OPINION ENTERED: May 8, 2012

CLAIM NO. 201100192

AGC AUTOMOTIVE AMERICAS PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

JERRY R. CHISM
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

and

JERRY R. CHISM CROSS-PETITIONER

VS.

AGC AUTOMOTIVE AMERICAS
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE CROSS-RESPONDENTS

OPINION
AFFIRMING ON APPEAL, AND AFFIRMING IN PART,
AND REMANDING ON CROSS-APEAL
* * * * * *

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

STIVERS, Member. AGC Automotive Americas ("AGC") appeals and Jerry R. Chism ("Chism") cross-appeals from the November 18, 2011, opinion, order, and award by Hon. R. Scott Borders, Administrative Law Judge ("ALJ") awarding Chism temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits without multipliers, and medical benefits. Both AGC and Chism filed petitions for reconsideration. AGC's petition for reconsideration was denied in part and granted in part by order dated December 22, 2011. Chism's petition for reconsideration was granted in full by the same order. Both parties also appeal from the December 22, 2011, order.

Chism's Form 101 alleges on October 21, 2009, he injured his low back, causing pain down his right side, in the following manner: "Plaintiff was driving a stand-up forklift when he hit a hole in the concrete." The Form 101 indicates Chism gave notice of his injury on December 18, 2009, when "he called and told his safety supervisor, Martha."

The July 14, 2011, benefit review conference ("BRC") order lists the following contested issues:

> 1. Extent and duration 2. Rate and duration of TTD 3/28/10 to 3/24/11 3. Multiplier 4. Timely notice 5. Proper credit for LTD & STD.

On appeal, AGC argues Chism failed to give due and timely notice of an injury as a matter of law. AGC argues as follows:

> Chism clearly failed to provide due and timely notice as a matter of law. The evidence is undisputed that the first notice that Chism gave of the alleged October 21, 2009 injury to AGC was when he left a voice mail on December 18, 2009. This was nearly two months after his alleged injury. During these two months he had daily contact with his supervisor, John Madras, including regular safety meetings. He never provided notice of any injury for the months of October, November and most of December. He never mentioned any injury to his family doctor, Dr. Bosley, on the November 11, 2009 visit, according to Dr. Bosley. Chism testified under oath at [sic] deposition he didn't tell anybody at AGC about an injury until the December 18, 2009 date. The ALJ found Chism did not provide notice of an injury during those two months.

AGC asserts Chism failed to provide a "reasonable explanation" for not providing notice until December 18, 2009, arguing as follows:

> The ALJ's finding that it was reasonable for Chism not to provide notice until after he underwent an MRI which showed a herniated disc and 'realized the seriousness' of his condition is also contrary to law. The statute clearly requires notice as soon as practical after the happening of the accident. KRS 342.185. Chism alleges a specific event which resulted in his injury. This is not a cumulative

> trauma claim. The ALJ's reliance on Brown-Forman Corporation v. Upchurch, 127 S.W.2d 615 (Ky. 2004), which states the fact whether a worker may have thought his injury was work-related before being told by a doctor is immaterial for notice purposes is misplaced. That case dealt with a cumulative trauma claim and such a rule is not applicable to an acute traumatic injury claim such as this one. The ALJ erred as [sic] matter of law in applying cumulative trauma law to this acute injury claim.

On the issue of notice, in the November 18, 2011, opinion, order, and award the ALJ determined as follows:

> The next issue for determination is whether or not Mr. Chism gave due and timely notice of his work-related incident. It is uncontradicted that Mr. Chism's incident occurred on October 21, 2009 and that he did not report the injury until December 18, 2011.
>
> KRS 342.185(1) states in pertinent part, 'no proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof.'
>
> The purpose of this notice requirement being given as soon as practicable after the occurrence of the accident is to give the Employer the opportunity to place the employee under the care of competent physicians to minimizes [sic] disability and the Employer's subsequent liability, and to allow the Employer to investigate at an early time the facts pertaining to the injury, and to prevent the filing of

fictitious claims once memories lapse and [sic] makes proof of lack of genuineness difficult. *Harlan Fuel Company vs. Burkhart*, 296 SW2d 722 (KY 1956).

However, the section does not require that notice of the accident be given to the Employer on the same day of the accident or even immediately [sic] that only 'as soon as practicable' after the happening of the accident. *Clover Fork Coal Company vs. Washington*, 247 KY. 848, 57 SW2d 994 (KY 1933). In addition, the fact that the worker may have thought his injury was work-related before being told by his doctor was immaterial for notice purposes because he could not be expected to self diagnose the cause of his problem. *Brown-Forman Corporation vs. Upchurch*, 127 S.W.3d 615 (Ky. 2004).

In this specific instance, after careful review of the evidence, the Administrative Law Judge finds that Mr. Chism's delaying [sic] giving notice from October 21, 2009, until December 18, 2009, was reasonable. While Mr. Chism did realize on October 21, 2009, that he had suffered a work-related incident because the onset of low back pain, and violated AGC Automotive's [sic] Company [sic] policy of not reporting it immediately, even if he did not believe it was a serious injury, the Administrative Law Judge finds that his actions and not reporting it at that time reasonable.

Mr. Chism testified, quite credibly, that he had hoped his condition would improve, and in fact, did improve after the incident and he was capable of continuing his job duties with the Defendant Employer. Mr. Chism testified he began to develop pain into

> his hip that radiated down his leg that he reasonably believed was due to a condition in his hip and not the result of the October 21, 2009, jarring incident. However, when he presented himself to his doctor in November of 2009, underwent an MRI scan, and was advised that he had a herniated disc in his lumbar spine, he then put two and two together and realized that this was a work-related condition resulting from the October 21, 2009, incident.
>
> After he became aware of the situation, he reported it to the company. The Administrative Law Judge finds that notice was therefore given as soon as practicable after Mr. Chism realized the seriousness of his condition and that it was caused by the October 21, 2009, incident.

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion with regard to every element of the claim, including notice. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). As Chism was the party with the burden of proof and was successful before the ALJ, we are left to determine whether substantial evidence supports the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). Although a party may note evidence that would

have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

There is no specific timeframe for satisfying the notice requirement pursuant to KRS 342.185, as the statute requires notice to be given to the employer "as soon as practicable after the happening thereof." See Marc Blackburn Brick Co. v. Yates, 424 S.W.2d 814 (Ky. 1968). While notice is mandatory, the Court of Appeals has indicated "the statute should be liberally construed in favor of the employee to effectuate the beneficent purposes of the Compensation Act." Marc Blackburn Brick Co. at 816. Whether notice was given as soon as practicable "depends upon all the circumstances of the particular case" and is a factual determination that lies solely with the ALJ, as the ALJ is the finder-of-fact. Id.

As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence,

regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

The ALJ determined Chism's delay in giving notice until December 18, 2009, was reasonable and discussed the testimony he relied upon that is supportive of this conclusion. Our sole task is to verify such testimony is in the record. If so, this evidence comprises substantial evidence in support of the ALJ's conclusion, and the conclusion will not be disturbed.

Chism testified by deposition and at the September 20, 2011, hearing. Chism testified as follows regarding the October 21, 2009, incident: "[W]hen I hit that hole it felt like somebody run [sic] a knife in my back, and so I went ahead, dumped my dumpster and went back in." Chism testified that he finished his shift on October 21, 2009, and continued working for several months thereafter. After the incident, Chism testified his pain actually improved, explaining as follows:

> Q: Did-- did the pain improve, or did it get worse, did it...
>
> A: It-- I mean, it got better, you know, after a few days it actually got better.

Then, Chism started experiencing pain in his right hip and his right leg which he did not associate with the October 21, 2009, incident. He testified as follows:

> A: Yes, then I started having pains on my right butt cheek and down my right leg, but I didn't associate that with my back. I thought I had hip-- my dad, he had a hip replacement, and he complained, you know, of it hurting and down his leg, so I'm thinking, well, I've got a hip going out, you know, so that's-- I never put them together-- the back and the hip and everything.
>
> Q: So the pain that you felt when you hit the crack was not the hip?
>
> A: No, it was to my back.
>
> Q: Where about on your back?
>
> A: Down here in my lower part of my back.
>
> Q: So you're indicating around the beltline?
>
> A: Yeah.
>
> Q: In the center?
>
> A: Yes.

Chism went to his family doctor, Dr. Jeanetta Bosley, after experiencing pain in his right leg and hip. He testified as follows:

> Q: Okay, well, when did you first seek medical treatment for the problem?

A: I went-- after I started having pains down my right leg and hip, I went to my family doctor.

Q: And who is that?

A: Dr. Bosley.

Q: And what did you tell her?

A: I told her, you know, I said, I'm having pains down my right leg and hip. I said, I was on a fork truck at work, and I, you know, told her about how I hit the hole, and I said I had pain in my back, but I said, it went away, and now it's going down my leg and my hip, so she said, well, we will need to do an MRI, but she wanted to do some other stuff first, so we tried some other treatment-- some medication, and it didn't do any good, so that's when they-- they set up the MRI.

Q: Now, as you know her records don't contain a history of a work injury, how do you explain that?

A: She told me she doesn't write down everything is what she told me.

Q: All right, so you had the conservative treatment, did that help?

A: No.

Q: Then she ordered an MRI?

A: Yes.

Q: All right, was the MRI normal, or did it come back...

A: No, I had a herniated disk-- L4-5.

Q: All right, now, did you continue to seek treatment, or...

> A: After I had the MRI, she-- of course, she sent me a little report paper saying, you know, telling me what it was, so-- and said if I wanted to-- to see a neurosurgeon...
>
> Q: Right.
>
> A: To, you know, contact them, so I did.
>
> Q: The-- the report she showed you wasn't a letter, it was just-- and this was in her notes...
>
> A: Yes.
>
> Q: Let me show you-- hand you a piece of paper, what's the date of that?
>
> A: 12-14-9.[1]
>
> Q: All right, and is that what she sent you?
>
> A: Yes.
>
> Q: And that shows the results of the MRI?
>
> A: Yes.

Chism contacted AGC after finding out the results of the MRI. Chism testified as follows:

> A: After that I called over there, called and talked-- you know, was going to talk to Martha, and I think she was out, and I left a message.
>
> Q: Okay, did you-- and when do you think you called-- what time? If it helps, that was dated December 14th...

[1] The radiology report filed in the record reflects a date of December 11, 2009.

> A: Right, I want to say it was around December the 18th, when I called.
>
> Q: Do you recall when you actually made contact with her?
>
> A: I want to say it was the 22nd, 23rd, because I think she said they was [sic] fixing to go to Mexico, go home.

Chism explained why, after the MRI, he believed the pain in his right hip and leg were work-related testifying as follows:

> Q: All right, what changed your mind-- I mean, you got an MRI result, but what-- why now did you think it was work-related?
>
> A: Well, because--I mean, I know when I hit that hole I had that pain in my back, but you know, that went away, and then I started having pains in my right leg and hip, and I-- but I'd never put them together, you know, until I had the MRI, you know, and so then after that, you know, it had to be that-- on that fork truck.

The first time Chism missed work following the incident was at the end of March in 2010.

Medical records attached to Dr. Bosley's deposition indicate Chism had an appointment on November 11, 2009, during which he presented with the following symptoms: "back pain radiating down R leg." The record also contains a radiology report regarding a lumbar spine MRI performed on December 11, 2009. The ordering physician

is indicated as Dr. Bosley. The report indicates the following impressions:

> 1. Focal disk protrusion/herniation in the right paracentral spinal canal at L4-5 results in moderate effacement of the right paracentral spinal canal and subarticular recess with nerve root displacement. There is also noted neural foraminal narrowing at this level as described.
>
> 2. Slight disk bulges at L2-3 and L3-4. No evidence of acute fracture or subluxation.

Chism’s testimony and the medical evidence constitute substantial evidence which supports the ALJ's determination Chism's delay in providing notice of his injury is reasonable. The evidence indicates the pain Chism experienced in his back subsided a few days after the October 21, 2009, incident, and Chism did not miss a day of work until March 2010. Chism testified he initially thought the pain in his right hip and leg was unrelated to the October 21, 2009, incident. It was only after Dr. Bosley ordered a lumbar MRI which ultimately detected a herniated disc that Chism made the correlation between the herniated disc, his right hip and leg pain, and the incident of October 21, 2009. The record reveals the MRI was performed on December 11, 2009, and Chism gave notice of his injury shortly thereafter on December 18, 2009.

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). The ALJ's determination that Chism's delay in providing notice on December 18, 2009, was reasonable will not be disturbed.

On cross-appeal, Chism asserts he is entitled to the two multiplier. Chism asserts as follows:

> Mr. Chism tried to return to his job practically scratching and clawing. As the Administrative Law Judge found in the Order granting the Plaintiff's Petition for Reconsideration, Mr. Chism returned to work at the same rate of pay or higher following his injury until he was taken off work by Dr. Rouben on March 20, 2010. The judge, however, erred in not applying the 2.0 multiplier.
>
> [text omitted]
>
> Mr. Chism's employment ceased when the company would not allow him to return to work once he reached maximum medical improvement. The alleged reason that he was not allowed to return to work because of his medication was obviously a ruse in that he had always taken the

> medication and the company knew it. He worked at his usual and customary rate of pay in his usual job from the alleged date of injury, October 21, 2009, up to the date Dr. Rouben took him off work on March 28, 2010. He attempted to return to work as soon as Dr. Rouben placed him at MMI on March 24, 2011. On May 2010 he underwent the FCE which the company doctor required and he passed. He did nothing to trigger the termination as the Plaintiff did in Chrysalis House v. Tackett, 283 S.W.3d 671 (Ky. 2009). Mr. Chism fought to return to work which would have limited him to a 1.0 multiplier. He is entitled to the 2.0 multiplier because there was a cessation of his employment which was no fault of his own. Hogston v. Bell South Telecommunications, 325 S.W.3d (Ky. 2010).

Regarding the issue of the two multiplier, in the November 18, 2011, opinion, order, and award, the ALJ determined as follows:

> Mr. Chism argues, however that he is entitled to application of the two time [sic] statutory multiplier.
>
> [text omitted]
>
> Mr. Chism argues he did continue to work, earning equal or greater pay at his normal job, from October 21, 2009, through March 28, 2010. He thereafter underwent surgery on July 13, 2010, and was released by Dr. Rouben to return to his job as a forklift driver for the Defendant Employer. Prior to returning to work, AGC required him to undergo a functional capacity evaluation which he passed. However, he was not allowed to return to work apparently as a result

of medications that he had been taken [sic] for several years prior to the accident but which the Defendant Employer argued affected his ability to safely operate their machinery.

Therefore Mr. Chism argues that he was not discharged because of anything he did but feels that he was being punished for reporting an injury and seeking Worker's Compensation benefits. He argues therefore the limitations placed on [sic] injured worker for receiving benefits enhanced by the two multiplier as set forth in the cases of *Chrysalis House vs. Tackett*, 283 SW3d 671 (Ky 2009), and *Hogston vs. Bell South Communications*, 2010-SC-229-WC, are not present. In these two cases, the Supreme Court stated that the termination of employment, after an employee returns to work at equal or greater wages, must be for some reason connected to the work-related injury.

AGC Automotive argues that Mr. Chism is not entitled to application of the two times multiplier as their [sic] refusal to allow him to return to work is due to non-work related conditions and medications he was taking that made it dangerous for him to operate a forklift and is therefore is [sic] completely unrelated to his work injury.

In this specific instance, after careful review of the lay testimony, the Administrative Law Judge finds that Mr. Chism has not met his burden of proving he returned to work for the Defendant Employer, at an equal or greater wage, and that that employment ceased as a result of anything to do with his work-related injury as required by the Supreme Court in the *Chrysalis House* case. Therefore, his request for enhancement of his benefits

> by the two times multiplier shall be denied.[2]

The record reveals Chism continued to work for AGC following the October 21, 2009, incident. In that regard, Chism testified at the hearing as follows:

> Q: You continued working?
>
> A: Yes.
>
> Q: The same position?
>
> A: Yes.
>
> Q: Same rate of pay?
>
> A: Yes.
>
> Q: Same hours?
>
> A: Yes.

Chism testified he continued to work at AGC until approximately March 28, 2010. He explained as follows:

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[2] In the December 22, 2011, order ruling on AGC's and Chism's petitions for reconsideration, the ALJ amended this paragraph as follows:
IT IS ORDERED that the first paragraph on page 28 is therefore meant to read as follows:

> In this specific instance, after careful review of the lay testimony, The Administrative Law Judge finds that although Mr. Chism returned to work for the employer at an equal or greater wage, the employment ceased as a result of nothing to do with the work related injury as required by the Supreme Court in the Chrysalis House case. Therefore, his request for enhancement of his benefits by the two times multiplier shall be denied.

> Q: All right, now why-- why did you stop working, or what happened at the end of March?
>
> A: When I went back to see Dr. Rouben, he said that-- because we was [sic] talking about working and everything, and he says, that's fine-- but not to be working any overtime, so he sent a note to work about that, you know, no-- forty hours a week and that was it, because we had been working some overtime-- quite a bit of overtime, so our laminated manager said that they couldn't accommodate that, just to have the doctor to take me off work.
>
> Q: All right, so they couldn't accommodate the short hours?
>
> A: Right-- right, forty hours.
>
> Q: And then you went off work about when?
>
> A: March the 28th of 2010, I believe.

Chism underwent fusion surgery on July 13, 2010. Chism testified Dr. Rouben released him to return to work without restrictions on March 24, 2011, but AGC would not let him return without first seeing "a company doctor," Dr. William B. King. Chism testified Dr. King imposed restrictions, and Chism was terminated by AGC on June 17, 2011. Chism testified he had no understanding of Dr. King's restrictions, and he was "just told" he had restrictions and "couldn't return to work." Chism testified as follows:

> Q: And why were you terminated?

> A: Because I couldn't return to work because of the restrictions of their doctor.

Later during the hearing, Chism testified as follows:

> Q: Now, you've testified that you were returned back to work March 24th of 2011?
>
> A: Yes.
>
> Q: And then you're sure that the only reason you weren't allowed to return to work is because you were on other medications unrelated to your back and weren't supposed to operate heavy machinery?
>
> A: I was only told that I had restrictions.
>
> Q: But weren't you taking medications?
>
> A: Yes, blood pressure medication.
>
> Q: And weren't you also having to take Valium for a number of years?
>
> A: For anxiety, but I mean, I don't take it everyday, no, but all-- you know, this has been years.

Chism testified AGC was aware of the fact he was taking blood pressure medication before the October 21, 2009, incident.

Martha Delgado Rowe, safety engineer at AGC, also testified at the final hearing. Regarding why Chism no longer works for AGC, Rowe testified as follows:

> Q: All right, and finally as far as Mr. Chism no longer working for AGC do

> you know the reasons-- as far as the issues-- as far as the medications he was on?
>
> A: Yes, they were mentioned that we have from our company doctor is that some prescription medications that he has been receiving for his health issues has [sic] some restrictions to operate any safety sensitive equipment.
>
> Q: And you wouldn't have had access to his personal doctor's information prior...
>
> A: No.
>
> [text omitted]
>
> Q: The only question I'm going to ask is that he just testified that the company did know that he was taking high blood pressure medicine and anxiety medicine while he was operating machinery before the accident. You did not know that?
>
> A: No, we don't know that.
>
> Q: We don't-- you don't know it?
>
> A: I don't know that.

While this Board has been unable to locate the medical report which addresses Chism's alleged restrictions, ostensibly written by Dr. King, AGC's "company doctor," the above-cited testimony by Rowe constitutes substantial evidence in support of the ALJ's determination that Chism's termination from AGC was for a reason that does not "relate to the disabling injury."

Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671, 674 (Ky. 2009). We also note that counsel for Chism failed to object to Rowe's testimony at the hearing regarding the alleged restrictions Dr. King imposed due to Chism's medications. The ALJ's determination that the two multiplier is not applicable *at this time* will remain undisturbed.

That said, since Chism returned to work at the same weekly wage he was earning at the time of the injury, as acknowledged by the ALJ in the November 18, 2011, order, KRS 342.730(1)(c)(2) is applicable subject to the conditions set forth in Chrysalis House, Inc., supra and Hogston, supra. Therefore, the ALJ's failure to provide for enhancement of the award by the two multiplier in the opinion, order, and award is error. While we acknowledge Chism has not yet met the requirements as set forth Chrysalis House, Inc., supra and Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010), at some point during the 425 weeks Chism receives income benefits, he may return to work at a weekly wage equal to or greater than his average weekly wage at the time of the injury. Therefore, should Chism's employment cease due to reasons which relate to the disabling injury or a previous work-related injury he would be entitled to have his income

benefits enhanced by the two multiplier upon a properly filed motion to reopen. Chrysalis House, Inc., supra and Hogston, supra. This is consistent with KRS 342.730(1)(c)4 which allows a claim to be reopened in order to modify or "conform" the "award payments" with the "requirements of subparagraph 2," i.e., the two multiplier. As Chism has already met the requirements of KRS 342.730(1)(c)2 *before* the entry of the final award, Chism is entitled to have the two multiplier language included in his award, contingent upon his meeting the requirements as set forth in Chrysalis House, Inc., supra and Hogston, supra, and the ALJ's failure to include this language in his final award is an error of law. On remand, the ALJ must include this language in the award. While neither party has raised this issue, this Board may raise it *sua sponte*.

Accordingly, concerning the issue raised on appeal, the ALJ's November 18, 2011, opinion, order, and award and the December 22, 2011, order ruling on the petition for reconsideration are **AFFIRMED**. Concerning the issue raised on cross-appeal, the ALJ's decision not to enhance Chism's benefits pursuant to KRS 342.730(1)(c)2 is **AFFIRMED**. However, this claim is **REMANDED** to the ALJ for entry of an amended opinion, order, and award reflecting Chism is entitled to enhancement of his benefits by the two

multiplier when at any time during his 425 week award his employment at weekly wages equal to or greater than the average weekly wage at the time of injury ceases due to reasons which relate to the disabling injury or a previous work-related injury.

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