

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: June 24, 2022

CLAIM NO. 202077651

DOLLAR GENERAL CORPORATION

PETITIONER

VS.                   **APPEAL FROM HON. TONYA M. CLEMONS,  
ADMINISTRATIVE LAW JUDGE**

TAMMY REEVES and  
HON. TONYA M. CLEMONS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

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

**ALVEY, Chairman.** Dollar General Store (“DG”) appeals from the December 10, 2021 Opinion, Award, and Order and the January 11, 2022 Order on Petition for Reconsideration rendered by Hon. Tonya M. Clemons, Administrative Law Judge (“ALJ”). The ALJ found Tammy Reeves (“Reeves”) sustained a work-related right shoulder injury on May 19, 2020 for which she provided due and timely notice. The ALJ awarded temporary total disability (“TTD”) benefits, permanent partial

disability (“PPD”) benefits, and medical benefits due to Reeves’ May 19, 2020 work injury.

On appeal, DG argues the ALJ erred in finding Reeves sustained a work-related injury, and her determination is clearly erroneous based on the reliable, probative, and material evidence of record. DG also argues the ALJ’s finding Reeves gave due and timely notice of her injury constitutes an abuse of discretion and an error in the application of the law. Finally, DG argues the ALJ’s determination that it was not prejudiced by Reeves’ delay is inconsistent with the holding in Trico County Development & Pipeline v. Smith, 280 S.W.3d 538 (Ky. 2008), which sets forth a delay in giving notice is not waived due to lack of prejudice. Because we determine the ALJ adequately reviewed the evidence, provided a sufficient basis for her determination, and properly exercised her discretion in reaching her decision, we affirm.

Reeves filed a Form 101 on April 1, 2021, alleging she injured her right shoulder on May 19, 2020 while lifting heavy bags of dog food in the course and scope of her employment as a store manager for DG. Reeves was born on March 2, 1970 and she resides in Benton, Kentucky. Reeves has a GED with no specialized training. The Form 104 lists Reeves’ previous employment as a hemmer at a garment factory, as well as working in retail distribution, factory work, and in retail management.

Reeves testified by deposition on June 11, 2021, and at the hearing held October 12, 2021. In addition to the jobs outlined in the Form 104, Reeves testified she worked as a final inspector on a steering column assembly line. She also

worked as an order filler for Wal-Mart. She additionally worked as a machine operator and quality technician at another factory. Prior to working for DG, she worked for a temporary agency performing many different jobs. At her deposition, Reeves testified she had returned to work for DG at its Calvert City, Kentucky location on April 16, 2022, earning more than she earned on the date of her injury. She testified that, although her treating physician did not impose any formal restrictions, she is unable to perform the full gamut of her work. She specifically testified she is unable to lift 50 pounds, and she avoids lifting large bags of dog food. She admitted she was on light duty prior to May 19, 2020 due to unrelated low back problems.

On May 19, 2020, Reeves was “throwing” 40-pound bags of dog food and lifting 32-packs of water when she experienced a pop in her right shoulder. She testified she reported this a week later, apparently to Ray Begley, her previous supervisor. She initially thought it was a strain that would resolve. She officially reported the injury on the DG hotline on June 30, 2020, after being advised of the rotator cuff tear by Dr. Spencer Romine on June 26, 2020, and after advising Shon Shaw (“Ms. Shaw”), her supervisor, on June 29, 2020.

Reeves initially treated with her primary care physician, Dr. Frances Marie Horn, for her right shoulder on June 2, 2020. She had previously treated with Dr. Romine for her right shoulder in January 2020. She reported to him she had experienced right shoulder pain for over six years. She saw Dr. Romine again on June 10, 2020 for her right shoulder problem but did not advise him of the May 19, 2020 occurrence. She testified her right shoulder pain changed after the May 19,

2020 incident. Dr. Romine obtained an MRI, which he reviewed with her on June 26, 2020. On that date, he advised her of the rotator cuff tear. She testified she was unaware she had sustained a rotator cuff tear until Dr. Romine advised her on June 26, 2020. As noted above, she informed Ms. Shaw, her district manager, of the accident and injury on June 29, 2020. Ms. Shaw directed her to report the incident and injury on the DG hotline, which she did the following day.

Reeves continued working for DG until October 2020. She underwent right shoulder surgery on November 17, 2020. She received short-term disability benefits and long-term disability benefits while she was off work. Dr. Romine released her to full-duty work in April 2021. She returned to work for DG without restrictions on April 16, 2021. Although she had no formal restrictions, she avoided lifting heavier items such as dog food. At the hearing, Reeves testified she is no longer working due to problems with her foot caused by dropping a heavy jar on her toes. She testified her foot began swelling and she could not put on her shoe. She was placed in a walking boot, then a walking shoe. She was taken off work due to the foot problem, and she was terminated when her leave expired. She testified she is unable to perform the store manager job due to her ongoing shoulder problems.

In addition to her shoulder, foot, and low back problems, Reeves has treated for diabetes for several years. She has been hospitalized for problems stemming from that condition both before and after her work injury.

Reeves filed Dr. Romine's November 2, 2020 office note in support of her claim. Dr. Romine noted Reeves complained of chronic right shoulder pain in January 2020 with no specific precipitating injury. She later reported her right

shoulder popped in May 2020 while she was lifting bags of dog food. Her chronic right shoulder pain worsened due to the lifting incident. She reported she was no longer able to elevate her shoulder above 90 degrees after the incident. He diagnosed her as having completely torn her right shoulder rotator cuff.

Reeves filed a report from Dr. Romine dated June 28, 2021. Dr. Romine stated Reeves sustained a right shoulder injury in a work-related accident. He stated she is status-post arthroscopic rotator cuff repair and subacromial decompression she underwent on November 17, 2020. He assessed a 4% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”).

DG filed treatment records from Dr. John Ruxer, D.O., Dr. Horn, and Dr. Romine. On January 30, 2020, Dr. Ruxer treated Reeves for complaints of low back pain. On January 31, 2020, Dr. Horn treated Reeves for right shoulder pain. She noted Reeves is right hand dominant. Reeves reported her right shoulder had bothered her for six years. Reeves had full range of motion on examination, but her pain worsened with overhead movement. Reeves did not report any left shoulder problems. On March 24, 2020, Dr. Ruxer noted Reeves’ chronic lumbar pain, and he prescribed Norco and Gabapentin. She again followed up for her low back complaints on April 9, 2020 and May 20, 2020. On June 10, 2020, Dr. Romine noted Reeves had continuing right shoulder complaints that were similar to those she expressed in January 2020. On June 26, 2020, Dr. Romine stated Reeves had completely torn her right rotator cuff, not associated with trauma. He also found she had right shoulder subacromial impingement syndrome based upon his review of an

MRI. On August 5, 2020, Dr. Ruxer noted Reeves continued to experience right shoulder complaints, and he noted she had a complete right rotator cuff tear.

DG also filed 107 pages of records from Baptist Health for 17 office visits for treatment Reeves received for various problems between October 25, 2016 and July 27, 2020. The problems listed included bilateral hip, arm, and leg pain, as well as ongoing treatment for diabetes and neuropathic pain. Reeves also treated for shortness of breath and chest heaviness. The records also reflect Reeves had a myocardial infarction and a stent was emplaced. She was also diagnosed as having depression with anxiety, tobacco use disorder, essential hypertension, and hypoglycemia. On July 14, 2020, Reeves was treated for toe injuries she received from dropping a heavy metal jar on them. The November 17, 2020 note reflects Reeves underwent right shoulder rotator cuff repair and a right shoulder subacromial decompression.

Dr. Calvin Dyer evaluated Reeves on July 13, 2021 at DG's request. Reeves reported she injured her right shoulder on May 19, 2020 when she was lifting 40 pounds of dog food. She also reported her right shoulder had been bothering her for several years. Dr. Dyer found Reeves has right shoulder pathology with an unclear injury date. He diagnosed right shoulder impingement with tendinosis and right shoulder pathology. He noted she had a very small tear inconsistent with a traumatic injury. He assessed a 0% impairment rating based upon the AMA Guides. He found she has no range of motion abnormality. In a supplemental report dated August 25, 2021, Dr. Dyer noted he had reviewed Dr. Romine's report. He reiterated Reeves has no impairment rating attributable to her work injury. He stated

any impairment rating she may have from her surgery is unrelated to her work injury.

DG also filed the lumbar x-ray report from January 30, 2020, and the report of the June 26, 2020 right shoulder MRI. The MRI was interpreted as showing severe tendinosis of the distal supraspinatus with a full thickness tear, bursitis with mild infraspinatus tendinosis, and mild AC joint arthrosis.

Ms. Shaw testified by deposition on August 27, 2021. She was Reeves' district manager on May 19, 2020. Ms. Shaw began working for DG in February 2020. She became Reeves' district manager on March 18, 2020. She testified Reeves was on intermittent leave due to her multiple health issues. Reeves did not provide a specific injury date when she reported her shoulder complaints on June 29, 2020. Reeves had previously inquired about workers' compensation benefits for diabetes on June 3, 2020. Shaw testified store managers are required to lift up to 55 pounds. Store managers are required to ensure employees, including themselves, adhere to any work restrictions.

A Benefit Review Conference was held on September 9, 2021. At that time, the issues preserved for determination included whether Reeves sustained a work-related right shoulder injury on May 19, 2020, work-relatedness/causation, notice, benefits per KRS 342.730, entitlement to TTD benefits, exclusion for pre-existing active disability/impairment, unpaid contested medical expenses, and entitlement to future medical benefits.

The ALJ rendered the Opinion, Award, and Order on December 10, 2021. The ALJ reviewed the evidence and noted Reeves' testimony that she was

throwing 40-pound bags of dog food while working for DG on May 19, 2020, when she experienced a pop in her right shoulder. She additionally noted Reeves did not initially believe she had significantly injured herself, so she delayed in reporting the incident. Relying upon Dr. Romine's opinion, the ALJ determined Reeves sustained a work-related right shoulder injury on May 19, 2020. The ALJ specifically found, "Combining the fact that Reeves worked for Defendant performing physical activities as described in her testimony and in a job description for the position along with Dr. Romine's findings of some form of an acute injury, the ALJ finds Reeves suffered a permanent harmful change to her right shoulder."

The ALJ also found Reeves provided due and timely notice of her injury. The ALJ acknowledged Reeves continued working after the accident without any formal restrictions. Reeves sought medical attention after her symptoms persisted and she was unaware she had sustained a right rotator cuff tear until she was advised by Dr. Romine on June 26, 2020 when he explained the findings shown on the MRI. The ALJ noted Ms. Shaw was notified of the work-related injury on June 29, 2020. The ALJ found Reeves met her burden of proving she gave due and timely notice of her work-related right shoulder injury to DG.

The ALJ found Dr. Romine's assessment of the 4% impairment rating more credible than the 0% rating Dr. Dyer expressed. Based upon the holding in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), the ALJ found DG failed to meet its burden of proving Reese had a pre-existing active condition that was both pre-existing and impairment ratable prior to her work injury, therefore she did not apportion any of the impairment. The ALJ also determined the multiplier

contained in KRS 342.730(1)(c)1 is not applicable. The ALJ determined, however, Reeves' award is subject to the two-multiplier contained in KRS 342.730(1)(c)(2), "for any periods of cessation of employment at same or greater than Reeves' pre-injury average weekly wage." In addition to the award of PPD benefits based upon the 4% impairment rating, the ALJ awarded TTD benefits from November 17, 2020 (the surgery date) through April 15, 2021, since Reeves returned to work on April 16, 2021. Although Reeves testified she stopped working in October 2020, the ALJ determined there is no medical evidence supporting her being off work until the surgery date.

DG filed a Petition for Reconsideration on December 23, 2021 requesting a specific finding of whether the delay in reporting did or did not impede its ability to investigate and verify the truth of the alleged work injury. It also requested a specific finding of whether notice was provided as soon as practicable. In the Order issued January 11, 2022, the ALJ noted DG failed to point to any patent errors. The ALJ also noted she had previously made the findings in her decision that provided the information DG requested in the Petition. The ALJ also specifically found DG's investigation was not impeded by any delay in reporting.

As noted above, on appeal, DG argues the ALJ erred by finding Reeves sustained a May 19, 2020 work-related injury. DG argues the ALJ abused her discretion by determining Reeves provided due and timely notice of her work injury. Finally, DG argues the ALJ erred by determining it was not prejudiced by the delay in reporting.

As the claimant in a workers' compensation proceeding, Reeves had the burden of proving each of the essential elements of her claim. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since she was successful in her burden, the question on appeal is whether substantial evidence of record supports 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). An ALJ is vested with broad authority in determining causation. 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, this 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 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).

KRS 342.185 requires notice of a work-related accident be given 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). Additionally, 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.

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. The Court 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 in an attempt to minimize the worker's ultimate disability and the

employer's liability; to enable the employer to investigate the circumstances of the accident promptly; and to prevent the filing of fictitious claims. The Court also 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.

DG identified evidence supporting a different conclusion than that reached by the ALJ; however, the ALJ explained that, although Reeves did not immediately report the injury, she did so within three days after Dr. Romine advised she had sustained a rotator cuff tear. The ALJ noted that prior to Reeves' discussion with Dr. Romine, she believed she had merely sustained a strain she thought would resolve. Once Dr. Romine advised she had torn her rotator cuff, she reported the incident to Ms. Shaw within three days, and then reported it on the company hotline, in what the ALJ determined was a timely fashion. Although Reeves had some difficulty providing dates, it was within the ALJ's discretion to base her determination on the entirety of the evidence. We find substantial evidence supports the ALJ's determination Reeves sustained a work-related injury for which she provided due and timely notice. Likewise, we determine the ALJ performed the appropriate analysis, and provided an adequate basis for her decision. Therefore, we affirm the ALJ's determination Reeves sustained a compensable work-related injury for which she provided due and timely notice.

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., 951 S.W.2d 329 (Ky. 1997). 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).

In the Order on the Petition for Reconsideration, the ALJ specifically determined DG’s ability to investigate the accident, and the delay in notice did not impede its investigation. The ALJ specifically cited the basis for her rationale, including the fact Ms. Shaw was able to review surveillance footage. She also remarked Ms. Shaw noted Reeves was performing inventory prep on the date of the incident. The ALJ specifically stated, “As the Defendant was able to review surveillance footage in connection with its incident investigation, the Opinion identifies the evidence relied upon in finding it was not impeded in its investigation by any delay in reporting.” It was within the ALJ’s discretion to determine whether DG was impeded in its investigation by any delay in reporting the incident. The ALJ determined there was no impediment and explained the basis for her reasoning. Because the ALJ had the discretion to determine Reeves sustained a work-related injury on May 19, 2020, provided due and timely notice, and DG’s investigation was not impeded, and further, because her decision is supported by substantial evidence, it will not be disturbed.

Accordingly, the December 10, 2021 Opinion, Award, and Order, and the January 11, 2022 Order rendered by Hon. Tonya M. Clemons, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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