

OPINION ENTERED: OCTOBER 26, 2012

CLAIM NO. 200201760

TOYOTA MOTOR MANUFACTURING KENTUCKY, INC. PETITIONER

VS. APPEAL FROM HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

JAHAUNA LYNN BROWN
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

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

SMITH, Member. Toyota Motor Manufacturing Kentucky, Inc. ("Toyota") appeals from the August 1, 2011 Opinion and Order; the September 2, 2011 Order on Petition for Reconsideration; the May 7, 2012 Opinion, Order and Award; and the June 5, 2012 Order on Petition for Reconsideration rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ Miller"). ALJ Miller determined Brown's claim

for a cumulative trauma injury was not barred by a prior settlement agreement and the statute of limitations.

Records of the Department of Workers' Claims ("DWC") indicate Toyota paid Brown (then Nurse) temporary total disability ("TTD") benefits in 1996 for injuries resulting from "overuse hands R>L" that occurred on July 10, 1995. Toyota filed a first report of injury on August 15, 1995, which was assigned claim number 1996-01980. The report indicated the accident was a result of Brown's use of air guns while working. The DWC sent three WC-3 letters to Brown notifying her of the termination of benefits and the need to file any claim within two years. Brown never filed a claim for benefits related to the 1995 injury.

The parties then entered a Form 110, Settlement Agreement, on November 8, 2002 for a work-related injury occurring November 13, 2000 which was described as resulting from "lifting heavy modules overhead and shooting air guns" which affected the bilateral upper extremities. The agreement noted Toyota paid medical expenses in the amount of \$3,469.70, with the last medical payment made on September 25, 2001. No medical reports were attached to the settlement agreement which listed Brown's injury diagnoses as carpal tunnel syndrome and median nerve compression. The agreement noted no TTD benefits had been paid and that the

settlement included no monetary payment. Under the heading of "other information," the agreement stated as follows:

We are filing this to protect future medical. Any reasonable & necessary medical treatment and expenses directly relating to this injury shall remain covered under this settlement agreement pursuant to KRS 342.

The agreement was signed by the parties on November 7, 2002 and approved by ALJ Sheila C. Lowther ("ALJ Lowther") on November 18, 2002.

Brown filed a Form 101, Application for Resolution of Injury Claim, on January 24, 2011, alleging a work-related injury to her hands on November 13, 2000 caused by repetitive movement using vibrating tools. The DWC assigned the same claim number, 1996-01980, to the application as had been assigned to the claim which was subject of the settlement.

Toyota filed a special answer on February 16, 2011 and an amended notice of claim denial or acceptance filed March 28, 2011, noting the claim had been previously settled and, if Brown contended the claim was not settled, it was barred by the statute of limitations. Toyota further asserted the claim was not reopened and the time to do so had run.

Brown testified by deposition on March 23, 2011 and at the hearing held March 23, 2012. When questioned regarding the November 13, 2000 injury date, Brown stated:

A. I believe that was the one they were saying, beings [sic] I was going back and forth to the doctors for hand treatment, that they were saying something about me having to have surgery or something of that magnitude, I think. I can't remember.

Q. You said there was an issue about the statute of limitations running or something?

A. Right. Because I remember somebody calling me saying I had to sign something in order to keep that case open so I could continue going to the doctors.

Brown confirmed her medical expenses had always been paid. At her deposition, Brown indicated she continues to have pain in her hands. She experiences occasional numbness in her fingertips, but her condition has improved since the surgery. Later, Brown was questioned as follows regarding the settlement agreement:

Q. Now, Mr. Dietz asked you about signing a Settlement Agreement, is that correct?

A. Correct. I didn't know it was a Settlement Agreement. I thought it was protecting me from being able to go to [sic] the doctor if my hand were [sic] to flare up after I had my surgeries. That they would always treat my hand.

That's what I thought I was signing, not nothing [sic] about any money.

Brown confirmed her signature on the settlement agreement. She indicated she did not have legal representation at the time she signed it. When asked whether someone explained the document to her, Brown stated "I thought she said clearly, this is protecting you for -- you can go to the doctor, to continue seeing Favetto if needed for you [sic] hand. The case is [sic] always be open with your hand."

Brown acknowledged she received TTD benefits whenever she was off work following her surgeries. Brown stated she could not recall receiving any type of paperwork from the State regarding her benefits being terminated.

On re-cross examination, the following exchange took place:

Mr. Dietz: I just have a follow up, Ms. Brown. When you mentioned when this Agreement that you signed, that they explained to you that your statute of limitations would run if this was not signed, is that correct?

A. Yes, but also in 2002, I was, it was the last of the year because I had perfect attendance and you can be off line on restrictions for so many days before they actually send you home. And by me being off [sic] on line for so many days, my restricted time was up. So they were sending me home because restrictions for my hand because I

couldn't work my job because my hand. But I didn't want to be cut on but I was forced. They told me I had no choice, I had to have the surgery. So, that's why I had surgery when I did. So --

Q. I'm going to get back to the Agreement that you signed. When you signed it they said that if they didn't go through this process of having a judge approve it, that your statute of limitations for this injury would have run?

A. Right.

Q. Right? And so you signed that in essence so that it would not run and that you would continue to have medical benefits, is that correct?

A. Correct. Ongoing treatment, correct.

Q. And they've done that, they paid you that ongoing treatment?

A. Correct.

At the hearing, Brown testified that prior to 2005, her job assembling engines involved frequent use of air guns, frequent turning, frequent repetitive motion and a lot of pinching, gripping and tedious activities. A new line started in 2005 which still required the use of lighter, less vibratory air guns but the guns were not as heavy and did not involve as much vibration.

Brown stated she continues to have problems with her hands including swelling and aching pain that she rated as

six and a half or seven on a ten scale. She stated she was never without pain.

When questioned regarding the settlement of her claim in 2002, Brown stated she could not recall the settlement document. She did not recall ever discussing that she was settling her claim in its entirety with anyone from Toyota or their carrier. She stated she was never paid anything to settle the claim but acknowledged she received TTD benefits. She also confirmed medical benefits continued to be paid.

Thomas Kelly ("Kelly"), claims manager at Mitsui Sumitomo Marine Management, testified at the hearing. Kelly confirmed Brown had not missed work until surgery was performed after the settlement. He indicated Toyota did not like to terminate treatment in claims where there was no lost time. Pursuant to an unwritten policy, Toyota offered settlement agreements to prevent the statute of limitations from running. The agreements provided that medical benefits would remain open. In Brown's case, the statute of limitations would have expired on November 13, 2002. Kelly assumed the adjuster who signed the agreement would have discussed it with Brown. He stated that would be typical of case handling practices. He stated the adjuster who signed the agreement is no longer with the company.

Brown relied upon the February 16, 2012 report and treatment records of Dr. Juan Martin Favetto and Dr. William O'Neill documenting treatment from January 23, 2008 through November 19, 2010. On January 23, 2008, Dr. O'Neill noted Brown had been Dr. Favetto's patient and had undergone right carpal tunnel release and left carpal tunnel injections in the past. She presented with an exacerbation of symptoms in her left hand. Dr. O'Neill noted an EMG performed in March 2005 showed moderate median sensory mononeuropathy in the left wrist. Dr. O'Neill administered an injection. On March 18, 2008, Dr. Favetto noted Brown's new EMG study showed moderate to severe slowing of the median nerve at the wrist. He noted Brown was doing better with therapy and the injection she received. Dr. Favetto noted Brown understood she would probably need carpal tunnel release at some point. An additional injection was administered on June 19, 2008. He noted Brown was doing "very, very well" on October 30, 2008.

On January 29, 2009, Dr. Favetto noted Brown complained of increased pain in her left hand that did not prevent her from working. He also noted the carpal tunnel syndrome was progressing slowly from her last visit. He administered another injection to see if that would improve her symptoms.

Brown returned on March 12, 2009, indicating the injection improved her numbness and tingling but she still had pain on the dorsum of the wrist. Dr. Favetto noted the pain was pervasive and prevented her from carrying out some work activities although she was on regular duty. He noted she had to ask for help with certain processes that bothered her hand.

On April 2, 2009, Dr. Favetto noted Brown had an MRI of the wrist that showed some dorsal synovitis at the level of the second dorsal compartment. Dr. Favetto administered an injection and indicated he would schedule her for carpal tunnel release.

In a May 10, 2009 report, Dr. Favetto stated:

As far as Ms. Brown's condition of left carpal tunnel syndrome I do not believe that Ms. Brown has suffered a new and separate injury to her wrist. Ms. Brown had signs and symptoms of left carpal tunnel syndrome as well as right carpal tunnel syndrome when I originally treated her. Carpal tunnel is not caused by a single injury it is caused, by as far as we know, by the sum of multiple small traumatic events which cause thickening of the synovium as well as swelling around the nerve which then puts pressure on the nerve. Therefore, although her symptoms were present they were not severe enough at the time to warrant surgery. She had been treated conservatively for this and never quit treatment for her carpal tunnel but it has now become uncomfortable or painful enough that she required surgery.

On September 4, 2009, Dr. Favetto noted Brown was doing well and had returned to full duties at work. Brown was having swelling on the dorsum of the wrist which worsened when she exercised or performed strenuous work. Brown returned to Dr. Favetto on December 15, 2009. She had a mass on the dorsum of her wrist. However, she reported that earlier that morning she had fallen from a platform landing on her outstretched left hand. She had severe pain and bruising on the palmar surface of the hand. On December 29, 2009, he noted an MRI showed no fractures, dislocations or ligament injuries. On February 2, 2010, Dr. Favetto noted Brown was doing well except for swelling on the dorsum of the left wrist. His impression was dorsal synovitis. She was only having occasional numbness and discomfort. Dr. Favetto indicated there was no further treatment required at this point and he discharged Brown from his care. She was to return to the clinic for follow-up on an as needed basis.

In his February 16, 2012 report, Dr. Favetto noted a history that Brown began working for Toyota in 1995 on the assembly line and started to develop right hand/wrist pain then later developed left hand/wrist pain. He noted she had previously treated with Kutz and Kleinert in Louisville where she was diagnosed with carpal tunnel syndrome and prescribed a wrist brace. Dr. Favetto began seeing her in

2002 and performed a right carpal tunnel release in 2003. He noted the left carpal tunnel release performed on May 4, 2009 and that she was released to return to work with no restrictions on February 19, 2010. Dr. Favetto noted Brown returned to Toyota and completed the work hardening re-entry program and continued to work regular duty on the assembly line. He noted she continued to complain of constant bilateral wrist pain aggravated with increased use, gripping, twisting and finger manipulation. She complained of constant right index finger numbness and frequent hand cramping. Dr. Favetto noted a May 20, 2011 functional capacity evaluation indicated she had the ability to work at a light-medium physical demand level. Dr. Favetto determined Brown had no permanent impairment pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Dr. Ronald C. Burgess performed an independent medical evaluation on January 25, 2012 at Toyota's request. Dr. Burgess stated there was a note from Industrial Health Services on November 30, 2000, stating Brown had bilateral wrist soreness and a nerve conduction study was ordered. The study was completed by Dr. Taylor on December 12, 2000 and was within normal limits. Dr. Burgess noted Brown saw Dr. Favetto on January 31, 2001, underwent a right carpal

tunnel injection on October 31, 2002 and subsequently had a right carpal tunnel release on January 6, 2003. Brown returned to normal duty. Brown returned to Dr. Favetto on July 8, 2003 with mild symptoms in the left hand. He concluded she was at maximum medical improvement on July 8, 2003 with no impairment. He re-injected the left hand on July 6, 2004 and April 14, 2005. She was next injected by Dr. Favetto's partner, Dr. O'Neill, on January 23, 2008.

Dr. Burgess reviewed Dr. Favetto's treatment from 2008 through 2010. Upon a physical examination, he determined Brown was at maximum medical improvement following the bilateral carpal tunnel releases and was asymptomatic within the median nerve distribution. There was no abnormality in her forearm. Dr. Burgess noted minimal swelling on the dorsum of her wrist which did not appear to be symptomatic. Brown had a normal motor and sensory examination with a history of mildly positive electro-diagnostic testing. Dr. Burgess felt she had a 1% impairment of both upper extremities which equaled 1% of the whole person pursuant to the AMA Guides. He assigned no restrictions.

By order dated April 26, 2011, ALJ Miller bifurcated the claim on the issue of statute of limitations and/or settlement. ALJ Miller rendered an Opinion and Order on August 1, 2011, finding the settlement agreement did not

preclude Brown from seeking income benefits. ALJ Miller further determined Toyota failed to comply with KRS 342.038(1) which requires the employer to notify the DWC within one week after an employee reports a work injury. ALJ Miller also determined Toyota and its insurer failed to comply with 803 KKR 25:170 section 2, paragraph (2)(b) which requires the filing of subsequent reports of injury every sixty days during TTD.

Toyota filed a petition for reconsideration seeking clarification of whether the settlement agreement approved by ALJ Lowther on November 18, 2002 was valid as a matter of law and whether the reporting requirements applied in this claim. ALJ Miller, in her September 2, 2011 Order, found Toyota overreached, misinformed and persuaded Brown to sign a document that it misrepresented to her. The ALJ noted Brown had been told and believed her case would "always be open with your hand."

On May 7, 2012, ALJ Miller rendered her Opinion, Order and Award ruling on the merits of the claim. The ALJ's findings relevant to this appeal are as follows:

As previously discussed, the undersigned issued an Opinion on the bifurcated issues of settlement and statute of limitations. After an additional period of proof and testimonial evidence from the Defendant/employer via Mr. Kelly, I find

that the initial Opinion remains the decision of the undersigned. Below the pertinent portions of the Opinion dated August 1, 2011 are set out and reincorporated this date:

"I find that the *Agreement as to Compensation and Order Approving Settlement* "Form 110-I" entered on November 18, 2002 does not preclude Plaintiff's right to seek income benefits under the Act. It has been undisputed that the Defendant/employer represented to the Plaintiff she was signing the document to protect her rights to medical treatment and allow her to continue to see her doctor. It did not address the remainder of the Plaintiff's rights such as income benefits, vocational retraining, right to reopen etc. Therefore, the Plaintiff has not settled her right to maintain a claim for income benefits arising from her November 13, 2000 injury.

Throughout the eleven year course of administering this worker's compensation claim, the Defendant/employer or its carrier has either been late or failed to file its required reports pursuant to 803 KAR 25:170 Section 2(2). On at least two occasions, the DWC's "statutory letter" (WC-3) was not sent to the Plaintiff subsequent to the two-year period allowed by KRS 342.185(1) and KRS 342.040(1). The Defendant/employer argues that because two years had passed since the last payment of TTD - Plaintiff's time had expired to file a 101 application. I

disagree for the following reasons.

Initially, the Defendant employer failed to comply with KRS 342.038(1), which requires that the employer notified the DWC within one week after an injured employee reports occurrence of a work injury, by filing Form IA-100-First Report of Injury. According to the DWC records, Plaintiff reported her November 13, 2000 injury to the Defendant/employer on December 8, 2000. The Defendant/employer reported Plaintiff's injury to the DWC on April 09, 2003.

The Defendant/employer and its insurer [sic] have failed to comply with 803 KAR 25:170 Section 2, paragraph (2)(b), which requires filing of a Subsequent Report of Injury (SROI) on an every 60-days' frequency during temporary total disability, and per Section 2, paragraph (2)(a) as soon as practicable and no later than one week from the date payments to an employee are commenced, terminated, changed, or resumed. The remaining issue for determination is whether or not Plaintiff's claim for an alleged work-related injury on November 13, 2000 is barred by the applicable statute of limitations. KRS 342.185 provides in pertinent part:

Except as provided in subsection(2) of this section, no proceeding under this chapter for compensation for an injury or death shall be

maintained unless . . . an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident . . . If payments of income benefits have been made, the filing of an application for adjustment of claim with the department within the period shall not be required, but shall become requisite within two (2) years following the suspension of payments or within two (2) years of the date of the accident, whichever is later.

In addition to KRS 342.185, the "notice" statute must be considered. The notice requirement is set forth in KRS 342.040 and provides in pertinent part:

- (1) Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability. All income benefits shall be payable on the regular payday of the employer, commencing with the first regular payday after seven (7) days after the injury In no event shall income benefits be instituted later than the fifteenth

day after the employer has knowledge of the disability or death. Income benefits shall be due and payable not less often than semimonthly. If the employer's insurance carrier or other party responsible for the payment of workers compensation benefits should terminate or fail to make payments when due, that party shall notify the 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. (Emphasis ours).

. . . A complete review of the evidence in this case shows very protracted and intermittent periods of medical treatment and various periodic payments of TTD income benefits. It also is undisputed that the Form 110-I was completed for the SOLE purpose of securing future medical benefits and does not address income benefits (past or future) in any manner. The Defendant/employer failed to file a number of important reports with the DWC over the years. However, there appears to be no question that the Defendant/employer violated the reporting requirements of 803 KAR 25:170 Section (2) on at least two occasions. That section requires that a Defendant/employer file a Form IA-2 (SROI) "as soon as

practicable and not later than one (1) week from the date payments to an employee are commenced, terminated, changed or resumed . . .". (Emphasis ours).

The Defendant/employer failed to submit any testimonial evidence to this ALJ regarding the administration and/or adjustment of this claim and therefore the Plaintiff's testimony and DWC record stand unchallenged. The DWC never issued a mandatory "statute letter" WC-3 at the termination of any of the Plaintiff's periods of TTD income benefit payments.

Therefore, the Plaintiff was never informed of her legal options and the time periods contemplated in KRS 342.185(1) and KRS 342.041(1). KRS 342.185(1) clearly mandates a two-year period for filing following suspension of payments.

This ALJ recognizes the holding in Lawson vs. Wal-mart, 56 SW3d 417 (Ky. App. 2001) which states that a subsequent payment of TTD will not revive an already expired statute of limitation. However, because the Defendant/employer failed to notify the DWC of the termination and/or resumption of income benefits and thereby bypassed the Plaintiff's right of notification pursuant to KRS 342.040(1), I find the Plaintiff was effectively deprived of the time contemplated and provided to her by the General Assembly. Therefore I find that the statute of limitations had not tolled and the Plaintiff timely filed her claim.

An employer cannot blatantly disregard its statutory obligation under KRS 342.040 and 803 KAR 25:170 and thereby claim the defense of limitation under this section. I find the Defendant/employer failed to comply with the statutory and regulatory duty of notice and reporting to the DWC and therefore cannot rely upon the statute of limitations as a part of this claim. Since the Defendant/employer has the burden of proving this affirmative defense, I find it has failed to carry its burden. See Frankfort vs. Rogers, 765 SW2d 579 (Ky. App. 1988).

ORDER

Based upon the foregoing findings of [sic] Findings of Fact and Conclusions of Law, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Plaintiff's claim is found to have been timely filed and the claim shall proceed to conclusion.

(Opinion and Order dated August 1, 2011).

Subsequent to this ruling, and at the formal hearing, it was explained for the first time by the testimony [sic] Mr. Kelly that Toyota did not file a First Report of Injury because the Plaintiff had not missed the required one day of work as prescribed in the statute. The Defendant/employer further argues that provision negates any reporting requirements for its subsequent payments of TTD. While it is true that KRS 342.038 contemplates the absence of at least one day from work - before the report to the Department of Workers Claims is required - the

circumstances here warrant a complete review of the facts and circumstances.

Mr. Kelly testified it was the company's policy to essentially assist its employees in maintaining their medical rights under KRS 342. It remains undisputed that the Plaintiff was called into the office on November 7, 2002 and advised she must sign certain paperwork or she would lose her right to future medical benefits. Ms. Brown testified that the agent/adjuster clearly told her that this (meaning the document she was signing) "is protecting you for - you can go to the doctor, to continue seeing Favetto if needed for you [sic] hand. The case is [sic] always be open with your hand." (Brown Depo., p. 14). Mr. Kelly's testimony seems to acknowledge that it was Toyota's policy to enter information into an Agreement that included not only medicals but also "TTD". (See Hearing Transcript, pp. 20-21).

Indeed, she began receiving workers' compensation income benefits (TTD) very shortly thereafter (November 21, 2002). Importantly, the Defendant/employer knew Plaintiff was going to undergo surgery before this disputed document was presented to her. In her deposition, Plaintiff testified:

A. Yes, but also in 2002, I was, it was the last of the year as I had perfect attendance and you can be off line on restrictions for so many days before they actually send you home. And by me being off on line for so many days, my restricted time was up. So they were sending me home because restrictions for my hand because I couldn't work my job because of my hand. I didn't

want to be cut on but I was forced. They told me I had no choice, I had to have the surgery. So that's why I had the surgery when I did." (Brown Depo., pp. 20-21).

To bolster the fact that Plaintiff was told she needed to sign the document in order to protect her rights to workers' compensation benefits, she was indeed paid TTD once she was taken off work and "forced" to have the surgery. She had been medically treated for her upper extremity problems since 1995. She testified she did not know how the date of injury of November 13, 2000 was determined. (See Brown Depo., pp. 5-6).

The Plaintiff's initial payment of TTD benefits began November 21, 2002. If the sole purpose of signing of the document was, as the Defendant/employer avers, only to "insure her medical treatment was protected" and nothing more, it makes no sense that her TTD was paid in addition to her medical benefits almost on the heels of the signing of the document. Plaintiff thought she was signing a document that protected her Workers' Compensation benefits. She stated: "I didn't know, I wouldn't have signed anything if I thought I was going to give up something. I wasn't going to get compensated for something, I wouldn't have signed anything." (Brown Depo., p. 23).

The Plaintiff testified she relied upon the advice of the Defendant/employer's agent to sign her name to that document. It cannot go without notice that she signed that document on November 7, 2002. It was approved by the ALJ on November 18, 2002. On November 21, 2002 the

Defendant/employer began voluntarily paying the Plaintiff TTD.

I find that the Plaintiff reasonably relied upon the representations of the agent/adjuster of the Defendant/employer and believed the agent/adjuster's representations that she was signing a document which protected her workers' compensation rights and benefits. The Defendant/employer relies on that same document (that they [sic] prepared and represented to the Plaintiff as required to protect her future workers' compensation rights) to argue that the claim had been settled and the statute of limitation prohibits her present claim. The facts and evidence did not support the Defendant/employer's position. The finding that the Plaintiff's claim is not barred by either settlement or statute of limitations shall stand and the Plaintiff's claim shall be allowed to proceed.

ALJ Miller determined, based upon Dr. Burgess' report, that Brown had a 1% impairment pursuant to the AMA Guides, and she had returned to work at the same or greater wage she earned at the time of her injury. She further concluded Brown would be entitled to the two multiplier at any time she ceases to work for any reason related to her disability.

Toyota filed a petition for reconsideration dated May 18, 2012, arguing ALJ Miller erred in admitting the report of Dr. Burgess into evidence after briefs had been submitted and moved to strike the report. Toyota also argued ALJ

Miller should find the original settlement agreement enforceable. Therefore, any attempt to re-litigate the settled claim could only be accomplished by a motion to reopen in accordance with KRS 342.265(4).

On June 5, 2012, ALJ Miller overruled the motion to strike the report of Dr. Burgess noting, at the beginning of the hearing, she listed the evidence on behalf of Brown. Counsel for Brown noted Dr. Burgess' report should have been listed as evidence submitted by the Plaintiff. ALJ Miller noted the report had not been entered in the file and Brown should check with the DWC to ensure it had been filed. ALJ Miller noted the report of Dr. Burgess was an IME requested and paid for by Toyota, which had knowledge of the report since January 25, 2012. Further, ALJ Miller noted Toyota made no objection to the report at the hearing. ALJ Miller determined the late filing was excusable and there was no sufficient reason to strike the report. ALJ Miller indicated she had reviewed the Opinion and found no patent errors appearing on the face of the decision. Accordingly, the petition for reconsideration was denied.

On appeal, Toyota argues Brown's exclusive remedy for her settled claim was a reopening under KRS 342.125 and therefore ALJ Miller erred in awarding permanent partial disability benefits in an already settled claim. Toyota

argues the parties entered into a valid settlement on November 7, 2002 for a 0% permanent partial disability which preserved Brown's rights under the Act for the November 13, 2000 injury. The agreement was approved by ALJ Lowther on November 18, 2002. Toyota notes if Brown wanted to seek relief or modification of the agreement, the exclusive remedy was reopening pursuant to KRS 342.125. It argues no filings were due at the time the Form 110 was approved since there was no lost time. Since no filings were due prior to the agreement, Toyota argues any filings after the settlement, including a first report of injury, are irrelevant.

Toyota argues the ALJ erred in allowing Brown to file Dr. Burgess' report after the final hearing and after briefs had been filed. Toyota asserts it objected to the late filing of proof and should not have been considered.

We begin by noting Toyota had no obligation to inform Brown of the impending expiration of the statute of limitations in November 2002 when it approached Brown with the proposed settlement agreement. Brown had no lost time from the injury and thus there was no requirement pursuant to KRS 342.038 for Toyota to report the injury at that time. Nothing in the record indicates Brown was aware her claim was about to expire and it appears Brown would not have been

able to assert a claim for any benefits beyond those secured by the agreement. It is important to note her treating physician never assessed an impairment rating, and it appears she could not have obtained a rating from another physician prior to the expiration of her time to file a claim in November 2002. Nothing in the record indicates Toyota prevented Brown from having the agreement reviewed by an attorney before she signed it. Since the agreement did not buy out any benefits or preclude reopening, the agreement did preserve Brown's claim. Brown received everything the evidence indicates she was entitled to at the time her claim was settled. Toyota is correct in noting the approval of the settlement agreement obviated the need to file an application. Failure to report the absence from work that occurred after the agreement was approved would not affect Brown's rights since the settlement had already secured her claim.

Brown's claim is one of cumulative trauma. The medical evidence establishes, and Toyota has never contested, that the injury was cumulative in nature. Pursuant to the holding in Special Fund v. Clark, 998 S.W.2d 487, 490 (Ky. 1999), in cases filed more than two years after the diagnosis of a work-related gradual injury, a portion of the impairment may be compensable if it is the result of trauma

that occurs within two years of the filing of the claim. Likewise, in Caldwell Tanks vs. Roark, 104 S.W.3d 753 (Ky. 2003), the Supreme Court reaffirmed that a claim is timely with regard to effects of trauma occurring within two years prior to the filing of such a claim. Clark, *supra*, does not eliminate Brown's burden to prove that her disability/impairment was due to work-related trauma following the settlement.

The medical evidence reveals no doctor assigned an impairment rating prior to the IME performed by Dr. Burgess. Dr. Favetto, the treating surgeon, opined Brown had no impairment rating in 2005 and again on February 16, 2012. The impairment rating assessed by Dr. Burgess was based upon her condition following the totality of her cumulative trauma. No doctor has directly expressed an opinion as to the functional impairment rating Brown would have had in November 2002. The settlement agreement does not shed any light on Brown's degree of injury as of November 2002, and no evaluator gives a percentage for Brown's level of impairment until January 25, 2012. The evidence in the claim was never developed to address a percentage of disability as it existed in November 2002.

We believe there is substantial evidence in the record to support a finding that Brown sustained additional

cumulative trauma upon her return to work and that additional cumulative trauma resulted in additional harmful change and disability. Toyota essentially argues all disability should be related to the November 2000 manifestation date. The record reveals Brown was able to continue performing her regular job duties for an extended period of time following her return to work after the first surgery. ALJ Miller could reasonably conclude Brown had a successful first surgery and it was the additional trauma sustained following her return to work that resulted in the need for additional surgery and her disability. ALJ Miller could reasonably conclude the condition manifesting in November 2000 was responsible for no impairment rating and the 1% rating assessed by Dr. Burgess arose at a later time.

ALJ Miller is certainly free to grant Brown's testimony whatever weight he chooses concerning the worsening of her condition. Further, Dr. Favetto's May 10, 2009 letter to Ms. Thompson set forth above may constitute substantial evidence concerning a worsening of Brown's condition and when Brown's functional impairment rating arose. There is substantial evidence for ALJ Miller to determine that additional cumulative trauma caused a change in the human organism consistent with injury. However, if ALJ Miller believes the impairment rating is the result of the pre-

settlement trauma and treatment solely related to that trauma, the impairment is not compensable since there was no timely reopening of the claim. The Board has no fact-finding authority, so it is necessary to remand this matter for further findings.

We find no abuse of discretion on the part of ALJ Miller in allowing the late submission of the report from Dr. Burgess. Our standard of review regarding the dismissal is whether the ALJ's decision constituted an abuse of discretion. "Abuse of discretion" has been defined, in relation to the exercise of judicial power, as that which "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 301 Ky. 187, 191 S.W.2d 214 (Ky. 1945). The record reveals Toyota was on notice of the medical evidence, including an impairment rating by Dr. Burgess, its IME doctor. Toyota was informed at the hearing of ALJ Miller's intent to consider the report as part of Brown's proof. Thus, Toyota was not surprised by the content of the report, nor was it unaware ALJ Miller considered the report to be part of Brown's proof. Toyota had ample opportunity to object to this evidence and failed to do so. Although Toyota, in its brief to ALJ Miller, noted the report of Dr.

Burgess was not in the DWC's records, Toyota did not object to its consideration. We therefore affirm the ALJ's finding of a 1% functional impairment rating based upon Dr. Burgess' rating.

To summarize, we vacate ALJ Miller's findings regarding the settlement agreement and statute of limitations and direct her to make additional findings regarding the trauma that produced Brown's impairment rating and the date the impairment arose. If ALJ Miller determines the impairment is the result of trauma which occurred prior to the settlement or a worsening of the condition related solely to that trauma and its treatment, the impairment is barred by the settlement and Brown's failure to reopen within four years of the date of the settlement. If the ALJ determines additional trauma caused the impairment and the impairment manifested within two years of the filing of Brown's application, the impairment is compensable.

Accordingly, the August 1, 2011 Opinion and Order, the September 2, 2011 Order on Petition for Reconsideration, the May 7, 2012 Opinion, Order and Award, and the June 5, 2012 Order on Petition for Reconsideration rendered by Hon. Jeanie Owen Miller, Administrative Law Judge, are **AFFIRMED IN PART, VACATED IN PART** and this matter is **REMANDED** for

additional findings in conformity with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

STIVERS, MEMBER. Because I would affirm the ALJ on all issues, I respectfully dissent from that portion of the opinion vacating in part and remanding.

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