Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 4, 2022

CLAIM NO. 201864352

FRANCISCO RODARTE PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

BLUELINX CORPORATION
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING AND REMANDING

* * * * * *

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

STIVERS, Member. Francisco Rodarte ("Rodarte") seeks review of the August 13, 2021, Opinion and Order of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"), dismissing the above-styled claim for failure to join this claim with a

previous claim, Claim No. 2016-98428 ("2016 claim"), against Bluelinx Corporation ("Bluelinx").[1]

The ALJ found Rodarte "failed to join this cause of action as required by KRS 342.270(1), that the claim had accrued, and that he knew or should reasonably have known of the requirement due to his representation by competent, English-speaking, legal counsel." Since Rodarte failed to join the above-styled claim ("2018 claim") for a right shoulder injury occurring on August 13, 2018, with the 2016 claim, the ALJ held the 2018 claim is barred by the joinder statute, KRS 342.270(1), and dismissed the claim. Rodarte also appeals from the August 25, 2021, amended Opinion and Order entered in response to Bluelinx's Petition for Reconsideration.

On appeal, Rodarte contends the ALJ's decision is erroneous, arbitrary, capricious, and an abuse of discretion. Rodarte asserts there was a mutual mistake because the settlement agreement relating to his 2016 knee and ankle injuries did not include language joining the 2018 claim. He also asserts that at the time he settled his 2016 claim on October 7, 2019, the above-styled claim was not accrued as the 2018 claim would have been placed in abeyance while he was still receiving temporary total disability ("TTD") benefits and medical care.

BACKGROUND

Rodarte was first injured while working at Bluelinx on January 5, 2016, when he injured his right knee and left ankle. He underwent right knee surgery

[1] The 2016 claim was for work-related knee and ankle injuries.

and returned to work post-injury on March 25, 2017.[2] The Form 110 settlement agreement in Claim No. 2016-098428, reflects right meniscus repair surgery was performed on July 19, 2016. The impairment ratings ranged from 1% to 7%. Rodarte settled for a lump sum of $4,500.00. He did not waive his right to future medical benefits, vocational rehabilitation, or right to reopen. Under the heading "Other Information" the agreement contains the following:

> This claim is settled now for a complete waiver of any and all potential rights to TTD, PPD, or PTD that plaintiff would otherwise retain pursuant to his workers' compensation claim. In consideration for the lump sum of $4,500.00, the plaintiff agrees to waive his right to claim any additional TTD, PPD, or PTD. Upon approval of this agreement, the plaintiff retains no indemnity rights.
>
> While the plaintiff may be able to prove some minimal impairment should this matter continue with litigation, the parties agree that it is in their best interest to reach a compromised settlement now, prior to adjudication. The plaintiff chooses to receive a lump sum settlement rather than litigating the possibility of being awarded weekly permanent partial disability benefits.

Rodarte sustained an August 13, 2018, right shoulder injury which is the subject of this action. The record indicates Rodarte underwent surgery on November 27, 2018, performed by Dr. Forest T. Heis. The operative report reveals pre-operative and post-operative diagnoses of right shoulder superior labrum anterior-posterior (SLAP) tear, subacromial impingement, and acromioclavicular arthropathy. The procedures performed were: 1. Right shoulder arthroscopic SLAP

[2] Much of the above information is taken from the undated settlement agreement approved by Hon. Roland Case, Administrative Law Judge ("ALJ Case"), on October 7, 2019, which was filed in the record during the pendency of this claim.

repair. 2. Arthroscopic subacromial decompression and acromioplasty. 3. Right shoulder arthroscopic Mumford.

The payment of TTD benefits for the 2018 injury spanned the period from August 14, 2018, the day after the injury, through September 14, 2020. At the time ALJ Case approved the settlement agreement in Claim No. 2016-98428, Rodarte was still receiving TTD benefits. As reflected by Dr. Heis' November 8, 2019, operative note, Rodarte underwent a second surgery consisting of 1. Right shoulder arthroscopic lysis of adhesions/glenohumeral debridement of the labrum. 2. Right open biceps tenodesis.

On December 4, 2020, Rodarte filed a Form 101 in this claim. Among the documents attached to the Form 101 is Dr. Bruce S. Kay's November 2, 2020, Independent Medical Evaluation ("IME") report. Within that report Dr. Kay noted as follows:

> When he was seen on 9-13-2019, he still complained of pain and decreased strength and Dr. Heis recommended another surgery; this was then done according to his note, it shows that Dr. Heis performed a right shoulder arthroscopic lysis of adhesions, glenohumeral debridement of the labrum, and a right open biceps tenodesis. He was to start gentle passive range of motion and physical therapy after that.

Dr. Kay assessed a 24% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He did not proffer an opinion concerning a specific date of maximum medical improvement ("MMI").

Bluelinx filed the August 19, 2020, report of Dr. Joseph Walkiewicz who performed an independent file review.[3] He noted Rodarte first underwent surgery performed by Dr. Heis at St. Elizabeth Healthcare on November 27, 2018. Dr. Walkiewicz observed a second operative report dated November 8, 2019, reveals Rodarte underwent arthroscopy, lysis of adhesion, debridement, and open biceps tenodesis. Dr. Walkiewicz noted an IME was ordered on September 5, 2019, performed by Dr. Samer Hassan who felt there was a failure of the SLAP repair with biceps tendinopathy and recommended repeat revision surgery, arthroscopy, lysis of adhesions, and biceps tenotomy with tenodesis.[4] On September 13, 2019, Dr. Heis concurred with Dr. Hassan's opinions and elected to proceed with revision surgery on the right shoulder.[5] Dr. Walkiewicz noted Rodarte was followed by Dr. Heis on November 20, 2019, January 30, 2020, and February 12, 2020. On March 11, 2020, Rodarte returned for re-evaluation. Dr. Walkiewicz set forth the results of Dr. Heis' physical examination of the right shoulder particularly with respect to the right shoulder range of motion and strength. He provided the following summary:

> After reviewing the job title and job requirements, which include lifting of 20-25 pounds, no overhead work, and no throwing tarps. Based on the timeframe of the operation and follow up, at this juncture he should be about ten months post-op. The records indicate his biceps tenodesis probably failed, which should not be an issue at all. After reviewing his range of motion and strength in physical therapy, I see no reason why this individual should not be able to go back to his normal duties without restrictions at this time.

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[3] Dr. Walkiewicz did not examine Rodarte.

[4] Presumably, Dr. Hassan's examination was at the request of Bluelinx.

[5] That surgery was performed by Dr. Heis on November 8, 2019.

> Care seemed to be reasonable and necessary; however, the decision to perform a superior labral repair on a 51-year-old workers' compensation patient is somewhat questionable. He probably should have just had a biceps tenotomy with tenodesis right out of the gate. Nevertheless, it is difficult to predict what is going to happen with some of these work-related injuries. **Francisco Rodarte would be at maximum medical improvement 1 year after the surgery date.** He does not need any additional treatment, he should work on a home exercise program. (emphasis added).

Bluelinx also introduced Rodarte's June 11, 2019, deposition taken with the assistance of a translator, in the 2016 claim. The 2019 deposition reveals Rodarte testified he had undergone right shoulder surgery at St. Elizabeth Healthcare. At the time of the deposition, Rodarte believed he was unable to perform his current job because he was recovering from shoulder surgery. He indicated his lifting was limited because of his right shoulder and knee conditions.

Bluelinx filed Dr. Heis' March 15, 2021, letter in which he opined, based on the AMA Guides, Rodarte retains a 13% impairment rating due to the right shoulder injury.

Rodarte's March 23, 2021, deposition, taken with the assistance of a translator, reflects Bluelinx questioned him about portions of his June 11, 2019, deposition testimony. Rodarte confirmed he received TTD benefits from the day after the subsequent injury through September 14, 2020.

The April 13, 2021, Benefit Review Conference Order and Memorandum ("BRC Order") reveals the parties stipulated the contested issues were benefits per KRS 342.730 and unpaid or contested medical expenses. Under "Other" is listed "Barred by KRS 342.270 (required joinder)." The BRC Order also reflects

Rodarte sustained a work-related injury on August 13, 2018. Although the parties did not stipulate the duration and amount of TTD benefits paid, they stipulated medical expenses were paid in the amount of $61,708.39.

On June 8, 2021, Rodarte filed a Motion to Continue the hearing setting forth the following:

> A Motion to Reopen has been filed with the Department of Workers' Claims along with the initial Motion for Nunc Pro relief.
>
> The Joinder issue, we may resolve itself under the 2016 claim. If the hearing goes forward the ALJ will be required to issue a decision 60 days from the hearing. If Plaintiff's Motion for Relief is still pending in the 2016-98428 claim this ALJ would be making a ruling based on facts that are subject to change. No prejudice would be done to the parties if a delay occurs as Plaintiff is not receiving any benefits.
>
> Plaintiff requests the hearing date be vacated and a scheduling conference between the ALJ and Counsel be scheduled.

On June 9, 2021, Bluelinx filed its Response and Objection to Rodarte's Motion to Reopen in Claim No. 2016-98428. For clarification purposes, Bluelinx noted that on June 4, 2021, Rodarte had served on the ALJ in this claim a "Motion to Correct Error and Omission Nunc Pro Tunc of Form 110 dated 10/07/2019 and/or Alternatively Motion to Amend Form 110" in Claim No. 2016-98428. It noted that Rodarte had previously filed a Motion to Reopen Claim No. 2016-98428 accompanied by a Motion to Correct Error. Although it did not believe either motion was before the ALJ, out of an abundance of caution, Bluelinx represented it was filing a copy of its Response and Objection to Rodarte's Motion to Reopen in order to ensure the motion was not considered unopposed for purposes of

this claim. As represented, attached to the Notice of Filing is Bluelinx's Response to Rodarte's Motion to Reopen Claim No. 2016-98428.

On June 10, 2021, Bluelinx filed a Response and Objection to the Motion for Continuance citing, in part, its Response and Objection to Rodarte's Motion to Reopen Claim No. 2016-98428 and asserting the holding in Ridge v. VMV Enterprises, Inc., 114 S.W.3d 845 (Ky. 2003) barred Rodarte's 2018 claim. On June 11, 2021, the ALJ overruled the Motion for Continuance of Hearing.

On June 15, 2021, Bluelinx filed its Response and Objection in Claim No. 2016-98428 to Rodarte's Motion to Void the Form 110 for mutual mistake of fact. Bluelinx again represented that because the ALJ had received Rodarte's motion in the previous claim, it was filing its response to Rodarte's motion. Bluelinx asserted it did not believe the motion was before the ALJ; however, out of an abundance of caution, it was filing a copy of its response in order to ensure Rodarte's motion in the previous claim was not considered unopposed for purposes of the pending claim.

At the June 16, 2021, hearing, the parties stipulated TTD benefits were paid from August 14, 2018, through September 14, 2020, for a total of $59,008.24. Notably, Bluelinx did not maintain TTD benefits were not owed during this period. Rodarte's hearing testimony will not be summarized.

On August 13, 2021, the ALJ rendered an Opinion and Order noting among other things that the parties had stipulated the period during which TTD benefits were paid. The ALJ also discussed the medical evidence and the Form 110 approved by ALJ Case in the 2016 claim. The ALJ provided the following findings of fact and conclusions of law in support of the dismissal of the 2018 claim:

…

11. The undisputed facts in this matter indicate the Plaintiff suffered an onset of pain while working for the Defendant on August 13, 2018, reported an injury, and received temporary total disability benefits as a result thereof.

12. It is also undisputed that the Plaintiff settled a prior claim against the same employer on October 7, 2019, for an injury that occurred in 2016.

13. The Kentucky Supreme Court, in Ridge v. VMV Enterprises, Inc., 114 S.W.3d 845, (Ky. 2003), said the language of KRS 342.270(1) is clear, unequivocal, and mandatory. Ridge involved almost identical facts including two sequential but different injuries suffered in the employ of the same defendant. The court reasoned that once a claim was made for the first injury, KRS 342.270(1) required him to join the claim for the second injury prior to settling the first. *Id*. at 847.

14. The Plaintiff has argued that the failure to join the instant claim was due to a mistake or in the alternative that the language barrier prevented his understanding of the joinder requirement.

15. The Plaintiff however testified he understood the origin of the temporary total disability and medical benefits he received due to the 2018 injury. Similarly, the Chief ALJ declined to reopen the 2016 claim based upon a failure to establish a prima facie case for mistake among other grounds.

16. The ALJ therefore finds the Plaintiff failed to join this cause of action as required by KRS 342.270(1), that the claim had accrued, and that he knew or should reasonably have known of the requirement due to his representation by competent, English-speaking, legal counsel.

17. The ALJ is therefore compelled to conclude that the Plaintiff's claim for a work-related right upper extremity injury occurring on August 13, 2018, is barred by KRS 342.270(1).

Bluelinx filed a Petition for Reconsideration noting certain errors and seeking clarification of the amount of Rodarte's average weekly wage ("AWW"). Rodarte did not file a Petition for Reconsideration. On August 25, 2021, the ALJ amended his finding regarding Rodarte's AWW and made other changes unrelated to the issue on appeal. The findings of facts and conclusions of law previously set forth remained unaltered.

Rodarte subsequently filed a Notice of Appeal.

On November 19, 2021, this Board affirmed the July 1, 2021, Opinion and Order of Hon. Douglas W. Gott, Chief Administrative Law Judge ("CALJ") overruling Rodarte's Motion to Reopen Claim No. 2016-98428 and the July 27, 2021, Order overruling his Petition for Reconsideration. The CALJ found Rodarte failed to make a *prima facie* case justifying reopening. On appeal to us, Rodarte argued the CALJ erred in denying the request to set aside or amend the settlement agreement which failed to include language preserving the claim for a subsequent injury known to Rodarte at the time of the settlement. Our decision contains the following summary of the facts relative to Rodarte's Motion to Reopen overruled by the CALJ:

> Rodarte noted BlueLinx Corporation ("BlueLinx") continued to pay benefits subsequent to the approval of the settlement, and it paid for shoulder surgery on November 8, 2019. Temporary total disability ("TTD") benefits and other medical benefits were paid after both surgeries and TTD benefits were not terminated until August 2020. A Form 101 for the 2018 injury was filed on December 4, 2020. Rodarte contended there was a clerical error by the parties in neglecting to exclude the pending claim concerning the 2018 injury. In the alternative, Rodarte moved to amend the Form 110 to include language excluding the 2018 claim. Pursuant to

Kentucky Civil Rule 60.01, Rodarte contended this was clearly a clerical mistake in the final Order arising from oversight or omission and was correctable by the ALJ at any time on motion of any party.

On June 11, 2021, Rodarte filed a Motion to Void Form 110 for mutual mistake of fact.

The CALJ's findings relevant to this appeal are as follows *verbatim*:

> Plaintiff Francisco Rodarte filed a Form 101 alleging right knee and left ankle injuries from falling off a flatbed truck while working for Defendant BlueLinx on January 5, 2016. The parties settled the claim by a Form 110 Agreement as to Compensation that was approved on October 7, 2019.
>
> Rodarte filed a separate Form 101 on December 4, 2020. (2018-64352) That Application alleged a shoulder injury while working for BlueLinx on August 13, 2018. BlueLinx is denying that claim, in part, on grounds that Rodarte failed to join the 2018 injury claim to the 2016 injury claim before it settled, relying on KRS 342.270(1). A review of that claim on LMS shows that a Hearing was held on June 16, 2021, and is presently submitted for decision.
>
> Eight days before that Hearing, Rodarte filed a motion to reopen this claim under KRS 342.125, specifically on grounds of "mistake" and "newly discovered evidence." He acknowledges on the Form MTR: "At the time of the settlement of this claim Plaintiff had an open and active claim from 08/13/2018."
>
> Attached to the motion to reopen was "Motion to Correct Error and Omission Nunc Pro Tunc of Form 110 dated 10/07/2019 and/or alternatively motion to amend Form 101." The requested relief

is "to correct the omission in the Form 110 of a sentence excluding Mr. Rodarte's claim of August 13, 2018." In other words, absent joinder, Rodarte wants the previous settlement agreement amended to say it would have no impact on the resolution of his second claim.

Three days after the motion to reopen was filed Rodarte filed a "Motion to Void Form 110 for Mutual Mistake In Fact and Supplemental Authority to Original Nunc Pro Tunc Motion." The CALJ accepts that pleading as further argument for reopening on grounds of mistake rather than a prohibited stand-alone motion unaccompanied by an initiating document such as a motion to reopen. Beginning with the nunc pro tunc motion, the CALJ had to look that up; it is Latin for "now for then," or making an order effective as of a date in the past rather than on the date it is issued. Applied to this case, Rodarte wants the CALJ to issue an order to retroactively say that the settlement of the 2016 claim in 2019 had no effect on the separate 2018 injury claim pending between the same parties.

The CALJ finds no basis for this argument. Rodarte says, "It is clear there was no intent by either party to settle the 2018 claim" in the settlement of the 2016 injury. (pleading attached to MTR, p. 2). But that's not the point. BlueLinx's defense in the 2018 claim is that Rodarte failed to join that claim to the 2016 claim before the Form 110 was approved, and therefore the 2018 claim is barred. It is up to the ALJ in the 2018 claim to decide whether the joinder defense applies. Rodarte cites no authority to allow this CALJ to reopen a claim to add language to a settlement agreement in order to protect the viability of a separate claim.

Rodarte's alternative motion to amend the prior Form 110 is denied for these same reasons. Further, he cites CR 60.01, which is not applicable in this administrative proceeding.

Rodarte's subsequent pleading grounding his motion to reopen in mutual mistake is also without merit. The basis for this argument is the "Restatement of Contracts" and "Kentucky Contract Law." Interestingly, Rodarte does not claim any mistake on his part, but says "The Defendant was clearly mistaken" in not preserving his 2018 shoulder claim in the 2019 settlement agreement. The Defendant concedes no such thing, so there cannot be a mutual mistake. The fact that the Defendant continued to pay benefits under the 2018 shoulder claim is immaterial. Further, the Defendant had to weigh the consequences of terminating benefits if the joinder defense is unsuccessful.

While Rodarte did not argue "newly discovered evidence," he did check that box on the Form MTR. However, newly discovered evidence is evidence that existed at the time the original case was decided but had not been discovered and could not have been discovered with the exercise of due diligence. When "newly discovered evidence" is used in a statute, it may not be construed to include evidence that came into being after a matter was decided. Stephens v. Kentucky Utilities Company, 569 S.W.2d 155 (Ky. 1978). Newly discovered evidence within the meaning of KRS 342.125(1)(b) does not include evidence which did not come into being until after a workers compensation award was entered. Summers v. U.S. Liquids, 2005- SC-0244, 2005 WL 2679994. The 2018 shoulder injury is not newly discovered evidence

> because Rodarte admits to its knowledge at the time he entered into the 2019 settlement agreement over the 2016 work injury.
>
> Finally, as BlueLinx notes, Rodarte does not seek reopening of the 2016 claim to modify the benefits he received from that settlement; he only seeks to change the effect of the closed 2016 claim on the pending 2018 claim. That is not a basis for reopening under KRS 342.125.
>
> Rodarte has failed to make a prima facie case, and thus the motion to reopen is overruled.

Rodarte filed a Petition for Reconsideration making essentially the same arguments he raises on appeal. The CALJ provided *verbatim* as follows in denying Rodarte's Petition for Reconsideration:

> Plaintiff Rodarte has filed a "motion"/petition for reconsideration under KRS 342.281. He has not identified a patent error in the Order of July 1, 2021, and so the petition is denied.
>
> Rodarte continues to emphasize an alleged mutual mistake. There was none. The settlement agreement in this claim stands on its own. It contains no statement that the parties agree that the 2018 claim is preserved despite settlement of another pending injury claim. Rodarte has no evidence that such a statement was intended to be included in the agreement, but, in hindsight, was discovered to have been inadvertently omitted. There is the separate issue about the failure of a motion to join, but, as stated in the prior Order, any consequence of that is pending before the ALJ presently assigned to the 2018 claim.

As stated in the prior Order, the Defendant's payment of benefits in the 2018 claim after it might have denied them based on lack of joinder is immaterial. The Defendant's payment of benefits in the 2018 claim until the agreement in this claim was approved has no statutory relevance. KRS 342.270 does not exept from joinder any claims for which benefits are being paid. Nothing required the Defendant to assist with preserving Rodarte's 2018 claim while settling his 2016 claim. Rodarte's statement that, "Neither party intended to close the 2018 injury when the contract of settlement was completed on the 2016 claim," has no evidentiary support.

Rodarte's petition conflates two cases that are separate claims; for example, he says, "It is clear the Defendant was mistaken that this claim was still open and not subject to any limitations under the joinder statute." This claim (2016-98428) is still open in the sense that all future rights were preserved in the settlement, e.g., medical benefits and the right to reopen. Rodarte is mixing this claim with his 2018 claim, where the Defendant has apparently taken the position that no benefits are owed under it because Rodarte did not abide by the joinder rule of KRS 342.270.

The Defendant's payment of benefits in the 2018 claim, or failure to do so, has nothing to do with the finality of the settlement agreement in this claim that speaks solely to an injury on January 5, 2016. Rodarte says, "At no point was the 2018 claim even discussed in settlement negotiations" of this claim. It was Rodarte's decision to settle the 2016 claim before his 2018 claim was ready for negotiations. The two injuries involved separate body parts, the 2018 injury was

> not at MMI when the 2016 claim was settled, and so there is no reason for the 2016 settlement agreement to mention the 2018 claim, unless it was to say that the settlement would have no impact on the pending 2018 claim. The joinder rule is statutory, and in the absence of an express agreement of the parties to preserve the 2018 claim, the CALJ has no discretion to reopen this claim.

In affirming the CALJ, we held as follows:

> On appeal, Rodarte argues the CALJ erred in denying the request to set aside the settlement agreement. Rodarte argues the parties were mistaken as to a material fact in settlement of the 2016 claim. Rodarte alleges he was mistaken in not including joinder language in the settlement when it was completed. He asserts BlueLinx was also mistaken after the Form 110 was completed and approved. The Form 110 approved by ALJ Case on October 7, 2019 closed the 2016 claim. BlueLinx continued to pay TTD and medical benefits in the 2018 claim for over 11 months post-settlement until he reached maximum medical improvement. It is clear BlueLinx was mistaken that the 2018 claim was still open and not subject to any limitations under the joinder statute and believed it had a legal duty to make these payments. Rodarte argues the CALJ erred in denying the *nunc pro tunc* motion to amend the contract to express the intent of the parties.
>
> We begin by noting Rodarte identifies no mistake regarding the settlement agreement as it applies to the 2016 injury claim. There is nothing to indicate a mistake as to the amount, duration, or scope of the 2016 compensation. His alleged mistake concerns only the 2018 injury claim. The joinder provision in KRS 342.270 possibly acts as a bar to the 2018 claim, an issue to be addressed by the ALJ assigned to that case. The joinder provision has no effect on the 2016 claim. As such, there is no basis to reopen the 2016 injury claim.
>
> Assuming *arguendo,* the joinder issue was properly before the ALJ in the 2016 claim. Rodarte filed no correspondence indicating the parties intended that the agreement contain language preserving the claim for

the subsequent injury. To the contrary, he acknowledged, "At no point was the 2018 claim even discussed in settlement negotiations." If the parties never discussed the 2018 claim in the negotiations, there clearly was no meeting of the minds as to inclusion of language to preserve the 2018 claim in the settlement agreement for the 2016 claim. There is simply no evidence that prior to the settlement the parties agreed to preserve the 2018 injury claim. Additionally, we note payment of benefits in the 2018 claim after the settlement has no bearing on the 2016 claim.

The facts in the case *sub judice* are indistinguishable from Ridge v. VMV Enterprises, Inc., 114 S.W.3d 845 (Ky. 2003). There, the claimant, Ridge, sustained a work-related knee injury in 1998 and a work-related back injury in 1999. Ridge filed an application for benefits with respect to his knee injury on April 19, 2000. In August 2000, the parties agreed to settle the claim and the ALJ approved the settlement. The agreement made no reference to the back injury. On February 26, 2001, Ridge filed an application with respect to the back injury. The employer denied the claim and filed a special answer asserting the claim was barred by KRS 342.270(1). The ALJ agreed and dismissed the claim. In affirming the ALJ, the Supreme Court stated as follows:

> The language of KRS 342.270(1) is clear, unequivocal, and mandatory, both with respect to a worker's obligation to join "all causes of action" against the employer during the pendency of a claim and with respect to the penalty for failing to do so. Under KRS 342.270(1), it is immaterial that the claimant's knee and back injuries arose at different times, involved separate claims, and were treated by the parties as separate matters. Once he filed a claim for the knee injury, KRS 342.270(1) required him to file and join the claim for the back injury before the knee injury claim was settled.

The CALJ properly determined reopening and/or the various motions filed by Rodarte were an improper attempt to use the 2016 injury claim to cure

> any perceived failure regarding the 2018 claim, and that any issues regarding joinder were properly before the ALJ in the 2018 claim. We conclude the CALJ correctly determined the proper forum for the litigation of the joinder question is in the 2018 injury claim.

On appeal, Rodarte argues that due to a mutual mistake of fact, the settlement agreement in Claim No. 2016-98428 did not include language joining the 2018 claim. He notes the litigation in Claim No. 2016-98428 is still pending.[6] Rodarte contends the contract of settlement for the 2016 claim is no longer valid and does not provide a basis for the ALJ's ruling on the joinder issue. He also asserts the above-styled claim had not accrued at the time the claim for the 2016 injuries was settled. Rodarte posits that if the 2018 claim had been joined with the 2016 claim, it would have been placed in abeyance because he was still receiving TTD benefits and medical care. Rodarte argues if the Board determines this claim had not accrued then he did not waive the claim. Rodarte also asserts since English is his second language, he was limited in his ability to read, write, and understand English. This is reflected at the final hearing in which he testified he did not understand he was waiving and "closing his right to the 2018 claim nor did he intend to do so."

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[6] Rodarte's brief in the above-styled appeal was filed prior to our decision relating to his Motion in Claim No. 2016-98428.

Bluelinx counters that the Kentucky Supreme Court's holding in Ridge is controlling since there is no material fact as to whether the 2018 claim had accrued before the 2016 claim was settled. It contends the language in KRS 342.270(1) is not subject to debate, because in Ridge the Supreme Court interpreted the joinder provision. It contends the facts in Ridge are virtually identical to the case *sub judice*. Bluelinx asserts since Rodarte failed to join the 2018 claim with the claim for the 2016 injuries during the pendency of the 2016 claim, this claim is barred by the holding in Ridge.

Bluelinx also maintains Rodarte's 2018 claim accrued before the 2016 claim was settled. Although Rodarte began receiving TTD benefits for the 2018 injury when he was taken off work, Bluelinx contends he understood he was receiving TTD benefits and it was paying for medical treatment. It notes that all of this occurred prior to Rodarte settling his claim for the 2016 injuries. According to Bluelinx, even though Rodarte asserts his 2018 claim would have been placed in abeyance upon joinder with the 2016 claim, he cannot claim it would have been dismissed. Bluelinx posits even though the claim would have been placed in abeyance, Rodarte still had a legally enforceable claim for medical and TTD benefits. Since his 2018 claim was a legally enforceable claim and had accrued before the 2016 claim was settled on October 7, 2019, Bluelinx argues KRS 342.270(1) bars Rodarte's claim for the 2018 injury.

ANALYSIS

KRS 342.270(1) reads as follows:

> If the parties fail to reach an agreement in regard to compensation under this chapter, either party may make

> written application for resolution of claim. The application must be filed within two (2) years after the accident, or, in case of death, within two (2) years after the death, or within two (2) years after the cessation of voluntary payments, if any have been made. When the application is filed by the employee or during the pendency of that claim, he or she shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him or her. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.

The seminal case interpreting this statute is Ridge, supra. Ridge sustained a work-related knee injury in 1998 and a work-related back injury in 1999. He filed an application for benefits for his 1998 knee injury on April 19, 2000. In August 2000, the parties agreed to settle the claim and the ALJ approved the settlement agreement. The agreement made no reference to the back injury. On February 26, 2001, Ridge filed an application with respect to the back injury. The employer denied the claim and filed a special answer asserting the claim was barred by KRS 342.270(1). The ALJ agreed and dismissed the claim. In affirming the ALJ, the Supreme Court held as follows:

> The language of KRS 342.270(1) is clear, unequivocal, and mandatory, both with respect to a worker's obligation to join "all causes of action" against the employer during the pendency of a claim and with respect to the penalty for failing to do so. Under KRS 342.270(1), it is immaterial that the claimant's knee and back injuries arose at different times, involved separate claims, and were treated by the parties as separate matters. Once he filed a claim for the knee injury, KRS 342.270(1) required him to file and join the claim for the back injury before the knee injury claim was settled.

Id. at 847.

However, the Supreme Court provided the following language:

> Although TTD benefits continued to be paid for the back injury at that point, the parties stipulated that they ceased shortly thereafter on December 26, 1999. The knee injury claim was not filed until April 19, 2000. Contrary to the claimant's assertion, there is no indication in the record that any TTD benefits for the back injury were paid after the knee injury claim was filed.

Id. at 847.

In Pepsi Cola General Bottlers, Inc. v. Butler, 2006-CA-002401-WC, rendered July 6, 2007, Designated Not To Be Published, the Kentucky Court of Appeals found KRS 342.270(1) inapplicable to Butler's asserted claim for a psychological injury on reopening. Butler had suffered a February 9, 2000, injury to his coccyx. He filed a Form 101 on June 1, 2001, alleging only a coccyx injury. He did not allege a psychological injury. Butler returned to work for Pepsi on January 7, 2001, and continued to work until July 21, 2004. The claim was settled in October 2001. The settlement agreement did not list the psychological injury. On March 3, 2005, Butler filed a Motion to Reopen claiming his condition had deteriorated to the point he was totally disabled. In his affidavit, Butler stated he developed depression because of his severe chronic pain. He attached two reports from Dr. Petruska, one assigning a 12% impairment rating and the other assigning an 8% impairment rating. The CALJ granted Butler's Motion to Reopen on April 11, 2005, and assigned it to an ALJ for further adjudication. The parties introduced evidence related to Butler's psychological and physical condition. The ALJ found Butler's claim for benefits relating to his psychological condition was timely filed and that he had a 55%

psychological impairment rating.[7] However, only 40% of the impairment rating was directly related to the work injury resulting in an award based on a 22% impairment rating. This Board affirmed the ALJ's determination Butler's claim for a psychological condition was not time barred. Pepsi then appealed. The Court of Appeals affirmed holding as follows:

> However, once reopened, Butler had the burden of proving that his claim for benefits related to his psychological condition had not accrued and/or that he did not know or have reason to know of that psychological claim when he settled his low back injury claim. As noted by both parties, Butler's entitlement to assert his claim for benefits for his psychological condition is governed by KRS 342.270(1), which provides that:
>
>> If the parties fail to reach an agreement in regard to compensation under this chapter, either party may make written application for resolution of claim. The application must be filed within two (2) years after the accident, or, in case of death, within two (2) years after the death, or within two (2) years after the cessation of voluntary payments, if any have been made. When the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.
>
> Based on KRS 342.270(1), the question before us is whether Butler's claim for benefits related to his psychological condition had accrued before the settlement and is therefore barred because Butler did not join that claim to his injury claim. To answer that

[7] We will not discuss the ALJ's determination regarding Butler's physical condition.

question, we must determine what the legislature meant by "accrued."

Pepsi argues that Butler's cause of action for his psychological injury accrued when he first experienced symptoms of depression and anxiety and sought treatment for those symptoms. Butler argues that his cause action for his psychological condition did not accrue until that claim had "all elements present to be a compensable claim."

KRS Chapter 342 does not specifically state when a cause of action for a psychological injury accrues. However, a cause of action generally accrues when a person becomes aware that he has suffered an injury. *Roman Catholic Diocese of Covington v. Secter,* 966 S.W.2d 286, 288 (Ky.App.1998). This is in keeping with the language in KRS 342.270(1) stating that a claimant must bring all claims "which are known, or should reasonably be known to him." Therefore, we hold that a cause of action for psychological injury accrues when a claimant becomes aware that he has suffered a psychological injury.

We must next determine when a psychological injury occurs. KRS 342.0011 defines injury as:

> [A]ny work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings ... but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury.

Reading the above in conjunction with KRS 342.270(1), we hold that the cause of action for a psychological injury accrues when a claimant has suffered a "harmful change in [his] human organism evidenced by objective medical findings" and he knows or should know that such harmful change is a "direct result of a physical injury." Therefore, Butler's claim for a psychological injury occurred and accrued when he became aware or

> should have become aware that he had suffered a harmful psychological change in his human organism and had objective medical findings to support that awareness.
>
> As noted above, Butler testified that he suffered from depression and anxiety during the initial litigation of this claim, and that he was taking medication for these symptoms during that litigation. However, there is no indication that Butler sought any treatment with a psychologist or psychiatrist or underwent any psychological testing between the time of his injury and the settlement. Furthermore, there is no indication in the record that Butler had any ongoing problems with depression and/or anxiety or that he continued to take medication for those symptoms between the settlement and when he stopped working in 2004. **Finally, there is no evidence that anyone assigned Butler any permanent impairment rating for his complaints of depression and anxiety until after the reopening. As noted by the Supreme Court of Kentucky in *Gibbs v. Premier Scale Company/Indiana Scale Co.,* 50 S.W.3d 754, 761 (Ky. 2001), a diagnosis is not an objective medical finding and is not, by itself, sufficient to establish a compensable injury. Therefore, Butler did not suffer any psychological injury until his symptoms were diagnosed by a physician and there were objective medical findings to support that diagnosis. Based on the evidence, the ALJ correctly inferred that Butler's psychological injury did not occur or accrue until after the 2001 settlement.** (emphasis added).

Slip Op. at 6-7.

In Saint Joseph Hospital v. Frye, 415 S.W.3d 631 (Ky. 2013), the Supreme Court held Frye's claim for a subsequent injury was not barred by his failure to join it with a pending claim for a previous injury. Frye filed a workers' compensation claim against Saint Joseph Hospital ("Saint Joseph") alleging an April 23, 2009, work injury. The ALJ dismissed the claim pursuant to KRS 342.270(1)

finding Frye should have but did not timely file a motion to join it with a pending claim. This Board reversed and the Court of Appeals affirmed the Board.

Frye suffered a work-related injury to her cervical and lumbar spine on January 3, 2008, while employed by Saint Joseph. Frye continued to work while undergoing medical treatment. She last worked for Saint Joseph in August 2009. Frye filed and the parties litigated a claim for benefits related to her January 2008 injury. On April 9, 2009, the ALJ held a final hearing regarding that claim. Following the hearing, the ALJ set a briefing schedule and stated he would take the claim under submission on May 10, 2009. On June 2, 2009, the ALJ rendered an opinion and award awarding Frye income and medical benefits related to her cervical spine injury and medical benefits related to the lumbar spine injury.

On April 23, 2009, after the final hearing in the 2008 claim but before the ALJ took the claim under submission or rendered a decision, Frye fell at work. She alleged a second injury to her lumbar spine and filed a claim for the April 23, 2009, injury, more than ten months after the ALJ rendered the opinion, order, and award regarding her 2008 claim. Saint Joseph filed a Notice of Claim Denial arguing, in pertinent part, that a claim for benefits regarding the second injury was barred by KRS 342.730(1). The ALJ agreed, but this Board reversed noting the workers' compensation practice regulations do not provide a mechanism for reopening proof in a claim after a hearing has taken place. Because of the regulatory deficiency, we concluded the claim was no longer pending for purposes of KRS 342.270(1). As noted, the Court of Appeals agreed with this Board. The Supreme Court agreed holding, in relevant part, as follows:

> The language in this statutory provision is problematic because the legislature did not define "causes of action" or when a claim is pending. Frye argues, in part, that her cause of action for the April 23, 2009, accident had not accrued. However, we need not address that issue because we agree with the Board and the Court of Appeals that Frye's claim for her 2008 injury was no longer pending when she fell on April 23, 2009.

Id. at 632-633.

The Supreme Court rejected Saint Joseph's argument Kroger v. Jones, 125 S.W.3d 241 (Ky. 2004) is applicable, reasoning as follows:

> *Jones* is distinguishable from this claim for three reasons. First, the language regarding the pendency of Jones's claim was not necessary to the ultimate decision and is, therefore, *dicta.* Second, in *Jones,* the parties litigated the issue of the compensability of Jones's left shoulder injury prior to the final hearing. Thus, there was no issue regarding the ALJ's authority to reopen proof time following the hearing. Herein, Frye's April 2009 accident occurred after the final hearing and, as noted by the Board and the Court of Appeals, the regulations provide no mechanism for the ALJ to re-open proof after the final hearing. Therefore, unlike Jones, if Frye had filed her second injury claim before the ALJ entered his opinion, she would have been foreclosed from presenting any proof.
>
> Third, the issue in *Jones* was not whether Jones *was required* to file and join her second injury claim to her existing claim, but whether she, or more accurately the ALJ, *was permitted* to amend her existing claim after the final hearing. For the foregoing reasons, we do not find *Jones* to be dispositive regarding when a claim is pending for the purpose of the mandatory filing requirement in KRS 342.270(1).
>
> Rather, based on *Adams v. NHC Healthcare,* 199 S.W.3d 163 (Ky. 2006) and *T.J. Maxx v. Blagg,* 274 S.W.3d 436 (Ky. 2008), we are more persuaded by the reasoning of the Board and the Court of Appeals that, for mandatory filing purposes, Frye's 2008 claim was no longer pending during the time between the final hearing and the ALJ's opinion.

> …
>
> Absent some regulatory framework addressing this situation, once the ALJ conducted the hearing on Frye's 2008 claim, it was a practical impossibility for Frye to file her second injury claim and join it to her first claim; the ALJ to reopen proof; the parties to present proof; and the ALJ to write an opinion. Therefore, we agree with the Board and the Court of Appeals that, in this case and under these facts, Frye's first injury claim was not pending between the date of the hearing and the date the ALJ rendered his opinion regarding that claim.

Id. at 634-635.

However, the Supreme Court added the following at the end of its opinion:

> The preceding reasoning and holding do not extend to claims pending on appeal before the Board, the Court of Appeals, or this Court. Those appellate bodies are authorized to remand a claim to the ALJ for additional proceedings, which contemplates the reopening of proof. Abating an existing claim that is on appeal while a subsequent claim is litigated may not be the best use of judicial resources. Furthermore, going forward with an appeal while a subsequent claim is being litigated may lead to inconsistent results; however, it is for the legislature or the Department of Workers' Claims to address these possible unintended consequences of KRS 342.210(1).

Id. at 635.

In Martin County Fiscal Court v. Simpkins, 2014-CA-001863-WC, rendered July 24, 2015, Designated Not To Be Published, the Court of Appeals held this Board correctly determined KRS 342.270(1) did not bar Simpkins claim for benefits in a subsequent claim. On July 12, 2010, Simpkins suffered skin damage caused by his exposure to chemicals at work. He sought medical treatment and filed a claim against Martin County Fiscal Court ("Martin County"). On October 10,

2011, the ALJ in Simpkins' 2010 claim entered a hearing order noting the parties had settled the claim for a lump sum of $3,000.00 for a complete buy-out and dismissal of the claim. The agreement was formally approved by the ALJ on October 27, 2011.

On January 13, 2013, Simpkins filed a second workers' compensation claim for a back injury occurring on October 4, 2011, six days before the ALJ's entry of the hearing order denoting settlement of the 2010 claim. Martin County filed a Motion to Dismiss the 2013 claim on the grounds that KRS 342.270(1) required joinder of the claims. The ALJ did not rule on this motion but scheduled a BRC. The parties submitted medical evidence following the BRC. The ALJ concluded Simpkins sustained a work-related lumbar injury meriting a 3% impairment rating. The ALJ held the joinder requirement of KRS 342.270(1) did not bar Simpkins' 2013 claim reasoning his injury did not accrue until after settlement of the 2010 claim, and joinder was not required. This Board affirmed and Martin County appealed. The Court of Appeals affirmed.

The Court of Appeals first noted the law regarding when a claimant's claim has accrued is scarce. However, in order to determine whether KRS 342.270(1) required joinder of the claims, it had to determine on what date Simpkins' 2013 claim accrued. It observed both parties cited its unpublished opinion in Butler. The Court of Appeals agreed with this Board holding as follows:

> The undisputed objective of KRS 342.270(1) is "to address the problems created by the piecemeal litigation of workers' compensation claims. *Ridge,* 114 S.W.3d at 847, citing *Jeep Trucking, Inc. v. Howard,* 891 S.W.2d 78 (Ky. 1995). This objective is achieved through faithful application of the statute's mandatory language in conjunction with other statutes, including KRS 342.0011 and its definition of an "injury." Therefore, we

reaffirm our holding in the *Pepsi Cola* case, and we see no reason the same rule should not apply in Simpkins's case.

Whether it concerns joinder or the statute of limitations, the existence of an injury is but one criterion for determining when a workers' compensation claim "accrues." Of additional import is the question of when the claimant became aware that the injury was work-related. *Compare Pepsi Cola* at 7, *with Alcan Foil Products v. Huff,* 2 S.W.3d 96 (Ky. 1999) (holding that workers' awareness of their work-related hearing loss and when that loss had ceased to worsen were key to a decision regarding the statute of limitations.); *see also* KRS 342.0011.

Looking to the facts in the present case, and applying the above criteria to the chronology of Simpkins's respective claims, we agree with the ALJ and the Board that KRS 342.270(1) did not compel joinder. Martin County argues that as of October 5, 2011, Simpkins had or should have had sufficient information to require joinder of his claims. It bases this assertion on Simpkins' testimony that he reported his October 4 injury to his employer; that he told his doctor on October 5 that he had "done a lot of lifting[;]" and that Dr. Lafferty diagnosed an injury on that day. While these facts show the existence of an injury, they do not definitively demonstrate that Simpkins also knew or should have known that the injury was work-related. Rather, the record demonstrates that it was unclear on October 5, 2011, whether Simpkins's complaints stemmed from a new work-related injury or from aggravation of preexisting and possibly non-work-related back pain. This issue was not resolved until Dr. Lafferty concluded on January 3, 2013, that Simpkins's was a "job injury resulting in a low back injury[.]"

As the Board stated, in the five days between the injury and settlement of the 2010 claim, "[i]t was extremely difficult to determine whether Simpkins had a meritorious claim for a work-related injury[.]" Indeed, on October 10, 2011, when the 2010 claim was settled, the appropriate process for making such a determination had only just begun. To read KRS 342.207(1) as requiring Simpkins to immediately continue the

> settlement of the 2010 claim and seek joinder of an unconfirmed work-related claim is unreasonable, unduly burdensome, and beyond the intended function of KRS 342.270(1).

Slip Op. at 2-3.

Applying the above holdings to the case *sub judice*, we conclude the ALJ erred in finding KRS 342.270(1) mandates dismissal of the 2018 claim because joinder of the claims was required. The facts in this claim are markedly different than in Ridge. In Ridge, the Supreme Court specifically noted there was no indication TTD benefits for the back injury were paid after the knee injury claim was filed. In the case *sub judice*, there is no dispute that after the 2018 injury, Rodarte immediately began drawing TTD benefits and shortly thereafter underwent surgery on November 27, 2018. The undated Form 110 in the 2016 claim was approved by ALJ Case by order dated October 7, 2019. At that time, Rodarte had not filed a claim for the 2018 injury presumably because he was receiving TTD benefits and was still recovering from the November 2018 surgery. The parties' stipulation establishes that at the time the Form 110 was approved in Claim No. 2016-98428, Rodarte was still drawing TTD benefits. Further, he underwent another surgery one month after the settlement agreement in the 2016 claim was approved. Thus, at the time the settlement agreement was approved, Rodarte could not possibly ascertain the extent to which the first surgery remedied his shoulder problem, whether he would be impaired as a result of the injury, i.e., the nature and extent of his injury, and whether the injury merited an impairment rating. Significantly, he underwent a second surgery which

Bluelinx's evaluating physician, Dr. Walkiewicz, agreed was reasonable and necessary.[8] He opined as follows:

> Care seemed to be reasonable and necessary; however, the decision to perform a superior labral repair on a 51-year-old workers' compensation patient is somewhat questionable. He probably should have just had a biceps tenotomy with tenodesis right out of the gate. Nevertheless, it is difficult to predict what is going to happen with some of these work-related injuries. **Francisco Rodarte would be at maximum medical improvement 1 year after the surgery date.** He does not need any additional treatment, he should work on a home exercise program. (emphasis added).

As emphasized, Dr. Walkiewicz opined Rodarte would be at MMI one year after the surgery. Assuming his opinion also applied to the November 27, 2018, injury, Rodarte at the time ALJ Case approved the settlement of the 2016 claim would not have been at MMI following the first shoulder surgery. Rather, he would have attained MMI on November 27, 2019.

Rodarte's TTD benefits were terminated by Bluelinx on September 4, 2020, over eleven months after the parties settled Claim No. 2016-98428. Based on a November 2, 2020, examination, Dr. Kay was the first doctor to offer an opinion concerning the existence of an impairment rating assessing a 24% impairment rating as a result of the 2018 injury. Subsequently, on March 15, 2021, Dr. Heis, who performed the 2018 and 2019 right shoulder surgeries, assessed a 13% impairment rating. In light of the above, we hold that at the time Claim No. 2016-98428 settled,

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[8] Apparently, Dr. Walkiewicz was the second doctor Bluelinx employed to evaluate the successfulness of the first surgery. Dr. Walkiewicz's August 19, 2020, report reveals that based on his September 5, 2019, evaluation, Dr. Hassan felt there was a failure of the SLAP repair with biceps tendinopathy and recommended repeat revision surgery, arthroscopy, lysis of adhesions, biceps tenotomy with tenodesis.

Rodarte's claim had not accrued for purposes of KRS 342.270(1). At the time of the settlement, assuming Dr. Walkiewicz would have assessed MMI one year after the first surgery, Rodarte would have attained MMI at least one month beyond the date ALJ Case approved the settlement on October 7, 2019. Significantly, when ALJ Case approved the Form 110 in Claim No. 2016-98428, Rodarte was drawing TTD benefits. The BRC Order reflects Bluelinx did not dispute Rodarte's entitlement to TTD benefits between August 14, 2018, and September 14, 2020. Thus, Rodarte had met the statutory definition of temporary total disability and was entitled to TTD benefits during this period. Just as important, as of October 7, 2019, none of the physicians could offer an opinion regarding the nature and extent of the injury and whether the 2018 injury generated an impairment rating pursuant to the AMA Guides, as the AMA Guides are clear an impairment rating cannot be assessed prior to attainment of MMI.

The first impairment rating offered in the case *sub judice* was generated by Dr. Kay, who based on a November 2, 2020, examination assessed a 24% impairment rating. Consequently, at the earliest, Rodarte was aware he sustained a permanent injury at the time of Dr. Kay's report. Mostly importantly, at the time the 2016 claim settled the statute of limitations had not begun to run on Rodarte's claim as the limitation period began to run after September 14, 2020, when payment of TTD benefits ceased. Thus, his claim had not accrued at the time the settlement agreement in the 2016 claim was approved and KRS 342.270(1) is inapplicable.

Bluelinx would have us hold that in order for Rodarte's August 2018 claim to be viable, he was required to file a claim for the 2018 injury even though he

was recovering from surgery, probably not at MMI, and could not be apprised of the nature and extent of his right shoulder injury. Further, in all likelihood, upon filing the claim for the 2018 injury, Rodarte's TTD benefits would have been terminated. According to Bluelinx, even though there was uncertainty as to the extent the first surgery was beneficial and whether Rodarte's 2018 right shoulder injury merited an impairment rating, he was required to file a claim for the 2018 injury. As claimed by Bluelinx, Rodarte was required to file a claim for the 2018 injury eleven months before the statute of limitations began to run on the claim. We reject that premise.

We conclude based on the qualifying language in Ridge, the Supreme Court's holding would have been different had Ridge been receiving TTD benefits for the last injury at the time the parties settled the earlier knee injury claim. As pointed out in Simpkins, supra, a separate panel in Butler, supra, had "employed KRS 342.270(1) and the same chapters definition of 'injury' in holding that the claimant's cause of action for psychological injury did not accrue until the claimant has suffered a 'harmful change in [his] human organism evidenced by objective medical findings', and he knows or should know that such harmful change is a 'direct result of a physical injury.'" Slip Op. at 2. In the case *sub judice*, at the time of the settlement of the 2016 claim, none of the physicians had expressed an opinion as to whether Rodarte had suffered a harmful change to his right shoulder evidenced by objective medical findings. Rodarte was still recovering from the first surgery and had to undergo another surgery one month after the settlement was approved. Further, as stipulated, he was still receiving TTD benefits which meant he was not at

MMI. Thus, pursuant to the AMA Guides, a physician could not offer an opinion that Rodarte had an impairment rating arising from the 2018 injury.

We emphasize one of the factors the Court of Appeals relied upon in determining KRS 342.270(1) was not applicable in Butler was the fact there was no evidence anyone had assigned a permanent impairment rating for Butler's complaints of depression and anxiety until after the reopening. Here, as in Butler, no physician offered an opinion as to whether Rodarte had an impairment rating at the time ALJ Case approved the settlement agreement in Claim No. 2016-98428 on October 7, 2019. As in Butler, even though there may have been a diagnosis of a shoulder injury, a diagnosis is not an objective medical finding and is not sufficient to establish a compensable injury. Because the physicians concluded Rodarte needed a second surgery, a mere diagnosis of a shoulder injury was not sufficient to establish a compensable injury as decreed by the Court of Appeals in Butler.

In summary, regardless of Rodarte's assertions contained in his Motion to Reopen the 2016 claim, the facts establish his 2018 claim had not accrued as of October 7, 2019, when ALJ Case approved the settlement agreement in the 2016 claim. Of great significance is the fact the statute of limitations on Rodarte's 2018 claim had not begun to run when the claim was settled. The statute of limitations began to run on September 15, 2020, the day after voluntary payment of TTD benefits ceased. Consequently, Rodarte's claim for the 2018 injury had not accrued since the statute of limitations had not begun to run on his 2018 claim when ALJ Case approved the settlement agreement in the 2016 claim on October 7, 2019. We adopt the Court of Appeals' logic in Simpkins and hold that to read KRS

342.270(1) requires Rodarte to immediately continue the settlement of the 2016 claim, file a claim which was not ripe for litigation, "and seek joinder of an unconfirmed work-related claim is unreasonable, unduly burdensome, and beyond the intended function of KRS 342.270(1)." Slip Op. at 3.

Accordingly, we **REVERSE** the August 13, 2021, Opinion and Order and the August 25, 2021, Amended Opinion and Order of the ALJ determining KRS 342.270(1) bars Rodarte's claim for an October 13, 2018, right shoulder injury and the dismissal of the 2018 claim. This claim is **REMANDED** to the ALJ for entry of a decision that the above-styled 2018 claim is not barred by KRS 342.270(1) and a resolution on the merits of the claim.

ALVEY, CHAIRMAN, CONCURS.

MILLER, MEMBER, CONCURS AND FILES A SEPARATE OPINION.

MILLER, Member. Rodarte has appealed the dismissal of his claim by the Administrative Law Judge who ruled that the failure to join this claim to a prior litigated claim requires dismissal per KRS 342.270(1). While no Petition for Reconsideration was filed by Rodarte, the facts are not in dispute but rather this claim concerns a question of law. The Majority has written an Opinion reversing the dismissal and cited extensively from prior case law and the distinguishing facts in the instant case from those contained in Ridge v. VMV Enterprises Inc., 114 S.W.3d 845 (Ky. 2003). This Opinion concurs with the majority but wishes to further delineate the reasons for reversing the decision to dismiss the claim.

Rodarte suffered his first work injury at Bluelinx to his right knee on January 5, 2016. Medical benefits for a right knee meniscal tear surgery and TTD benefits were paid. The Form 101 was filed on March 11, 2019, within 2 years of the last TTD benefit and litigation commenced.

Prior to the Form 101 being filed, Rodarte had a second injury while working at Bluelinx on August 13, 2018, the injury to the right shoulder. He was working for the same employer and the same insurance company and/or third-party administrator, ESIS, was involved in this claim. TTD benefits were paid from August 21, 2018, and continued uninterrupted until September 14, 2020. Rodarte underwent two right shoulder surgeries, one in November 2018 and the next one in November 2019.

During the litigation of the 2016 claim, there were three times the right shoulder injury was discussed. In response to a Motion for More Definite Medical History, on May 23, 2019, Rodarte filed an amended Form 105 listing the right shoulder injury with treatment in August 2018 to present and naming Dr. Heis as his physician. At the deposition of Rodarte taken by defense counsel, P. 61, 65, June 11, 2019, where counsel stated he had some records of the right shoulder injury.

The other mention of the right shoulder injury occurred in the report filed by Bluelinx of a medical examination it requested. Dr. Randolph, in this report dated June 17, 2019, discusses the right shoulder injury occurring at work. Medical treatment including the surgery was noted.

While a Form 101 for the 2018 injury was not filed and therefore no accompanying Motion to Consolidate the second injury claim of 2018 with the first

claim of 2016, it cannot be argued Bluelinx was prejudiced in any manner. While the right shoulder injury claim was not litigated as were the injuries in Kroger v. Jones, 125 S.W.3d 241 (Ky. 2004), it was nowhere near ripe to be litigated. In fact, TTD benefits continued from the time the 2016 claim was filed on March 11, 2019 through September 14, 2020, significantly past the date when the 2016 claim settlement agreement was approved on October 7, 2019.

During the litigation of the 2018 injury claim, a report generated for ESIS by Dr. Walkiewicz dated August 19, 2020 references an independent medical examination dated September 5, 2019 by Dr. Hasan discussing the need for a repeat surgery of the right shoulder.

KRS 342.270 (1) is the Joinder statute. Ridge, supra, states the language is clear, unequivocal and mandatory for the worker to join "all cause of action" against the employer during the pendency of a claim and with respect to the penalty for failing to do so. Yet the wording of the statute specifically states he or she shall join all causes of action against the named employer which have accrued, and which are known or should reasonably be known to him or her. In light of Rodarte already having one surgery and a second to occur shortly after settlement, whether the cause of action was known by Rodarte or should reasonably be known to him is not the main issue. It was certainly premature to assess any impairment rating, a prerequisite to obtaining permanent disability benefits. *See* KRS 342.0011(36). However, whether the cause of action has accrued when the statute of limitations has not even begun to run is problematic. When TTD income benefits are paid, the filing of an application for benefits shall be required within two (2) years

following the suspension of payments or within two (2) years of the date of the accident, whichever is later. KRS 342.185(1). Certainly the facts are distinguishable from Ridge, supra, in this respect. In Ridge, the last TTD benefit payment for the back injury had ended in December 1999 and the Form 101 was not filed for the prior knee injury until April 2000. The statute of limitations had begun to run so the action had accrued.

Further, no prejudice can be shown to Bluelinx. During the initial litigation, Bluelinx and its insurance carrier paid income and medical benefits, had medical exams, and filed a report into evidence which discuss the second injury. There was even testimony elicited concerning the second injury.

The combination of these distinguishing factors removes this claim from the Ridge orbit.

At this point, a balancing of the competing interests of the statute and the entire Workers' Compensation scheme must be reviewed. One purpose of KRS 342.270(1) is to limit piecemeal litigation. *See* Ridge, 114 S.W.3d at 847, citing Jeep Trucking, Inc v. Howard, 891 S.W.2d 78 (Ky. 1995). It also must be considered that inconsistent opinions could arise from claims not joined, though this would certainly be more relevant if the same body part was injured in successive claims.

Yet, the entire Workers Compensation scheme is to encourage speedy resolution of work injury claims and further to have the statutes liberally construed to promote the purpose for which the statute was enacted. Here, there could be no resolution of the second claim for an indeterminant time, and to cause the first injury claim to be placed in abeyance and not resolved is unduly burdensome to Rodarte.

There would be a delay of any income benefit at a time when the injured worker most often needs money.

It is well settled that Workers Compensation is social legislation with a foremost purpose of compensating disabled workers for the loss of their earning capacity and promoting settlements as a means of promptly disposing of compensation claims. Newburg v. Weaver, 866 S.W.2d 435 (Ky. 1993).

All statutes shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to statutes of this state. KRS 446.080(1).

It further states, "All words and phrases shall be construed according to their common and approved usage of language, but technical terms and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning." (4). KRS 446.080.

When the cause of action accrues has not been adequately defined in claims when the statute of limitations timeline has not begun. Coupling this fact with the lack of prejudice to the employer permits this claim to not be governed by KRS 342.270 and avoid the harsh dictates of the statute.

For the above stated reasons, I concur that KRS 342.270(1) did not mandate joinder of the right shoulder claim and adopt the Opinion of the Majority.

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