Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 9, 2021

CLAIM NO. 201993999

MJ GREAT CLIPS, INC. PETITIONER

VS. **APPEAL FROM HON. TONYA CLEMONS, ADMINISTRATIVE LAW JUDGE**

ANGELA JOHNSON
and HON. TONYA CLEMONS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. MJ Great Clips, Inc. ("Great Clips") appeals from the December 17, 2020, Opinion, Award, and Order and the January 21, 2021, Order of Hon. Tonya Clemons, Administrative Law Judge ("ALJ"). The ALJ awarded Angela Johnson ("Johnson") temporary total disability benefits, permanent partial disability benefits, and medical benefits for a left shoulder injury arising from cumulative trauma occurring while in the employ of Great Clips.

On appeal, Great Clips asserts the ALJ erred by awarding Johnson benefits, as her claim is barred by a failure to give notice and the statute of limitations. Great Clips also asserts the ALJ abused her discretion by awarding benefits for Johnson's left shoulder condition.

BACKGROUND

The Form 101, filed March 13, 2020, alleges Johnson sustained work-related cumulative trauma injuries to her "shoulder" on November 20, 2018, in the following manner: "Impingement syndrome with glenoid labral tear of the left shoulder due to cumulative trauma as a hair stylist at work, aggravated by the work injury in November of 2018."

Johnson filed the medical records of Dr. James Bilbo with OrthoCincy Orthopaedics & Sports Medicine. A November 20, 2018, record reflects that after receiving a history and performing a physical examination, Dr. Bilbo diagnosed the following: "Chronic rotator cuff tendinopathy, possible evolving partial or full thickness tear, labral tearing with cystic changes due to chronicity by a 2016 MRI, biceps tendinopathy itself, no instability present, early AC arthritis and some hypertrophy contributing to impingement with rotator cuff/scapular weakness and minimal loss of motion, left shoulder."

A November 29, 2018, MRI report contained within these records details the following findings:

> 1. Negative for full thickness or high-grade partial thickness rotator cuff tendon tear.
>
> 2. Mild / moderate supraspinatus / infraspinatus tendinosis about the conjoined segment.

> 3. Revisualized labral tearing including disruption of the biceps labral anchor. The posterosuperior perilabral cyst is less conspicuous currently.
>
> 4. Acromioclavicular degenerative changes with undersurface spurring.
>
> 5. Trace subacromial/subdeltoid bursal fluid.

Johnson introduced the April 14, 2020, Form 107-I completed by Dr. Bilbo. The Form 107 lists the following examination dates: November 20, 2018, December 6, 2018, January 21, 2019, February 19, 2019, March 4, 2019, April 16, 2019, and June 11, 2019. It reveals Dr. Bilbo performed the following surgical procedure on January 11, 2019:

> On 1/11/19, examination under anesthesia, arthroscopy, arthroscopic debridement of partial thickness rotator cuff tearing; arthroscopy of glenohumeral joint with debridement including partial synovectomy, excision of labral tearing to a stable rim, release of longhead biceps from the superior labrum; arthroscopy subacromial/subdeltoid space with bursectomy and Neer acromioplasty for subacromial decompression; arthroscopic Mumford distal claviculectomy; open distal biceps tenodesis with interference screw fixation of longhead biceps to the proximal humerus, left shoulder.

Dr. Bilbo set forth the following diagnosis: "Low-grade partial thickness rotator cuff tearing, rotator cuff tendinopathy and impingement, AC arthritis and hypertrophy contributing to impingement, longhead biceps tendinopathy with biceps anchor instability and labral tearing, left shoulder." Regarding causation, Dr. Bilbo opined as follows: "The repetitive activity/use of her left shoulder performing her job as a hairdresser can certainly be a cause of the pathology that was identified on her MRI and at surgery." Dr. Bilbo believed

Johnson would reach maximum medical improvement ("MMI") one year after her January 11, 2019, surgery and assessed a 0% impairment rating. He opined Johnson could return to her pre-injury job as a hairdresser but would "need to be cautious of repetitive reaching and overhead activity."

Johnson introduced Dr. Jeffrey Fadel's September 26, 2019, Independent Medical Evaluation ("IME") report. After conducting a physical examination and a medical records review, Dr. Fadel diagnosed the following: "Impingement syndrome with glenoid labral tear of the left shoulder, aggravated by the work injury in November of 2018." Dr. Fadel opined Johnson reached MMI as of June 2019 and assessed a 7% upper extremity impairment pursuant to Figures 16-38 through 16-46 of the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He also assessed a 10% impairment for the distal clavicular resection she underwent at the time of her arthroscopy. Pursuant to Table 16-3 of the AMA Guides, Dr. Fadel concluded that due to the work injury Johnson had a 10% impairment rating. Dr. Fadel offered the following opinion concerning causation:

> It is obvious to this examiner that Ms. Johnson has sustained injury to her glenoid labrum and had intermittent flare-ups of her rotator cuff due to the accumulative trauma as a hairstylist prior to the November 2018 episode.
>
> At that time though, the increased symptomatology that did develop in November, was due to the increase volume of clients. It should be noted that she had not been treated at all for her left shoulder for over one year after being discharged from pain management until this episode. This would explain in my view and classify her with a pre-existing dormant condition, which was

> subsequently aroused by the increased demand on her left shoulder that she experienced in November of 2018.

Great Clips introduced Dr. Rick Lyon's June 9, 2020, report. After performing a physical examination and medical record review, Dr. Lyon diagnosed the following:

> 1. Partial-thickness rotator cuff tear, labral tear, paralabral cyst, and subacromial bursitis.
>
> 2. Post debridement of partial-thickness rotator cuff tear, partial synovectomy, excision of labrum tear, release of long head of biceps, subacromial bursectomy and subacromial decompression, Mumford, biceps tenodesis.

Dr. Lyon assessed an impairment rating for the shoulder condition which he concluded is not work-related based on the following reasoning:

> As reviewed above, the medical records confirm Ms. Johnson had a labral tear in 2014. Additionally, Ms. Johnson states she was informed by Dr. Bilbo and her primary care provider that the tear was a result of her work at Great Clips. She was subsequently reevaluated and found to have a new paralabral cyst in 2016, confirming the chronicity of the labral tear. Of importance, in February 2018, she was offered the same surgery that Dr. Bilbo eventually performed on 01/11/2019.
>
> Therefore, it is my opinion the shoulder pathology was active and preexisted the November 2018 work event. As Ms. Johnson believes she began working at Great Clips for the second time in August 2018, it is also my opinion the shoulder pathology was active and preexisted her second employment at Great Clips. Furthermore, it is my opinion the sensation she experienced in November 2018 was simply a continuation of the preexisting pathology. Therefore, it is my opinion the shoulder pathology and treatment are unrelated to the subject work event.
>
> Regardless of causation, it is my opinion Ms. Johnson has reached maximum medical improvement as of Dr.

> Fadel's 09/26/2019 evaluation. Since she is at MMI, an impairment rating can be determined using the AMA Guides to Impairment, 5th edition. Referencing Figure 16-40 p.476, she has a 2 percent upper extremity impairment for loss of flexion and no impairment for extension. Per Figure 16-43, p. 477, she has a 1 percent upper extremity impairment for loss of abduction and no impairment for adduction. Per Figure 16-46, p. 479, she has no impairment for internal or external rotation. The upper extremity impairments for motion add to 3 percent. Additionally, Ms. Johnson receives a 10 percent upper extremity impairment as a result of the Mumford procedure per Table 16-27, p. 506. The upper extremity impairments combine to 13 percent, and per Table 16-3, p. 439 convert to an 8 percent whole person impairment.
>
> I have reviewed the evaluation by Dr. Fadel. Although we agree with the methodology to determine impairment, our impairments are different based upon the discrepancy in range of motion measurements. Since it has also been eight months since Dr. Fadel's evaluation, it appears that Ms. Johnson has experienced some improved motion and decreased impairment since his evaluation. Although I agree with Dr. Fadel's restrictions, it is my opinion that with alteration of her work station (such as a stool), it is possible she would be able to return to work at her previous occupation.

Johnson was deposed on May 5, 2020. At the time of her deposition, Johnson was not working. She described the onset of her shoulder symptoms as follows:

> Q: Okay. And so, again, getting back to what we were talking about earlier, there's not a specific – there's not a specific traumatic event, this is – you couldn't finish the haircut either sometime in November, or sometime in October, or some other date, right?
>
> A: Right, yes.
>
> Q: Regardless of the date that you recall not being able to finish the client's haircut that day, does that mean you weren't able to finish your shift, or did you finish your shift rather through sheer will power or whatnot?

A: No, I did not finish my shift I had to come home.

Q: I don't believe so. I think that was that – that was it.

…

Q: What did you immediately feel at the time of the work accident?

A: It felt like I was shot in the back, like, a really bad painful pain – shoulders on fire.

Q: I've heard 'shot in the back,' and I've heard 'shoulder on fire.'

A: Yes.

Q: Okay. We're not talking about a back injury, or are we?

A: No, it was completely on my shoulder, but where your shoulder is on your back so it kind of felt like my back, but it was my shoulder.

Q: And so, the symptoms are isolated about the shoulder and in terms of description it felt like they were on fire or that you had been shot.

A: Well, I imagine if there – if I'd been shot it was because my shoulder was so badly messed up. It was on fire and it was a very bad painful – a shot of pain going through it.

Concerning her prior symptoms, Johnson testified as follows:

Q: Right. Okay. Had you ever had pain in that area before?

A: Yes, not as bad though.

Q: When had you previously had pain that area before?

A: I believe it was 2013, and they said that I had a tear in the labrum of my shoulder, and then I started going to CPS to try to manage that.

Q: What is this acronym, CPS, or what is that?

A: Cincinnati Pain – Cincinnati Pain Institute or service or something like that. It was a pain clinic.

Johnson testified she provided notice to Great Clips that her shoulder condition is work-related in a text message to the owner in December 2018. She testified further as follows:

Q: So you did know in late 2013 or in 2014 that you had a problem about your shoulder and that this was on and off –

A: Yes.

Q: - through your work at Great Clips, through your work at Walmart, through your work at Great Clips the second time, correct?

A: Yes, Great Clips the second time.

Q: Okay. Well, when did you work for them the first time, did you work for them before 2013?

A: No.

Q: When did you work for them the first time, what was the timeframe for the initial –

A: I don't remember-

Q: - round of employment?

A: -the month but it was 2013 through 2016. I worked for another Great Clips. 2013 through 2016 or '15.

Q: Okay. And all during that time you would have known about a problem about your left shoulder?

A: I knew that I had a tear in my labrum, yes, but then I went to CPS, and they told me it was my neck, so I was confused, sorry.

Q: What is CPS?

A: Cincinnati Pain Specialist.

Q: Yeah, but you said you didn't start treating with them until 2018.

A: Right. I knew I had a tear in my shoulder, but I could work with it, but then when I started going to CPS, they told me it was my neck and not my shoulder.

Q: Okay. And so you would have told Chris and Great Clips that [sic] everything that you just told me. That you've had problems with your shoulder on and off since 2013 and 2014, and now they're telling me I've got a problem with my neck.

A: Yes.

…

Q: I understand that. Well, tell the Judge – I mean, what happened starting back in 2013 and apparently in 2014 when you had the MRI of the left shoulder and what –

A: I was working –

Q: How did all of this come about?

A: I was working at Great Clips, and I started getting back pain, but it was actually shoulder pain. And I went to them, and they said I had a tear in my labrum, and that was it.

Q: So this is in, like, 2013 and 2014?

A: Yes.

…

Q: Well, I guess where I'm getting confused at is – but the tear, the tear that you knew that you had that either happened in 2013 or 2014 that's not work-related, right?

A: No, it is. It's from holding my hands up all day cutting hair.

Q: Well, I thought – okay. You've had problems about the left shoulder off and on since 2013, right?

A: Yes.

Q: And that's the tear that you were talking about, correct?

A: Correct.

Q: Okay. So what was it – so you knew you had that, so what was it that you found out from Dr. Bilbo that was work-related since the tear was already present?

A: The fray in the bicep –

Q: Like, what did you report to Great Clips?

A: The fray in the bicep and where they had to cut the bicep because of the fray, and I had a whole bunch of other stuff messed up in my shoulder after the surgery he told me that. I had, like, three – three or four things wrong with my shoulder – and it's all work-related.

Q: Do you ever recall- or do you have any understanding from your dealings with Dr. Bilbo that the condition about the shoulder had been going on for at least five years before your surgery?

A: I had a tear in my labrum of my shoulder, the other stuff just happened when I got the surgery.

Johnson also testified at the October 21, 2020, hearing. Concerning her November 2018 appointment with Dr. Bilbo, the following exchange occurred:

Q: Do you recall going to see Dr. Bilbo in November of 2018?

A: Yes.

Q: Why did you go see Dr. Bilbo in November of 2018?

A: Because my shoulder was hurting pretty bad and it popped at work and I knew something was wrong.

Q: When you met with Dr. Bilbo in November of 2018, did he ask about your work activities?

A: Yes.

Q: After you begin treating with Dr. Bilbo in November of 2018, did you report your injury to a supervisor?

A: Yes.

Q: Did you tell them that you had gone to see Dr. Bilbo?

A: Yes.

Dr. Bilbo recommended surgery which was ultimately performed in January 2019.

Johnson described her 2013 left shoulder problems as follows:

Q: - you've had a tear about your left shoulder since 2013; is that correct?

A: No, I don't think so.

Q: Okay. Do you know whether or not you have been a surgical candidate about the left shoulder since 2014?

A: Since 2014, yeah, I guess. Yes, I guess but it was two different procedures.

The October 21, 2020, Benefit Review Conference Order and Memorandum lists the following contested issues: "work-related injury/causation; notice; statute of limitations/repose; permanent income benefits per KRS 342.730; TTD benefits; ability to return to work; exclusion for pre-existing impairment; credit for: claims against indemnity, e.g. STD or LTD; unpaid or contested medical expenses, and proper use of the AMA Guides." Under "other contested issues" is the

following: "1) 'Injury' as defined by the Act; 2) Reasonableness and necessity of medical treatment; 3) Unreimbursed mileage."

The December 17, 2020, decision contains the following findings of fact and conclusions of law which is set forth, in relevant part, *verbatim*:

> …
>
> Defendant argues that Plaintiff has had the same problems with her left shoulder since 2013 or 2014 with surgery previously recommended. Pre□ incident medical records from 2016 submitted, however, do not reflect left shoulder treatment. The 2016 records also do not document that a physician advised Plaintiff that she had a work-related condition to her left shoulder nor is there testimony that Plaintiff was informed that her left shoulder symptoms were work-related prior to November 2018. The only medical records of evidence indicating a physician advised Plaintiff of a work-related condition of the left shoulder are Dr. Bilbo's November 20, 2018 records.
>
> After review of the records and examination, Dr. Fadel found that Plaintiff had a pre-existing dormant condition, which was aroused by increased demand on her left shoulder that she experienced in November 2018, which is consistent with Dr. Bilbo's records. While Dr. Lyon was of the opinion that Plaintiff had a pre-existing, active condition, there are no records to reflect that Plaintiff had treatment for approximately nine months prior to November 2018 or that a physician related those prior symptoms to Plaintiff's work activities prior to November 20, 2018.
>
> Additionally, the clocking for notice, statute of limitations, and statute of repose did not begin to run until November 20, 2018. Per Plaintiff's testimony, the location manager, was present when she began to experience symptoms in November 2018 and she reported her symptoms to him. Plaintiff also testified that she did inform her employer of her condition once notified by Dr. Bilbo that it was work-related.
>
> Having reviewed the evidence on these issues, the ALJ finds the opinions of Dr. Fadel in light of the testimony

of Plaintiff to be the most credible and persuasive. Accordingly, the ALJ finds Plaintiff suffered a work-related cumulative trauma to her left shoulder with a manifestation date of November 20, 2018. The ALJ also finds due and timely notice of the cumulative trauma was provided and the claim was filed within the applicable statute of limitation.

…

C. Benefits per KRS 342.730; Proper use of the Guides; and Ability to return to work.

The ALJ has found that Plaintiff suffered a cumulative trauma to her left shoulder during the course and scope of her employment with Defendant on November 20, 2018. Accordingly, the ALJ must now determine the income benefits under the Act. To that end, Plaintiff argues that Dr. Fadel provides the most credible opinion as to impairment. Further, when her physical limitations are taken into account, Plaintiff is also entitled to application of the three multiplier. Defendant, conversely, argues that Plaintiff did not suffer an injury and; thus, is not entitled to any income benefits.

There are three impairment ratings that have been presented in this matter. Dr. Bilbo, Plaintiff's treating surgeon, rendered an opinion in an April 2020 Form 107 report wherein he assessed 0% AMA impairment. Dr. Bilbo's opinions were reviewed by the other medical experts in this matter, Dr. Fadel and Dr. Lyon, who both found his opinions as to AMA impairment to be not in line with the AMA Guides, 5th Edition. As a result, the ALJ does not find his opinion as to AMA impairment to be credible.

Dr. Fadel assessed a 10% AMA impairment rating due to the left shoulder cumulative trauma due to the January 2019 surgery. Dr. Lyon, regardless of causation, assessed 8% AMA impairment as a result of the surgical procedure. The experts utilized essentially similar methods under AMA Guides to assess impairment. Dr. Lyon, however, explained the difference in the assessed impairment by the fact that his examination took place approximately eight months after Dr. Fadel's examination and that Plaintiff appeared to have

experienced improved motion and decreased impairment since Dr. Fadel's evaluation.

Having considered the evidence, the ALJ finds Dr. Lyon's assessment of AMA impairment to be the most credible and persuasive. Accordingly, the ALJ concludes that Plaintiff retains 8% AMA impairment to her left shoulder due to the November 2018 cumulative trauma.

Plaintiff's capacity to return to work is also at issue. Dr. Fadel assessed Plaintiff with permanent restrictions of "no repetitive use of her left upper extremity from the shoulder level and above, no pushing or pulling more than 40 pounds occasionally, and no lifting more than 15 pounds from shoulder level and above, . . ." See September 26, 2019 Fadel Report, at p. 5. He felt these restrictions would make it impossible for her to return to her prior employment at the volume she was required to pursue.

Dr. Lyon essentially agreed with the restrictions assessed by Dr. Fadel although he felt Ms. Johnson could return to work with alteration of her work station such as with use of a stool. Plaintiff testified that she had not returned to work and she did not believe that she could go back to work as a part-time hairdresser due to her shoulder swelling and pain. She further stated that her shoulder becomes aggravated with activity.

The ALJ finds Plaintiff's testimony regarding her physical inability to perform her job duties for Defendant to be credible and consistent with the permanent restrictions assessed by Dr. Fadel. Consequently, having reviewed all the evidence on this issue, the ALJ finds that Plaintiff does not retain the physical capacity to return to the type of work she performed at the time of the November 2018 injury. Consequently, Plaintiff qualifies for the three multiplier under KRS 342.730(1)(c)1. Thus, the award of PPD benefits is calculated as follows:

$251.00 x 66 2/3% x 8% x 0.85 x 3.0 = $34.14 per week for 425 weeks.

In its Petition for Reconsideration, Great Clips asserted the same arguments it now makes on appeal. The January 11, 2021, Order overruling the Petition for Reconsideration contains the following additional findings:

> …
>
> First, Defendant takes issue with the findings with respect to injury and the dormant nature of the condition. Specifically, Defendant maintains that it was error to find that there was no testimony that Plaintiff was informed that her left shoulder symptoms were work-related prior to November 2018 as it asserts this finding is contrary to the evidence of record. Next, Defendant argues that the findings with respect to notice and statute of limitations ignores facts that Plaintiff conceded and the employer knew that she had a tear in her left shoulder as of her date of hire and date of injury.
>
> Defendant further argues the reliance on Dr. Fadel's report was misplaced as Dr. Lyon provided a more accurate opinion as to Plaintiff's condition and pre-injury conditions. Defendant also argues that the finding that Plaintiff lacks the capacity to return to her pre-injury work is inaccurate as it argues that Plaintiff and Defendant knew that she could not perform the job when she began working for the Defendant.
>
> Plaintiff has responded to Defendant's Petition indicating that Defendant reargues the merits of the case and does not point to patent error on the face of the complaint as its Petition asks the ALJ to "revisit the findings." Thus, she maintains Defendant's Petition should be overruled.
>
> The ALJ is not convinced that Defendant points to patent errors on the face of the Opinion. The parties in a workers' compensation claim are entitled to a sufficient explanation by the ALJ of the basis for a decision. Whittaker v. Roland, 998 S.W.2d 479, 481 (Ky. 1999)(internal citations omitted). The Opinion sets out the evidence relied upon and the reasoning behind the findings under relevant and applicable law.
>
> In its Petition, Defendant states that the Summary of Evidence indicates that Plaintiff was told in 2013 or

> 2014 that she had a labrum tear. Further, Defendant maintains that the Summary of Evidence indicates Plaintiff testified that the labral tear was work-related. The Opinion lays out, however, that there is no testimony or medical opinion of record indicating that Plaintiff was told by a medical professional that she had a work-related left shoulder condition until November 20, 2018 as indicated in the records of Dr. Bilbo. The requirements under the Workers' Compensation Act for notice and statute of limitations in cumulative trauma had not been triggered until Plaintiff was advised by a physician that she had a work-related condition as a claimant is not required to self-diagnose in this jurisdiction. Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001); Consol of Kentucky, Inc. v. Goodgame, 478 S.W.3d 78, 82 (Ky. 2015); KRS 342.185(3).
>
> The Opinion indicates all evidence was fully considered in determining that Plaintiff suffered a work-related cumulative trauma to her left shoulder as well as a rationale for reliance on the opinions of Dr. Fadel as the most credible and persuasive with respect to dormant conditions and capacity to return to work. Further, consistent with applicable law, the Opinion identifies the date triggering notice and clocking of the statute of limitations based upon the opinion of Dr. Bilbo.
>
> Defendant's Petition on these issues is a re-argument of the merits of the claim. Accordingly, Defendant's Petition is OVERRULED.

ANALYSIS

Great Clips first argues the ALJ committed reversible error by awarding benefits, as Johnson has allegedly known for eight years she had a "work related pre-existing active left shoulder condition." Therefore, as argued by Great Clips, Johnson violated both the notice and statute of limitations requirements relating to cumulative trauma injury claims. On this issue, we affirm.

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 other words, inquiries regarding notice and statute of limitations in cumulative trauma cases are dictated by the date of manifestation, the date "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). A worker is not required to self-diagnose the cause of a harmful change as being a *work-related* cumulative trauma injury. *See* American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004). Rather, a physician must diagnose both the condition and its work-relatedness.

In the December 17, 2020, decision and the January 11, 2021, Order, the ALJ relied upon Dr. Bilbo's November 20, 2018, record in concluding the date of manifestation for the left shoulder injury is November 20, 2018. In the December 17, 2020, decision the ALJ concluded, in relevant part, as follows: "The only medical records of evidence indicating a physician advised Plaintiff of a work-related condition of the left shoulder are Dr. Bilbo's November 20, 2018 records." However, there is nothing in Dr. Bilbo's November 20, 2018, medical record indicating

Johnson was informed that her left shoulder injury is work-related. We acknowledge the following language contained in the "History" section of the November 20, 2018, record: "No history of trauma, but she is a hair stylist, and this all seemed to start in 2013 related to a high volume of work where she reaches overhead on a repetitive basis. There has never been one traumatic injury to her left shoulder." However, this is not a statement evidencing Johnson was then *informed* that her left shoulder condition is work-related. This is merely a recitation of the history Johnson provided Dr. Bilbo. That said, we deem this determination to be harmless error.

Significantly, Great Clips points to no evidence, either lay or medical, suggesting Johnson was informed that her left shoulder condition was work-related *earlier than* the November 20, 2018, medical record of Dr. Bilbo. While Great Clips claims Johnson admitted in her deposition she was informed her left shoulder condition is work-related in 2013, a review of Johnson's deposition provides no support for this contention. Even though Johnson testified that she had a labrum tear in her left shoulder which was work-related, she did not testify when or even if she was informed by a *physician* that it was work-related. Johnson testified the only condition Dr. Bilbo informed her is work-related was the fray in her bicep. However, Johnson did not elaborate when Dr. Bilbo informed her of this. The pertinent testimony is as follows:

> Q: Well, I guess where I'm getting confused at is – but the tear, the tear that you knew that you had that either happened in 2013 or 2014 that's not work-related, right?
>
> A: No, it is. It's from holding my hands up all day cutting hair.

> Q: Well, I thought – okay. You've had problems about the left shoulder off and on since 2013, right?
>
> A: Yes.
>
> Q: And that's the tear that you were talking about, correct?
>
> A: Correct.
>
> Q: Okay. So what was it – so you knew you had that, so what was it that you found out from Dr. Bilbo that was work-related since the tear was already present?
>
> A: The fray in the bicep –

Further, Great Clips fails to cite to any medical evidence in the record indicating Johnson was informed of a work-related left shoulder condition in 2013. In fact, a review of the medical evidence reveals that the only definitive statement of work-relatedness is contained within Dr. Fadel's September 26, 2019, IME report in which he opined, in relevant part, as follows:

> At that time though, the increased symptomatology that did develop in November, was due to the increase volume of clients. It should be noted that she had not been treated at all for her left shoulder for over one year after being discharged from pain management until this episode. **This would explain in my view and classify her with a pre-existing dormant condition, which was subsequently aroused by the increased demand on her left shoulder that she experienced in November of 2018.** (Emphasis added).

In sum, a date of manifestation was not established *earlier than* November 20, 2018, but there is evidence of a date of manifestation nearly one year *after* November 20 2018. Consequently, Johnson's Form 101, filed on March 13, 2020, is well within the two-year mandate set forth in KRS 342.185(3) in the context of a date of manifestation of either November 20, 2018, or September 26, 2019.

Further, the notice inquiry has been rendered moot. In Diane Anderson v. Mountain Comprehensive Health Corporation, 2020-SC-0133-WC, rendered March 25, 2021, Designated To Be Published,[1] the Kentucky Supreme 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 Court held, in relevant part, as follows:

> **Clearly, on its face, 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).

"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), the notice requirement is essentially rendered moot.[2] Therefore, assuming *arguendo* that Johnson's "notice" was given by filing her Form 101 on March 13, 2020, this is well within two years from the date of manifestation. Thus,

[1] We acknowledge the decision is not final.

[2] The two-year notice requirement does have relevancy within the context of the statute of repose, as a claimant is afforded up to five years to file his or her claim after the last injurious exposure.

this marks both the beginning and the end of the notice inquiry. Relative to the issues of notice and the statute of limitations, KRS 342.185(3) has been satisfied, and we affirm the ALJ's determination.

Great Clips next argues the ALJ committed an abuse of discretion in awarding income and medical benefits for the left shoulder injury. On this issue, we affirm.

Abuse of discretion, by definition, "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky National Park Commission, ex rel. Comm., v. Russell, 301 Ky. 187, 191 S.W.2d 214 (1945). Here, since substantial evidence supports the ALJ's award of income and medical benefits for the left shoulder injury, there is no abuse of discretion. In the December 17, 2020, decision and reiterated in the January 11, 2021, Order, the ALJ concluded that, based upon the medical opinions of Dr. Fadel, Johnson suffered from work-related left shoulder cumulative trauma unrelated to a pre-existing active condition. This conclusion is fully supported by Dr. Fadel's opinions set forth in his September 26, 2019, IME report in which he opined, in relevant part, as follows:

> It should be noted that she had not been treated at all for her left shoulder for over one year after being discharged from pain management until this episode. This would explain in my view and classify her with a pre-existing dormant condition, which was subsequently aroused by the increased demand on her left shoulder that she experienced in November of 2018.

Further, the ALJ, *as is her prerogative*, relied upon Dr. Lyon's impairment rating in awarding benefits instead of Dr. Fadel's impairment rating.

When "the physicians in a case genuinely express medically sound, but differing opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Consequently, the ALJ is free to rely upon the opinions of Dr. Fadel regarding causation while simultaneously relying upon Dr. Lyon's impairment rating. In doing so, the ALJ left no room for doubt. She set forth sufficient findings apprising the parties and this Board of her rationale and the substantial evidence supportive of her ultimate conclusions. 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); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). The ALJ held, in pertinent part, as follows:

> The experts utilized essentially similar methods under AMA Guides to assess impairment. Dr. Lyon, however, explained the difference in the assessed impairment by the fact that his examination took place approximately eight months after Dr. Fadel's examination and that Plaintiff appeared to have experienced improved motion and decreased impairment since Dr. Fadel's evaluation.

As substantial evidence supports the determination Johnson sustained a work-related cumulative trauma left shoulder injury and the award of benefits, Great Clips' argument regarding an abuse of discretion fails.

Accordingly, the December 17, 2020, Opinion, Award, and Order and the January 21, 2021, Order are **AFFIRMED**.

ALL CONCUR.

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