OPINION ENTERED: MARCH 15, 2013

CLAIM NO. 200696917

JEFF FARLEY PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

KENTUCKY MIRROR & PLATE GLASS COMPANY
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Jeff D. Farley ("Farley") appeals from the September 4, 2012 Opinion and Order rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), and from the October 17, 2012 order overruling his petition for reconsideration.

The ALJ dismissed Farley's claims for injuries occurring on November 30, 2005 and June 4, 2007 as barred by the statute of limitations. Farley argues the evidence

compels a finding temporary total disability ("TTD") benefits were payable as a result of the June 4, 2007 injury and the employer Kentucky Mirror & Plate Glass Company ("KMPG"), as insured by KESA, did not comply with the requirements of KRS 342.040.

Farley filed a Form 101, Application for Resolution of Injury Claim, on October 28, 2011, alleging right shoulder injuries on November 30, 2005 and June 4, 2007 while employed by KMPG. Farley alleged he injured his right shoulder on November 30, 2005 while pulling on a piece of glass. He returned to work after the surgeries and injured his right shoulder again on June 4, 2007 while working with glass.

Farley testified by deposition on January 17, 2012 and at the hearing held July 18, 2012. Farley worked for KMPG as a glazier installing plate glass and, occasionally, metal systems and framing to hold glass. He injured his right shoulder on November 30, 2005 while pulling on an improperly installed piece of glass. He saw Dr. Zack R. Stearns who previously treated him for a left knee injury. Shoulder surgery was performed on January 19, 2006 with a repeat surgery performed June 1, 2006. Farley returned to work for KMPG in October 2006 with light duty restrictions. He continued to work for KMPG until March 2009.

Farley re-injured his right shoulder in June 2007 while installing glass. He could not remember receiving a letter from KESA denying his claim for the June 2007 accident or injury, nor did he recall any other communication from them. Farley stated Dr. Stearns recommended shoulder surgery in July 2007. However, he continued to work until March 6, 2009, without additional medical treatment. He returned to Dr. Stearns with complaints of increased pain and stiffness on March 6, 2009.

On April 27, 2009, Dr. Stearns performed a total shoulder replacement. On October 16, 2009, Dr. Stearns indicated Farley could return to full duty work in two weeks. Farley stated he has continued to have problems with his shoulder, including restricted mobility and pain since his first injury in 2005. He received TTD benefits from April 27, 2009 until he was released on October 30, 2009, when he began drawing unemployment benefits.

At the hearing, Farley reiterated the history of the 2005 work injury and subsequent surgeries performed by Dr. Stearns. Farley stated he worked as a supervisor while on light or restricted duty and he was not physically capable of performing the work, but instead ensured requirements and quality assurance guidelines were met. Farley stated he advised KMPG of the surgery recommendation following the

2007 injury and he was asked to hold off until the workload was lighter. He eventually performed the physical aspects of the work as well as supervisory duties. His symptoms progressively worsened until March 2009 when he returned to Dr. Stearns after KMPG advised he could have the surgery. Farley stated he was released by Dr. Stearns in October 2009, and attempted to return to work. KMPG advised him business was slow and no work was available. Farley acknowledged he received a letter from the state when his benefits were terminated in October 2009. On cross-examination, Farley acknowledged he saw Dr. Stearns after the June 2007 injury, and was advised he would eventually require surgery.

Farley submitted treatment records from Dr. Stearns who he first saw on December 15, 2005 for a “new problem” in his right shoulder. Farley reported developing a sharp pain in his shoulder when pulling on glass. After an MRI revealed a complete tear of the supraspinatus, Dr. Stearns performed surgery on January 19, 2006. On April 5, 2006, Dr. Stearns noted Farley had swelling over the proximal lateral humerus with increased pain, although he had no recent accident or injury. Dr. Stearns performed revision surgery on June 1, 2006.

On January 5, 2007, Farley complained of pain especially after lifting glass. X-rays showed humeral arthrosis. Farley returned to Dr. Stearns on February 16, 2007 complaining of right shoulder pain and tightness.

On June 6, 2007, Farley returned for what Dr. Stearns described as “a recurrent injury to the right shoulder” which occurred when Farley was “moving a piece of glass and felt a tearing sensation of the arm.” Dr. Stearns ordered an MRI which was performed by High Field Open MRI on June 11, 2007. Dr. Stearns noted the MRI demonstrated a supraspinatus tear with mild retraction and possible labrum tear. Dr. Stearns planned to perform a revision cuff repair and possible SLAP repair.

Dr. Stearns next saw Farley on March 6, 2009 for complaints of increasing pain, stiffness and difficulty sleeping. X-rays revealed advanced arthrosis and “moderate anterior spur, anchors in the humeral head at least four with marked glenohumeral arthritis and inferior spur formation.” On April 27, 2009, Dr. Stearns performed a right reverse total shoulder prosthesis with biceps tenodesis. On October 16, 2009, Dr. Stearns noted Farley was doing well and could return to work with no restrictions in two weeks.

Farley submitted the March 29, 2012 report of Dr. Craig S. Roberts. Dr. Roberts diagnosed a work-related injury to the right shoulder with rotator cuff arthropathy requiring three shoulder surgeries including a reverse right shoulder replacement. Dr. Roberts attributed the surgeries to the November 30, 2005 work injury, and assigned a 17% whole person impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment 5th Edition ("AMA Guides"). Dr. Roberts indicated it was difficult to tell whether it was significant that, following the June 2007 work injury, Farley continued his regular work which included manipulating large heavy pieces of glass. In addition, he stated it was difficult to ascertain whether the continuation of duties after June 4, 2007 accelerated the degenerative changes and necessitated the need for the April 27, 2009 surgery. Dr. Roberts stated "however, I do think it is medically probable this did occur."

In a May 15, 2012 addendum report, Dr. Roberts indicated he had been made aware of "typographical errors" in response to a letter forwarded by Farley's counsel. In the addendum, Dr. Roberts indicated Farley sustained a harmful change to the human organism due to the right shoulder injury of November 30, 2005, for which Dr. Stearns conducted January 19 and June 1, 2006 surgical repairs. He

further stated Farley sustained a harmful change to the human organism due to the work-related injury to the right shoulder on June 4, 2007 for which his continued work afterward caused additional trauma. Dr. Roberts stated the April 27, 2009 surgery was “accelerated and progressive glenohumeral joint articular cartilage wear as a result of his work activities.”

KMPG submitted Dr. Thomas Loeb’s February 14, 2012 report. Farley complained of right shoulder pain, weakness and loss of motion. Dr. Loeb stated it appeared the injury on June 4, 2007 was sufficient to cause recurrent pathology and a June 2007 MRI showed a re-current rotator cuff tear with progressive degenerative change in the right shoulder. On November 30, 2005, Dr. Loeb diagnosed a rotator cuff tear of the right shoulder with a re-current rotator cuff tear through the original surgical site. He underwent surgery for the recurrent rotator cuff tear on January 19, 2006. He underwent additional surgery for the same condition on June 1, 2006. Dr. Loeb stated Farley then developed progressive degenerative arthritic changes in the right shoulder. Dr. Loeb indicated if Farley had any propensity for degenerative changes in his right shoulder, it was essentially dormant prior to the original injury on November 30, 2005. Typically, rotator cuff tears did not lead to glenohumeral

arthropathy but can be contributory if they fail to heal. Dr. Loeb indicated at least 50% of the ultimate result of Farley's arthritis was from the original November 30, 2005 injury, and the second injury on June 4, 2007 was simply a recurrent tear through the original tear area and was part of the same pathology. He indicated Farley reached maximum medical improvement ("MMI") six months after the April 27, 2009 reverse total shoulder operation. Dr. Loeb assigned a 7% whole person impairment based on the AMA Guides of which he apportioned 50% to a pre-existing disease process, and 50% to the combined effects of the work injuries of 2005 and 2007.

Gayla Lynn Pritchard, a claims representative for KESA, testified at the hearing. She confirmed KESA provided workers' compensation coverage to KMPG at the time of the June 4, 2007 injury and received notice from the employer through a first report of injury received on June 6, 2007. At some point thereafter, Dr. Stearns' office called asking for authorization for treatment indicating Farley was a patient who had been seen as recently as February 2007. KESA did not authorize treatment since Farley was still on light duty from a previous injury. The KESA representative advised medical records were required and, if Farley was still on light duty, it would probably be considered a

continuation of the prior injury. Pritchard testified Dr. Stearns' office called back stating the employer had been contacted and the matter was going to be treated as a continuation, and would not be provided to KESA.

KESA did not receive any records from Dr. Stearns' office in 2007 and received no demand for payment of Farley's medical bills for the June 4, 2007 injury date. A denial letter was sent to Farley on June 6, 2007 indicating the claim was denied because it stemmed from an active pre-existing condition. The file was ultimately closed.

Prior to the institution of litigation, KESA was never advised Farley had been taken off work due to the effects of the June 4, 2007 injury, and never received notice of an obligation to tender payment for any benefits to him or on his behalf. Based upon her understanding of the statutes, regulations and KESA's policy, Pritchard stated KESA denied any obligation to report to the Department of Workers' Claims regarding denial or payment of benefits. Pritchard stated KESA did not receive a demand for payment of TTD benefits in March 2009 and did not receive a request for pre-authorization of the reverse total shoulder procedure. KESA undertook no additional investigation once Dr. Stearns' office advised there was a pre-existing condition for which Farley remained on restrictions and was treated. Pritchard

stated the employer did not inform KESA in March 2009 Farley was off work for surgery. KESA took no action to notify the Department of Worker's Claims the claim had been denied since it was not a loss-time claim.

KMPG filed a First Report of Injury form reflecting a November 30, 2005 right shoulder injury. The form indicated the compensation carrier was "KY AGC/SIF and the claims administrator as Ladegast & Heffner." KMPG also filed a June 5, 2007 First Report of Injury form indicating Farley injured his shoulder on June 4, 2007 with a return to work that same date. KESA was listed as the insurer.

KMPG submitted Department of Workers' Claims records including a November 9, 2006 letter regarding claim number 2006-96917 informing Farley his income benefits had been terminated as of October 16, 2006 and advising of the necessity of filing a claim within two years of the termination. A second termination letter concerning claim number 2006-96917 was sent on December 7, 2009 listing a termination date of October 29, 2009.

The ALJ dismissed Farley's claim concerning the 2005 injury, noting TTD benefits were paid through October 15, 2006 and the payment of TTD benefits in March 2009 could not revive the claim.

In his opinion rendered September 4, 2012, the ALJ made the following findings regarding the 2007 injury:

> Plaintiff's Form 101 was clearly filed more than two years after June 4, 2007. His claim is time barred, therefore, unless the statute of limitations was tolled by voluntary payment of temporary total disability benefits or unless the defendant and/or its carrier failed to comply with statutory reporting obligations under either KRS 342.038 or .040 so as to preclude a limitations defense.
>
> It is undisputed that temporary total disability benefits were paid from March 6, 2009 through October 29, 2009 at the weekly rate of $490.15, the same weekly rate at which those benefits were paid in 2006 following the plaintiff's first two shoulder surgeries. It is also undisputed that those benefits were paid by the carrier on risk at the time of the 2005 injury. Further, the ALJ is persuaded by the testimony of Ms. Pritchard that KESA, the carrier on risk at the time of the 2007 right shoulder injury denied plaintiff's claim at the outset, and within a few days of the occurrence, based upon information it received from Dr. Stearns' office that plaintiff's right shoulder condition was being considered a continuation of his earlier injury. Records from Dr. Stearns reflect that as recently as February 16, 2007 plaintiff was still treating for the 2005 injury and was still working under "light restrictions at work." KESA, therefore, has not paid workers' compensation benefits as a result of the June 4, 2007 injury. It is clear to the undersigned that when KAGC paid TTD benefits in 2009 it was paying those benefits for the only injury for which it had coverage, i.e.,

the November 2005 injury. Plaintiff acknowledged that when he received those benefits they were paid by Ladegast & Heffner, the same entity that paid benefits in 2006, and as set forth above, benefits were paid at the same weekly rate as in 2006. In addition, by the time temporary total disability benefits were paid in 2009 almost a year and three–quarters had lapsed from the June 4, 2007 event. Considering the totality of the evidence, the ALJ is not persuaded that temporary total disability benefits were paid as a result of the June 4, 2007 injury and the statute of limitations is not, therefore, tolled by virtue of payments made from March through October 2009 by KAGC.

With respect to plaintiff's argument that the defendant is precluded from asserting a limitations defense now because it failed to comply with the reporting requirements of KRS 342.038 and .040, the ALJ notes that KRS 342.038(1) requires that an injury causing absence from work for more than one day be reported to the Department of Workers Claims. Although plaintiff last worked on or about March 6, 2009, from the evidence in the record is unclear whether he began to lose time at that point because of he was laid off or because of an injury. Although plaintiff testified he left work at that time because his employer told him to get his surgery, plaintiff also testified that when he took forms back into [sic] the employer a couple of months later, he was advised that he had been laid off as of March 6, 2009. In essence, the plaintiff neither admitted nor denied that he first missed time on March 6, 2009 because of a layoff as opposed to his injury. Regardless, however, KAGC reinstituted plaintiff's

TTD payments as of that date and the ALJ infers, therefore, that the employer advised its workers' compensation carrier with respect to the 2005 date of injury that plaintiff was off work as a result of that injury. There is no substantial or persuasive evidence in the record to establish that the employer, as opposed to either of its carriers, was aware in March of 2009 that the plaintiff was missing time from work as a result of the 2007 injury as opposed to the 2005 injury. In this regard the testimony of Ms. Pritchard is unrebutted that KESA was advised by Dr. Stearns' office that plaintiff's right shoulder condition was being considered as a continuation of his 2005 injury and, by implication, did not constitute a new injury. In short, there is no evidence that the defendant was aware that plaintiff was missing time from work at any point subsequent to March 2009 as a result of the June 4, 2007 right shoulder injury. This fact is bolstered by evidence presented that the plaintiff was able to perform his full regular duties for part approximately 21 months following the June 4, 2007 event and prior to the time they stopped working on March 6, 2009. The ALJ is simply not persuaded that the defendant/employer either knew or should have known that the plaintiff's absence from work beginning March 6, 2009 was attributable to the June 4, 2007 right shoulder injury. As such, there was no obligation under KRS 342.038 to report that absence to the Department of Workers' Claims. The ALJ does not construe the absence of any reporting by the employer or KESA as an attempt to manufacture a limitations defense.

In the same vein, the plaintiff has not persuaded the ALJ that KESA was required to notify the Commissioner of

its failure to pay temporary total disability benefits as a result of the June 4, 2007 injury. Again, the uncontroverted evidence from Ms. Pritchard establishes that KESA was advised by Dr. Stearns' office in June of 2007 that they were treating the plaintiff for a continuation of his prior injury and that, therefore, they were not sending and did not send medical records in support of a new and distinct June 4, 2007 injury. In fact, the employer notified KAGC of the plaintiff's absence and, as a result, plaintiff was paid temporary total disability benefits and medical benefits while off work prior and subsequent to his shoulder replacement surgery. Again, the ALJ is not persuaded that the employer or KESA either did or failed to do anything with a goal of manufacturing a statute of limitations defense with respect to the June 4, 2007 work injury. The more likely explanation, and one that the ALJ deems to be true is that both the employer and KESA believed that the right shoulder treatment which Dr. Stearns continued to render was rendered as a result of the continuing effects of the November 30, 2005 injury.

While the result in this claim is undoubtedly harsh, the ALJ is not persuaded that the "equities" in this matter rest with the plaintiff. The ALJ notes that practically from day one, KESA advised the plaintiff in writing that it was denying the June 4, 2007 injury claim as an active pre-existing condition. TTD benefits were paid at the same rate as 2006 and by the same payor as 2006 income and medical benefits. In a sense, this matter presents the perfect storm with all parties operating under reasonable, if mistaken, beliefs with respect to their relative respective rights and duties.

> That said, the ALJ finds that the statute of limitations with respect to the June 4, 2007 injury was not tolled by the payment of voluntary benefits subsequent thereto and that there is no evidence that the defendant or KESA failed to comply with the reporting requirements under either KRS 342.038 or .040. Plaintiff's claim is, therefore, barred by the statute of limitations, KRS 342.185, and, therefore, dismissed.

Farley filed a petition for reconsideration raising essentially the same arguments he now raises on appeal which was overruled by order dated October 17, 2012. The ALJ determined Farley's petition for reconsideration constituted nothing more than a re-argument of the merits. Nevertheless, the ALJ provided the following findings:

> Having carefully reviewed the medical evidence and the Opinion and Order the Administrative Law Judge remains unpersuaded that when the plaintiff missed work beginning in March 2009 that the reason for that absence was the June 4, 2007 right shoulder injury. It is undisputed that the plaintiff sustained a significant right shoulder injury on November 30, 2005, as a result of which he underwent two rotator cuff repair procedures. Plaintiff was off work and, based on the undersigned's review of office notes from his treating physician, Dr. Stearns, the plaintiff was never released to return to full regular duty but was only released to restricted duty. Moreover, Dr. Stearns' records reflect that the plaintiff continued to complain of pain subsequent to both of the initial surgeries up to and including complaints of ongoing shoulder

symptoms at an office visit in February 2007. It is further undisputed that the plaintiff continued to perform his regular duties at work subsequent to June 4, 2007 in spite of ongoing right shoulder symptoms. The evidence is somewhat conflicting as to why the plaintiff left work in March 2009 in that there is evidence that he was either laid off at that time or was given permission by the employer to take off work then in order to have his right shoulder addressed surgically. In any event, the workers' compensation carrier for the November 30, 2005 injury reinstituted temporary total disability payments when the plaintiff left work in March 2009.

With respect to medical evidence the ALJ notes that the plaintiff's evaluating with orthopedic surgeon, Dr. Roberts, issued a report on March 29, 2012 based on his examination of the plaintiff and review of medical and diagnostic records in which he stated his diagnostic impression without equivocation as follows:

> Left shoulder work–related injury to the right shoulder with rotator cuff arthropathy which required three shoulder surgeries including reverse right shoulder placement. To a reasonable degree of medical probability, this is the result of the work–related injury of November 30, 2005.

While the plaintiff attempted to rehabilitate his own expert witness through a fill–in–the–blank questionnaire that questionnaire only muddied the water. Labeled "addendum to medical report" Dr. Roberts indicated that he had been made aware of

“typographical errors” (which were not identified) by plaintiff's counsel and he expressed additional opinions regarding the plaintiff's right shoulder pathology and surgery. Specifically, when asked whether the plaintiff’s continued work after the June 4, 2007 work–related injury caused additional trauma to the right shoulder Dr. Roberts indicated that it did and he elaborated “abnormal anatomy and altered biomechanics of the shoulder” created the causal nexus. Most significantly, when asked what necessitated the April 27, 2009 surgery Dr. Roberts indicated “accelerated and progressive glenohumeral joint articular cartilage tears as a result of his work–activities.” The undersigned infers that the “work activities” identified by Dr. Albert's refers to plaintiff's “continued work after June 4, 2007” as asked in the prior question. In other words, Dr. Roberts was of the opinion initially that the plaintiff's right shoulder pathology was attributable solely to the November 30, 2005 injury but thereafter seems to have opined that the right shoulder reverse replacement surgery was precipitated by glenohumeral joint articular cartilage wear as a result of plaintiff's cumulative work activities. Plaintiff, however, did not amend his claim to assert a cumulative trauma claim. In any event, Dr. Roberts does not, in his initial report or the “addendum” specifically indicate that the June 4, 2007 work–related injury caused either the plaintiff’s symptoms in March 2009 when he went off work or precipitated the need for replacement surgery thereafter. The undersigned finds Dr. Roberts initial opinion with respect to attribution of the plaintiff's shoulder pathology to the November 30, 2005 initial injury as the most persuasive medical evidence

> submitted by either party and finds, in reliance thereon, that the plaintiff has failed to prove that he missed any time from work specifically as a result of the June 4, 2007 right shoulder injury or that the reverse right shoulder replacement surgery is directly and causally related to the June 4, 2007 work injury. Accordingly, the ALJ further finds that temporary total disability benefits paid in 2009 both immediately before and subsequent to the reverse shoulder replacement surgery was [sic] not paid as a result of the June 4, 2007 work injury.

With respect to Farley's contention KMPG did not comply with reporting requirements of KRS 342.040 regarding the June 4, 2007 injury, the ALJ stated he believed he had adequately addressed the matter in the opinion and order. The ALJ reiterated, having determined Farley failed to prove he missed any time from work subsequent to June 4, 2007 as a result of an injury occurring on that date, KMPG was not required to report either termination or failure to pay workers' compensation benefits.

On appeal, Farley argues the evidence compels finding TTD benefits were payable due to the June 4, 2007 work-related injury. Farley contends it is undisputed he suffered a harmful change to the human organism on June 4, 2007. He notes Dr. Stearns stated there was a recurrent injury to the right shoulder when he was moving a piece of

glass and experienced a tearing sensation of the arm with loss of abduction.

Farley also notes both Dr. Roberts and Dr. Loeb opined he sustained a work-related injury in June 2007. He argues Dr. Roberts explained the abnormal anatomy and altered biomechanics of the shoulder caused the additional trauma. Dr. Roberts further stated accelerated and progressive glenohumeral joint articular cartilage wear as a result of the work activities necessitated the 2009 surgery. Further, Dr. Roberts and Dr. Loeb opined unrepaired rotator cuff tears contribute to or accelerate glenohumeral arthropathy. Farley contends the medical evidence established his surgery in 2009 was the result of the June 4, 2007 work-related injury. Thus, he argues the ALJ improperly disregarded medical opinions on matters solely within the province of medical experts.

Farley argues KMPG, as insured by KESA, did not comply with the requirements of KRS 342.040 with regard to the June 4, 2007 work-related injury. Farley asserts this failure to strictly follow the notice requirements of KRS 342.040 precludes the assertion of a statute of limitations defense. Farley notes the failure of an employer to satisfy the statutory notification requirements tolls the statute even if the employer was acting in good faith.

Since Farley, the party with the burden of proof, was unsuccessful before the ALJ, the issue on appeal is whether the evidence compels a contrary conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). It is not enough for Farley merely to show there is some evidence supporting a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). As long as the ALJ's opinion is supported by any evidence of substance, we may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The time period within which an injured worker must file a claim for benefits is contained in KRS 342.185(1), which provides:

> [n]o 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 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.

The intended purpose of this statutory provision for tolling the period of limitations during the payment of voluntary income benefits is to prevent injured workers from being lulled into a false sense of security and, therefore, failing to file a timely claim. City of Frankfort v. Rogers, 765 S.W.2d 579 (Ky. App. 1988). Furthermore, it is axiomatic that KRS 342.185 operates in conjunction with KRS 342.040(1) to achieve this purpose. KRS 342.040(1) provides:

> [I]f 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 commissioner of the termination or failure to make payments and the commissioner shall, in writing, advise the employee or known dependent of right to prosecute a claim under this chapter.

This legislative mandate of employer notice followed by written notice from the commissioner "is to advise an injured worker, in writing, of his right to prosecute his claim, and the time frame in which to do so, and to provide prompt resolution of asserted work-related injury claims." H.E. Neumann Co. v. Lee, 975 S.W.2d 917 (Ky. 1998). *See*

also Newberg v. Hudson, 838 S.W.2d 384 (Ky. 1992); Ingersoll-Rand Co. v. Whittaker, 883 S.W.2d 514 (Ky. App. 1994). Case law also instructs the tolling of the statute of limitations is grounded in equity and, as an equitable remedy its application in any given case is fact intensive. J & V Coal Co. v. Hall, 62 S.W.3d 392 (Ky. 2001); Lizdo v. Gentec Equipment, 74 S.W.3d 703 (Ky. 2002).

The evidence in the case *sub judice* falls far short of compelling a finding Farley missed work in 2009 due to the June 4, 2007 incident for which income benefits were paid or owed. As noted by the ALJ, Dr. Roberts initially attributed the need for the surgery in 2009 solely to the November 2005 injury. The ALJ, on reconsideration, specifically found Dr. Roberts' initial attribution of Farley's condition to the 2005 injury was the most persuasive medical evidence on the issue. Additionally, Dr. Loeb stated the 2007 injury "is simply a recurrent tear through the old original tear area and is part of the same pathology." The evidence establishes the degenerative process was present in the shoulder prior to the 2005 injury although it was previously dormant. The ALJ found it significant Dr. Roberts did not specifically indicate the 2007 event caused the symptoms in 2009 or precipitated the need for surgery. Substantial evidence supports the

ALJ's finding the TTD payments in 2009 were not paid as a result of the 2007 injury.

Since the ALJ determined TTD benefits were not paid or payable for the 2007 injury at the time Farley was off work and had surgery in 2009, the reporting requirements of KRS 342.038 and .040 were not triggered, and the ALJ correctly determined the statute of limitations was not tolled. The evidence establishes at the time of the 2007 incident, the question of whether Farley's condition constituted a new injury or was a continuation was resolved following consultation with Dr. Stearns who indicated it would be treated as a continuation of the 2005 injury. As the ALJ observed, there is no evidence to contradict Ms. Pritchard's testimony. KMPG and KESA were not informed Farley missed work in 2009 due to the 2007 incident, and therefore, there was no obligation to report the injury. H.E. Neuman Co. v. Lee, 975 S.W.2d 917 (Ky. 1998). Further, no demand was made for payment from KESA, and benefits were paid by the carrier responsible for the 2005 injury.

Accordingly, the September 4, 2012 Opinion and Order rendered by Hon Robert L. Swisher, Administrative Law Judge and the October 17, 2012 order denying Farley's petition for reconsideration are **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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