Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 28, 2022

CLAIM NO. 202100849

MARQUIS CARTER — PETITIONER/CROSS-RESPONDENT

VS. **APPEAL AND CROSS-APPEAL FROM HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

WEBASTO ROOF SYSTEMS — RESPONDENT/CROSS-PETITIONER
and HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING ON APPEAL,
VACATING IN PART ON CROSS-APPEAL,
AND REMANDING

* * * * * *

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

STIVERS, Member. Marquis Carter ("Carter") appeals and Webasto Roof Systems ("Webasto") cross-appeals from the May 16, 2022, Opinion, Award, and Order and the July 11, 2022, Order of Hon. Thomas G. Polites, Administrative Law Judge ("ALJ"). The ALJ awarded Carter permanent partial disability ("PPD") benefits and

medical benefits for a work-related low back injury resulting from cumulative trauma while in the employ of Webasto.

On appeal, Carter asserts the ALJ erred in calculating PPD benefits based upon Dr. Gregory Snider's 3% impairment rating assessed for the work-related cumulative trauma low back injury. On cross-appeal, Webasto asserts Carter's claim is barred by the statute of limitations.

BACKGROUND

The Form 101, filed on June 8, 2021, alleges Carter sustained a work-related cumulative trauma injury to his "low back area (Inc: lumbar and lumbo-sacral)" on August 20, 2019, in the following manner: "Plaintiff injured back due to cumulative trauma from repetitive heavy lifting, twisting, and pulling." The Form 101 indicates Carter's occupation is "assembly line worker."

On June 29, 2021, Webasto filed a Special Answer raising the defenses of notice as well as the running of the period of repose and statute of limitations.

Carter testified by deposition on September 14, 2021. Carter began working for Webasto around 2013. He testified that prior to working for Webasto, he had not sustained any back injuries. He testified as follows:

> Q: Did you have any problems, minor or otherwise, involving the back?
>
> A: Well, not nothing where I couldn't take some ibuprofen or something like that for it, you know.
>
> Q: Did your back ever bother you prior to going to Webasto?
>
> A: No. No.
>
> Q: So you needed some ibuprofen on occasion?

> A: Well, that had – that was just like regular pain, you having other pains. Like if you have, say, a headache or shoulder pain or something like that, I took ibuprofen. But no back pain.

Carter's first job at Webasto was in the receiving department using a stand-up forklift. When asked if he experienced back problems in this department, he answered "somewhat." After working in the receiving department for approximately one year, Carter moved to the service department where he worked for over two years. He then transferred to the "final assembly" department.

Carter explained when his back problems began:

> A: My – my back problems kind of accumulated over the years of doing the lifting and just, I guess, gradually on a daily basis. I would say really started when I went to a – it was a line they used to have, it was called the D-47 line. And I think that's where it really started really causing me some problems, you know, leading up to there.
>
> Q: When were you on the D-47 line?
>
> A: It was – I'm guessing now it would be – it was in 20 – 2019 – 2019 when I was there.

On the D-47 line, Carter's duties entailed bending down and picking up glass. Carter denied experiencing a specific incident at Webasto which hurt his back.

As to whether a doctor ever informed him his work at Webasto caused his back problems, he testified:

> Q: Now, has any doctor told you that your work caused your back problems?
>
> A: Has any doctor told me that?
>
> Q: Yeah.

A: Said it's possible it could be. But no doctor actually has said that, no.

Carter first informed someone at Webasto he believed his back pain was caused by his work at Webasto in 2019.

Carter also testified at the March 16, 2022, hearing. Carter testified that although he experienced back problems in 2016, they resolved. He explained:

Q: Well, the record indicates that you also had some back problems in 2016, and we filed medical records from that point forward, and it doesn't appear that you complained of any back problems during that time. Did your back problems resolved from 2016?

A: Yes, it did.

Carter later testified as follows:

Q: Okay. Now, I want to go back – you said your condition started – or you – started making it worse back around August 20th, 2019. Was your condition – was you back problem bothering you since 2016?

A: No, not – not after 2- 2016. I'd gotten better after that. I didn't – I wasn't having no more problems with that. Yeah, I got better.

Q: So you had no symptoms in your back from – from 2016 until August of 2019, no symptoms whatsoever?

A: Right. It didn't start up until that – actually, that year of 2019 again.

Carter reiterated his back problems started on August 20, 2019.

Q: Okay. And you had been dealing with these back problems since 2016 and they just got worse in August of 2019?

A: As I said, up to 2016, my back got better, sir; okay? I – I didn't have any pain anymore. But I'd say, I don't know, maybe a few months, I think – or then 2019 I wasn't having really no really major pain. The major

pain actually started again, really had gotten really bad in 2019.

Concerning whether his doctor had advised him concerning the cause of his problems, he testified as follows:

Q: Okay. Now, has any doctor told you that your back problems were caused by your job?

A: Yes. Yes. My doctor told me that – that this came – could come from just continual repetitive working, and over the years sometimes, you know things take wear and tear on you, you know. I went to a – a Dr. Gish, and Dr. Gish had said that. And at the time – and he had gave me shots. I took my shot therapy to him – through him. First it was steroids that he gave me, and then the other one was – I don't know the name of those shots, the – the actual medical term.

…

Q: Yeah. Did Dr. Roberts tell you that your back problems were being caused by your work?

A: Yeah. She – my – Dr. Roberts has told me that, too. She –

Q: Okay.

A: She had said it. That's why Dr. Roberts – that's why Dr. Roberts had put me on a muscle relaxer and she had put me on eight hour restrictions.

Q: Okay. And that was in 2016 when she first told you that; is that correct?

A: 2016? That was – 2016 is when I told her about – when I – when I had some – some back trouble during that time. But that was like maybe before that, maybe even before that. But my back –

Q: Okay. So she told you at least by 2016 –

A: But my back –

> Q: - Dr. Roberts told you at least by 2016 that your back was being caused by your job at Webasto?
>
> A: She said it's probably – it's probably related – it's related to it, because that's actually – she only had to go on what I told her, okay –
>
> Q: All right.
>
> A: - about where my back trouble started at; okay? But after 2016, 2016 my back got better because I was – I was – wasn't doing the same job at the time. I was doing something different, I was in another – I was in a different department.

Webasto introduced Dr. Snider's September 28, 2021, Independent Medical Evaluation ("IME") report. After obtaining a history, carrying out a physical examination, and performing a medical records review, Dr. Snider rendered the following diagnosis:

> Mr. Carter's diagnosis is low back pain radiating to his left thigh. Imaging studies revealed degenerative change. In my opinion, this is likely multifactorial, arising from age, obesity, prior knee injury with altered gait, and potentially a work-related component. It is clear from the medical records that Mr. Carter was at least intolerant to certain activities at Webasto and was aware of a work-related etiology as far back as 2016.

Concerning causation, Dr. Snider opined as follows:

> 2. Mr. Carter has evidence of multilevel degenerative change, somewhat in advance of what one would expect based solely on his age and habitus. These changes were symptomatically aggravated by his work at Webasto, at least according to the medical record.
>
> 3. As above, Mr. Carter's complaints are multifactorial and other contributing causes are age, habitus, altered gait from remote left knee injury, diabetes, and other avocational activities.

Dr. Snider opined Carter reached maximum medical improvement as of January 1, 2021, and provided the following regarding the appropriate impairment rating:

> According to the AMA Guides, 5th Edition, for Mr. Carter's lumbar complaints, estimate 6% WPI. **In my opinion, half of this is apportioned to avocational factors and half to aggravation over the last four or so years of his employment at Webasto.** Total: 3% WPI for assumed cumulative trauma. I do not see a basis for impairment for other body parts, including neck, hand, or knees. (Emphasis added).

Webasto also introduced Dr. Snider's November 22, 2021, supplemental report expressing, in relevant part, the following opinion:

> I received your inquiry regarding Mr. Carter's impairment assessment. As you know, I have seen Mr. Carter on two occasions; once on 01/13/21 for a 'Fit for Duty' evaluation at the request of Webasto and again on 09/28/21 for IME at the request of your firm. I had assessed 6% WPI for Mr. Carter's lumbar complaints, apportioning these '50/50' between presumed 'cumulative trauma' and other avocational factors (including age, habitus, altered gait from a remote left knee injury, and avocational activities).
>
> The inquiry involves when Mr. Carter's vocational impairment was established. As I previously noted, Mr. Carter complained, in 2016, of low back pain that he attributed to his work activities. He saw Sarah Grimm, PA-C, in the office of his PCP. Ms. Grimm issued a letter restricting Mr. Carter's activities. Shortly thereafter, Dr. Shannon Roberts, Mr. Carter's PCP, issued another letter requesting that he refrain from certain parts of his job for six months to allow time for him to heal. Mr. Carter complained to me that Webasto never did abide by these restrictions. He was subsequently seen for complaints of chronic low back pain.
>
> It is difficult to say precisely when these complaints became established as work related, but it is clear that

> Mr. Carter, Ms. Grimm, and Dr. Roberts, all identified work activities as a cause for Mr. Carter's complaints in 2016. Assuming Mr. Carter's symptoms persisted, as he says, then it is true that Mr. Carter's vocational impairment would have been established in 2016.

Carter filed Dr. Gregory Nazar's December 8, 2021, report generated after performing an evaluation on November 23, 2021. Dr. Nazar agreed with Dr. Snider's 6% impairment rating but apportioned 80% of the impairment rating to a pre-existing condition and only 20% to the cumulative trauma work-related injury. Dr. Nazar further opined that he believes the date of Carter's injury is August 20, 2019. He opined as follows: "This is the date at which he became more significantly disabled."

The March 16, 2022, Benefit Review Conference Order and Memorandum lists the following contested issues: "Injury under the Act, Work-relatedness/causation, Statute of limitations, Notice, TTD benefits, KRS 342.730 benefits, Pre-existing disability and/or impairment exclusion, Credit/offset for: [space left blank], and Unpaid or contested medical expenses." Under "other contested issues" is the following: "Failure to file special defense on SOL defense."

The May 16, 2022, Opinion, Award, and Order contains the following findings of fact and conclusions of law which are set forth *verbatim*:

> …
>
> Plaintiff argues that he filed his claim in a timely fashion, provided due and timely notice, did not suffer from a pre-existing active condition as his back problems in 2016 resolved and did not require treatment for over 3 years, and suffered a 6% impairment based upon both Dr. Nazar and Dr. Snider which should be enhanced by the 3x multiplier given his inability to return to his preinjury work. The Defendant argues to the contrary

that Plaintiff's claim is barred by the statute of limitations as he was told that his back condition was work-related in 2016 and his claim was not filed until 2021, Plaintiff is not permanently totally disabled, and at least half of his impairment is due to non-occupational factors.

The primary determination to be made in this matter is whether Plaintiff has suffered a compensable injury. Having reviewed and considered the entirety of the evidence on this matter, it is determined that Plaintiff has met his burden of proof on this issue and he shall be entitled to an award of permanent partial disability benefits based upon a 3% impairment rating assessed by Dr. Snider with enhancement by the 3x multiplier given his lack of physical capacity to return to his preinjury work for the Defendant.

In support of this determination, Dr. Snider assessed a total 6% impairment rating, half of which he attributed to "avocational factors and half to aggravation over the last 4 or so years of his employment at Webasto" and he specifically stated Plaintiff suffered a 3% impairment for cumulative trauma. Given that Dr. Snider evaluated Plaintiff at the request of the Defendant, his report finding a work-related component to Plaintiff's low back condition caused his opinion to be given significant weight. In addition, his opinion was consistent with Plaintiff's expert, Dr. Nazar, who also found that Plaintiff suffered from cumulative trauma although he attributed only 20% of his 6% impairment to Plaintiff's work, with 80% being due to "pre-existing problems" by which he apparently meant non-work-related factors. The fact that both of the medical experts in this matter agreed that Plaintiff suffered a cumulative trauma injury due to his work for the Defendant was compelling evidence on this issue and Dr. Snider's opinion of a 50% contribution due to work activities was found to be more credible as it was more consistent with Plaintiff's 16-year history of work for the Defendant.

Dr. Snider and Dr. Nazar also agreed that Plaintiff did not retain the physical capacity to return to his preinjury work such that enhancement of Plaintiff's PPD benefits by the 3x multiplier contained in KRS 342.730(1)(c)1 is appropriate.

As to the Defendant's argument that Plaintiff suffered a cumulative trauma injury in 2016 and that his filing of his claim in 2021 was violative of the statute of limitations, it was determined that the evidence does not support such a conclusion. Plaintiff's testimony that he recovered from his back problems in 2016 was found to be credible, notwithstanding his equivocal Hearing testimony on this issue, and supported by the medical records of Dr. Roberts which do not reflect any treatment for any type of low back problem from late 2016 until August 23, 2019, following the August 20, 2019 injury, despite the fact that Plaintiff saw Dr. Roberts numerous times during that time period for general medical conditions. The treatment Plaintiff received from Dr. Roberts also included an annual examination performed by Dr. Roberts on July 24, 2019, in which back pain was specifically denied as well as a follow-up visit on August 21, 2019, for hypertension, again with a denial of any back symptoms. Also, Dr. Nazar stated the Plaintiff had a 0% impairment rating prior to August, 2019, which was also found to be credible. While some of Dr. Snider's opinions have been found to be credible in this matter, his opinion expressed in his supplemental report that Plaintiff's vocational impairment would have been established in 2016 was not considered persuasive, partly due to the fact that his opinion in this regard was premised on his statements that "He was subsequently seen for complaints of chronic back pain [after 2016]" and "Assuming Mr. Carter's symptoms persisted [after 2016]", neither of which is supported by the medical records of Dr. Roberts. The above evidence supports a conclusion that Plaintiff did not suffer a permanent cumulative trauma injury in 2016, but did suffer a permanent cumulative trauma injury on August 20, 2019. As such, Plaintiff's claim is not barred by the statute of limitations.

As to Plaintiff's argument that he should be entitled to PPD benefits based upon a full 6% impairment rating, Plaintiff is correct that there is no degree of a pre-existing active impairment rating in this matter. However, this argument ignores the fact that both medical experts apportioned a percentage of their impairment rating to non-work-related factors which precludes an award of the full 6%. Dr. Snider clearly attributed half of his 6% rating to non-work-related

> factors which he described as "age, habitus, altered gait from remote left knee injury, diabetes, and other avocational activities". In addition, Plaintiff's own expert, Dr. Nazar, apportioned 80% of his 6% rating to what he called "pre-existing symptoms" but it is apparent from his conclusions that what he called "pre-existing" actually meant "non-work-related" as he specifically stated that he based his apportionment opinion on the fact that Plaintiff was "62 years of age, likely has genetic predisposition to this [low back problems], and had ongoing degenerative changes in his back with a history of milder lower back pain". Dr. Nazar further specifically stated that only 20% of his 6% rating was due to the "work process and the cumulative work trauma itself." Lastly, he did not state that Plaintiff suffered from a pre-existing, dormant, nondisabling condition that was aroused into disabling reality by the work activities which would have supported Plaintiff's argument in this regard. As such, the evidence in this claim is compelling that only a portion of Plaintiff's impairment is attributable to his work for the Defendant and therefore Plaintiff is not entitled to the full 6% impairment as an apportionment between the work-related and non-work-related causal factors is required based upon the unanimous medical testimony.
>
> As to notice, Plaintiff's testimony that he told Defendant personnel in HR in August 2019 of his back problems which he felt were due to his work was found to be credible and as such, notice is determined to be due and timely in this matter.

Carter filed a Petition for Reconsideration asserting the same argument he now makes on appeal. Webasto did not file a Petition for Reconsideration. In the July 11, 2022, Order, the ALJ set forth the following additional findings which are set forth *verbatim*:

> …
>
> Plaintiff requests reconsideration regarding whether Dr. Nazar provided an opinion that Plaintiff's work activities aroused or accelerated a pre-existing degenerative condition which would support a

conclusion that Plaintiff did not suffer a pre-existing active impairment such that the entirety of Plaintiff's 6% impairment rating should have been awarded. Plaintiff is correct that Dr. Nazar testified to that effect in response to question #3 on page 7 of his November 23, 2021 report and the Opinion and Award is corrected and amended to reflect that testimony. However, notwithstanding this additional testimony, the ALJ remains unconvinced that the entire 6% impairment rating assessed by Dr. Nazar should be found to be compensable. As indicated in the Opinion, Dr. Snider's impairment rating was relied on to support a finding that Plaintiff was entitled to PPD benefits based upon his 6% impairment rating, one half of which Dr. Snider attributed to avocational factors and one half to aggravation over the last 4 or so years of his employment for the Defendant, and he specifically stated Plaintiff suffered a 3% impairment for cumulative trauma. The testimony of Dr. Snider in this regard supports the findings in the Opinion regarding PPD benefits and given the ALJ's reliance on Dr. Snider's testimony which is unchanged by any of the testimony from Dr. Nazar, the Plaintiff's Petition is overruled.

As to the Defendant's argument that all of Plaintiff's impairment rating of 6% should be found to be work-related on the basis of Dr. Nazar's testimony, noted above, that Plaintiff suffered from underlying pre-existing degenerative changes that were aroused by Plaintiff's work for the Defendant, the ALJ was unconvinced by this argument and declines to so find. As such, the award set forth in the Opinion is unchanged despite the inclusion and consideration of Dr. Nazar's opinions noted above. As indicated in the opinion, Dr. Nazar, Plaintiff's own witness, stated that 80% of his 6% rating was described by him as being due to "pre-existing symptoms" but what he described as being "pre-existing" was interpreted by the ALJ as meaning "non-work-related". Further, Dr. Nazar in his December 8, 2021 report, stated that while Dr. Snider apportioned 50% of his impairment rating to pre-existing factors and 50% to cumulative trauma work-related disability, Dr. Nazar's assessment of 80% due to the pre-existing component and thus only 20% or 1.2% due to cumulative trauma was even higher than Dr. Snider's assessment which the ALJ concluded indicated Dr.

> Nazar's agreement that a substantial portion of Plaintiff's impairment was attributable to non-work-related factors. As such, even considering Dr. Nazar's testimony that Plaintiff's work caused an arousal of a pre-existing condition, the evidence on the whole was insufficient to convince the ALJ that the entirety of the 6% impairment rating should be found to be compensable and therefore Plaintiff's Petition is overruled on this issue. (Emphasis not ours).

On appeal, Carter claims the ALJ erroneously failed to base the award of PPD benefits upon the entire 6% impairment rating assessed by Drs. Snider and Nazar, as both doctors "attempted improperly to apportion a percentage of their impairment rating to a pre-existing condition." Carter relies upon Finley v. DMB Technologies, 217 S.W.3d 261 (Ky. App. 2007) asserting that neither doctor rendered opinions consistent with Finley, supra. On this issue, we affirm.

ANALYSIS

We first note that the May 16, 2022, Opinion, Award, and Order and the July 11, 2022, Order reflect the ALJ did not rely upon Dr. Nazar's opinions but relied exclusively upon those proffered by Dr. Snider. As the ALJ stated in the May 16, 2022, Opinion, Award, and Order, "Dr. Snider's opinion of a 50% contribution due to work activities was found to be more credible as it was more consistent with Plaintiff's 16-year history of work for the Defendant." In the July 11, 2022, Order, the ALJ reiterated his conclusion by stating as follows:

> As indicated in the Opinion, Dr. Snider's impairment rating was relied on to support a finding that Plaintiff was entitled to PPD benefits based upon his 6% impairment rating, one half of which Dr. Snider attributed to avocational factors and one half to aggravation over the last 4 or so years of his employment for the Defendant and he specifically stated

> Plaintiff suffered a 3% impairment for cumulative trauma.

When physicians genuinely express differing opinions, the ALJ has the discretion to choose which physician's opinion to believe as long as the opinion is based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). As the ALJ relied exclusively upon Dr. Snider's opinions and impairment rating, Dr. Nazar's impairment rating is of no consequence in the context of Carter's appeal.

Carter's argument Dr. Snider improperly "apportioned" 3% of his 6% impairment rating to a "pre-existing condition" is misplaced, as Dr. Snider did not opine that Carter suffered from a pre-existing condition at any point in either his September 28, 2021, IME report or November 22, 2021, report. Rather, Dr. Snider attributed 50% of the 6% impairment rating to *non-work-related factors* such as "age, habitus, altered gait from remote left knee injury, diabetes, and other avocational activities." Dr. Snider opined in his September 28, 2021, IME report that, "[a]ccording to the AMA Guides, 5th Edition, for Mr. Carter's lumbar complaints, estimate 6% WPI. In my opinion, half of this is apportioned to **avocational factors** and half to the aggravation over the last four or so years of his employment at Webasto." (Emphasis added). Similarly, in the November 22, 2021, report, Dr. Snider reiterated his opinions regarding the appropriate impairment rating as follows: "I had assessed 6% WPI for Mr. Carter's lumbar complaints, apportioning these "50/50" between presumed 'cumulative trauma' and other avocational factors

(including age, habitus, altered gait from a remote left knee injury, and avocational activities)."

Since Dr. Snider did not opine Carter had a pre-existing active condition, he was neither expected nor required to render opinions consistent with the standards articulated in Finley, supra, before his impairment rating could be relied upon by the ALJ. Dr. Snider's opinions relate to causation not apportionment. Consequently, Dr. Snider's opinions and impairment rating constitute substantial evidence upon which the ALJ may rely. "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). Further, as fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). Where the evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ has the discretion and sole authority to reject any testimony and believe or disbelieve parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977); Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence

contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, supra.

Here, the ALJ properly considered the evidence of record and ultimately relied upon Dr. Snider's impairment rating and his opinion concerning causation. Since substantial evidence supports the ALJ's determination and he clearly outlined his reasoning for his findings in the May 16, 2022, Opinion, Award, and Order and the July 11, 2022, Order, we must affirm.

On cross-appeal, Webasto asserts that Carter's claim is barred by the statute of limitations as his work-related cumulative trauma injury claim allegedly manifested on July 11, 2016, but Carter filed it on June 8, 2021. We vacate the ALJ's award of PPD and medical benefits and remand for additional findings.

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 or 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.

As evidenced by the May 16, 2022, Opinion, Award, and Order, the ALJ failed to determine the date of manifestation for Carter's cumulative trauma back injury, a critical determination that must be made before resolving the statute of limitations issue in any cumulative trauma injury claim. In other words, the ALJ should have determined upon what date, if any, a physician diagnosed Carter's low back condition and informed him that it was work-related. However, no such analysis took place.

Carter testified his back condition worsened on August 20, 2019. However, he denied experiencing a specific work-related incident. Dr. Nazar expressed the opinion that August 20, 2019, was "the date he became more

significantly disabled." The ALJ found Carter suffered a permanent cumulative trauma injury on August 20, 2019, but he did not provide the basis for that finding. The statute, as amended in 2018, mandates that in determining whether a claim has been filed within the two-year statute of limitations, an initial finding must be made regarding the date an employee is told by a physician that the cumulative trauma injury is work-related. Thus, any inquiry as to whether a claim is timely filed first requires a determination of when the employee is first told by a physician that he/she sustained a work-related cumulative trauma injury. This analysis was not performed by the ALJ. In order for the decision to comply with the statute, this inquiry must be addressed upon remand.

On remand, the ALJ must make additional findings and determine the date of manifestation pursuant to the correct legal standard set forth in the statute and pertinent cases. It is not the duty of this Board to make these findings of fact. After doing so, the ALJ shall resolve the statute of limitations issue and make a determination as to whether Carter filed his Form 101 within *two years* of the date of manifestation. Should the ALJ determine the claim was not filed within the two-year statute of limitations, he shall enter an amended order dismissing Carter's claim for failure to comply with the statute of limitations, KRS 342.185(3). Should the ALJ determine Carter's claim was filed within the two-year statute of limitations pursuant to KRS 342.185(3), he may reinstate his order and award based upon the impairment rating assessed by Dr. Snider. We point out notice of a cumulative trauma injury claim is satisfied upon timely filing the claim. *See* Anderson v. Mountain Comprehensive Health Corporation, 628 S.W.3d 10 (Ky. 2021).

We are cognizant of the fact that Webasto failed to file a Petition for Reconsideration on this issue. However, the Board bears the responsibility regardless of the arguments made by the parties to ensure all orders comply with the Act. The Supreme Court in Whittaker v. Reeder, 30 S.W.3d 138 (Ky. 2000) observed that whether an award conforms to the Act is a question of law which a court can review without regard to whether it was contested by a party. It noted a reviewing court had a duty to determine whether an award is in conformity with the Act even if the question first arose there. The Board is authorized to determine an award did not conform with Chapter 342 regardless of whether the particular error in applying the law was contested by a party or whether the initial award was appealed on a different ground.

Accordingly, concerning the issue raised by Carter, the May 16, 2022, Opinion, Award, and Order and the July 11, 2022, Order are **AFFIRMED**. On cross-appeal concerning the issue raised by Webasto, the award of PPD and medical benefits is **VACATED** and the claim is **REMANDED** for additional findings consistent with the instructions set forth herein.

ALL CONCUR.

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