OPINION ENTERED: June 21, 2013

CLAIM NO. 201083732

WENDY S. CANUEL PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

ATRIA SENIOR LIVING, INC.
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. Wendy Canuel ("Canuel"), *pro se*, seeks review of the Opinion and Order rendered February 8, 2013 by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"), dismissing her claim against Atria Senior Living ("Atria") for failure to provide timely notice of her alleged April 15, 2010 work injuries as soon as practicable. Canuel also

seeks review of the March 8, 2013 order denying her petition for reconsideration. The sole issue on appeal is whether the ALJ erred in determining Canuel failed in her burden of proving she provided due and timely notice pursuant to KRS 342.185.

On appeal, Canuel insists she gave notice of her injuries as soon as practicable. Canuel argues she provided an adequate and reasonable justification for waiting until June 25, 2010 to notify Atria of her work injuries occurring over two months prior on April 15, 2010. Canuel also argues the ALJ misinterpreted and misstated her testimony which falsely led "to this ALJ's interpretation of Petitioner's ample testimony as inconsistent and highly suspect."

Canuel filed a Form 101 alleging injuries to her left shoulder and right foot on April 15, 2010 while moving multiple files and boxes. She indicated she provided verbal notice of her injuries to Atria on or about June 25, 2010. Canuel attached records from Dr. Michael Salamon to the Form 101, indicating treatment from August 10, 2010 through May 17, 2011. Both parties filed additional medical evidence which we will not further summarize because the appeal solely concerns whether timely notice was provided.

Canuel testified by deposition on July 11, 2012 and at the hearing held December 17, 2012. Canuel, born

January 12, 1969, is a resident of Louisville, Kentucky and has an Associate's degree in paralegal studies. Her employment history includes work as a cashier, title examiner, "top producer secretary" for a real estate agency, closing coordinator, receptionist for a law firm, and a paralegal. Canuel testified she began working for Atria in May 2005 initially as an operations paralegal, then as a senior workers' compensation analyst beginning in November 2006. Canuel worked for Atria until she was terminated on June 25, 2010. Thereafter, Canuel worked as an auditor from August 2010 to June 2011. Canuel currently works as a paralegal for a law firm.

As a workers' compensation analyst for Atria, Canuel opened files on every workers' compensation claim. For each file, she documented the injured employee's date of hire, pay rates and dates missed from work. Canuel addressed safety issues, ensured files contained employee statements, retrieved payroll information for weekly wage determinations, tracked work statuses, and ensured medical bills were properly paid. Canuel also communicated with the third party administer, the "communities," and occasionally the injured employee.

Canuel testified that on April 12, 2010, she was lifting a box of files when she heard a crunch and

experienced pain in her left shoulder, which “scared the crap out of me.” Canuel continued working and approximately one hour later experienced pain in her right foot when she leaned down from a sitting position to lift a box from the floor. At the deposition, Canuel testified as follows regarding what happened following her injuries and when she reported them to Atria:

> Q: What happened after you felt a crunch and pain in your left shoulder?
>
> A: Well, I immediately stopped and then I immediately looked around to make sure no one heard me or saw me.
>
> Q: Why would you make sure nobody saw or heard you?
>
> A: Because probably about two weeks prior there was a lot of issues going on with management. I had been written up and it was a final one, and being in Workers’ Comp, I knew how they felt about Workers’ Comp and the costs. There was no way in hell I was going to tell anyone that I had injured myself to lose my job.
>
> Q: So you didn’t report this injury?
>
> A: No.
>
> Q: Okay. Where did you go seek medical treatment?
>
> A: I didn’t.
>
> Q: You testified earlier that it scared the crap out of you because of the pain and the crunch.

> A: Uh-huh, because if you--I would picture myself going to the doctors and I'd have to tell them how it happened. And I couldn't do that because he would say, "Well, it's a work injury." You know, I'm just assuming. I'm going through my mind. It was a catch-22.
>
> Q: So after the injury you made sure nobody saw the event?
>
> A: That's right.
>
> Q: Did you tell anybody what had happened?
>
> A: No.
>
> Q: And were you required, do you know--in your handbook are you required to report?
>
> A: Yes, uh-huh.
>
> Q: But despite that, you chose not to?
>
> A: I never thought--it never occurred to me that it wouldn't get better. I'd never had any major injuries, so. . .
>
> Q: You mentioned that you know how management felt about Workers' Comp. Is there an unwritten policy at Atria that you are not supposed to report?
>
> A: Is there an unwritten policy? Not that I'm aware of--
>
> Q: Manager--
>
> A: --other than being--you know, being in Workers' Comp, how they felt about spending the money on Workers' Comp.

At the hearing, Canuel testified she did not provide immediate notice because she assumed her injuries

would heal on their own and numerous other employees never reported their work-related injuries to Atria.

Canuel continued to work her normal duties and hours despite persistent shoulder and right foot symptoms. Canuel testified she informed Atria of her April 15, 2010 injuries after she was terminated on June 25, 2010, stating as follows:

> A: I was at home, and I was on the phone with Mark Jesse and Deborah McCormack. They informed me that I had--that I was not going to be allowed back to my position, and I immediately told them that I had my injuries. And, we got off the phone, and I thought, well, I don't think that they-- they didn't sound like they believed me, so I had to call back just to make certain that they heard the information and were going to report it. So that's what I did. And, I told them again--made sure that they heard, and they said, okay, we'll report it.
>
> Q: What day was this, specifically, for the Judge?
>
> A: June 25th - - yeah, June 25th, 2010.

At the deposition, Canuel testified as follows when questioned why she did not seek treatment for her work injuries at the time she was terminated from her job on June 25, 2010:

> A: I waited until--I went out and got an attorney and we were waiting for--well, first, it had to be reported.

> Atria still hadn't reported it because they did not believe me. So I had to wait for that, and then my attorney mentioned, "Well, we can just report it ourselves if they don't." I think they eventually did and I think I got my paperwork in and got my claim number and made an appointment with--not Dr. Solomon (sic). It was someone else in that same group, but I couldn't get in because Workers' Comp still hadn't said whether they were going to deny or accept it.
>
> Q: But you eventually saw Dr. Solomon (sic) on August 10th?
>
> A: Yes.

At the hearing, Canuel testified she did not seek treatment until August 10, 2010 because she was waiting for approval from workers' compensation. Dr. Salamon ordered physical therapy for her left shoulder and eventually performed surgery on her right foot in March 2011. Canuel missed five days of work following her surgery. In March 2012, Canuel began treating with Dr. Kris Abeln for her left shoulder and Dr. Adam Didyk for her right foot. Canuel testified she continues to experience symptoms in both her left shoulder and right foot.

In his February 8, 2013 Opinion and Order, the ALJ extensively summarized Canuel's testimony provided at the deposition and hearing. The ALJ then stated as follows regarding due and timely notice:

KRS 342.185 prohibits an employee from obtaining compensation for an injury "unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof…." The term "as soon as practicable" has been interpreted in many different cases and has been found to encompass a variety of periods of time. Claimants have been found to have given appropriate notice of injuries that occurred as long as three months, and even longer, prior to the date of reporting. However, the employee must generally provide an explanation for the delay in reporting and must justify the delay. The employee bears the burden of proof that appropriate notice has been given. As noted by the Defendant in his brief, the purposes of the notice requirement are at least threefold: (1) to provide prompt medical treatment in an attempt to minimize the worker's ultimate disability and the employer's liability; (2) to enable the employer to make prompt investigation; and (3) to prevent the filing of fictitious claims. The failure to give due and timely notice bars a plaintiff from pursuing a claim and recovering thereon. Each case must be examined on its own set of circumstances and, as stated above, there is no precise period of time or number of days set forth in the statute.

In reviewing Ms. Canuel's testimony, as given during her deposition and at the Final Hearing, the ALJ does not find her to be a credible witness. The Claimant was employed as a workers' compensation claims analyst. Her job entailed the handling of workers' compensation claims. She, of all people, was aware of the requirement of giving due and

timely notice. Her reasons for not doing so are not credible. First, she testified that she heard the crunch in her shoulder and it “scared the crap” out of her. Next, she testified that it was only a strain or sprain and she had no reason to think that it would not go away. She at first testified that her supervisor instructed her not to file a claim, but she later admitted under cross-examination that her supervisor had not actually directed her not to file a claim. Her testimony was inconsistent and simply does not convince or persuade this ALJ that any work-related event occurred on the date in question.

Whereas, she was diagnosed with some conditions, one of which resulted in a surgical procedure, which could have been consistent with the events she described, the ALJ finds that Plaintiff has failed to sustain her burden of proving due and timely notice, which is a threshold issue, and the failure to prove notice was given as soon as practicable, and the failure to justify the delay, bars Plaintiff from any recovery relative to her allegations.

It is also significant that Ms. Canuel did not mention her injuries until being notified of her termination. According to her own testimony, she was notified by telephone that she no longer had a job to return to, and immediately upon receipt of that information she blurted out to two supervisors to whom she was talking that she had sustained the two injuries. Thinking that they might not have heard her and/or comprehended her, she promptly called them back. She reiterated the story to them. Reporting work-related injuries immediately upon

> being advised of termination from work more than two months after the alleged injurious event is highly suspect and would require the ALJ to be more than gullible to accept the Plaintiff's claim as compensable. The notice requirement being a threshold issue, and the Plaintiff having failed to sustain her burden of proof relative to this issue, compels the ALJ to dismiss and deny this claim. There is no reason to summarize and/or consider the remaining evidence on the other issues which were preserved. Consequently, this claim will be dismissed.

Canuel filed a petition for reconsideration asserting "the ALJ relied upon three prongs in finding Ms. Canuel did not meet the notice requirements." She cited to the February 8, 2012 opinion and Smith v. Cardinal Construction, 13 S.W.3d 623 (Ky. 2000). Canuel asserted the ALJ did not detail how the three prongs applied to her circumstances. Canuel stated she was denied prompt medical treatment by the workers' compensation carrier after she provided notice. There is no indication the delay in treatment enhanced her disability. She claimed she provided Atria with specific details of her injuries, which facilitated their investigation into the accident. Canuel stated Atria did not refute her testimony regarding her injuries and the medical evidence indicates her claim was not fictitious. She requested the ALJ find she satisfied

the notice, or alternatively, requested additional findings consistent with the factors set forth in Smith v. Cardinal Construction, supra.

In the March 8, 2013 Order on reconsideration, the ALJ amended the title of the opinion from "Opinion, Award and Order" to "Opinion and Order." In denying Canuel's petition for reconsideration, the ALJ stated as follows:

> The Plaintiff argues that the ALJ has relied upon "a three-prong test" in finding that Ms. Canuel did not meet the notice requirement. This is not accurate. The ALJ did not rely upon a three-prong test, but merely listed three of the reasons that notice "as soon as practicable" is important in workers' compensation situations. At least two of those reasons are apparent in the case at hand. Due to Ms. Canuel's failure to give notice for more than two months after the alleged incidents, her employer was unable to make a prompt investigation of the circumstances of the accident and, in the opinion of the ALJ, the late notice facilitated the filing of a fictitious claim.
>
> The Plaintiff had the burden of proof on all relevant factors. *Snawder vs. Stice, 576 S.W.2d 276 (Ky. App. 1979).* In this case, the Plaintiff failed to provide an adequate justification for her delay in giving notice to her employer, and the ALJ is simply not persuaded that notice of the alleged injuries was given as soon as practicable. In fact, notice was not given until after the Plaintiff's employment was terminated and she had been advised of that fact. Further, the

> reasons given by Ms. Canuel for not reporting the incident immediately were inconsistent and not worthy of credibility.
>
> With the exception of amending the title of the opinion from "Opinion, Award and Order" to "Opinion and Order," the Plaintiff's Petition for Reconsideration is hereby **denied** and **overruled**.

On appeal, Canuel, *pro se*, states KRS 342.185(1) does not define "as soon as practicable," but does permit the filing of a claim within two years from the date of injury. Canuel asserts there is no statute defining undue delay in reporting injuries "to be assumed or considered as suspect in nature and/or not credible based upon termination." Canuel asserts the ALJ misinterpreted the facts and erred in applying the law to the facts of this particular claim. Likewise, she argues the ALJ misinterpreted her testimony which "falsely lead to this ALJ's interpretation of [her] ample testimony as inconsistent and highly suspect." She also asserts she provided adequate and reasonable justification for her delay in notifying Atria of her work injuries, and gave notice as soon as practicable pursuant to KRS 342.185(1). Canuel emphasizes her testimony indicating she feared of losing her job upon reporting her work injuries. She states she knew

of management's negative view toward workers' compensation claims and it was understood Atria employees were not to file claims. She also had no reason to believe her injuries were serious or would not heal over time. Once she was terminated, Canuel argues she no longer feared reporting her injuries and "[t]hen, and only then, did it become reasonable and practicable for her to report her injuries and seek a medical opinion on the injuries."

Canuel also disputes several findings by the ALJ, specifically that she intentionally delayed seeking medical treatment; did not seek treatment until after securing counsel; and "blurted out" her injuries after being notified of termination. She asserts Atria did not provide any evidence her injuries were invalid or not work-related. Canuel argues there is no evidence establishing she filed a fictitious claim and likewise states the finding her work injuries are highly suspect is "without substantial merit."

As the claimant in a workers' compensation case, Canuel bore the burden of proving each of the essential elements of her cause of action before the ALJ, including providing notice to Atria of the accident pursuant to KRS 342.185(1). Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Canuel was unsuccessful in her burden, the question on appeal is whether the evidence compels a

different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). As long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). For an unsuccessful party, this is a great hurdle to overcome:

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made. Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.
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> Id. at 643.

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); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an ALJ is vested with broad authority to decide questions involving notice. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, supra.

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).

Pursuant to KRS 342.185(1), no proceedings for compensation for an injury shall be maintained unless a notice of the accident "shall be given to the employer as soon as practicable after the happening thereof . . . ." KRS 342.190 requires notice to be given in writing and to include the time, place, nature, and cause of the accident as well as a description of the nature and extent of any resulting injury. KRS 342.200 provides in part:

> Want of notice or delay in giving notice shall not be a bar to proceedings under this chapter if it is shown that the employer, his agent or representative had knowledge of the injury or that the delay or failure to give notice was occasioned by mistake or other reasonable cause.

Canuel is correct in stating KRS 342.185(1) does not fix a definite time restriction. Notice must be given as soon as practicable. The ALJ has sole discretion for making such determination. Newburg v. Slone, 846 S.W.2d 694, 699 (Ky. 1992). Whether notice was given "as soon as practicable" depends on the circumstances of the particular case. Marc

Blackburn Brick Co. v. Yates, 424 S.W.2d 814 (Ky. App. 1968).

The purposes of the notice statutes are three-fold. To enable the employer to provide prompt medical treatment in an attempt to minimize the worker's ultimate disability and the employer's liability, enable the employer to make a prompt investigation of the circumstances of the accident, and to prevent the filing of fictitious claims. Trico County Development & Pipeline v. Smith, 289 S.W.3d 538, 5423 (Ky. 2008). Lack of prejudice on the part of the employer does not waive a delay in giving notice. Id. The courts have found notice of an accident and the resulting harm to be inadequate where the worker's conduct thwarted the purposes of the requirement. Id.

We conclude the record contains substantial evidence to support the ALJ’s determination of lack of notice, and a contrary result is not compelled. The ALJ properly stated the law regarding notice and was presented with Canuel’s deposition and hearing testimony in making his determination. On appeal, Canuel essentially requests the Board to re-assess her testimony and superimpose its own appraisals regarding her credibility. This we cannot do. Magic Coal Co. v. Fox, supra.

In the February 8, 2013 opinion, the ALJ unequivocally found Canuel not to be a credible witness and provided several reasons for his finding. He noted she was employed as a workers' compensation analyst. He cited to several inconsistent statements made by Canuel in her deposition and at the final hearing. The ALJ found highly suspect the fact Canuel reported her injuries immediately after being informed of her termination, more than two months following the injurious event on April 15, 2010. As a result, the ALJ concluded Canuel failed in her burden of proving due and timely notice, and dismissed her claim.

The ALJ provided additional findings to support his determination in the March 8, 2013 Order denying Canuel's petition for reconsideration. He found Atria was unable to make a prompt investigation of the circumstances of the accident due to her over two month delay in providing notice of her injuries, which also facilitated the filing of a fictitious claim. The ALJ was simply not persuaded by the reasons given by Canuel for such delay in providing notice to Atria. He again highlighted the fact notice was not given until after Canuel was terminated and found her testimony inconsistent and not credible.

The ALJ acted well within his authority as fact-finder in making these findings. The ALJ has sole

discretion to determine the quality, character and substance of evidence. Square D Co. v. Tipton, supra.

Accordingly, the February 8, 2013 Opinion and Order and the March 8, 2013 Order denying Canuel's petition for reconsideration by Hon. Edward D. Hays, Administrative Law Judge, is **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

PETITIONER *PRO SE*:

WENDY S CANUEL
8603 AUTUMN RIDGE COURT
LOUISVILLE, KY 40242

COUNSEL FOR RESPONDENT:

HON STEVEN ARMSTRONG
138 SOUTH 3RD STREET
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

HON EDWARD D HAYS
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601