Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 18, 2022

CLAIM NO. 201800765

TOYOTA MOTOR MANUFACTURING KENTUCKY, INC. PETITIONER

VS. **APPEAL FROM HON. PETER NAAKE, ADMINISTRATIVE LAW JUDGE**

DAVID FINCH
and HON. PETER NAAKE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. Toyota Motor Manufacturing Kentucky, Inc. ("Toyota") appeals from the January 6, 2020, Interlocutory Opinion, Award and Order and the January 24, 2020, Order on Reconsideration of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ Williams"). It also appeals from the November 9, 2021, Opinion, Award, and Order, and the December 7, 2021, Order on Reconsideration of Hon. Peter Naake, Administrative Law Judge ("ALJ Naake"). In

the November 9, 2021, Opinion, Award, and Order, ALJ Naake awarded David Finch ("Finch") permanent partial disability benefits beginning on November 16, 2017, to be interrupted by periods of temporary total disability ("TTD") benefits already paid, and medical benefits for a work-related left shoulder injury.

On appeal, Toyota asserts there was no medical evidence supporting ALJ Williams' finding of a work-related left shoulder injury due to cumulative trauma at the time she rendered the January 6, 2020, Interlocutory Opinion and Award. Toyota also argues that ALJ Naake improperly reversed the finding of an *acute* left shoulder injury in ALJ Williams' Interlocutory decision in his November 9, 2021, Opinion, Award, and Order. Finally, Toyota asserts the record does not support ALJ Naake's finding of a date of manifestation in 2017.

BACKGROUND

The Form 101, filed May 14, 2018, alleges Finch sustained work-related injuries to his shoulders on May 16, 2016, in the following manner: "Repetitive motion of work performed caused a strain in the left shoulder."

On July 25, 2018, Finch filed a "Motion to Place Claim in Abeyance" seeking to place the claim in abeyance pending Finch achieving maximum medical improvement ("MMI").

On January 2, 2019, Finch filed Dr. Scott Mair's August 16, 2018, medical record which indicates Finch was being seen for left shoulder pain. It notes Finch underwent an MRI prior to the appointment revealing "a probable posterior inferior labral tear." Dr. Mair opined as follows:

> We discussed treatment options. The patient has had symptoms for close to 2 years after an injury at work. He

> had previous superior labral repair in 2005 and had done very well at work at Toyota until his more recent injury. He now has significant pain at work and difficulty continuing with full duty. We'll [sic] long discussion about different options. He is frustrated by his continued symptoms. He's had no real improvement with conservative measures including supervised physical therapy, anti-inflammatory medications, and injections. MRI shows probable posterior labral tear. Given that he has had pain for about 2 years after his work injury, [sic] decision was made to proceed with left shoulder arthroscopy. We will repair or debride his labrum is [sic] indicated. The patient understands the risks and benefits of surgery. The patient understands the risks of continued pain, stiffness, neurovascular injury, infection, possible need for further surgery, anesthesia and medical complications and wishes to proceed.

On January 23, 2019, Finch filed a "Motion to Remove Claim from Abeyance and Bifurcate Claim" requesting ALJ Williams remove the claim from abeyance and bifurcate the claim on the issue of compensability of the proposed surgery by Dr. Mair. In the February 11, 2019, Order, ALJ Williams removed the claim from abeyance and bifurcated the claim on the issue of compensability of the surgery.

On April 30, 2019, Finch filed a "Motion to Amend 101" in order to change the injury date to November 16, 2017.

On June 18, 2018, Finch filed the November 28, 2017, First Report of Injury. The report indicates a date of injury of May 16, 2016, and Toyota was notified of the injury on November 16, 2017.

During the July 2, 2018, deposition of Finch, the following testimony regarding the date of injury, relevant to this appeal, transpired:

Q: You listed an injury date of May the 6th, 2016. Excuse me. May 16th, I believe, of '16. What's the significance of that date? What happened?

A: I'm not – I'm not sure on the dates, but it's for my shoulder injury. I don't know exactly how you want me to answer that.

Q: Okay. Well, you listed that you had a repetitive injury that –

A: Yes.

Q: - occurred May 16, 2016.

A: Uh-huh (affirmative). I think the injury may have occurred before that. That's maybe when – I'm not sure how they do – actually, it was before that.

…

Q: Okay. So did anything in particular happen to you on that date that you can recall?

A: I'm not sure how to answer that. It was two years ago. I mean, I'm assuming the date is for my – my report of injury to IHS for my shoulder.

Q: All right. Let me ask it to you a different way. When did you first start having problems with – are we talking about your left shoulder?

A: Yes.

Q: When did you start having problems with that?

A: At some time before that. If I'm not mistaken, before this, I did an ESI, an Early Symptom Investigation, and then I did therapy. When the therapy wasn't working is when they referred me to go to a specialist. I'm guessing that's what that date is for is when I went to IHS to refer me to my specialist.

Q: Okay.

Finch testified he filed an "Early Symptom Investigation" in November or December of 2015. He explained:

> Q: So, in December of '15, you're telling them that you hurt your shoulder at work?
>
> A: Yes, that's exactly what I did.

A June 11, 2019, Benefit Review Conference Order and Memorandum ("BRC") Order lists the following contested issues: unpaid or contested medical expenses and TTD. Under "Other Matters" is the following: "Hearing on bifurcated issues of compensability of proposed surgery Left Shoulder."

The October 7, 2019, Telephonic Status Conference Order and Memorandum lists the following contested issues [handwritten: "Amended"]: work-relatedness/causation, unpaid or contested medical expenses [handwritten: "compensability of surgery"], injury as defined by the ACT, TTD, and date of injury.

In a November 15, 2019, Order entered following a Telephonic Status Conference held on the same date, ALJ Williams once again ordered the claim "bifurcated on the issue of compensability of left shoulder surgery as recommended."

In the January 6, 2020, Interlocutory Opinion, Award and Order, within the "Introduction" section, ALJ Williams stated as follows: "The claim has been bifurcated for a determination on the issue of compensability of a surgery. This is the sole issue before the ALJ at this time." ALJ Williams then set forth the following findings of fact and conclusions of law:

> Pursuant to KRS 342.0011, an injury must be work-related and be the "proximate cause" producing a harmful change in the human organism in order to be compensable. (Emphasis ours). The Courts have held that in order for an injury to be work related, it must

> arise out of and in the course of employment. *Armco Steel Corp. v. Lyons*, 561 S.W.2d 676 (Ky. App., 1978). Furthermore, the burden is on the claimant to establish that the injury is work connected. Hudson v. Owens, 439 S.W.2d 565 (Ky., 1969). The Courts have long held that when the cause of a condition is not readily apparent to a lay person, medical testimony regarding causation is required. *Mengle v. Hawaiian-Tropic Northwest & Central Distributions, Inc.*, 618 S.W.2d 184 (Ky. App., 1966). The mere possibility of work-related causation is insufficient. *Pierce v. Kentucky Galvanizing Co., Inc.*, 606 S.W.2d 165 (Ky. App., 1980). Additionally, if an injury only represents a temporary exacerbation, it does not constitute a new permanent injury. See *Calloway Co. Fiscal Court v. Winchester*, 557 S.W.2d 216 (Ky. App., 1977). It should be noted that the law does not allow for recovery for feeling the effects of a non-work related condition while at work. *American Bakeries Co. v. Hatzell*, 771 S.W.2d 333 (Ky., 1989); *Sowders v. Mason and Dixon Lines*, 579 S.W.2d 380 (Ky. App., 1979).
>
> Because of Plaintiff's prior treatment including left shoulder surgery in 2005 and intervening 2017 cycling accident, Defendant argues the need for left shoulder surgery is not related to his work at Toyota. While this argument is certainly possible, the facts are that following the 2005 surgery, Plaintiff returned to full duty at Toyota until November of 2017 when he felt the pop while working. His symptoms of left shoulder pain have not stopped at any point. Although Finch did experience the cycling accident and had abrasions on his left shoulder, the main injury was a rib fracture rather than a shoulder injury. Dr. Mair, Plaintiff's treating physician, has stated his opinion that the left shoulder injury is related to his work and that surgery is recommended. Dr. Kakel's opinion has been considered but it is the opinion of Plaintiff's treating physician that is relied upon herein.

Toyota filed a Petition for Reconsideration requesting additional findings concerning the date of injury and the reasonableness and necessity of surgery.

In the January 24, 2020, Order, ALJ Williams provided the following additional findings which are set forth *verbatim*:

> Defendant's first issue is with the injury date being determined to be November, 2017, rather than May, 2016. In *Randall v. Pendland*, Ky. App., 770 S.W.2d 687, 688 (1988), the Court of Appeals held the date for giving notice and the date upon which the statute of limitations begins to run is when the disabling reality of the injury becomes manifest. A gradual injury becomes "manifest" and thus triggers notice and statute of limitations requirements when the injured worker becomes aware of the harmful change and the fact that it is work-related. *Special Fund v. Clark*, Ky., 998 S.W.2d 487, 490 (1999); *Alcan Foil v. Huff*, Ky., 2 S.W.3d 96 (1999).
>
> Manifestation date was addressed more recently by the Court in *Consol of Kentucky, Inc., v. Goodgame. Jr.*, 479 S.W.3d 78 (Ky. 2015), where the Court held that KRS 342.185(1) acts as both a statute of limitations and statue of repose with both periods beginning to run as of the date the employee is advised he has incurred a cumulative trauma injury.
>
> In this instance. Finch became aware he had incurred a cumulative trauma injury to his left shoulder and advised Toyota in November of 2017, as evidenced by the First Report of Injury.
>
> Relative to Defendant's second contention, the opinion specifically states Dr. Mair recommends surgery and relates same to the work injury. Implicit in the recommendation for surgery is that the surgeon believes the surgery is reasonable and necessary. It was clear in Dr. Mair's notes that he believes surgery is the next step to improve Plaintiff's condition.

Toyota filed Dr. Mair's answer to the following question on February 11, 2021, which reads, in relevant part, as follows:

> Thank you for your care of David Finch regarding his left shoulder arthroscopy with you on 08/14/20. Mr. Finch returned to work at TMMK on 02/01/21. We

> would appreciate your response to the following few questions:
>
> Has MMI been reached for the injury of 11/16/17? [Answer: No.]
>
> If not, when will MMI be reached? [Answer: He just cleared to resume full duty work. Anticipated when he returns to clinic in about 2 months.]

Finch introduced Dr. Anthony McEldowney's March 23, 2021, report. After performing a physical examination and a medical records review, Dr. McEldowney diagnosed a "left shoulder posterior labral tear." Dr. McEldowney opined that the work event caused the injury, Finch achieved MMI on March 1, 2021, and he assessed a 2% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. McEldowney opined Finch did not have any active impairment prior to the work injury and has the physical capacity to return to the type of work he was performing at the time of the injury.

The September 15, 2021, BRC Order lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, notice, average weekly wage, injury as defined by the Act, credit for TTD overpayment, exclusion for pre-existing disability/impairment, TTD as to rate. Under "Other" is the following: "Date of Injury is disputed, notice of injury, claim barred by the statute of limitations depending on date of injury found."

ALJ Naake's November 9, 2021, decision lists the following issues preserved for resolution:

> 1. Income benefits pursuant to KRS 342.730;
> 2. Work-relatedness/causation;

3. Date of injury: May 16, 2016 or November 16, 2017;
4. Notice;
5. Average weekly wage for date of injury;
6. Injury as defined by the Act;
7. TTD as to rate;
8. Credit for potential TTD overpayment;
9. Exclusion for pre-existing disability or impairment; and
10. Statute of limitations.

ALJ Naake set forth the following findings of fact and conclusions of law which are set forth *verbatim*:

> The parties have previously argued the issue of whether an injury occurred within the meaning of the KRS 342.0011(1) definition of that term, and whether a shoulder surgery was a reasonable and necessary treatment for that injury. The previously assigned Administrative Law Judge, Hon. Jane Rice-Williams, rendered an Opinion on these issues, finding that:
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> 1. The injury which was responsible for a need for surgery is November 16, 2017, when he felt a pop in his left shoulder while working;
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> 2. Previous left shoulder injuries were not symptomatic at the time of the Plaintiff's injury at work; and
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> 3. The left shoulder surgery as recommended by Dr. Mair was reasonable and necessary for the cure and relief of the effects of the 2017 injury.
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> The Administrative Law Judge is bound by that decision absent evidence which undermines those findings.
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> > "Legal consequences streaming from an ALJ's factual determination must not be left to ebb and flow according to the changing current of the ALJ's mere whim as factfinder. Thus, absent newly discovered evidence, fraud, or mistake, parties have a reasonable expectation that they may rely on factual findings that have been fully and fairly adjudicated by an ALJ, even when rendered in an interlocutory decision." *Bowerman v. Black*

Equipment Company, 297 S.W.3d 860 (Ky. App. 2009).

The Plaintiff has filed the report of Dr. McEldowney, who stated that a gradual injury occurred on May 1, 2016 as a result of a repetitive process of moving carpets into automobiles, resulting in the surgery performed by Dr. Mair. Dr. McEldowney assessed a 2% impairment to the body as a whole under the A.M.A. Guides to the Evaluation of Permanent Impairment, 5th Ed. for this injury. This is new evidence which may overcome the previous decision of Judge Williams.

The Administrative Law Judge finds that Dr. McEldowney's opinion more closely conforms to the evidence concerning an injury in this case. There is no evidence in the record of an event which occurred on November 16, 2017. Instead, on that date Finch reported a history of left shoulder pain which had been ongoing for a year or more. That report, filled out by Finch and not supported by any medical documentation, stated that the problem was old, from 2016, and Finch began seeing a specialist at the beginning of the year. Dr. Kakel's report and Dr. McEldowney's report describe a gradual repetitive motion injury in May, 2016 from repetitively carrying carpet overhead into automobiles. Based on Dr. McEldowney's report, and finding that the injury occurred as a result of this repetitive process, the Administrative Law Judge finds that Finch suffered a cumulative trauma injury arising out of and in the course of his employment at Toyota.

The Defendant argues that no injury has been proven to have occurred at work, and that a pre-existing mountain-bike accident is responsible for the Plaintiff's symptoms.

Regarding proof of an injury, Dr. McEldowney's report is substantial and probative evidence. The fact-finder may, in piecing together the entirety of the testimony, conclude that causation has been established by viewing the totality of the circumstances, including the history related by the injured worker. *Union Underwear v. Scearce*, Ky., 896 S.W.2d 7 (1995). In this case Finch's injury was caused by working in a repetitive job over a period of time. He continued working for over a year before he

concluded that the injury would not improve and he reported it as a work related injury. Dr. McEldowney's opinion corresponds with this history.

Dr. Kakels' countervailing opinion found that the injury Finch sustained while riding a mountain bike was the cause of his shoulder pain and rotator cuff tear. However, this opinion is contradicted by the records of Dr. Wilson, who treated Finch for a rib fracture as a result of that accident, and did not treat a left shoulder injury.

Where, as here, the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ. *Pruitt v. Bugg Brothers*, Ky., 547 S.W.2d 123 (1977). The Administrative Law Judge is persuaded by the report of Dr. McEldowney that Finch suffered an injury arising out of his work at Toyota as a result of cumulative trauma.

DATE OF INJURY

The Defendant argues that the date of injury controls whether a claim is barred by the statute of limitations. However, that is not true under current law for gradual or cumulative trauma claims. In the context of a cumulative trauma injury, the term "date of injury" may have different meanings in different contexts.

In *American Printing House for the Blind v. Brown*, 142 S.W.3d 145 (Ky. 2004) the Kentucky Supreme Court held that the date that an employee gives notice of a cumulative trauma injury is the date that fixes the liability of the employer. However, the date that an employee is informed by a physician that his/her condition is work-related begins the running of the statute of limitations and triggers the obligation to give notice of the injury to the employer. The holding of *American Printing House* which governs the statute of limitations was later codified in KRS 342.185(3). Under that statute, the date that an employee is informed by a physician that a cumulative trauma injury is caused by his work is the date which triggers the statute of limitations and the obligation to give notice of the injury. The date that an employee believes, without a physician's opinion, that his injury is work-related may not be the same as the date which triggers the running of

> the statute of limitations and obligation to provide notice to the employer. *Ford Motor Company v. Duckworth*, 615 S.W.3d 26, 32 (Ky. 2021).
>
> In *Anderson v. Mountain Comprehensive Health Corporation*, 628 S.W.3d 10 (Ky. 2021), the Kentucky Supreme Court held that KRS 342.185(3) applies to cumulative trauma injuries, even if the application of the statute is retroactive. Therefore the date for determining whether notice was timely given and whether the claim was filed within the statute of limitations is the date on which Finch was first informed by a physician that his left shoulder injury was caused by his work. The first indication which is in the record of this claim that a physician attributed the Plaintiff's left shoulder cumulative trauma problems to his work was the medical note of Dr. Mair dated August 16, 2018. The date of filing of this claim is May 14, 2018. Therefore this claim is not barred by the statute of limitations, and notice is timely.
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> In *American Printing House*, the Court held that the date the claimant suffered an injury as defined by the Act was the date she became symptomatic and reported her injury. Once an employer is informed that a work-related injury is alleged, it has certain obligations under KRS 342.038 and KRS 342.040, and therefore certain aspects of its liability may be determined. The date which fixes the liability of the employer in this case is the date of the Plaintiff's report of injury, which was November 17, 2017. At that time, Finch had experienced symptoms for over a year and finally reported the injury. Because that date provided the first report of injury, the Plaintiff's average weekly wage will be calculated as of that date.
>
> The findings of ALJ Williams also calculated the applicable average weekly wage as of November 16, 2017, but for different reasons. Therefore, the rate at which TTD was paid was correct and there is no overpayment.

Relying upon Dr. McEldowney's impairment rating, ALJ Naake found the injury generated a 2% impairment rating. The impairment rating when multiplied

by the statutory .65 factor resulted in a permanent disability rating of 1.3%. ALJ Naake determined Finch is not entitled to enhanced PPD benefits.

In its November 23, 2021, Petition for Reconsideration, Toyota argued Finch first informed Toyota of his injury in December 2015 and not in 2017. It requested additional findings regarding the issue of when Finch gave Toyota notice and "the late filing of the 101."

The December 7, 2021, Order overruling Toyota's Petition for Reconsideration furnished the following additional findings:

> In reconsidering the Defendant's argument that the claim is barred by the statute of limitations, the ALJ must apply KRS 342.185(3) as it is currently written. In *Anderson v. Mountain Comprehensive Health Corporation*, 628 S.W.3d 10 (Ky. 2021), the Kentucky Supreme Court held that KRS 342.185(3) applies to cumulative trauma injuries, even if the application of the statute is retroactive. Therefore, whether the claim was filed within the statute of limitations must be determined by measuring two (2) years from the date Finch was first informed by a physician that his left shoulder injury was caused by his work. That date was determined to be August 16, 2018 based on Dr. Mair's note, and the Form 101 was filed within that time. The statute of limitations is not triggered by notice of a cumulative trauma injury to the employer. The Defendant's request to reconsider the statute of limitations argument is overruled, because it is not affected by the date Finch believed, without a supporting physician's opinion, that his injury was due to work-related cumulative trauma.
>
> The Defendant requests further findings of fact concerning the date that Toyota was first informed of a cumulative trauma injury. The Defendant argues that because Finch himself testified that he informed the employer that his shoulder pain was caused by his work in 2015, that testimony must be accepted as fact. However, Finch also testified he filed an ESI (Early Symptom Investigation) reporting the injury to Toyota at that time. The Defendant did not file a copy of that

> document. Had that document been a report of injury, it would have been in Toyota's possession under KRS 342.038(1), which requires an employer to keep a record of each report of injury by its employees. The Administrative Law Judge did not believe that the Plaintiff was accurate when he described the date of that event in his deposition. A different date of the first report of injury was proven by evidence that a First Report of Injury was filed reporting an injury that had been ongoing since May 16, 2016. That document was filed with Toyota as a report of injury on November 28, 2018 and the employer stated in that form that it had been notified on November 16, 2017. The Administrative Law Judge chose to rely on the documentary evidence of the First Report of Injury instead of Finch's testimony in his deposition.
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> The Petition presented by the Defendant asks the ALJ to re-weigh the evidence relied upon in the Opinion and Award and change the findings of fact made therein. The scope of review on a petition for reconsideration is to examine the opinion or order for patent errors and the ALJ may not reweigh the evidence on a factual issue decided in the initial opinion. *Wells v. Ford*, 714 S.W.2d 481 (Ky. 1986). The ALJ does not have the authority to reconsider the merits of the claim and change the findings of facts on Petition for Reconsideration. *Garrett Mining Co. v. Nye*, 122 S.W.3d 513, 520 (Ky. 2003). Therefore, the Defendant's Petition for Reconsideration is overruled.

ANALYSIS

Toyota first argues medical evidence does not support ALJ Williams' determination in the January 6, 2020, Interlocutory Opinion, Award and Order and affirmed by the January 24, 2020, Order, that Finch sustained a work-related left shoulder cumulative trauma injury. As argued by Toyota, "[a]lthough she noted that this acute traumatic event happened in 2016, she nevertheless found a repetitive injury with a 2017 injury date. There was no medical testimony in the record supporting this finding."

We note Toyota does not challenge any aspect of ALJ Naake's November 9, 2021, Opinion, Award, and Order and December 7, 2021, Order. Further, Toyota is not challenging ALJ Williams' determination regarding the compensability of the proposed left shoulder arthroscopy performed by Dr. Mair. Instead, Toyota is challenging only whether substantial evidence supports ALJ Williams' determination of a work-related injury.

As the claimant in a workers' compensation proceeding, Finch had the burden of proving each of the essential elements of his cause of action, including whether he sustained a work-related injury to his left shoulder. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Finch was successful in that burden, the question on appeal is whether substantial evidence of record supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "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).

ALJ Williams relied upon Dr. Mair's opinion in concluding Finch sustained a work-related left shoulder injury due to cumulative trauma he experienced at work. A close review of Dr. Mair's August 16, 2018, medical record reveals the following language:

> - "The patient has had symptoms for close to 2 years **after an injury at work**." (emphasis added).
>
> - "He had previous superior labral repair in 2005 and had done very well at work at Toyota **until his more recent injury.**" (emphasis added).

- "**Given that he has had pain for about 2 years after his work injury**, decision was made to proceed with left shoulder arthroscopy." (emphasis added).

While these are not definitive statements regarding causation, ALJ Williams could reasonably infer causation from Dr. Mair's statements. In rendering a decision, KRS 342.285 grants an ALJ, as fact-finder, the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Dr. Mair's findings and statements constitute substantial evidence supporting ALJ Williams' determination Finch sustained a work-related left shoulder injury arising out of cumulative trauma. Therefore, we affirm on this issue.

Toyota next claims ALJ Williams, in the January 6, 2020, Interlocutory Opinion, Award and Order, found "an acute trauma cause for the injury in question," and ALJ Naake, in relying upon Dr. McEldowney, "improperly reversed" this finding and concluded Finch sustained a left shoulder cumulative trauma injury. Further, it argues Dr. McEldowney's opinions cannot constitute substantial evidence supporting a finding of a left shoulder cumulative trauma injury because he opined the injury was due to an acute trauma injury.

We first note inconsistencies within Toyota's appeal brief that directly refute Toyota's second argument on appeal. On page 5 of its appeal brief, Toyota makes the following assertion regarding ALJ Williams' interlocutory findings pertaining to the type of injury Finch sustained (i.e. cumulative trauma vs. acute trauma): "Although she noted that this acute traumatic event happened in 2016, **she**

nevertheless found a repetitive injury with a 2017 injury date." (emphasis added). However, Toyota's second argument on appeal relies solidly on the premise that ALJ Williams did not find Finch sustained a left shoulder cumulative trauma injury. Nonetheless, we will address this argument.

While it is admittedly unclear in the January 6, 2020, Interlocutory Opinion, Award and Order as to whether ALJ Williams believes Finch sustained an acute trauma injury or a cumulative trauma injury, she provided clarification in the January 24, 2020, Order on Reconsideration with the following language:

> - "A gradual injury becomes 'manifest' and thus triggers notice and statute of limitations requirements when the injured worker becomes aware of the harmful change and the fact that it is work-related. [citations omitted]"
>
> - "Manifestation date was addressed more recently by the Court in *Consol of Kentucky, Inc. v. Goodgame, Jr.*, 479 S.W.3d 78 (Ky. 2015), where the Court held that KRS 342.185 (1) acts as both a statute of limitations and statue [sic] of repose with both periods beginning to run as of the date the employee is advised he has incurred a cumulative trauma injury."
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> - "In this instance, Finch became **aware he had incurred a cumulative trauma injury to his left shoulder** and advised Toyota in November of 2017, as evidenced by the First Report of Injury." (emphasis added).

The above language in the January 24, 2020, Order unequivocally clarifies that ALJ Williams concluded Finch sustained a work-related left shoulder *cumulative trauma injury* manifesting in November 2017 when Finch, as ALJ Williams stated in the January 6, 2020, Interlocutory Opinion, Award and Order, "felt the pop [in his shoulder] while working." Consequently, Toyota's argument

ALJ Naake "improperly reversed" ALJ Williams' findings of an acute trauma injury to his left shoulder is without merit.

That said, we acknowledge the language in ALJ Naake's November 9, 2021, Opinion, Award, and Order referencing the March 23, 2021, report of Dr. McEldowney as constituting "new evidence" that "may overcome the previous decision of Judge Williams." However, in light of the language in ALJ Williams' January 24, 2020, Order indicating she believes Finch sustained a work-related left shoulder cumulative trauma injury, ALJ Naake did not "overcome the previous decision of Judge Williams," as this language constitutes harmless error. In the November 9, 2021, Opinion, Award, and Order, ALJ Naake firmly delineated his reliance upon Dr. McEldowney's opinions. However, Dr. McEldowney's report, despite ALJ Naake's language regarding overcoming the "previous decision of Judge Williams," actually *supports* ALJ Williams' determination Finch sustained a work-related left shoulder cumulative trauma. On this argument, we affirm.

Toyota also argues Dr. McEldowney's March 23, 2021, report, evinces an opinion Finch sustained an acute trauma injury and not a cumulative trauma injury. Consequently, Dr. McEldowney's report cannot constitute substantial evidence supporting a finding of a left shoulder cumulative trauma injury.

In the November 9, 2021, Opinion, Award, and Order, ALJ Naake concluded as follows: "The Plaintiff has filed the report of Dr. McEldowney, who stated that a gradual injury occurred on May 1, 2016 as a result of a repetitive process of moving carpets into automobiles, resulting in the surgery performed by

Dr. Mair." A review of Dr. McEldowney's March 23, 2021, report reveals the following language:

> Pleasant 44-year-old male who states, and of which medical records confirm, work-related injury nondominant left shoulder per medical records May 1, 2016 and patient confirms approximately 2016. Patient describes previous work process which required him to lift and carry piece of carpeting through rear door every 4 to 5 minutes holding the carpet at above shoulder level with new onset pain nondominant left shoulder.

Dr. McEldowney diagnosed a left shoulder posterior labral tear and opined that *the work event as described to him* is the cause of Finch's impairment.

Even though Dr. McEldowney did not provide a specific statement that Finch sustained a work-related left shoulder injury due to cumulative trauma, the ALJ, as fact-finder, was free to infer from the above-cited language, Dr. McEldowney was of the opinion Finch sustained a work-related left shoulder injury due to cumulative trauma.

As held by the Kentucky Supreme Court in Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615, 621 (Ky. 2004), "[i]t is the quality and substance of a physician's testimony, not the use of particular "magic words," that determines whether it rises to the level of reasonable medical probability, i.e., to the level necessary to prove a particular medical fact. *Turner v. Commonwealth, 5 S.W.3d 119, 122-23 (Ky. 1999).*" As previously stated herein, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, supra. This means that an ALJ may draw all reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence. Jackson v. General Refractories Co., 581

S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). 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 of the evidence or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). The sole 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).

ALJ Naake's interpretation of Dr. McEldowney's report as support for a finding of a work-related cumulative trauma left shoulder injury is certainly reasonable. Therefore, we affirm.

Finally, Toyota asserts the evidence does not support a manifestation date in 2017. It observes Finch testified at his deposition that he first reported his injury in December of 2015. While this portion of Toyota's brief is somewhat unclear, we assume Toyota is reiterating the argument made in its November 23, 2021, Petition for Reconsideration taking issue with ALJ Naake's determination that Finch sustained a work-related left shoulder cumulative trauma injury on November 16, 2017. Notably, Toyota does not take issue with ALJ Naake's August 16, 2018, *date of manifestation*, a term of art which refers to the date that triggers a claimant's obligation to give notice and the clocking of the statute of limitations in cumulative trauma injury claims. Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999). Rather,

Toyota only takes issue with the ALJ Naake's factual finding November 16, 2017, represents Finch's date of injury. On this issue, we affirm.

As correctly stated by ALJ Naake in his November 9, 2021, Opinion, Award, and Order and affirmed in the December 7, 2021, Order on Reconsideration and, in American Printing House for the Blind vs. Brown, 142 S.W. 3d 145 (Ky. 2004), "the Court held that the date the claimant suffered an injury as defined by the Act was the date she became symptomatic and reported her injury. Once an employer is informed that a work-related injury is alleged, it has certain obligations under KRS 342.038 and KRS 342.040, and therefore certain aspects of its liability may be determined."

ALJ Naake determined the date of Finch's work-related left shoulder cumulative trauma injury is November 16, 2017, the date Finch's First Report of Injury indicates Toyota was notified by Finch of the injury. We acknowledge Finch's deposition testimony indicates he informed Toyota he was having problems with his left shoulder in December 2015. However, ALJ Naake, in the December 7, 2021, Order on Reconsideration, explained why he rejected this testimony:

> The Administrative Law Judge did not believe that the Plaintiff was accurate when he described the date of that event in his deposition. A different date of the first report of injury was proven by evidence that a First Report of Injury was filed with Toyota as a report of injury on November 28, 2018 and the employer stated in that form that it had been notified on November 16, 2017. The Administrative Law Judge chose to rely on the documentary evidence of the First Report of Injury instead of Finch's testimony in his deposition.

This finding is harmonious with Finch's May 1, 2019, Motion to Amend seeking to amend his injury date to November 16, 2017.

There is inconsistency between Finch's deposition testimony and his Motion to Amend and the First Report of Injury. However, as we have held in innumerable decisions, the ALJ, as fact-finder, may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence *regardless of whether it comes from the same witness or the same party's total proof*. Jackson v. General Refractories Co., supra; Caudill v. Maloney's Discount Stores, supra. Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The ALJ's finding Finch's cumulative trauma injury arose on November 16, 2017, is fully supported by substantial evidence in the form of the First Report of Injury, and the ALJ has the discretion to rely upon this date instead of Finch's deposition testimony.

Accordingly, on all issues raised on appeal, the November 9, 2021, Opinion, Award, and Order, and the December 7, 2021, Order on Reconsideration of ALJ Naake and the January 6, 2020, Interlocutory Opinion, Award and Order and the January 24, 2020, Order on Reconsideration of ALJ Williams, made final in ALJ Naake's November 9, 2021, Opinion, Award, and Order, are **AFFIRMED**.

ALL CONCUR.

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