Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 22, 2021

CLAIM NO. 202000313

BASEL MASHNI PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY, ADMINISTRATIVE LAW JUDGE**

INSTALLATION SERVICES and
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Basel Mashni ("Mashni") appeals from the June 17, 2021 Opinion and Order and the July 9, 2021 Order overruling his Petition for Reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"). The ALJ concluded Mashni failed to provide due and timely notice of the January 25, 2020 right shoulder injury and such failure was prejudicial to Installation Services ("Installation").

On appeal, Mashni argues the ALJ erred in her determination since he notified who he thought was his supervisor on the day of the work injury. Mashni also argues Installation was not harmed by his unintentional delay in providing notice. Because substantial evidence supports the ALJ's determination and a contrary result is not compelled, we affirm.

Mashni filed a Form 101 on March 4, 2020, alleging he injured his right shoulder as he picked up a seatback on January 25, 2020 while working as a seamster for Installation. He ultimately underwent right shoulder surgery in June 2020 to repair a torn rotator cuff. Mashni alleged he "told Jose that I just hurt my shoulder at the time it happened." The Form 104 indicates Mashni worked for Installation from December 2, 2019 through January 30, 2020. We will not summarize the medical evidence since due and timely notice is the sole issue on appeal.

Mashni testified by deposition on May 19, 2020 and at the final hearing held April 22, 2021. Mashni previously injured his right knee and left shoulder. He also had a history of previous low back treatment. He also suffers from circulation issues and had a heart attack at age of 26. Mashni began receiving Social Security disability benefits in 2014 or 2015 based upon his low back condition and circulation issues in his legs. He then underwent vocational rehabilitation and a work-learning program, which allowed him to return to work.

Mashni began working for Installation on December 2, 2019. He was interviewed by Danica Fick ("Fick"), and Kenny (last name not provided). At his deposition, Mashni testified he was hired as a tailor, which required him to sew

panels used for theater seating. At the hearing, Mashni indicated he was hired to manage the cutting room and to make patterns. Mashni testified he injured his right shoulder in the morning as he was handling a seatback on Saturday, January 25, 2020. Mashni left work early around 2:30 p.m. due to his right shoulder pain. Mashni was not scheduled to work on Sunday. Mashni returned to work on Monday, Tuesday, and Wednesday. On Thursday, January 30, 2020, Mashni was terminated from Installation before his sixty-day probationary period ended. Mashni filed his Form 101 on March 4, 2020. Mashni has not returned to any work since he was terminated from Installation.

At the deposition, Mashni was questioned about who he notified of the work accident. He testified as follows:

> Q: Okay. And was anyone there that witnessed it?
>
> A: I don't know if they witnessed it, but yeah, Jose was there. And then the guy that cuts material, Melvin, was there. I don't know if they witnessed it or not.
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> Q: Okay. And then who was the manager on duty?
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> A: I guess Jose. He was above me. There was - - there was no management per se, but Jose was acting manager that day, I guess.
>
> Q: Okay. Did you talk to Jose?
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> A: I did, around 11:00. We were sitting down to try and figure out what we were going to have to eat. And I told Jose, I said, "Man, I hurt my shoulder. It's killing me." He was like, what happened. And I told him what happened. And that was all. We left it at that. We got some lunch and we ate. And then around 2:30, I just - - my - - I was hurting too bad on my shoulder. So I went and left. I was supposed to work until 4:00. But I left at 2:30.

> Q: Okay. Did you have any discussions with anybody else that day aside from Jose?
>
> A: I mean, my wife. Told my wife I hurt my shoulder.

Mashni testified Jessica Smith ("Jessica") performed monogramming but he did not know her official job title, nor did he know if she was a manager. Mashni did not mention his right shoulder injury to Fick, Jessica, or anyone else in the front office after he returned to work following January 25, 2020. His exit interview was conducted on January 30, 2020 by Kenny and Fick. Mashni did not report or mention the work accident or his right shoulder injury at the exit interview.

Mashni provided similar testimony at the hearing. He believed Jose was employed by Installation and that he was a manager. Mashni asserted Jose "punched in the clock like everybody else." Jose possessed more experience sewing upholstery and patterns, and provided Mashni instructions on how to sew and shared tricks of the trade. Mashni testified Jose was his resource for sewing questions. Mashni testified Fick and Kenny requested he work on Saturday, January 25, 2020. Mashni was working with Jose when he injured his right shoulder. Mashni testified he told Jose about the right shoulder incident as soon as it happened and again during lunch. Mashni left work early, around 2:30 p.m., due to right shoulder pain. Mashni returned to work on Monday, Tuesday, and Wednesday but had difficulty performing the job tasks due to his right shoulder pain. Mashni asserted he again told Jose about his right shoulder on Wednesday. Mashni was called into the front office with Fick and Kenny on Thursday, January 30, 2020 and was let go within the sixty-day probationary period. Thereafter, he underwent right

shoulder surgery. On cross-examination, Mashni was questioned more about Jose's working relationship with Installation:

> Q: And about how long did you know [Jose] or have any interaction with him before - -
>
> A: I started working on December 2nd. I did not see him for a couple, maybe three weeks after I started. But I've seen him. That was like December, I don't know, 17th or 18th, and then he came back. He left and then came back on January - - I want to say the 15th or 16th.
>
> Q: Okay. When you say he left and came back, what do you mean?
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> A: Well, he has people that work for him down in Georgia. But he would come up here and pick up work and correct patterns if they needed to be corrected and allocate the work to different people, and then he would leave.
>
> Q: Okay. So it's your testimony that he owns the company in Georgia that interacts some with our client.
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> A: I believe so. This is like a side business for him.
>
> . . . .
>
> Q: I mean, you testified on direct examination that you assume that he worked with you.
>
> A: Yeah. He was my boss, basically. And on that Saturday and other days where Danica and Kenny weren't there, he would tell us, okay, we need to get these tops done, you know, one, two, three. You do three. You do two. You do one. And then if there was something wrong with the pattern, he would correct it, and then we would start all over. So yeah, he was definitely boss and management.

Mashni acknowledged Jose resides in Georgia but stays at an extended stay motel when he works for Installation. Mashni agreed he was terminated because his tailoring skills did not transfer well to commercial sewing. Mashni

testified he believed Fick was in management. He testified Kenny was either the Installation's owner, or a boss. Mashni testified Jessica did monogramming and he did not know she was a manager. Mashni did not discuss his work injury with Fick or Jessica and did not believe they were his bosses. Mashni stated neither Jessica nor Fick demonstrated how to perform his job duties.

Fick testified by deposition on July 14, 2020 and at the final hearing held April 22, 2021. Fick is Installation's director of administration, a position he also held at the time Mashni was allegedly injured. Fick testified she hired Mashni because he was a tailor. However, Mashni was terminated near the end of his probationary period since his tailoring skills did not transfer to the commercial aspect of sewing. Fick testified she hired Mashni, worked with him every day, and assigned tasks to him.

Fick testified Jose is a subcontractor or vendor. Jose resides in Georgia where he runs a full-time operation. Fick testified Installation worked with Jose:

> … as a sub to come in, pick up material, created patterns, and then he would leave and take the material back to his operation in Georgia. He was not here full time. He would come to get the material, leave with the material. He did help create patterns. That was his expertise, he was not full time, and he did not have any managerial duties.

Jose was not Installation's employee, and specifically was not a manager. Fick testified Jose was not involved in risk management and he did not have a managerial role. Jose instructed Installation employees regarding patterns he created due to his sewing experience.

Fick testified Jessica was Installation's onsite manager on January 25, 2020. She worked with Mashni and Jose on that date. Mashni did not report a work-related injury to Jessica on January 25, 2020. Likewise, he did not report the injury to either Jessica or Kenny at the exit interview conducted on January 30, 2020. Similarly, Mashni did not report the work injury to anyone at Installation during the week he continued to work after January 25, 2020. Installation first became aware of the alleged work injury upon receipt of the Form 101, which was filed on March 4, 2020. Fick testified Installation employees are required to report work injuries to any manager or the owner immediately. They are not instructed to report injuries to Jose.

The ALJ rendered an Opinion on June 17, 2021. She first determined Mashni sustained a right shoulder injury on January 25, 2020. However, the ALJ dismissed Mashni's claim for benefits after finding he failed to provide notice of his work injury to Installation as soon as practicable and that this failure was prejudicial to Installation. The ALJ stated as follows:

> KRS 342.185(1) requires an injured worker to provide notice of a work accident as soon as practicable. However, KRS 342.190 provides that delayed notice shall not bar proceedings if it is shown that the employer, his agent, or representative had knowledge of the injury.
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> Mashni sustained a right shoulder injury on January 25, 2020 as the result of an acute work event. He testified that he reported the work accident to Jose Gonzales ("Jose") immediately and later at lunch. Mashni considered Jose to be a manager. However, Danica Fick ("Fick") provided testimony and explained Jose is a vendor or subcontractor. Furthermore, Fick explained Jose played no part in risk management and he did not have a management role. Rather, Jose owned his own

business in Georgia, and he created patterns for IS. Jose had vast sewing experience and provided instruction to IS employees regarding the patterns he created.

Mashni assumed Jose was a manager, but the evidence does not support this assumption. Mashni began working for IS on December 2, 2019 and he did not see Jose for the first few weeks of his employment. He saw Jose on approximately December 17, 2019. Thereafter, Jose left and presumably returned to Georgia. Jose returned to IS on January 15, 2020. Mashni was aware Jose owned a business in Georgia, and he stayed at an extended stay motel while in Lexington. Thus, this ALJ is not convinced Jose was an employee of IS or a regular presence at the job site.

Mashni contends that Jose was an agent of IS and his notice to Jose was sufficient under the statute. Agency is the fiduciary relation, which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to act. CSX Transportation, Inc. v. First National Bank of Grayson, 14 S.W.3d 563, 566 (Ky.App. 1999). Under Kentucky law, the right to control is considered the most critical element in determining whether an agency relationship exists.

After reviewing the evidence, this ALJ finds Jose was not an agent of IS to the extent of managing employees or receiving reports of work accidents. Jose utilized a time clock to track his time, but his presence at IS was intermittent. Moreover, Jose did not assign Mashni work tasks or oversee his work schedule. Mashni's work tasks emanated from Fick or Kenny. Also, Fick and Kenny set Mashni's work schedule, and required him to work on Saturday, the day he was injured. Thus, IS exerted control over Jose only to the extent that he created patterns. IS did not require Jose to be a constant presence at the job site and he did not actively manage employees. As such, this ALJ finds Jose was not an agent of IS for the purpose of receiving reports of work accidents.

Importantly, Mashni attended an exit interview on January 30, 2020, and did not report the work injury.

> He continued to work after January 25, 2020 and had multiple opportunities to report the work injury to management, but did not. His testimony establishes he only informed Jose. Thus, this ALJ finds Mashni did not provide due and timely notice.
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> Mashni filed a Form 101 (Application For Resolution of Injury) on March 4, 2020. This is the first time he provided notice to IS that he alleged a work-related injury. Thus, he did not provide notice until well over a month after the work injury. This negated IS's ability to conduct a meaningful investigation of the work injury. As a result, this ALJ finds IS was prejudiced by Mashni's late notice. Consequently, his claim for benefits is dismissed.

Mashni filed a Petition for Reconsideration essentially making the same arguments now raised on appeal. The ALJ provided additional findings of fact in overruling the Petition, *verbatim*:

> This matter comes before this Administrative Law Judge ("ALJ") upon the Plaintiff's petition for reconsideration. The Plaintiff argues proper notice was provided to an individual named Jose who was an ostensible agent and ostensible supervisor. Secondly, the Plaintiff argues any late notice was not prejudicial to the Defendant. The Defendant responded to the Plaintiff's petition for reconsideration.
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> This ALJ previously addressed the Plaintiff's arguments in her opinion and order issued on June 17, 2021. This ALJ concluded Jose was not an agent of IS and set forth the basis for conclusion as follows:
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> - Jose's presence at the job site was intermittent;
> - Jose did not assign the Plaintiff work tasks or oversee his work schedule;
> - Plaintiff's work tasks emanated from Kenny or Danica Fick; and
> - Jose's primarily created patterns that the Defendant's employee used.

> Secondly, the Plaintiff argued the Defendant was not prejudiced by any late notice. This ALJ does not agree. This ALJ concluded the Defendant was deprived of the ability to conduct a meaningful investigation following the alleged work injury. This ALJ reviewed the evidence once again, and is not compelled to reach a different conclusion. The work accident occurred on January 25, 2020. The Plaintiff maintains that the Defendant had the opportunity to review video footage of the Plaintiff's work activities on January 25, 2020 and that negates any perceived prejudice. However, this ALJ does not agree.
>
> The Defendant did not receive notice of an alleged injury until March 4, 2020 when the Plaintiff filed a Form 101. Thus, the Defendant was deprived of the opportunity to investigate the matter and locate potential witnesses shortly after the work accident occurred. Furthermore, the Defendant did not have an opportunity to refer Plaintiff to a physician immediately after the work accident to have his condition assessed. Thus, this ALJ concludes the Plaintiff's failure to provide due and timely notice was prejudicial to the Defendant.

On appeal, Mashni argues the ALJ erred in finding notice inadequate. Mashni asserts notice was provided as soon as practicable when he notified his "apparent supervisor of his injury," Jose. Mashni asserts there was no evidence he had been instructed to give notice of an injury in any specific manner or that he was advised to do so at all. Mashni asserts no management was present on the day of his injury. Mashni asserts any delay or failure to give notice due to mistake as to whom motive must be given is excusable under KRS 342.200. Mashni asserts there was no showing that his excusable delay in providing notice caused any actual injury to Installation, and that notice "must be held to be adequately given." Mashni also asserts Jose was put in a supervisory capacity.

As the claimant in a workers' compensation proceeding, Mashni had the burden of proving each of the essential elements of his claim, including due and timely notice. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Mashni was unsuccessful in his burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is 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). The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence

of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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 which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

KRS 342.185 requires providing notice of a work-related accident to the employer "as soon as practicable after the happening thereof." 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. v. Yates, 424 S.W.2d 814, 816 (Ky. 1968). Whether notice has been given as "soon as practicable" depends upon the circumstances of the particular case. Id. Notice to an employer of a physical injury carries with it notice of all conditions that may reasonably be anticipated to result from that injury. *See* Dawkins Lumbar Co. v. Hale, 299 S.W. 991 (Ky. 1927). *See also* Reliance Die Casting v. Freeman, 471 S.W.2d 311 (Ky. 1971). The statute does not necessarily require an injured worker to be aware of and report each injury resulting from an accident, but must report the accident itself. Id. KRS 342.190 requires that the "notice and claim shall be in writing." KRS 342.200 provides want of notice or delay in giving notice shall not be a bar to pursuing a claim, "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." The ALJ has discretion to determine whether a reasonable cause for delay exists based upon the particular facts and circumstances of the case. Marc Blackburn Brick Co. v. Yates, 424 S.W.2d 814 (Ky. 1968).

The Kentucky Supreme Court held in Granger v. Louis Trauth Dairy, 329 S.W.3d 296 (Ky. 2010), the ALJ correctly dismissed a claim based upon inadequate notice, and affirmed the ALJ's refusal to find an excusable delay in reporting the injury pursuant to KRS 342.200. The Court noted the purpose of the notice requirement is threefold: to enable an employer to provide prompt medical treatment to minimize the worker's ultimate disability and the employer's liability; to enable the employer to promptly investigate the circumstances of the accident; and to prevent the filing of fictitious claims. The Court additionally noted that although a lack of prejudice to the employer excuses an inaccuracy in complying with KRS 342.190, it does not excuse a delay in giving notice.

While Mashni has identified evidence supporting a different conclusion than reached by the ALJ, primarily his own testimony, substantial evidence was presented to the contrary. While Mashni may have notified Jose of the work accident, Fick testified he was neither employed by Installation, nor a manager in any capacity. Rather, Jose was a subcontractor or vendor who owned his own business in Georgia, and he was used by Installation to create and sew patterns. Mashni also testified that although he believed Jose was employed by Installation, he also owned a side business in Georgia. He also testified he did not work with Jose until several weeks after his employment began. He indicated he first saw Jose

around December 17, 2019. Jose then left, and he returned in mid-January 2020. The above testimony constitutes substantial evidence supporting the determination Jose was not employed by Installation at all relevant times, and a contrary result is not compelled.

We similarly find substantial evidence supports the ALJ's determination that Jose was not Installation's "agent or representative", and again, a contrary result is not compelled. The ALJ provided a detailed explanation supporting her determination, noting Jose's presence at Installation was intermittent, Jose did not assign work tasks or oversee Mashni's work schedule, Mashni's work tasks came from Fick or Kenny, and that Jose primarily created patterns that Installation used. While it has been held that notice of an injury to an employer's insurer is sufficient pursuant to its agency relationship with the employer, *see* Trico County Development & Pipeline v. Smith, 289 S.W.3d 538, 542 (Ky. 2008), we are not willing to extend this holding to a contractor and subcontractor.

Finally, as noted above, "a lack of employer prejudice does not waive a delay in giving notice." Trico County Development & Pipeline v. Smith, supra. *See also* Granger v. Louis Trauth Dairy, supra. As fact-finder, the ALJ has the sole authority to adjudge the weight and credibility of the evidence. Miller v. East Ky. Beverage/Pepsico, Inc., supra. Further, there is no statutory timeframe for the notice requirement and the ALJ has discretion in determining whether notice was given "as soon as practicable." Newberg v. Slone, 846 S.W.2d 694, 699 (Ky. 1992). Because the ALJ had the discretion to determine Mashni did not provide due and

timely notice, and her decision is supported by substantial evidence, her decision will not be disturbed.

Accordingly, the June 17, 2021 Opinion and Order and the July 9, 2021 Order rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

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