Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 25, 2021

CLAIM NO. 201901239 & 201901237

CHRISTOPHER RUSSELL PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

WHITEHALL INDUSTRIES
AUTO OWNERS INSURANCE COMPANY
HARTFORD ACCIDENT & INDEMNITY
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

STIVERS, Member. Christopher Russell ("Russell") appeals from the June 29, 2021, Order on Remand dismissing his bilateral carpel tunnel syndrome ("CTS") claim and the July 27, 2021, Order overruling his Petition for Reconsideration rendered by Hon. Grant Roark, Administrative Law Judge ("ALJ"). In the Order on Remand, the ALJ determined that any portion of Russell's claim for bilateral CTS

occurring during the two years before October 10, 2019, is barred because Russell failed to provide due and timely notice. Further, the ALJ determined that Russell is not entitled to an award for a worsening of his bilateral CTS condition between October 10, 2017, and October 10, 2019, because he found "nothing in the record to allow a determination of how much, if any," of Russell's CTS impairment rating developed exclusively within that time.

On appeal, Russell asserts the ALJ failed to comply with the Board's instructions on remand by failing to address the issue of apportionment as it relates to his continued work for Whitehall Industries ("Whitehall") after October 10, 2017.

BACKGROUND

As this is second time this claim has come before the Board, we will recite, in relevant part, the background contained in our Opinion of March 5, 2021:

> The Form 101 for Claim No. 2019-01237, filed October 10, 2019, alleges Russell sustained work-related injuries to his wrists and hands on September 22, 2016, in the following manner: "My injury occurred over time. I felt numbness, tingling, and pain in my hands." Regarding notice, the Form 101 alleges as follows: "While I was working, I told my supervisor that my hands were giving me trouble." At the time Russell filed his Form 101, Whitehall was insured by Auto Owners Insurance.[1]
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> On November 18, 2019, Whitehall filed a Special Answer asserting a statute of limitations defense.
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> On December 10, 2019, Russell filed a "Motion for Leave to Amend Form 101" seeking to amend the bilateral CTS claim to reflect the onset of his symptoms occurred in "Mid-2017," and the first day of work

[1] The record indicates Whitehall's workers' compensation insurance coverage switched from Auto Owners to The Hartford on October 6, 2017.

missed due to those symptoms was December 26, 2017. By Order dated January 2, 2020, the ALJ sustained Russell's motion.

Russell was deposed on March 9, 2020. Regarding the discussions he had with Whitehall's personnel before he underwent left carpal tunnel release surgery, he testified as follows:

Q: In terms of your dealings with the folks at Whitehall, do you recall any conversations reaching back to the time around you had to take leave for the surgery, do you recall any conversations with the folks at HR or anything like that when coordinating your leave?

A: The little bit that I recall after going to the doctors and I told them that I get a week vacation at the end of the – of the year. The company give a week vacation, so I tried to work as much as I could that was tolerable because I knew I was going to be off for six weeks.

And I just told HR that I was having a hand surgery, and I did my own prep work with paperwork and got it to the doctors. And then after the surgery, they had to have some stuff faxed to them or some that I had to sign to hand back to them.

Russell acknowledged that Dr. Christopher Sperry was the first doctor to inform him the CTS is work-related.

At the August 19, 2020, hearing, Russell testified extensively concerning the onset of his CTS symptoms:

Q: All right. Now we've made reference here to your onset of symptoms. I know you testified about that, that in the middle part of 2017, you started having some symptoms in your hands. How would you describe those symptoms?

A: The numbness, burning sensation. I would lose my grip on certain objects.

Q: Was this both hands?

A: Yes sir.

Q: And where were you having the numbness?

A: From the hands to the elbows.

Q: All right. After experiencing these symptoms for a while, did you go to your family doctor?

A: Yes sir.

Q: And that is Dr. Christopher Sperry?

A: Yes sir.

Q: What did he do for you?

A: He told me that –

Q: Well, you can't say what he told you. Did he examine your hands?

A: Yes sir.

Q: Did he order any testing?

A: Yes sir, he did.

Q: Okay. Was that the nerve testing?

A: Yes sir.

Dr. Sperry referred Russell to an orthopedic surgeon, Dr. Romine, who performed carpal tunnel release surgery on Russell's left hand on December 26, 2017. Following the surgery, Russell was off work until the first week of February. Regarding what he informed Whitehall's personnel around this time, he testified as follows:

Q: All right. Now did you keep your employer informed about the status of your hands, the treatment you were receiving, and the complaints that you were having with your hands?

A: From time to time, I would tell them that I have problems with my hands. But to hold onto a job, I would go to work.

Q: Yes sir. For instance, whenever you had to take off work to have the surgery, did you inform them then that that was because of your hands?

A: Yes sir.

Following the left carpal tunnel release surgery, Russell returned to his same job at Whitehall working until May 27, 2020. At that time, his left hand condition had regressed to its pre-surgery condition. However, Russell stopped working because, after overhearing a conversation amongst his colleagues, he believed he had been fired.

At the hearing, concerning when Dr. Sperry first informed Russell the bilateral CTS is work-related, the following exchange occurred:

Q: Okay. Now the next page I wanted to show you was something, again, that you may not have seen, but I want to ask you a question about. Dr. Sperry has, in the questionnaire, stated that on September 28 that there was talk about he told you that your carpal tunnel syndrome was a result of overuse and was greatly impacted by your employment at the time of diagnosis. My question for you is did Dr. Sperry tell you during that September 28, 2017 visit that your carpal tunnel syndrome was due to your work?

A: Yes sir.

…

Q: Okay. During that time did you tell anyone at Whitehall Industries that you had been diagnosed with carpal tunnel syndrome?

A: Yes sir.

Q: Who did you tell?

A: A few of the coworkers, just chitchatting with the supervisors.

Russell was unable to pinpoint the exact date he informed Whitehall the bilateral CTS is work-related. He testified as follows:

Q: Mr. Russell, on September 28 of 2017, that note where Dr. Sperry states you wanted to hold off on surgery because of a promotion, were you concerned about telling Whitehall Industries that you had been diagnosed with carpal tunnel syndrome because you were afraid you were not going to get a raise that you were due the next week?

A: To be honest, yes sir.

Q: How long did you wait to tell them?

A: Well, we would make small talk. But during – I can't specifically tell you. Whenever we scheduled the surgery, I told them I would be off for four to six weeks.

Q: Did you tell them it was because of carpal tunnel?

A: Yes sir.

Q: So you waited until surgery was scheduled to tell them that you were diagnosed with carpal tunnel due to your work?

A: No sir. We talked weeks before that and days before that. I told them I had to have surgery.

Q: Who is we?

A: The cell techs, and then our supervisor.

Whitehall introduced several of Dr. Sperry's medical records. Pertinent to the issues on appeal is the September 28, 2017, medical record reflecting Dr. Sperry and Russell discussed the need for surgery for CTS. It, reads in relevant part, as follows:

Discussed the need for surgery. Patient is not wanting to have it done at this time related to his possible promotion at work. Patient is unable to afford to take time off. Discussed the risk of permanent nerve damage if surgery is not completed in the near future.

Whitehall also filed Dr. Sperry's August 10, 2020, supplemental report containing the following question and answer:

1. At the time of Mr. Russell's office visit to you on September 28, 2017, did you advise and explain to Mr. Russell that you were of the opinion that Mr. Russell's bilateral carpal tunnel complaints were the result of Mr. Russell's employment at Whitehall Industries? Please explain.

Yes, I did explain that his CTS was a result from overuse and was greatly impacted by his employment at the time of diagnosis.

…

The August 19, 2020, Benefit Review Conference ("BRC") Order and Memorandum 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, credit for unemployment, and TTD. Under "Other" is the following: "S.O.L., Manifestation date; RTW wages; Apportionment; Failure to follow medical advice; sanctions for failure to pay drug test bill; compensability of drug test."

Also pertinent is Whitehall's August 19, 2020, "Motion to Clarify BRC Order" requesting the ALJ clarify the issue of "apportionment," asserting as follows:

1. In its Proposed BRC Order, as filed on August 13, 2020, the Defendant identified 'whether Plaintiff experienced a progression and/or worsening of his symptoms due to continued exposure to the harmful mechanism after October 6, 2017 as an issue to be preserved.

2. During the August 19, 2020 BRC, the parties discusses [sic] the issue, as raised by the Defendant, and it was decided that this issue would be identified on the BRC Order as 'apportionment' as between the two insurers provided a defense for the Defendant.

3. While the Honorable Administrative Law Judge and the parties understand what this issue is intended to address, for purposes of making the issue more clear in the event this claim is the subject of an appeal, the Defendant respectfully requests that the issue of

'apportionment' be clarified to specify that the issue includes whether Plaintiff experienced a progression and/or worsening of his symptoms due to continued exposure to the harmful mechanism after October 6, 2017.

By Order dated September 1, 2020, the ALJ sustained Whitehall's motion.

The October 19, 2020, decision contains the following Findings of Fact and Conclusions of Law which are set forth *verbatim*:

Notice/Manifestation Date

As an initial, threshold issue, the defendants maintain plaintiff failed to provide timely notice of his claim as required by KRS 342.185. In cumulative trauma cases such as this, the claimant must provide notice, as soon as practicable, after the disability manifests. *Randall Co./Randall Division of Textron, Inc. v. Pendland*, 770 S.W.2d 687, 688 (Ky. App. 1989). The *Huff* Court determined Pendland's manifestation of disability language refers to a "worker's discovery that an injury has been sustained." *Alcan Foil Products v. Huff*, 2 S.W.3d 96, 101 (Ky. 1999). The *Huff* Court further determined the notice requirement and statute of limitations commence when the claimant "…discovers that a physically disabling injury has been sustained and knows that it is caused by work." Id. Accordingly, KRS 342.185(1)'s "date of accident" language, at least for cumulative trauma cases, means the discovery date. The discovery date is the date a physician advises the claimant he has: (1) a gradual injury; and (2) the claimant's work caused it. *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503 (Ky. 2001). Claimants are not physicians, and the law does not require them to self-diagnose a condition/injury or its cause. *American Printing House for the Blind v. Brown*, 142 S.W.3d 145 (Ky. 2004).

A cumulative trauma's accident date is the date a physician diagnosis a condition, and advises the claimant it is work-related. The claimant's requirement to provide notice, as well as his statute of limitations, begins running on this date. *Consol of Kentucky, Inc. v. Goodgame*, 479 S.W.3d 78 (Ky. 2015).

As applied to the present case, plaintiff amended his application to allege that his bilateral carpal tunnel syndrome as date of injury either sometime in mid-2017, or December 26, 2017, which was when he underwent left carpal tunnel release surgery and missed work while he recovered from surgery. Applying the preceding case law to the evidence presented, the Administrative Law Judge is first persuaded that plaintiff's injury date/manifestation date is mid-2017. Specifically, it is determined plaintiff was advised by his physician, Dr. Sperry, that he had work related bilateral carpal tunnel syndrome which would require surgical repair one plaintiff was seen by Dr. Sperry on September 28, 2017. Per the directives in *Consol*, above, it is clear this was the date plaintiff was first diagnosed with work related bilateral carpal tunnel syndrome which was significant enough to require surgery. As such, plaintiff's time for providing notice and his statute of limitations began to run on September 28, 2017.

However, with respect to notice, the ALJ finds plaintiff never provided notice of any work related bilateral carpal tunnel syndrome before he filed his Form 101 on October 10, 2019. In his deposition and hearing testimony, plaintiff testified he only told his employer that he had hand problems, or that he had carpal tunnel syndrome, and that he would be off work for carpal tunnel surgery. At no point did plaintiff ever indicate he advised his employer that his bilateral carpal tunnel syndrome was work-related. Indeed, even in his Form 101, in responding to the question of how and when plaintiff provided notice, he only indicated, "While I was working, I told my supervisor that my hands were giving me trouble." The ALJ can find no evidence of record to indicate plaintiff ever advised his employer his bilateral CTS was a work-related condition. In addition, plaintiff had his December 26, 2017 carpal tunnel surgery paid for by his private health insurance and applied for and received short-term disability benefits, which are not payable for work-related conditions.

Based on these facts, the ALJ is persuaded plaintiff never provided timely notice of his bilateral carpal tunnel syndrome claim as required by KRS 342.185. This alone would be grounds for dismissal. However, insofar as the issue of notice also relates to the

statute of limitations, that issue will be analyzed below as well.

Statute of Limitations

As another threshold issue, the defendants maintain plaintiff's bilateral carpal tunnel syndrome claim was not filed within two years from his date of injury/manifestation and, as such, is barred by the statute of limitations in KRS 342.185. As set forth above, it is now been determined plaintiff's date of injury/manifestation for his bilateral carpal tunnel syndrome claim was September 28, 2017. He did not file his claim until October 10, 2019, more than two years afterward. However, plaintiff argues that, to the extent his claim might otherwise be barred by the statute of limitations, the defendant is estopped from asserting the defense because it failed to pay TTD benefits while plaintiff was off work for his carpal tunnel surgery from December 26, 2017 through February 8, 2018. *H.E. Neumann Co. v. Lee*, 975 S.W.2d 917 (Ky. 1998). The ALJ finds plaintiff's reliance on Lee is, in this instance, misplaced.

KRS 342.040(1) requires an employer to notify the commissioner of its termination of payment of voluntary income benefits or of its failure to make payment of voluntary income benefits. If an employer fails to give notification to the commissioner as required by KRS 342.040(1), the employer "is not permitted to raise a limitations defense because its action effectively prevents the commissioner from complying with its duty . . . to notify the worker of his right to prosecute a claim and of the applicable period of limitations." *Patrick v. Christopher East Health Care*, 142 S.W.3d 149, 151-52 (Ky. 2004). Under KRS 342.040(1), the employer's duty to notify the commissioner is triggered when the employee misses more than seven days of work. *H.E. Neumann Co. v. Lee*, 975 S.W.2d 917 (Ky. 1998). However, if the worker engages in conduct/actions that cause the employer not to comply with KRS 342.040(1), the employer has no duty to report the missed time to the Department of Workers Claims. *Newburg v. Hudson*, 838 S.W.2d 384 (Ky. 1992).

In this case, as determined above, plaintiff never provided notice that his bilateral carpal tunnel syndrome

was work-related before he filed this claim in October, 2019, over two years after his date of injury and after his statute of limitations would have already run. As such, by the time plaintiff filed this claim and gave notice that he alleged it was work-related, his claim was already barred by the statute of limitations and no TTD benefits would be payable for the time he missed from work following his carpal tunnel surgery on December 26, 2017. Therefore, plaintiff's actions in this case -- specifically, his failure to provide notice of his work related condition -- prevented the employer from complying with KRS 342.040(1) and reporting a lost time work injury to the Department of Workers Claims.

For these reasons, it is determined that point's claim for bilateral carpal tunnel syndrome due to a September 28, 2017 manifestation date is barred by the statute of limitations and KRS 342.185 and must be dismissed.

Causation/Work-Relatedness

A threshold issue also exists with respect to plaintiff's alleged May 1, 2019 hernia injury. The defendant maintains plaintiff has not carried his burden of proving he suffered any hernia injury as result of a work accident or condition. Having reviewed the evidence of record, the ALJ finds no evidence establishing that plaintiff's hernia was caused by any work injury or activities. As such, plaintiff has not carried his burden of proving this condition is work-related and must be dismissed.

All other issues are rendered moot.

Russell's Petition for Reconsideration claimed the ALJ erred in resolving the issues concerning the statute of limitations and notice as well as failing to address his request for sanctions. Russell also asserted the findings relative to the statute of limitations defense "ignore the fact that Mr. Russell continued to work for the Defendant-Employer, and was subject to the same cumulative trauma, until May, 2020, and that he sustained an appreciable worsening of his condition within two (2) years of the filing of the claim."

In the November 12, 2020, Order, the ALJ stated as follows:

> This matter comes before the Administrative Law Judge pursuant to the plaintiff's petition for reconsideration of the Opinion & Order dismissing his claim rendered on October 5, 2020. In his petition, plaintiff alleges patent error in the determination that plaintiff failed to provide timely notice; that his claim is barred by the statute of limitations; and by failing to address plaintiff's claim for sanctions.
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> With respect to plaintiff's petition as to the dismissal of his claim for lack of timely notice and under the statute of limitations, the ALJ is not persuaded plaintiff points out any patent errors and, instead, plaintiff is merely rearguing the merits of the claim. Accordingly, plaintiff's petition on those points is overruled.
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Concerning the issue on appeal, we held as follows:

> According to Russell, Whitehall's failure to file notice it did not pay TTD benefits following his left carpal tunnel release surgery vitiates the statute of limitations defense. As Russell asserts, he missed five weeks of work after his surgery, Whitehall paid short-term disability benefits instead of TTD benefits, and did not notify the Department of Workers' Claims of its failure to pay TTD benefits. We affirm on this issue.

KRS 342.040(1) states, in relevant part, as follows:

> (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….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.

Kentucky courts require strict compliance with KRS 342.040(1), and employers who fail to comply with its requirements are estopped from asserting a limitations defense. *See* Kentucky Container Service, Inc. v. Ashbrook, 265 S.W.3d 793, 795-6 (Ky. 2008). That said, the exception to the principle of strict compliance is when the worker engages in conduct that causes the employer to fail to comply with KRS 342.040(1). Relevant here is Newberg v. Hudson, 838 S.W.2d 384 (Ky. 1992) in which the employee failed to inform his employer that his injury was work-related. The Kentucky Supreme Court ultimately determined the employer was not estopped from asserting a statute of limitations defense.

In the case *sub judice*, the ALJ determined the date of manifestation for the bilateral CTS was September 28, 2017, the date the ALJ concluded Dr. Sperry informed Russell his bilateral CTS is work-related. *Importantly, the ALJ's determination of the date of manifestation was not challenged by Russell in the Petition for Reconsideration and is not on appeal; therefore, we will not address it.* The ALJ determined Russell failed to notify Whitehall that his bilateral CTS is work-related at any point before he filed his claim on October 10, 2019, and this failure to provide due and timely notice caused Whitehall not to comply with the mandates of KRS 342.040(1).

KRS 342.185(1) provides notice of an accident shall be given, "as soon as practicable." The date for giving notice and for clocking the statute of limitations for injuries due to cumulative trauma is triggered by the date of manifestation. Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999). An injury caused by cumulative trauma manifests when "a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." Alcan Foil Products v. Huff, 2 S.W.3d 96, 101 (Ky. 1999). Consequently, "for cumulative trauma injuries, the obligation to provide notice arises and the statute of limitations does not begin to run until a claimant is advised by a physician that he has a work-related condition." Consol of Kentucky, Inc. v. Goodgame, 479 S.W.3d 78, 82 (Ky. 2015).

The ALJ was persuaded by Russell's deposition and hearing testimony, as well as the representations he made regarding notice in his October 10, 2019, Form 101. He provided the following findings of fact:

> In his deposition and hearing testimony, plaintiff testified that he only told his employer that he had hand problems, or that he had carpal tunnel syndrome, and that he would be off work for carpal tunnel surgery. At no point did plaintiff ever indicate he advised his employer that his bilateral carpal tunnel syndrome was work-related. Indeed, even in his Form 101, in responding to the question of how and when plaintiff provided notice, he only indicated, 'While I was working, I told my supervisor that my hands were giving me trouble.' The ALJ can find no evidence of record to indicate plaintiff ever advised his employer his bilateral CTS was a work-related condition.

A review of Russell's deposition and hearing testimony as well as the Form 101 substantiate the ALJ's findings of fact. At the hearing, Russell testified he was informed by Dr. Sperry at the September 28, 2017, appointment that his bilateral CTS is work-related. However, and as concluded by the ALJ, Russell proffered no testimony to the effect he notified Whitehall of the work-relatedness of the CTS *before* filing his Form 101 on October 10, 2019, more than two years after he was informed by Dr. Sperry the CTS is work-related. Our review of Russell's deposition and hearing testimony reveals that, at most, he informed Whitehall he had developed CTS necessitating surgery on his hands. Russell provided no definitive testimony indicating he informed Whitehall his bilateral CTS is work-related. Particularly compelling is his testimony on pages 42-43 of the hearing transcript:

Q: So you waited until surgery was scheduled to tell them that you were diagnosed with carpal tunnel due to your work?

A: No sir. We talked weeks before that and days before that. I told them I had to have surgery.

In this exchange, Russell failed to corroborate he informed Whitehall the CTS is work-related. Rather, Russell testified he informed Whitehall that he was having surgery on his hands without addressing the cause of the conditions. As concluded by the ALJ, there is no testimony from Russell, either during his deposition or at the hearing, demonstrating he notified Whitehall his bilateral CTS is work-related. Based upon Russell's failure to provide due and timely notice of his work-related CTS, the ALJ concluded Whitehall was unable to comply with KRS 342.040(1). As concluded by the ALJ, "by the time plaintiff filed this claim and gave notice that he alleged it was work-related, his claim was already barred by the statute of limitations and no TTD benefits would be payable for the time he missed from work following his carpal tunnel surgery on December 26, 2017." The ALJ's conclusion is supported by substantial evidence, thus, we are compelled to affirm.

Russell next argues the ALJ erred in finding he failed to provide due and timely notice of his bilateral CTS. Russell points to the above-cited hearing testimony on pages 42-43 in which he was asked if he informed Whitehall that he was diagnosed with work-related CTS. However, and as noted above, Russell would not confirm he informed Whitehall the CTS is work-related. Rather, he only confirmed that he informed Whitehall he was undergoing surgery due to CTS.

As the claimant in a workers' compensation proceeding, Russell had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Russell was unsuccessful in his burden on the issue of notice, 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may

draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). If the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal.

Here, the ALJ enjoyed the discretion to infer from Russell's testimony that he did not inform Whitehall the bilateral CTS is work-related. At the hearing, Russell clearly testified that "from time to time," he would tell them that he had "problems" with his "hands." He did not testify that he informed Whitehall he was diagnosed with work-related bilateral CTS. Further, the hearing testimony to which Russell cites as evidence he informed Whitehall his bilateral CTS is work-related does not support this interpretation. Consequently, the ALJ's finding Russell failed to provide Whitehall with due and timely notice of the bilateral CTS must be affirmed.

Next, Russell asserts the ALJ failed to address the alleged worsening of his condition two years before the filing of his claim. We agree and remand for additional findings.

The issue of apportionment was identified as a contested issue at the August 19, 2020, BRC. Further, as noted herein, Whitehall, as insured by Auto Owners Insurance, filed a Motion to Clarify the BRC Order in

order for the ALJ to specify that "apportionment" refers to whether Russell experienced a worsening of his symptoms after Whitehall's workers' compensation insurance coverage was switched to The Hartford on October 6, 2017, and before Russell filed his Form 101 for bilateral CTS on October 10, 2019. Whitehall's motion was sustained by Order dated September 1, 2020. Whitehall, as insured by Auto Owners Insurance, also extensively argued the issue of worsening in its brief to the ALJ.

Despite the fact that apportionment was made an issue at the BRC, the ALJ failed to address it in the October 19, 2020, Opinion and Order. Further, even though Russell pointed to the ALJ's omission in his Petition for Reconsideration, this issue was not addressed in the November 12, 2020, Order. Clark v. Special Fund, 98 S.W.3d 486 (2000) *may* be implicated by this issue, as the Supreme Court in Clark held that the claimant, despite failing to file his cumulative trauma claim within the applicable two-year statute of limitations, may be entitled to benefits based upon the worsening of disability that occurred during the two-year period before he filed his claim. However, we emphasize Clark is specific to its unique set of facts, and the Supreme Court made a point of highlighting that the determination is dependent upon the date of manifestation holding as follows:

We conclude, therefore, that the claim must be remanded to the ALJ to make a finding from the evidence concerning when claimant became aware that work contributed to the development of the degenerative condition in his knees. If that occurred in 1987, the manifestation of disability occurred in 1987, and the decision which the ALJ made on remand should be reinstated. If it occurred at a subsequent point in time, more of the claim may be compensable, and the decision should be amended accordingly.

Id. at 490.

That said, this issue may very well be moot in light of the ALJ's findings regarding notice. However, the ALJ was obligated to address and resolve all contested issues raised at the BRC.

…

> Accordingly, to the extent the ALJ failed to address the issue of a worsening of Russell's bilateral CTS during the two years before he filed his Form 101, this claim is **REMANDED** to the ALJ for additional findings. Concerning all other issues raised on appeal, the October 19, 2020, Opinion and Order and the November 12, 2020, Order are **AFFIRMED**.

In the June 29, 2021, Order on Remand, the ALJ held as follows:

> This matter comes before the Administrative Law Judge upon remand from the Kentucky Workers Compensation Board with instructions to determine whether any portion of plaintiff's bilateral carpal tunnel claim is not barred by the statute of limitations as having occurred within two years from the date of filing, October 10, 2019, in keeping with *Clark v. Special Fund*, 98 S.W.3d 486 (2000). The Board acknowledged, however, that such a finding may be moot given the fact it was determined plaintiff failed to provide timely notice of his claim as required by KRS 342.185.
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> Having considered the matter upon remand, the ALJ finds that any possible claim for bilateral carpal tunnel syndrome which developed during the two years before October 10, 2019 is also barred because plaintiff still never provided notice of any such claim until the filing of the claim. In addition, the ALJ finds nothing in the record to allow a determination of how much, if any, portion of plaintiff's carpal tunnel syndrome impairment rating developed just in the time from October 10, 2017 through October 10, 2019. For these reasons, it is determined plaintiff is not entitled to any award for a worsening of his alleged carpal tunnel syndrome between October 10, 2017 and October 10, 2019.

Russell filed a Petition for Reconsideration asserting the same arguments that he now makes on appeal. In the July 27, 2021, Order, the ALJ stated as follows:

> This matter comes before the Administrative Law Judge upon the plaintiff's petition for reconsideration of the Opinion on Remand rendered on

June 29, 2021. In his petition, plaintiff argues his claim should be compensable. He cites a Kentucky Supreme Court case rendered while this matter was on appeal which holds that notice in a cumulative trauma claim now does not need to be provided until within two years from the date a physician advises the condition is work-related, relying on the version of KRS 342.185 as amended in 2018. Plaintiff also vaguely suggests the opinion on remand was in error because it did not discuss the evidence of record.

However, several points prevent the ALJ from sustaining the plaintiff's petition. First, the only issue the ALJ had the authority to address upon remand was whether any portion of plaintiff's claim was not barred by the statute of limitations as having developed within 2 years from the date plaintiff filed his claim. As pointed out in the remand opinion, plaintiff has absolutely no evidence that any definable portion of his claim/impairment developed within two years of October 10, 2019. This fact alone prevents the ALJ from finding any portion of plaintiff's claim compensable.

Next, plaintiff offers no explanation how the recent Kentucky Supreme Court case affects his particular claim or, specifically, how it impacts the statute of limitations issue singularly presented to the ALJ. Indeed, the ALJ fails to ascertain how the case is relevant to the limited issue.

In addition, plaintiff's reliance on the recent supreme court case misses the point. That case goes to the question of whether it should have been previously determined that he provided timely notice of his cumulative trauma claim. If the ALJ had been instructed to address the issue of notice, an analysis of the proffered, but not final, case would be appropriate. However, again, the ALJ only had authority to address the statute of limitations issue and the *Diane Anderson v. Mountain Comprehensive Health Corporation, et al.*, 2020-SC-0133-WC does not impact that analysis.

It also bears repeating that nothing about the issue of notice would save plaintiff's claim in this instance because his statute of limitations already ran because the claim was filed more than two years after he was advised by a physician that his condition was work-

> related. Plaintiff's argument that the defendant's failure to pay TTD continues not to be persuasive and is not affected by the Anderson case. The defendant was never obligated to pay TTD before plaintiff's claim was barred by the statute of limitations because plaintiff did not provide notice of the claim during that time. The fact that the newly amended KRS 342.185 may not require notice as soon as practicable does not matter if the claim is already barred by the statute of limitations.

On appeal, Russell asserts that the ALJ did not follow this Board's instructions on remand as he "failed to address the apportionment as it relates to [his] continued work for Whitehall after October 10, 2017." We agree and remand for additional findings.

ANALYSIS

As an initial matter, we vacate the ALJ's resolution of the issue of notice and remand for the ALJ to enter a finding consistent with KRS 342.185(3) and Anderson v. Mountain Comprehensive Health Corporation, 628 S.W.3d 10 (Ky. 2021).

KRS 342.185(3), as created by House Bill 2, effective July 14, 2018, states as follows:

> The right to compensation under this chapter resulting from work-related exposure to cumulative trauma injury shall be barred unless notice of the cumulative trauma injury is given within two (2) years from the **date the employee is told by a physician that the cumulative trauma injury is work-related.** 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 employee is told by a physician that the cumulative trauma injury is work-related.** However, the right to compensation for any cumulative trauma injury shall be forever barred, unless an application for adjustment of claim is filed with the

> commissioner within five (5) years after the last injurious exposure to the cumulative trauma. (Emphasis added).

In Anderson v. Mountain Comprehensive Health Corporation, supra, rendered by the Kentucky Supreme Court twenty days after the Board's March 5, 2021, Opinion, the Court held that the newly enacted version of KRS 342.185(3) contains no requirement to provide notice "as soon as practicable" in cumulative trauma cases. The Supreme Court held, in relevant part, as follows:

> **KRS 342.185(3) provides a bright-line two-year limitation period from the date the plaintiff is told her cumulative trauma is work-related. Additionally, it establishes a firm five-year repose period from the date of last exposure. Neither limitation includes a further provision that notice to the employer be provided "as soon as practicable.**"

Slip Op. at 8. (Emphasis added).

Further, the Supreme Court determined that the changes in KRS 342.185(3) are retroactive and "apply to 'all claims irrespective of the date of injury or last exposure.'"

"The most commonly stated rule in statutory interpretation is that the 'plain meaning' of the statute controls." Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 614 (Ky. 2004). Where the language of a statute is clear and unambiguous, it is not open to construction or interpretation and must be applied as written. Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008). Consequently, pursuant to the recently enacted version of KRS 342.185(3), if a cumulative trauma claim is filed within the two-year statute of limitations set forth in KRS 342.185(3), notice is timely.

The ALJ resolved the issue of notice pursuant to the law that preceded the amended version of KRS 342.185(3) and Anderson, supra. The Board bears the responsibility regardless of the arguments made by the parties, to ensure all orders comply with the Act. The Supreme Court in Whittaker v. Reeder, 30 S.W.3d 138 (Ky. 2000) observed that whether an award conforms to the Act is a question of law which a court can review without regard to whether it was contested by a party. It noted a reviewing court had a duty to determine whether an award was in conformity with the Act even if the question first arose there. The Board clearly is authorized to determine an award did not conform with Chapter 342 regardless of whether the particular error in applying the law was contested by a party or whether the initial award was appealed on a different ground.

On remand, the ALJ must resolve the notice issue utilizing the correct standard delineated in Anderson. This Board agrees with the ALJ's finding, as set forth in the July 27, 2021, Order, that the notice issue does not save Russell's claim because the claim was filed more than two years after the date of manifestation, thus violating the statute of limitations. However, this does not negate the fact that the issue of *notice* needs to be resolved under the correct legal standard as incorrectly held by the ALJ in the July 27, 2021, Order. Further, the ALJ must resolve the issue of apportionment because the filing of the claim constitutes timely notice of an injury due to cumulative trauma occurring within two years of the filing of the claim.

Russell next argues the ALJ did not follow the Board's instructions on remand as he failed to properly address the issue of apportionment. We vacate the ALJ's finding that Russell is not entitled to an award for a worsening of his CTS

between October 10, 2017, and October 10, 2019, and remand for additional findings.

In our March 5, 2021, Opinion, we requested the ALJ to address the issue of a worsening of Russell's bilateral CTS during the two years before he filed his Form 101. As we noted in the opinion, the issue of apportionment was identified as a contested issue in the August 19, 2020, Benefit Review Conference Order and Memorandum; however, the ALJ failed to address it in either his October 19, 2020, Opinion and Order or the November 12, 2020, Order.

In the June 29, 2021, Order on Remand, the ALJ failed to set forth any additional findings on this issue. In fact, the ALJ merely repeated his conclusory statement previously made in both the October 19, 2020, Opinion and Order or the November 12, 2020, Order by stating as follows: "In addition, the ALJ findings nothing in the record to allow a determination of how much, if any, portion of plaintiff's carpal tunnel syndrome impairment rating developed just in the time from October 10, 2017 through October 10, 2019." Without additional fact-finding and further explanation, the ALJ's decision does not apprise the parties and this Board of the basis for his conclusion. The ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful 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). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his

reasoning in reaching a particular result. The only requirement is the decision 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).

We remand the claim to the ALJ to provide additional findings and explanation that adequately address the issue of a worsening of Russell's bilateral CTS during the two years before he filed his Form 101. Should the ALJ, on remand, once again conclude that nothing in the record allows him to determine how much of Russell's carpal tunnel syndrome impairment rating, if any, developed from October 10, 2017, through October 10, 2019, he must at a minimum cite the medical evidence he considered in reaching this conclusion. A conclusory statement is insufficient. We note that the five points made on pages 12-13 in Russell's brief to this Board would be a satisfactory place for the ALJ to begin in his review and discussion of the evidence relevant to the issue of apportionment. We express no opinion as to the outcome on remand.

Accordingly, to the extent the ALJ determined Russell is not entitled to any award for a worsening of his CTS between October 10, 2017, and October 10, 2019, and also determined Russell failed to provide notice of his cumulative trauma claim as soon as practicable, the June 29, 2021, Order on Remand denying Russell's claim and the July 27, 2021, Order are **VACATED**. This claim is **REMANDED** for additional findings and a decision consistent with the instructions set forth herein.

ALL CONCUR.

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