Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 22, 2019

CLAIM NO. 201800201 & 201800200

TRANS ASH INC. PETITIONER

VS. **APPEAL FROM HON. CHRISTINA D HAJJAR, ADMINISTRATIVE LAW JUDGE**

CRAIG PAPINEAU
and HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. Trans Ash Inc. ("Trans Ash") seeks review of the October 4, 2018, Opinion, Order, and Award of Hon. Christina D. Hajjar, Administrative Law Judge ("ALJ"), finding Craig Papineau ("Papineau") sustained cumulative trauma injuries to his shoulders and lower back manifesting on November 1, 2016, while in the employ of Trans Ash. The ALJ awarded permanent partial disability ("PPD") benefits enhanced by the three multiplier contained in KRS 342.730(1)(c)1 and

medical benefits. The ALJ also found Papineau sustained work-related hearing loss but only awarded medical benefits. Trans Ash also appeals from the November 2, 2018, Order overruling its petition for reconsideration.

On appeal, Trans Ash asserts three arguments. First, it argues the ALJ erred in finding Trans Ash's failure to timely file a Form 111 equated to admitting November 1, 2016, as the date of injury, and "Papineau's medical issues to his shoulders, hips, arms, back, feet, and knees were caused, either wholly or in part, by his job activities, and that continuation of the job duties would have adverse health consequences."[1] Trans Ash asserts it did not receive the notification letter and, therefore, was not issued notice of the claim until February 21, 2018. Thus, it timely filed a Form 111 on April 6, 2018, forty-four days after it was issued notice. Alternatively, Trans Ash asserts if the Form 111 is deemed to be tardy, 803 KAR 25:010 does not require all allegations made in Papineau's Form 101 be admitted. Rather, the ALJ may allow an untimely filed Form 111 where there is good cause shown. Trans Ash argues the ALJ's determination there was not good cause shown for the delay in filing its Form 111 is an abuse of discretion. Trans Ash maintains its tardiness was caused by a reasonable misinterpretation of the deadline, and the untimely filing did not impact the claim.

Trans Ash also argues Papineau did not raise the timeliness issue prior to the August 21, 2018, hearing. It also notes the July 17, 2018, Benefit Review Conference ("BRC") Memorandum and Order reflects the parties stipulated the

[1] We note the ALJ concluded nothing in Dr. James Rushing's report attached to the Form 101 establishes Papineau required medical treatment or that his work activities caused permanent impairment. Further, the ALJ concluded the hearing loss evaluation attached to the Form 103 did not establish causation of his injuries and hearing loss.

contested issues were work-related injury, date of injury, physical capacity to return to the type of work performed at the time of injury, and permanent income benefits per KRS 342.730 including multipliers. Trans Ash asserts Papineau did not request, pursuant to 803 KAR 25:010 Section 16 (2), to be relieved of the stipulation by filing a motion ten days prior to the hearing or as soon as practicable after establishing the stipulation was erroneous.

Next, Trans Ash argues the ALJ erred in determining Papineau satisfied his burden of proving a work-related cumulative trauma while working for Trans Ash. Citing to Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), Trans Ash argues Papineau concealed critical information regarding his medical and work history. According to Trans Ash, the record reveals Dr. Stephen Autry's opinion is based upon substantial inaccuracies regarding Papineau's work history and medical history. Because Dr. Autry's report is based upon erroneous information, it argues his opinion cannot serve as substantial evidence. Specifically, Trans Ash charges Dr. Autry had an incorrect understanding of the amount of time Papineau spent working for Trans Ash, his medical history, and his job duties at Trans Ash. Thus, in Trans Ash's view, the ALJ erred in finding Papineau satisfied his burden of proof concerning causation since the reports of Dr. Autry and Dr. James Rushing did not take into account information concealed by Papineau.[2]

Finally, Trans Ash argues the ALJ erred in finding Papineau is entitled to PPD benefits enhanced by the three multiplier contained in KRS 342.730(1)(c)1. It argues that, because of Dr. Autry's mistaken understanding of Papineau's job duties

[2] Because the ALJ did not rely upon Dr. Rushing's medical records, we will not address this issue.

at Trans Ash, he was "unable to give an opinion as to an impairment rating." Trans Ash notes Dr. Autry's description of Papineau's job duties at Trans Ash "in no way comports with his actual duties," as he incorrectly stated the job required "prolonged standing, walking, climbing, lifting, reaching, pushing, pulling, bending, stooping, crouching, and overhead lifting." Trans Ash notes Papineau's testimony reveals his job did not involve heavy lifting or much bending and stooping. It also contends Dr. Autry's restrictions do not translate into an inability to return to the same type of work he performed.

Trans Ash also argues Papineau's testimony that he does not believe he could return to his prior work is not consistent with his testimony his injuries have not caused any restriction in his daily life and "there is nothing he used to be able to do that he is no longer able to do." Therefore, neither Dr. Autry's opinions nor Papineau's testimony constitute substantial evidence supporting enhancement by the three multiplier.

BACKGROUND

On February 3, 2018, Papineau filed a Form 101 alleging cumulative trauma injuries to multiple body parts manifesting on November 1, 2016. In the description of how the injured occurred, Papineau listed "cumulative trauma to his lower back, bilateral shoulders, bilateral knees, and bilateral ankles." Papineau attached a medical questionnaire completed by Dr. Rushing, a chiropractor, and his August 2, 2017, office records. On that same date, Papineau also filed a Form 103 hearing loss claim alleging repetitive exposure to loud noise in the workplace which

resulted in occupational hearing loss arising out of and in the course of his employment with Trans Ash. An audiological evaluation was attached.

In separate letters dated February 5, 2018, Hon. Robert L. Swisher, Commissioner ("Commissioner") of the Department of Workers' Claims ("DWC"), advised Trans Ash and Zurich American, its insurance carrier, that Papineau had filed a hearing loss claim and an application alleging an injury on or about November 1, 2016. Trans Ash was advised to forward all correspondence to its insurance carrier at the time of the alleged injury and to comply with this request at once, as there were specific time requirements for defensive responses. Insurance carriers, self-insured employers, and uninsured employers were directed to contact their counsel of choice and give written notice to the DWC concerning the name and address of counsel. On that same date, the Commissioner sent another letter stating the DWC found no matching first report of injury.

On February 14, 2018, Papineau filed a motion to join his claim for coal workers' pneumoconiosis ("CWP") filed against Trans Ash and to consolidate and bifurcate the injury and hearing loss claims, as they were ripe for adjudication.

On February 15, 2018, the Commissioner sent two letters stating the injury and hearing loss claims had been assigned to the ALJ for a BRC to be held on June 12, 2018. Notably, both letters contained the following: "Within **forty-five (45) days** of this notice, Defendants **SHALL** file a Notice of Claim Denial or Acceptance (Form 111). If no Form 111 is filed; all allegations of the application **shall be deemed admitted**." (emphasis in original).

On February 27, 2018, Papineau was notified of his appointment with the University Evaluator in relation to his hearing loss claim. That appointment was subsequently canceled.

On March 15, 2018, the ALJ entered an order setting a BRC for June 12, 2018.

On March 19, 2018, Papineau was advised that he had an appointment at the University of Kentucky regarding his hearing loss claim.

On March 19, 2018, Papineau filed a Notice of Disclosure.

On March 27, 2018, Papineau filed the Form 107 completed by Dr. Autry on March 8, 2018.

On March 28, 2018, Papineau filed a Motion to Amend his Form 101 to include cumulative trauma injury to his left foot based on the report of Dr. Autry.

On April 4, 2018, counsel for Trans Ash filed a Notice of Representation in both claims.

On April 6, 2018, Trans Ash filed a Form 111 in each claim denying the claim and stating there was a dispute concerning the amount of compensation owed, Papineau was not employed by Trans Ash on the date of the injury, the alleged injury did not arise out of and in the course of employment, and Papineau did not give due and timely notice of the injury. It noted there were other reasons for the denial. Under the Special Answer section, Trans Ash asserted the statute of limitations or of repose barred Papineau's recovery in each claim. On that same date, Trans Ash filed a Notice of Disclosure in each claim.

By order dated November 9, 2018, the ALJ consolidated the hearing loss and injury claims. The ALJ also ordered that Papineau's CWP claim would remain separate due to different proof schedules and procedural issues. A BRC was scheduled for June 15, 2018.

On March 28, 2018, a letter was issued by the DWC rescheduling Papineau's medical evaluation with the University of Kentucky. This appointment was subsequently canceled and rescheduled by letter dated April 16, 2018.

On May 11, 2018, Trans Ash filed a Motion for Extension of Proof Taking noting Papineau's medical evaluation had been rescheduled, and pursuant to the original schedule, Papineau would undergo a medical evaluation two full months prior to the close of its proof taking period. It requested an extension until July 6, 2018, in order to allow it obtain the results of the medical evaluation and take proof. Trans Ash also requested the BRC be rescheduled. By order dated May 25, 2018, the ALJ granted Trans Ash's motion and allowed it to take proof through July 6, 2018, with Papineau having fifteen days thereafter for rebuttal. The BRC was rescheduled for July 17, 2018.

On May 29, 2018, the Form 107 of Dr. Raleigh Jones and Angela Mikel, M.S., along with accompanying documents was filed in the record.

On July 13, 2018, Papineau was deposed. He testified he has a GED and began working for Trans Ash in 2016. Before working for Trans Ash, he worked for Kiewit for less than a year as a heavy equipment operator performing "grade work and dirt work." Papineau provided his job description while working for Kiewit. Before working for Kiewit, he worked for Patriot Coal from 2014 to 2015 as a heavy

equipment operator. He was also responsible for maintaining a nine-mile beltline. Prior to working for Patriot Coal, he worked for GMS from 2013 to 2014 as a heavy equipment operator. Between 1998 and 2013, he was a self-employed contractor operating heavy equipment and providing demolition and reclaiming work. He also tore down houses and buildings and removed the remnants from the property. While working as a contractor, he primarily worked inside vehicles. When he worked outside, Papineau performed very little heavy lifting. While self-employed his work was sporadic and sometimes he did not work all winter. From 1995 to 1998, he worked for Black Diamond Coal as a drag-line operator. This job entailed "pulling a lot of levers, and pushing pedals." From 1981 to 1995, he worked for Smith Coal. He denied experiencing any work injuries during any of this time.

Papineau was hired to work at Trans Ash through a local union and worked two different periods for Trans Ash. While working for Trans Ash he operated excavators and bulldozers. Papineau testified that, in order to operate the excavator which was approximately six to seven feet high, he climbed steps and ladders to get into the cab. He explained operating the excavator was similar to driving a car, as he was enclosed in a cab with glass windows and a door. He denied experiencing a specific back injury. Rather, he experienced "wear through the years of lifting and pulling levers and stuff like that." He denied having any discussions with doctors regarding his back condition being age-related. While working for Trans Ash, he sat in a vehicle most of the day and got out of the vehicle three of four times a day. He performed no maintenance of the equipment. Papineau acknowledged the job description introduced as Exhibit 1 to his deposition is accurate. He also

acknowledged that, on his daily time sheets, he never reported being injured or telling a supervisor he had been hurt. Papineau retired after leaving Trans Ash. He denied sustaining an injury after he quit; however, performing chores around his home aggravates his existing pain. Regarding his cumulative trauma injuries, Papineau testified:

> Q: So was there any specific incident that made you decide to go to the doctor or to finally apply for disability?
>
> A: No.
>
> Q: Had you noticed any increased pain throughout time?
>
> A: Yes.
>
> Q: Where were you experiencing increased pain?
>
> A: My lower back, my shoulder some.
>
> Q: So, in your Workers' Comp claim for a cumulative injury, what are all – where are all the places on your body that you feel have been injured due to your work at Trans Ash?
>
> A: Well, my lower back and shoulders would be the most things I think that aggravated, maybe from climbing in and out of machines.
>
> Q: Sir, what was that?
>
> A: I said my lower back and shoulders.

Papineau believed his first discussion with a doctor about his back and shoulders occurred approximately five or six years ago and maybe even ten years ago. He did not remember the doctor's name. Papineau again denied experiencing a specific injury, explaining as follows:

> Q: Okay. Do you recall when you first noticed that --- if that's when you told your doctor? The question I have is: When did you first notice that these parts of your body

> were injured? Was there a time period where you felt like you were injured but you put off going to the doctor?
>
> A: No. That's just a gradual something there. I don't – I don't really remember.

Papineau underwent therapy for his lower back and shoulders when he worked for Patriot Coal. He testified his injuries have not caused restrictions in his daily life nor affected his ability to engage in hobbies. However, he has not fished in a couple of years.

On June 27, 2018, Papineau filed a discovery request requesting that Trans Ash supply any documents, videos, audio recordings, or other recorded transmissions which would be relied upon to deny his claim.

The July 17, 2018, a BRC Order notes Trans Ash disputed a work injury occurred on November 1, 2016. The stipulated contested issues are: work-related injury, date of injury, physical capacity to return to the type of work performed at time of injury, and permanent income benefits per KRS 342.730 including multipliers. Under the heading "Other matters," is the following: "Defendant shall have through August 10, 2018 to file proof, and Plaintiff has time to submit rebuttal through August 21, 2018. Plaintiff's Motion to Amend the Form 101 Application for benefits due to cumulative trauma injuries to his lower back, bilateral ankles, bilateral knees, and bilateral shoulders is sustained."

On September 5, 2018, a formal hearing was held at which only Papineau testified. Significantly, the ALJ asked the parties if they had reviewed the July 17, 2018, BRC Order, and if there are any issues to be discussed, and both parties indicated there were none. Papineau believes his job with Trans Ash injured his lower

back and shoulders. Because of the condition of his back and shoulders, Papineau does not believe he is physically capable of returning to his position at Trans Ash. Papineau testified he first worked for Trans Ash from October 26, 2015, through November 20, 2015. He returned to work on February 15, 2016, and worked through November 1, 2016.[3] He had no other duties other than operating heavy equipment while seated in a cab. He engaged in no heavy lifting and did not spend a lot of time bending and stooping. He described the physical strain associated with his job:

> Q: So throughout the day, you would be seated in this cab operating the vehicle?
>
> A: With the exceptions of getting out once in a while.
>
> Q: Okay. But that wouldn't happen often during the day; correct?
>
> A: Two or three times maybe.
>
> Q: So the job itself did not have a large physical demand. You'd say it had a light demand; correct?
>
> A: I don't know about that. It would sometimes get pretty – pretty intense on slopes and things.
>
> Q: And by pretty intense on slopes, can you just describe that?
>
> A: Well, if I was working a slope with – a slope with, say, three to one elevation, you know, you'd be leaning over in the seat pretty bad one way or the other.

During the hearing, Papineau withdrew his claim for cumulative trauma injuries to his knees, ankles, and feet. Therefore, his claim was limited to cumulative trauma injuries to his low back and shoulders. Papineau testified he had previously complained to his doctors about problems with his low back and shoulders:

[3] Papineau's Form 104 reflects he last worked for Trans Ash on November 1, 2016.

Q: And you had already received treatment for your back and for your shoulders; correct?

A: Therapy.

Q: And again, this was years before you had gone to work at Trans Ash?

A: I wouldn't say years. It may be two or something. It wasn't a long period.

Q: Can you recall precisely how long it was before you began to work for Trans Ash?

A: No, I can't. I don't remember when exactly. It was a cumulative. You know, my shoulder started hurting when I couldn't – I don't remember when.

Q: But you would agree that they started hurting prior to your work at Trans Ash?

A: Yes, to some degree.

Q: And you had received treatment?

A: Therapy.

Papineau experienced some degree of pain prior to working for Trans Ash. He believed the pain in his back and shoulders developed over time:

Q: Okay. And you had complained to your doctor about your shoulders and your back?

A: I had, yes.

Q: When you received this therapy, was this physical therapy?

A: Yes.

Q: During this physical therapy, would you talk about sort of the causes of your injuries, why your back and why your shoulders were hurting?

A: No.

> Q: Did you ever discuss how your job might be contributing to the injuries and why your shoulders were hurting and why your back was hurting?
>
> A: No one asked them questions that I remember.
>
> Q: Did – do you recall why your shoulders and back started hurting? Do you recall sort of what – what spurred that?
>
> A: It was just over time. I don't remember [sic] exact day or anything like that.
>
> Q: And you don't recall ever discussing with a doctor how your – your job at the time could have been –
>
> A: No.

Papineau believed he is incapable of returning to his previous employment. He testified some daily activities aggravate his pain. He provided the following explanation as to the activities at Trans Ash which he believed caused his work injuries:

> Q: Mr. Papineau, what do you think about your job with Trans Ash injured your low back?
>
> A: Vibration. You know when you're driving along in a car and you hit a pothole? Same thing on a heavy piece of equipment, like a bulldozer or a bobcat. You're going along there and the terrain changes or you run over something there's a jar, or maybe back into something, there's a jar. You know, that's what I'm saying.
>
> Q: And you said it was kind of like driving a car. Would you say it's just on a larger scale as far as the vibrations and the jarring?
>
> A: Yes. I think that probably would be a pretty good description.
>
> Q: What do you think about your work with Trans Ash injured your shoulders?
>
> A: Climbing from the ground up on the machine and you get up there and you twist around on a track and open a

door and maybe go around, tie the door open. And you do that three or four times a day. It contributed to it.

Q: And earlier in the hearing you were asked about this job description. It's tab B. It was also attached as Exhibit B to your deposition. At the top it says, "Physical Demand Level: Light."

Would you describe your work with Trans Ash as light?

A: Physically light? You mean like lifting, stuff like that?

Q: How would you describe it?

A: Running a piece of machinery?

Q: Yeah.

A: It would be moderately – you get – you get jarred and bounced around, but you know, I'm still here.

At the end of the hearing, Papineau moved for summary judgment:

MR. SMITH: I don't have anything further.

JUDGE HAJJAR: Do you have anything else?

MR. ROBINSON: No. I'm good.

JUDGE HAJJAR: Thank you.

MR. SMITH: Your Honor, at this time, I believe the proof is completed. I'm going to go ahead and move for Summary Judgment on the record and outline my position.

On February the 3rd, 2018, Mr. Papineau filed a claim for cumulative trauma, a Form 101, with the Department of Workers' Claims. He alleged injury to multiple body parts. We've now limited those to his lower back and his bilateral shoulders.

Included with that filing was the opinion of Dr. James Rushing that his work with Trans Ash had caused injury to his ow back and bilateral shoulders.

> On February the 15th, 2018, Department of Workers' Claims sent out a Notice of Filing assigning this claim to an ALJ and setting a BRC. Per KRS 342.270, a response, a Form 111, was due to be filed within 45 days. Per 803 KAR 25:010, if the Form 111 is not filed within 45 days or – April the 2nd, 2018, is what 45 days would have been after February the 15th, 2018 - - all allegations made within the Form 111 (sic) are deemed admitted.
>
> The case Gray versus Trimmaster [sic] 173 S.W.3d 236, [sic] that's a Kentucky Supreme Court case from 2005, reaffirms that and states that at that time all the allegations in the Form 101 are deemed admitted. All the defense potentially can argue is extent and duration.

Papineau also sought summary judgment because the opinions of Drs. Autry and Rushing were unrebutted. Trans Ash responded as follows:

> MR. ROBINSON: Yes, Judge. I guess in response to the, I guess, the claim that our response was not submitted in time within the 45 days, I'll note that it's the 45 days from receipt of the letter. So if a letter is dated on the 15th, we did not receive it until – I'll be honest, I can't remember at this time if it was the 20th or the 22nd, but then we did file it within the 45-day period.

Counsel provided a response to Papineau's motion for summary judgment based on the unrebutted medical evidence. At the end of the discussion, the ALJ directed the parties to submit briefs on all issues and "all the issues admitted in the case." The ALJ indicated she would not issue a decision on the motion until she read the briefs. Her decision would be included within her opinion deciding Papineau's claim.

On October 4, 2018, the ALJ rendered an Opinion, Order, and Award finding Papineau sustained work-related hearing loss and cumulative trauma to his lower back and shoulders and entitled to PPD benefits based on Dr. Autry's 23% impairment rating enhanced by a 3.6 multiplier due to his inability to return to the

work he was performing at the time of the injury. Concerning the issue of the late filing of the Form 111 raised by Papineau at the hearing, the ALJ entered the following findings of fact and conclusions of law:

> In ***Gray v. Trimmaster***, 173 S.W.3d 236 (Ky. 2005), the Court noted the provisions set forth in KRS 342.270 (2) and 803 KAR 25:010, section 5 (2) (a) (now Section 7 (2) (a)) are mandatory and that if a Form 111 is not timely filed the allegations of the application for benefits are deemed admitted. The Court noted the purpose is to facilitate the prompt and orderly resolution of workers' compensation claims. In that case, the Court noted that the medical opinion attached to the application for benefits was not sufficient by itself to support an award of income or medical benefits as the medical report did not indicate the condition caused a permanent impairment, required medical treatment, or caused any particular symptoms.
>
> This ALJ does not agree with Defendant that the regulations allow for the filing of the Form 111 within 45 days of *receipt* of the scheduling order. KRS 342.270(2) states, in pertinent part: "Within forty-five (45) days of the date of issuance of the notice required by this section, the employer shall file notice of claim denial or acceptance…." 803 KAR 25:010, Section 7, (2)(b) states, in part, that if a notice of claim denial is not filed within forty-five (45) days of the date of the Notice of Filing of Application, "all allegations of the application shall be deemed admitted." This ALJ finds that the statute and regulations are clear, and the Form 111 was not filed within 45 days of *issuance* or the *date of the notice* of the filing of application.
>
> Defendant argues that because defense counsel had a good faith belief that the Form 111 was due on April 6, rather than April 2, 2018, that he had good cause for the untimely filing. Defendant further argues that the form was filed just four days later, and it did not cause the delay in the prompt and orderly resolution of this claim. However, in ***American Woodmark Corp. v. Mullins***, 484 S.W.3d 307 (Ky. App. 2016), the Court of Appeals cited to the unpublished decision in ***Neace v. Asplundh Tree Expert Company, Inc.***, 2007 –SC – 000268 –WC (Ky.

April 24, 2008) for the proposition that whether good cause for delay exists is a factual determination to be made within the ALJ's discretion. The Court also cited to ***Clark Regional Medical Center v. Lovings***, 2006 –SC – 0027 –WC (Ky. October 19, 2006), for the proposition that mere inattention on the part of the defendant or the defendant's attorney does not constitute good cause for setting aside a default judgment. Although defense counsel may have had a good faith belief that the Form 111 was timely filed, this ALJ finds that Defendant has not shown good cause for the delay in the filing of the Form 111. The Court of Appeals further rejected the argument that Plaintiff's failure to file for default judgment or motion to strike the Form 111 waived the issue of the timeliness of the Form 111, stating that the timely filing of the Form 111 is mandatory.

However, in ***American Woodmark Corp.***, the Court of Appeals noted the failure to timely file a Form 111 does not, by itself, entitle the claimant to benefits. The court cited to *Gray* for the proposition that the burden remained on the claimant to prove the extent of the employer's liability. It noted the failure to file the Form 111 was analogous to a default judgment in a civil action which determines liability, with damages being awarded only after a hearing, findings of fact and conclusions of law.

In this case, only Dr. Rushing's report was attached to the Form 101. Dr. Autry's report was not submitted until March 27, 2018. Thus, even though this ALJ finds that the Form 111 was untimely filed, Defendant only admitted to the date of injury, as November 1, 2016 (as alleged in the application), and that Papineau's medical issues to his shoulders, hips, arms, back, feet, and knees were caused, either wholly or in part, by his job activities, and that continuation of the job duties would have adverse health consequences. Nothing in Dr. Rushing's report establishes that he required medical treatment or that his work activities caused a permanent impairment. Further, the hearing loss evaluation attached to the Form 103 also did not establish causation of his hearing loss.

In determining Papineau sustained work-related cumulative trauma injuries to his shoulders and low back, the ALJ provided the following findings of fact and conclusions of law:

CAUSATION

> As set forth herein, this ALJ finds that even if the Form 111 was filed timely, Papineau has met his burden to prove that he sustained work-related cumulative trauma while working for Trans Ash. It has long been held in Kentucky courts that a worker is entitled to be compensated for all the harmful changes that flow from a work-related injury that are not attributable to an independent, intervening cause. ***Elizabeth Sportswear v. Stice***, 720 S.W. 2d (Ky. App. 1986). KRS 342.0011(1) defines an injury as being a work-related traumatic event or series of traumatic events, including cumulative trauma, that causes a harmful change in the human organism, as evidenced by objective medical findings. The Court first recognized the compensability of injuries that resulted from cumulative trauma or gradual wear and tear in 1976. **Haycraft v. Corhart Refractories Co.**, 544 S.W.2d 222 (Ky. 1976). Where an individual continues to perform the same repetitive activity after a gradual injury becomes manifest, additional incidents of workplace trauma may well cause additional harmful changes. In other words, the individual may well sustain subsequent gradual injuries. **Special Fund v. Clark**, 998 S.W.2d 487 (Ky. 1999). The Kentucky Supreme Court recently addressed which employer bears the responsibility of compensating an injured worker for an alleged cumulative trauma injury:
>
> > In hearing loss and occupational disease claims — which are quite similar in nature to cumulative trauma because they occur gradually over time—the employer at the time of the last injurious or hazardous exposure is liable. The employee is entitled to the same amount of compensation whether he worked for one employer or many. An employee who sustains a harmful change in his human organism due to cumulative trauma over many years

> working for the same employer is entitled to compensation to the full extent of his resultant disability.

Hale v. CDR Operations, Inc., 474 S.W. 3d 129 (Ky. 2015).

Defendant argues that Dr. Autry's report is insufficient to support a claim for cumulative trauma, in part, because Dr. Autry was mistaken concerning the amount of time he worked at Trans Ash, and when his employment ended. Defendant argues that such mistake is critical given that he never provided a manifestation date for the injury. However, this ALJ finds whether he worked at Trans Ash for 9 months or three years is irrelevant, because Dr. Autry opined that Papineau's employment at Trans Ash as an equipment operator caused cumulative trauma, and Trans Ash was Papineau's last employer. Defendant failed to file any medical evidence disputing Dr. Autry's report. Further, it has been definitively established by Papineau's testimony that he last worked for Defendant in November 2016, and that Trans Ash was his last employer. Although Defendant had symptoms in his low back and shoulders, and even underwent some treatment before working for Trans Ash, there is no evidence that his injury manifested prior to his employment with Trans Ash, or that his conditions were active when he started working for Trans Ash. Papineau worked at Trans Ash with no restrictions and continued to do so until he retired in November 2016.

A cumulative trauma injury must be distinguished from an acute trauma injury where a single traumatic event causes the injury. In ***Randall Co./Randall Div. of Textron, Inc. v. Pendland***, 770 S.W.2d 687, 688 (Ky. App. 1989), the Kentucky Court of Appeals adopted a rule of discovery with regard to cumulative trauma injury holding the date of injury is "when the disabling reality of the injuries becomes manifest." (emphasis added). In **Special Fund v. Clark**, 998 S.W.2d 487, 490 (Ky. 1999), the Supreme Court of Kentucky defined "manifestation" in a cumulative trauma injury claim as follows:

> In view of the foregoing, we construed the meaning of the term manifestation of disability,' as it was used in ***Randall Co. v. Pendland***, as referring to physically and/or occupationally disabling symptoms which

> lead the worker to discover that a work-related injury has been sustained.

In other words, a cumulative trauma injury manifests when "a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." ***Alcan Foil Products v. Huff***, 2 S.W.3d 96, 101 (Ky. 1999). 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 the condition and its work-relatedness. Although Defendant asserts that Papineau had complaints of pain and sought treatment before his work at Trans Ash, Defendant has pointed to no evidence indicating that any doctor ever related his complaints to cumulative trauma until he was examined by Dr. Rushing on August 2, 2017. This ALJ also finds that the timesheets Papineau submitted indicating that he had no injuries each day he worked for Trans Ash is not determinative as to whether he had a cumulative trauma injury, as he is not required to self-diagnose his injuries. Since Dr. Autry related the cumulative trauma to his last employment with Trans Ash, and Plaintiff's last date of employment was November 1, 2016, this ALJ finds that the injury date is November 1, 2016.

Permanent Partial Disability

In order to qualify for permanent partial disability under KRS 342.730, the claimant is required to prove not only the existence of a harmful change as a result of the work-related traumatic event, but also required to prove that the harmful change resulted in a permanent disability as measured by an AMA impairment. This ALJ finds that Defendant has produced no medical evidence to dispute Dr. Autry's report, who found that Papineau has a 23% impairment due to work-related cumulative trauma. This ALJ is also unconvinced by Defendant's arguments that Papineau has failed to meet his burden of proving a work injury and resulting impairment by filing Dr. Autry's report. Thus, pursuant to the unrebutted report of Dr. Autry, Plaintiff has a 23% impairment rating.

Further, this ALJ finds Papineau's testimony convincing that due to his shoulder pain and low back pain, he would not be able to return to the work he was

performing at the time of the injury, and he is entitled to the 3.6 multiplier (the .6 due to his age at the time of the injury). This ALJ acknowledges that Papineau testified that his injuries do not affect his daily activities, or his ability to do his hobbies. However, he did explain that his hobby was fishing. Although he can perform his daily activities and fish, this does not equate to a finding that he could return to the work he was performing as an equipment operator. He stated that he did have some pain while trying to mow the grass, and he stated unequivocally that he did not believe he could return to his prior work. Further, Dr. Autry recommended restrictions and specifically opined that he could not perform his work activities as an equipment operator. There is no medical evidence disputing Dr. Autry's report.

Although Defendant argues that Dr. Autry had an incorrect description of his job duties, and points to fact that he described working as a drag line operator, this ALJ finds that Dr. Autry was describing all of Papineau's prior jobs in the past that would have contributed to his cumulative trauma. Further, Dr. Autry stated that Papineau's job required significant operation of heavy equipment with impact loading, climbing, operating and working in difficult positions, creating significant stress loads on both shoulders and the lower back. This ALJ finds that Dr. Autry's opinion is consistent with Papineau's testimony. Papineau stated that he felt the vibration of the heavy equipment caused his low back injuries. He testified that climbing from the ground up on the machine and twisting to open/close the cab door three to four times per day caused his shoulder injury. Papineau denied that he considered operating heavy machinery as light duty. Further, Papineau explained that it would moderate in his opinion, because of the jarring and bouncing, due to the terrain. Defendant argues that Papineau admitted that operating heavy equipment was like driving a car. However, he admitted only that it was similar in the sense that the controls were where he could reach them from a sitting position. This was not an admission that his job was as easy as driving a car on a paved road. Thus, this ALJ finds that Dr. Autry did have an adequate understanding of Papineau's job, and therefore, his opinion concerning causation and whether Papineau can return to work is credible.

The ALJ accepted the opinions of Dr. Jones, the University Evaluator, in finding Papineau had a 0% impairment rating. However, because Dr. Jones found the hearing loss was mild and recommended hearing protection, the ALJ awarded future medical expenses for work-related hearing loss.

Trans Ash filed a petition for reconsideration making the same argument he now makes on appeal. Significantly, Trans Ash did not request additional findings regarding any issue raised in the petition for reconsideration. Concluding Trans Ash's petition for reconsideration was an impermissible re-argument of the merits, the ALJ overruled the petition for reconsideration.

ANALYSIS

Addressing Trans Ash's first argument on appeal, KRS 342.270(2) reads, in relevant part, as follows:

> Within forty-five (45) days of the date of issuance of the notice required by this section, the employer or carrier shall file notice of claim denial or acceptance, setting forth specifically those material matters which are admitted, those which are denied, and the basis of any denial of the claim.

In response to KRS 342.270(2), the Legislature promulgated 803 KAR 25:010 Section 7 (2)(a) and (b) which reads as follows:

> (2)(a) Following the filing of an application for resolution of claim, or the sustaining of a motion to reopen, the commissioner shall issue a Notice of Filing of Application. Within forty-five (45) days of the date of the Notice of Filing of Application, each defendant shall file a notice of claim denial or acceptance. A notice of claim denial shall not be required to be filed by any party in a claim reopened pursuant to KRS 342.125.
>
> (b) If a notice of claim denial is not filed, all allegations of the application shall be deemed admitted.

Gray v. Trimmaster, 173 S.W.3d 236 (Ky. 2005), cited by the ALJ, is the seminal case addressing the effect of the employer's failure to timely file a Form 111. The employer had failed to timely file a Form 111, introduce any proof, or appear at the BRC. Thereafter, counsel for Trimmaster's insurer filed a notice of representation and a Form 111. The Kentucky Supreme Court interpreted the regulation to be mandatory and held the failure to timely file a Form 111 resulted in the admission of the allegations in the Form 101:

> KRS 342.270(2) provides that within 45 days of the issuance of the notice of the filing of a claim, the employer or carrier "shall" file a notice of denial or acceptance. 803 KAR 25:010, § 5(2)(a) requires a Form 111 to be filed within 45 days after notice of the scheduling order.[4] Subsection (b) provides that if a Form 111 is not filed, all allegations of the application shall be deemed admitted. These provisions are mandatory. Their purpose is to facilitate the prompt and orderly resolution of workers' compensation claims. As interpreted by the ALJ, an employer's failure to file a timely Form 111 results in an admission of "all allegations of the application." The employer does not assert that this interpretation is erroneous.
>
> Among other things, KRS 342.275(1) requires the Department to schedule a pre-hearing BRC, the purpose of which is to define and narrow issues, to discuss settlement, and to consider other relevant matters that may aid in the disposition of the case. Consistent with KRS 342.275(1), 803 KAR 25:010, § 13 states that the purpose of the BRC is to "expedite the processing of the claim and to avoid if possible the need for a hearing." Thus, it requires the parties or their representatives to be present and be authorized to settle the claim. The regulation also provides for a memorandum of stipulated and contested issues and limits further proceedings to those issues listed on the memorandum as being contested. It is apparent that enforcing the BRC memorandum and penalizing employers who fail to file a

[4] What was 803 KAR 25:010 §5(2)(a) and (b) is now 803 KAR 25:010 § 7(2)(a) and (b).

> timely Form 111 or to appear at the BRC effectuates the purpose of the provisions by encouraging employers to comply with them.

Id. at 240.

Thus, the late filing of a Form 111 resulted in an admission Gray sustained a work-related injury:

> When concluding that the claimant failed to prove a compensable injury, the ALJ erred by failing to consider the effect of the employer's failure to file a timely Form 111. Although Dr. Owen's testimony did not establish that the claimant sustained a compensable injury, the employer's failure to file a timely Form 111 resulted in an admission that she sustained a work-related inflammatory process.

Id. at 243.

The ALJ also relied upon the holding in American Woodmark Corp. v. Mullins, 484 S.W.3d 307 (Ky. App. 2016). There, the employer filed a late Form 111 unaccompanied by a motion to file an untimely Form 111. The Court of Appeals noted the BRC identified the timeliness of the Form 111 as a contested issue. In affirming this Board, the Court of Appeals held the failure to timely file a Form 111 did not entitle the claimant to benefits but was analogous to a default judgment resulting in the employer admitting the claimant sustained a work-related injury. The Court of Appeals explained:

> The failure to timely file a Form 111 does not, by itself, entitle the claimant to benefits. In *Gray,* the Court stressed that while the employer was deemed to have admitted that the claimant sustained an injury within the scope of employment, the burden remained on the claimant to prove the extent of the employer's liability. *Id.* at 241. The result is analogous to a default judgment in a civil action which determines liability but damages may be awarded only after a hearing and findings of fact and conclusions

> of law. *Deskins v. Estep,* 314 S.W.3d 300, 304 (Ky. App. 2010).

Id. at 314.

Thus, an untimely filed Form 111 resulted in American Woodmark's admission of a work-related injury.

> To the contrary, the filing of a Form 111 is mandatory and, in the absence of a showing of good cause by the employer, the consequence for its untimely filing is provided. As observed the Board, American Woodmark could have "brought this matter to the forefront by filing a motion to permit the later filing of its Form 111[.]"
>
> …
>
> This argument ignores the mandatory language of KRS 342.270 and 803 KAR 25:010, § 5(2). Mullins's Form 101 alleged all his conditions were work-related. Because the Form 111 was determined to be untimely filed without good cause, the conditions are deemed work-related. *Gray,* 173 S.W.3d at 241.

Id. at 315.

In Stilwell v. Kentucky State University, 2016-CA-001528-WC, rendered November 22, 2017, Designated Not To Be Published, the Court of Appeals adhered to the previous decisions of the Supreme Court and Court of Appeals holding as follows:

> Like the majority of the Board, we find it instructive that 803 KAR 25:010, Section 5 requires only a medical report describing the injury or injuries at issue and their casual connection to the claimant's work to be included with the Form 101. [footnote omitted] Neither the statutes nor the regulations require an impairment rating to be submitted as part of the Form 101. Likewise, in *Mullins*, our Court held "that the burden remained on the claimant to prove the extent of the employer's liability" notwithstanding a late Form 111. *Mullins*, 484 S.W.3d at 314. Thus, we hold that an untimely filed Form 111, by the employer, shall result in the admittance that the employee sustained a

> work-related injury if such is alleged as part of the application. However, impairment ratings and other opinions attached to the Form 101 that are not required by the statutes or regulations to be included as part of a completed application are not deemed conclusive by the filing of a late Form 111. The employee still bears the burden of proving the extent of his injuries before the ALJ.
>
> The ALJ properly deemed admitted the allegation of an alleged work-injury contained in Stilwell's Form 101 based on KSU's untimely Form 111 and the mandatory language of 803 KAR 25:010, Section 5(2)(b).

Slip Op. at 8.

In Sunz Insurance Company v. Decker, 2017-SC-000257-WC, rendered April 26, 2018, Designated Not To Be Published, the Supreme Court reiterated an untimely filed Form 111 constituted an admission of a work-related injury:

> In *Gray,* we held that by failing to timely file Form 111, the employer was deemed to have admitted that the claimant sustained an injury within the scope of employment. *Id.* This result is analogous to a default judgment in a civil action which determines liability, with damages awarded after a hearing and findings of fact and conclusions of law. *Deskins v. Estep,* 314 S.W.3d 300, 304 (Ky. App. 2010). Thus, the effect of Sunz's failure to timely file Form 111 was to admit that injury occurred within the course and scope of employment.

Slip Op. at 6.

In the case *sub judice*, the ALJ correctly concluded Trans Ash did not timely file a Form 111. The record reveals on February 15, 2018, the Commissioner sent a letter directing the employer must file a Form 111 within 45 days of February 15, 2018. Trans Ash did not file a Form 111 until April 6, 2018. Consequently, Trans Ash's Form 111 was not timely as it was filed 50 days after the Commissioner's February 15, 2018, letter. Further, the ALJ correctly concluded good cause for the

delay in filing the Form 111 did not exist, as the case law is clear that counsel's inattention or good faith belief the Form 111 was timely does not constitute good cause for the delay in filing the Form 111.

That said, the ALJ erred in finding Trans Ash's late filing of the Form 111 resulted in Trans Ash admitting the date of injury "and that Papineau's medical issues to his shoulders, hips, arms, back, feet, and knees were caused, either wholly or in part, by his job activities, and that continuation of the job duties would have adverse health consequences."

In the above-cited cases, the failure to timely file a Form 111 was raised either before the BRC, at the BRC, or shortly after the BRC.[5] Here, Papineau did not raise the failure to timely file a Form 111 until after the hearing and all proof had been submitted. In fact, at the hearing, Papineau represented to the ALJ there were no issues to be discussed on the record. More importantly, the July 17, 2018, BRC reflects the contested issues were work-related injury, date of injury, physical capacity to return to the type of work performed at time of injury, and permanent income benefits per KRS 342.730 including multipliers. The BRC Order also noted the ALJ sustained Papineau's motion to amend the Form 101 "for benefits due to cumulative trauma injuries to his lower back, bilateral ankles, bilateral knees, and bilateral shoulders." Thus, as of July 17, 2018, the parties had stipulated the contested issues and Papineau had been permitted to amend his claim. Papineau cannot be permitted to identify the

[5] Although the Supreme Court's opinion in Sunz Insurance Company v. Decker, supra, was unclear whether the issue of an untimely Form 111 was raised as a contested issue during the proceedings, our review of that file reveals the issue was raised during the proceedings thereby providing all the parties an opportunity to address the issue.

contested issues and wait until the end of the hearing after all proof is concluded to raise the issue of the employer's failure to timely file a Form 111 for the first time.

The controlling factor here is Papineau's stipulation of the contested issues, one of which was whether he had sustained a work-related injury.

803 KAR 25:010 Section 13(11)(12) and (13) read as follows:

> (11) If at the conclusion of the BRC the parties have not reached agreement on all the issues, the administrative law judge shall:
>
> (a) Prepare a final BRC memorandum and order including stipulations and identification of all issues, which shall be signed by all parties or if represented, their counsel, and the administrative law judge; and
>
> (b) Schedule a final hearing.
>
> (12) Only contested issues shall be the subject of further proceedings.
>
> (13) Upon motion with good cause shown, the administrative law judge may order that additional discovery or proof be taken between the BRC and the date of the hearing and may limit the number of witnesses to be presented at the hearing.

By virtue of the stipulations set forth in the BRC Order, Papineau waived his right to seek redress for Trans Ash's failure to timely file a Form 111. Stated another way, Papineau agreed to the contested issues and did not identify as a contested issue Trans Ash's failure to timely file a Form 111. Also, pursuant to 803 KAR 25:010 Section 16(2), Papineau did not file a motion to be relieved of the stipulation 10 days prior to the hearing or as soon as practicable after discovery that the stipulation was erroneous. Abundantly clear from the hearing transcript is the fact Papineau was well aware the Form 111 had not been timely filed but waited until all proof was completed before moving for summary judgment. Significantly, summary

judgment is not available in workers' compensation proceedings. Papineau was bound by the stipulations set forth in the July 17, 2018, BRC Order.

The following language in Davidson v. Bluegrass Oakwood, Inc., 2012-CA-002078-WC, rendered August 1, 2014, Designated Not To Be Published, is directly on point:

> The purpose of a BRC is to expedite the processing of a claim and avoid the need for a hearing, if possible. 803 KAR 25:010 § 13(1). Issues that are not listed as contested at a BRC cannot be the subject of further proceedings. 803 KAR 25:010 § 13(14). 803 KAR 25:010 § 16(2) allows a party to be relieved of a stipulation, upon cause shown, if a motion is filed at least ten days prior to the hearing.
>
> The language of the stipulation at issue, asking whether Davidson "retain[s] the physical capacity to return to former work," directly mirrors the language found in KRS 342.730(1)(c)(1), permitting application of the three multiplier if an employee "does not retain the physical capacity to return to the type of work that the employee performed at the time of injury." *Id.* We agree with the Board, which held the purpose of this stipulation was to resolve by agreement whether an issue remained as to entitlement to the three multiplier. As such, Davidson's stipulation that she retains the physical capacity to return to work nullifies a necessary element of the three-multiplier. Davidson did not file a motion to be relieved of this stipulation. To allow one party to disregard the stipulation would negate the purpose of limiting the issues at the BRC and would contravene the intent of the regulations. Contrary to Davidson's assertion, a *Fawbush* analysis to evaluate which multiplier to apply is precluded; such an analysis is unnecessary due to the stipulation.

Slip Op. at 2.

The case law is clear in that, once the failure to timely file a Form 111 is raised by the claimant, the employer has the right to introduce proof establishing there was good cause for its failure to timely file a Form 111. This was specifically

addressed in American Woodmark Corp. v. Mullins, supra, wherein the Court of Appeals noted both the Court of Appeals and the Supreme Court had indicated good cause for relief from a default judgment would also be sufficient to excuse an employer from filing a timely Form 111. The Court of Appeals explained:

> In *Clark Regional Medical Center v. Lovings,* No. 2006–SC–0027–WC, 2006 WL 2987038 (Ky. Oct. 19, 2006), the Court indicated the same "good cause" for relief from a default judgment in a civil action would be sufficient to excuse an employer from filing a timely Form 111. However, citing law generally applicable to setting aside a civil default judgment, the Court held that "mere inattention on the part of the defendant or the defendant's attorney did not constitute good cause for setting aside a default judgment." *Id.* at 2. The Court further indicated actual prejudice to the claimant is not a factor to be considered. *Id.* at 3–4.
>
> In *Neace v. Asplundh Tree Expert Co., Inc.,* No. 2007–SC–000268–WC, 2008 WL 1850622 (Ky. April 24, 2008), the Court noted the various civil rules providing for the failure of a party to timely answer a complaint and the default provisions. *Id.* at 2. Noting the disfavor of default judgments in civil actions and the application of a liberal standard when determining whether good cause exists to set aside a default judgment, the Court determined the same rule is applicable to the untimely filing of a Form 111. *Id.* at 3. Whether good cause for the delay has been shown by the employer is a factual determination to be made within the ALJ's discretion. *Id.*

Id. at 314.

In raising this issue at the conclusion of the hearing after all proof was completed, Papineau denied Trans Ash the opportunity to establish whether good cause existed justifying its failure to timely file a Form 111. Thus, we find the ALJ erred in determining Trans Ash's failure to timely file a Form 111 resulted in Trans Ash admitting the date of the injury, the injury to the various body parts was caused

by Papineau's job, and the continuation of his job duties would have adverse health consequences. That said, the ALJ's finding is harmless error, as we are affirming her determination that even if the Form 111 was timely filed, Papineau had met his burden to prove he sustained a work-related cumulative trauma while working for Trans Ash.

Concerning Trans Ash's second argument, we observe that it in its petition for reconsideration, Trans Ash did not request additional findings concerning any issue raised on appeal. The petition for reconsideration was, as the ALJ noted, a re-argument of the merits of the case. Nonetheless, Trans Ash did not request additional findings of fact or a more explicit ruling in its petition for reconsideration, as required by KRS 342.281 and KRS 342.285. As such, the issue is not properly preserved for review by this Board. *See* Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 893 (Ky. 2007) (failure to make statutorily-required findings of fact is a patent error which must be requested in a petition for reconsideration in order to preserve further judicial review). Thus, our task on appeal is to determine whether substantial evidence supports the ALJ's determination Papineau sustained cumulative trauma injuries to his lower back and shoulders.

Trans Ash's argument to the contrary, we conclude substantial evidence supports the ALJ's finding Papineau sustained cumulative trauma injuries to his lower back and shoulders. The ALJ rejected Trans Ash's argument that Dr. Autry's report does not support a finding of multiple cumulative trauma injuries because he was mistaken concerning the length of time Papineau worked for Trans Ash. In his March 8, 2018, report, Dr. Autry stated that, in 2014, after Papineau was laid off at Patriot Coal, he began working for Trans Ash and continued working through April 2017

when he retired. That statement is not correct, as Papineau testified he only worked for Trans Ash from October 26, 2015, through November 20, 2015, and from February 15, 2016, through November 2016. His work history reveals he was last employed by Trans Ash on November 1, 2016. As noted by the ALJ, the fact Papineau worked nine months is irrelevant. If the ALJ determines, which she did, that the symptoms in Papineau's lower back and shoulders worsened during his employment with Trans Ash causing the injuries to manifest, then Trans Ash is the employer at risk and bears the entire liability for the cumulative trauma injuries.

In Hale v. CDR Operations, Inc., 474 S.W.3d 129 (Ky. 2015) the Supreme Court decreed that an employee is entitled to the same amount of compensation for cumulative trauma injuries whether he or she worked for one employer or many. Thus, the last employment contributing to the cumulative trauma injury confers on the last employer liability for the full effect of the cumulative trauma injury. The Supreme Court explained:

> An employee who sustains a harmful change in his human organism due to cumulative trauma over many years working for the same employer is entitled to compensation to the full extent of his resultant disability. But, someone like Hale would not be fully compensated, simply because he worked for multiple employers. We can discern no basis for such a distinction. "Although both the employee and the employer have rights under the [Workers' Compensation] Act, the primary purpose of the law is to aid injured ... workers." *Zurich Am. Ins. Co. v. Brierly,* 936 S.W.2d 561, 563 (Ky.1996). Nothing in KRS Chapter 342 limits the liability of the employer, in whose employ the date of manifestation occurred, to the percentage of the claimant's work-life spent there. *Southern Kentucky Concrete* has no application under the current statutory scheme.

Id. at 138.

Here, the ALJ concluded the unrebutted report of Dr. Autry established even though Papineau experienced symptoms in his lower back and shoulders and also underwent some treatment before working for Trans Ash, his employment with Trans Ash resulted in the manifestation of the cumulative trauma injuries to his lower back and shoulders. The ALJ found the evidence revealed Papineau worked for Trans Ash without restrictions and had no "active conditions" when he began working for Trans Ash. Her findings are amply supported by Papineau's testimony and Dr. Autry's opinions.

After examination of the record, this Board believes Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004) is inapplicable to the case *sub judice*. Cepero, was an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury had left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied in awarding benefits was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous. We find nothing akin to Cepero in the case *sub judice*.

Cepero prohibits an ALJ from relying on a medical expert whose report contains an incomplete or erroneous history only if that opinion is based on such a history and "unsupported by any other credible evidence." Id. at 842. Although Dr.

Autry had a mistaken understanding of the length of Papineau's employment with Trans Ash, he clearly attributed Papineau's cumulative trauma injuries to his lower back and shoulder to his work activities with Trans Ash. More importantly, his report, in two different sections, demonstrates he possessed a correct understanding of Papineau's job duties with Trans Ash. Pursuant to Hale, that is sufficient to impose the entire liability for the cumulative trauma injuries upon Trans Ash.

We find no basis for Trans Ash's assertion Papineau concealed information concerning his work history and medical history as there is nothing indicating he was less than candid with Dr. Autry. Although Dr. Autry may have been mistaken about the length of Papineau's employment with Trans Ash, there is nothing indicating his belief was based on misinformation supplied by Papineau. Similarly, we find nothing indicating Dr. Autry had a mistaken understanding of Papineau's medical history by virtue of his opinion that Papineau did not have an active impairment prior to his injury. In Trans Ash's view, the fact Papineau admitted to discussing issues involving his back and shoulder with doctors before beginning work at Trans Ash translates into an active impairment prior to the commencement of his employment with Trans Ash. We reject that premise. The fact Papineau experienced back and shoulder symptoms before beginning work with Trans Ash does not equate to an impairment. Moreover, there is no medical evidence demonstrating Papineau had a pre-existing active condition meriting an impairment rating in the record.

The record does not demonstrate, as argued by Trans Ash, Dr. Autry misunderstood Papineau's job duties. In making this argument, Trans Ash notes Dr. Autry stated as follows:

> 1. The plaintiff described the physical requirements of the type of work performed at the time of injury as follows:
>
> The plaintiff described physical requirements of the type of work performed with last employer and **injury history**. The job description included prolonged standing, walking, climbing, lifting, reaching, pushing, pulling, bending, stooping, crouching, and overhead lifting. (emphasis added).

The ALJ concluded that, in making his statement, Dr. Autry was describing all of Papineau's prior jobs which contributed to the cumulative trauma injuries to his lower back and shoulders. We believe this is a reasonable interpretation of Dr. Autry's statement set forth above.

Significantly, Dr. Autry's report, in two different sections, demonstrates he had an accurate understanding of Papineau's job duties with Trans Ash. In his report, under the heading "Plaintiff's History," Dr. Autry noted as follows: "He had to operate levers and controls, climb up and down off of equipment, perform maintenance and do lifting, bending and stooping activities during the course of his employment." Similarly, under the heading "Causation," Dr. Autry again described Papineau's job with Trans Ash as follows:

> The plaintiff's history and job description correlate with the specific diagnoses. The plaintiff's job required significant operation of heavy equipment with impact loading, climbing, operating and working in difficult positions, creating significant stress loads on both shoulders and lower back.

The history Dr. Autry set forth and his description of Papineau's job duties contained in the "Causation" section are consistent with Papineau's testimony concerning his job duties with Trans Ash. Thus, we find no merit in Trans Ash's assertion Dr. Autry misunderstood Papineau's job duties. The opinions expressed by

Dr. Autry under the "Causation" and "Explanation of Causal Relationship" sections in his report constitute substantial evidence supporting the ALJ's determination Papineau sustained cumulative trauma injuries to his lower back and shoulders manifesting during his employment with Trans Ash. As pointed out by the ALJ, Trans Ash offered no evidence disputing Dr. Autry's opinion Papineau has a 23% permanent impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment as a result of work-related cumulative traumas manifesting during his employment with Trans Ash.

Papineau, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Papineau was successful in that burden, the question on appeal is whether there was substantial evidence of record to support 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979);

Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). 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). Although a party may note evidence that would have supported a different outcome than that 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 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, 998 S.W.2d 479 (Ky. 1999).

Dr. Autry's opinions, although based in part upon an erroneous understanding of the length of Papineau's employment, qualify as substantial evidence sufficient to support the ALJ's finding regarding causation. Further, Dr. Autry's misunderstanding as to the length of employment with Trans Ash merely went to the weight and credibility to be afforded his testimony, which is a matter to be decided exclusively with the ALJ's province as fact-finder. Paramount Foods, Inc. v.

Burkhardt, 695 S.W.2d 418 (Ky. 1985). Hence, we find no error in the ALJ's reliance upon Dr. Autry's opinion.

The ALJ relied upon that portion of Dr. Autry's report in which he stated Papineau's job required significant operation of heavy equipment with impact loading, climbing, operating and working in difficult positions, creating significant stress loads on both shoulders and the lower back. The ALJ concluded Dr. Autry's opinion is buttressed by Papineau's testimony indicating he believed the vibration of the heavy equipment caused his low back injury. He also testified that climbing from the ground up on the machine and twisting to open and close the cab door three or four times per day caused his shoulder injuries. Because the ALJ's decision is supported by substantial evidence, we are without authority to disturb her finding Papineau sustained work-related cumulative trauma injuries to his lower back and shoulders. Special Fund v. Francis, supra.

We reject Trans Ash's third argument on appeal that substantial evidence does not support the ALJ's finding Papineau does not retain the capacity to return the job he was performing at the time of the injury. In finding the three multiplier applicable, the ALJ was convinced by Papineau's testimony indicating that, due to his lower back and shoulder pain, he would not be able to return to the type of work he was performing at the time of the injury. The ALJ acknowledged Papineau's testimony his injuries did not affect his activities of daily living but was not convinced this established he could return to his work as a heavy equipment operator. The ALJ also relied upon Dr. Autry's restrictions and his opinion Papineau could not return to his work as a heavy equipment operator. The ALJ correctly noted there is no medical

evidence disputing Dr. Autry's opinions. During his July 13, 2018, deposition, Papineau testified that although there was no specific incident which made him decide to go to a doctor and finally apply for disability, he had noticed increased pain in his lower back and shoulder. At the hearing, Papineau testified as follows:

> Q: Do you believe that based upon the – just upon your back, do you think you're physically capable to return to your position with Trans Ash?
>
> A: No.
>
> Q: I'm going to ask you the same question about your shoulders.
>
> A: No.
>
> Q: May I ask it, though. Do you believe, based off [sic] the condition of your shoulders alone, you could return to the position you were working with [sic] at Trans Ash?
>
> A: No, I could not.

Later, Papineau testified: "I've been restricted to what I can do now since I've been laid off. I couldn't go back and work." When asked if he had any restrictions in his daily life, Papineau testified: "No. But I cannot go back to work for anybody like that, I mean."

When the issue is the claimant's ability to labor and the application of the three multiplier, within the province of the ALJ is the authority to rely on the claimant's self-assessment of his ability to perform his prior work. *See* Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000); Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). We have consistently held that it remains the ALJ's province to rely on a claimant's self-assessment of his ability to labor based on his physical condition. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

Clearly, the ALJ's decision to apply the three multiplier pursuant to KRS 342.730(1)(c)1, is based on a determination that Papineau did not have the capacity to return to the type of work performed at the time of injury. Special Fund v. Francis, supra. Papineau's testimony alone constitutes substantial evidence supporting the ALJ's determination the three multiplier is applicable.

Further, the ALJ also relied upon Dr. Autry's statement in the "Causation" section of his report, as set out herein, that Papineau's job "required significant operation of heavy equipment with impact loading, climbing, operating and working in difficult positions, creating significant stress loads on both shoulders and lower back." The ALJ also relied upon Dr. Autry's opinion that, "due to the above diagnoses, the plaintiff lacks the physical capacity to return to work in the type of employment and job description performed at the time they ceased working." Dr. Autry's opinions also constitute substantial evidence supporting the ALJ's determination the three multiplier is applicable. Since the ALJ's decision the three multiplier is applicable is supported by substantial evidence it may not be set aside on appeal. Special Fund v. Francis, supra.

Accordingly, the October 4, 2018, Opinion, Order & Award, and the November 2, 2018, Order denying Trans Ash's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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