Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 4, 2013

CLAIM NO. 201101002

DANIEL BOONE TRANSIT PETITIONER

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

LUCY BOWLING;
SENTURE; and
and HON THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Daniel Boone Transit ("DBT") appeals from an Opinion and Award rendered May 6, 2013 by Hon. Thomas G. Polites, Administrative Law Judge ("ALJ"), awarding Lucy Bowling ("Bowling") income and medical benefits for injuries resulting from an automobile accident. DBT argues

the ALJ's findings with respect to causation and notice are not based on substantial evidence. We disagree and affirm.

Bowling was a public transit driver for DBT on August 5, 2009, when the van she was driving hit an embankment and fell into a ditch. She reported the accident by radio and was treated at Manchester Memorial Hospital for left shoulder pain. A week later, she visited Dr. Suzanne Dansereau, who diagnosed strains to the lower back, upper back strain and shoulder. When Bowling visited again two weeks following the accident, Dr. Dansereau's diagnosis was neck and lower back strain. Dr. Dansereau released Bowling to full-duty work on August 24, 2009.

Bowling testified she suffered pain in her back, shoulders and neck during this period. Nonetheless, she continued to work for DBT until May, 2010 and made no complaint to her employer. She left DBT to take a position at Senture LLC in a call-center facility because it would be "easier" and paid more. Bowling last worked at Senture in October 2010.

She continued treatment with Dr. Stacy Smallwood, who eventually referred her to Dr. Amr El-Naggar, a neurosurgeon. He first evaluated Bowling on June 30, 2011, and initially recommended physical therapy for her complaints of pain in the right upper shoulder blade

radiating into her neck and arms. A subsequent MRI revealed a large osteophyte, and Dr. El-Naggar performed a discectomy and fusion on February 3, 2012.

Bowling initially filed her claim solely against DBT, alleging injury to her neck and left shoulder as a result of the motor vehicle accident. She later amended the claim to allege the same injuries were due to activities she performed while employed at Senture. By the July 29, 2013 Opinion and Award, Senture was dismissed, though it remains a party to this appeal.

Dr. El-Naggar placed Bowling at maximum medical improvement as of February 16, 2012, and assessed a 25% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He attributed 50% of the impairment to the motor vehicle accident, 25% to her work activities at Senture, and 25% to degenerative disc disease.

Dr. Richard Sheridan evaluated Bowling at DBT's request, and diagnosed a resolved acute cervical strain and lumbar strain. He assessed a 0% impairment rating pursuant to the AMA Guides. He stated there are a lack of objective findings consistent with a herniated disc, and no evidence of cervical radiculopathy. Dr. Sheridan believed Bowling's

spine surgery was unrelated to the accident, but was due to the natural aging process. He further opined the work at Senture did not aggravate any existing degenerative condition.

Dr. Joseph Zerga also evaluated Bowling at DBT's request. Like Dr. Sheridan, Dr. Zerga believed the accident caused only temporary cervical and shoulder strains which had resolved. He assessed a 0% impairment according to the AMA Guides.

At Senture's request, Bowling was evaluated by Dr. Rick Lyon, who diagnosed a right disc osteophyte complex. He believed the condition was exacerbated by the motor vehicle accident, not her work at Senture. Dr. Lyon assessed a 25% impairment rating pursuant to the AMA Guides.

Ultimately, in the May 6, 2013 decision the ALJ relied upon the opinions of Dr. El-Naggar and Dr. Lyon, and awarded benefits based upon a 25% impairment rating. He relied solely on Dr. Lyon's medical report to attribute all of the 25% impairment rating to the motor vehicle accident, and none to Bowling's work at Senture. In a subsequent petition for reconsideration, DBT challenged the ALJ's finding with respect to causation and requested the ALJ make additional findings concerning notice. By Order dated

July 29, 2013, the ALJ denied the petition with respect to the causation issue, and determined DBT had sufficient notice of Bowling's neck injury.

On appeal, DBT first argues there is insufficient evidence upon which to conclude the August 5, 2009 motor vehicle accident caused Bowling's cervical injury. DBT directs our attention to the inconsistent histories Bowling provided various physicians regarding the onset date of her neck pain, and whether she had ever experienced neck pain prior to the accident. It also emphasizes the fact Bowling continued to work without restrictions at DBT for nine months after the accident, making no complaints to her employer.

In the Opinion and Award, the ALJ acknowledged "the conflicting and inconsistent histories that [Bowling] provided to numerous medical providers with regard to her cervical condition." Notwithstanding, the ALJ chose to rely upon Dr. El-Naggar's opinion Bowling's cervical condition resulted from a combination of the motor vehicle accident and her work at Senture. In reaching this conclusion, the ALJ noted Dr. El-Naggar's status as the treating physician, the fact Dr. Lyon also attributed the injury to the motor vehicle accident, and that he

"maintained this opinion despite vigorous cross-examination on two occasions."

Because Bowling successfully bore her burden of proof before the ALJ, our review is limited to a determination of whether the award is supported by substantial evidence. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Dr. El-Naggar's opinion constitutes the requisite substantial evidence upon which to conclude Bowling's motor vehicle accident caused her injury, and the ALJ articulated his reasons for relying upon that opinion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). While DBT has pointed to significant evidence to the contrary, which it has exhaustively catalogued on appeal, the existence of conflicting evidence is not adequate reason to disturb the ALJ's award. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Nor do we believe Dr. El-Naggar's medical opinion is predicated on such a false medical history as to render it unreliable. He was confronted on cross-examination with the conflicting medical histories Bowling provided, and still maintained his opinion as to causation. *Cf.* Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004).

Also concerning causation, DBT argues the ALJ erred in attributing all of the 25% impairment rating to

the motor vehicle accident. In doing so, the ALJ relied upon the opinion of Dr. Lyon, who believed the accident alone aroused Bowling's pre-existing degenerative condition. While DBT emphasizes Dr. El-Naggar only attributed 50% of the injury to the accident, the ALJ enjoys the discretion to believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Dr. Lyon's opinion is substantial evidence upon which to base this finding.

DBT next argues Bowling provided insufficient notice of a neck or cervical injury. KRS 342.185(1) requires notice of an accident be given to an employer "as soon as practicable after the happening thereof." While DBT concedes it had notice of the motor vehicle accident, it claims no notice of a neck injury was provided. As DBT emphasizes, Bowling testified she never told her employer she hurt her neck in the accident, and complained only of shoulder pain. Also, Debbie Lunsford, a DBT manager, testified Bowling did not mention a neck injury and submitted no invoices relating to treatment for her neck.

The ALJ determined Bowling satisfied the notice requirements of KRS 342.185. As DBT concedes, it had actual notice of the motor vehicle accident, which Bowling

immediately reported from the van. Dr. Dansereau's notes from the August 17, 2010 office visit document left shoulder pain and lower back pain. A week later, Dr. Dansereau's clinical impression was neck strain and lower back strain. She also recommended a cervical spine x-ray if Bowling's left arm numbness recurred. DBT was aware Bowling was treating with Dr. Dansereau, and paid for her medical treatment. The ALJ also noted Bowling's ultimate diagnosis was cervical radiculopathy, a primary symptom of which is arm pain.

The question of adequate notice must be determined by the factual situation of each claim. Kirkwood v. John Darnell Coal Co., 602 S.W.2d 170 (Ky. 1980). As DBT correctly argues, notice has two components – notice of the accident and notice of the injury. However, the courts have long held that if the employer has notice of the incident or accident which reasonably might be expected to cause an injury, the employer is then held to be reasonably apprised of the probability of injury so no further notice is necessary until the injury gradually progresses into a compensable state which is diagnosed. Reliance Diecasting Co. v. Freeman, 471 S.W.2d 311 (Ky. 1971). Further, this Board has consistently held KRS 342.185 and KRS 342.190 do not require an injured worker to

notify the employer each time a new diagnosis is made during the course of medical treatment.

The ALJ examined the factual situation of Bowling's claim and drew reasonable inferences therefrom. After the accident, she initially experienced pain in her lower and upper back, and her shoulder. The pain in her shoulder progressed and was not relieved by conservative treatment. She was eventually referred to Dr. El-Naggar, who identified a cervical injury as the cause of her symptoms, which Dr. Danserreau had also identified as a possible source of Bowling's arm pain. DBT was aware Bowling was treating with Dr. Danserreau for neck strain within two weeks of the accident. In light of this evidence in the record, we cannot hold the ALJ's finding was clearly erroneous or so unreasonable it must be reversed as a matter of law.

Accordingly, the May 6, 2013 Opinion and Order and the July 29, 2013 Order on Petition for Reconsideration by Hon. Thomas G. Polites are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON RALPH CARTER
PO DRAWER 1017
HAZARD, KY 41702

COUNSEL FOR RESPONDENT:

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON, KY 40741

ADMINISTRATIVE LAW JUDGE:

HON THOMAS G. POLITES
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601