is on the claimant (Plaintiff herein) to prove each and every essential element of his claim. Snawder v. Stice 576 S.W.2d 276 (Ky. App. 1978). Specifically, notice of an injury is mandatory and, if there is a delay giving notice, the burden is upon the injured party to explain why he did not give notice. Buckles v. Kroger Grocery and Baking Co., 134 S.W.2d 221 (Ky. 1939); Sexton v. Black Star Coal Corp., 296 S.W.2d 450 (Ky. 1956). Here, I found plaintiff's explanation not to be credible.

As to the remainder of plaintiff's arguments, his allegation of error patently appearing on the face of the Opinion, Award & Order is a disagreement with my interpretation of the medical evidence in the record, which is not within the scope of my review under the provisions of KRS 342.281. Francis v. Glenmore Distilleries, 718 S.W.2d 953 (Ky. App. 1986).

Plaintiff's petition for reconsideration, having failed to point out error patently appearing on the face of the Opinion, Award and Order of February 15, 2016 is therefore **DENIED** and **DISMISSED**.

McDowell's first argument on appeal is the ALJ erred in dismissing his right shoulder claim due to failure to give due and proper notice.

As the claimant in a workers' compensation proceeding, McDowell 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 McDowell 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). Here, the record compels a different conclusion on the issue of due and proper notice regarding McDowell's right shoulder injury.

There is no specific timeframe for satisfying the notice requirement pursuant to KRS 342.185, as the statute requires notice "of the accident" to be given to the employer "as soon as practicable after the happening

thereof." See Marc Blackburn Brick Co. v. Yates, 424 S.W.2d 814 (Ky. 1968). While notice is mandatory, the Court of Appeals has indicated "the statute should be liberally construed in favor of the employee to effectuate the beneficent purposes of the Compensation Act." Id.

In the February 15, 2016, Opinion, Award, and Order, the ALJ determined "the employer was only timely apprised of an accident involving harmful contact of the employee's right elbow with the conveyor." However, notice to an employer of a physical injury carries with it notice of all conditions that may reasonably be anticipated to result from that injury. See Dawkins Lumbar Co. v. Hale, 299 S.W. 991 (Ky. 1927). See also Reliance Die Casting v. Freeman, 471 S.W.2d 311 (Ky. 1971). Additionally, and as acknowledged by the ALJ in the February 15, 2016, Opinion, Award, and Order, "the statute does not necessarily require an injured worker to be aware of, and report each injury resulting from an accident, but must report the accident itself. Reliance Diecasting Co. v. Freeman, 471 S.W.2d 311 (Ky. 1971)."

We acknowledge the October 6, 2014, First Report of Injury or Illness only mentions McDowell striking his elbow on the conveyor belt; however, McDowell testified that he never reviewed the injury report, and the report

shows he did not sign it. Attached to McDowell's Form 101 are several medical reports by Dr. Bonnarens. These records indicate that on November 6, 2014, one month after the accident, McDowell complained to Dr. Bonnarens of "aching pain" in his right shoulder. The reports also indicate a right shoulder rotator cuff tear was diagnosed by Dr. Bonnarens on December 18, 2014, two months after the October 2, 2014, work incident, and Dr. Bonnarens opined that a rotator cuff tear "is consistent with the injury that he describes." Additionally, in his March 19, 2015, report, Dr. Bonnarens stated "the rotator cuff was reasonably related to his fall." Dr. Bonnarens stated in his April 23, 2015, report that McDowell's surgery was going to be covered under his private healthcare insurance since it was denied as a work-related injury. Surgery was performed on May 13, 2015, and the Form 101 was filed on August 3, 2015, to which all pertinent records of Dr. Bonnarens were attached.

McDowell testified he gave notice of the accident the day that it occurred, and an injury report was filled out four days later on October 6, 2014. McDowell further testified that at the time the injury report was filled out, he reported that he had pain all the way up to his shoulder. As stated, McDowell testified that he was unable

to review the injury report, and the report itself indicates that he did not sign it. Based on this fact alone, it would be impossible for the ALJ to determine exactly what McDowell gave notice of regarding shoulder pain when the injury report was filled out. The ALJ's dismissal of McDowell's right shoulder claim due to lack of due and proper notice is erroneous and reversed as a matter of law.

McDowell's second argument on appeal is the ALJ failed to make adequate findings of fact on the issue of causation regarding McDowell's alleged right shoulder condition. McDowell requests remand for additional findings.

In the February 15, 2016, Opinion, Award, and Order, citing no medical evidence and only addressing the issue of McDowell's credibility, the ALJ devoted two sentences to the issue of causation regarding McDowell's right shoulder condition. In his petition for reconsideration, McDowell specifically requested additional findings on the issue of causation. These findings were not rendered in the March 11, 2016, Order on Petition for Reconsideration.

While an ALJ is not required to set forth the minute details of his reasoning in reaching a particular

result, he must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). The parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful appellate review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). The ALJ must articulate sufficient findings to apprise both the parties and this Board of the reasons for his ultimate conclusions. This is particularly important when additional findings were *specifically requested* in a petition for reconsideration as they were here.

The two sentences the ALJ provided concerning the issue of causation regarding McDowell's right shoulder injury, do not sufficiently apprise the parties or this Board of the basis for the ALJ's decision. The ALJ concluded McDowell's lack of credibility compelled a finding the shoulder condition is not work-related. This conclusion was based, in part, upon the medical evidence which the ALJ did not identify. Thus, the parties and the Board can only surmise as to the medical evidence upon

which he relied. That being the case, remand for additional findings regarding causation as requested by McDowell, is necessary. This is particularly important in light of the fact that Dr. Bonnarens in fact expressed opinions establishing a causal connection between the work incident and McDowell's right shoulder injury. We vacate the ALJ's determination McDowell failed to establish the work-relatedness of the alleged right shoulder condition and remand for additional findings.

Accordingly, the February 15, 2016, Opinion, Award, and Order and the March 11, 2016, Order on Petition for Reconsideration are **REVERSED** to the extent the ALJ determined notice of the alleged right shoulder injury was not due and proper. In an amended opinion and order, the ALJ shall find that notice of McDowell's right shoulder condition was due and proper. The ALJ's determination that McDowell's alleged right shoulder condition is not causally related to the work accident is **VACATED**. This claim is **REMANDED** for additional findings on the issue of causation of the right shoulder injury in conformity with the views set forth herein.

CHAIRMAN, ALVEY, CONCURS.

RECHTER, MEMBER, DISSENTS WITHOUT SEPARATE
OPINION.

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