

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
Administrative Hearings Division



(202) 671-2233-Voice
(202) 673-6938-Fax

In the Matter of,)
)
ROY T. ECKERT,)
)
Claimant,)
)
v.)
)
ARTHUR D. HEATH CORPORATION,)
)
And)
)
ERIE INSURANCE GROUP,)
)
Employer/Carrier.)

AHD No. 05-120
OWC No. 586974

Appearances

WILLIAM S. HOPKINS, Esquire
For the Claimant

JEFFREY W. OCHSMAN, Esquire
For the Employer/Carrier

Before:

FRED D. CARNEY, JR.
ADMINISTRATIVE LAW JUDGE

AMENDED COMPENSATION ORDER ON REMAND

STATEMENT OF THE CASE

This proceeding arises out of a claim for worker's compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, D. C. Code, as amended, §§ 32-1501 *et seq.*, (hereinafter, the Act).

BACKGROUND/PROCEDURAL HISTORY

Claimant works for employer as a plumbing

contractor. On January 7, 2003, claimant alleges he injured his neck and right shoulder by hurriedly climbing a ladder and hitting his head on a pipe. On May 9, 2003, claimant underwent surgery on his cervical spine. Claimant alleges that on May 9, 2003 he suffered further injury to his left shoulder arising out of the surgery performed on his cervical spine. Claimant sought wage loss and medical benefits under the Act for injuries to his neck and left upper extremity. Employer and insurer contested the claim, alleging that

ROY T. ECKERT,

claimant failed to provide timely notice of his injury as required by the Act.

After timely notice, a full evidentiary hearing was held on April 11, 2005 before the undersigned. Roy T. Eckert, (hereinafter, claimant) appeared in person and by counsel. Employer appeared by counsel. Claimant testified on his own behalf. Employer introduced the testimony of Carolyn Hoffman and Arthur Heath. Claimant Exhibit (hereinafter, CE) Nos. 1-9, and Employer Exhibit (hereinafter, EE) Nos. 1-16, described in the Hearing Transcript (hereinafter, HT), were admitted into evidence. The record closed on May 19, 2005 with the submission of CE 17 into the record.

A Compensation Order was issued on October 31, 2005. Therein, the claim was denied on the ground that the record evidence failed to support a finding of causal relationship between claimant's left upper extremity impairment and his employment. *Roy Eckert v. Arthur D. Heath Corporation*, AHD No. 05-120, OWC No. 586974 (October 31, 2005) (hereinafter, "*Eckert I*").

The Compensation Order was appealed to the District of Columbia Department of Employment Services Compensation Order Review Board (hereinafter, "Board").¹ In the

¹D.C. Code Ann. §32-1521.01(2001) and Title 7 of the District of Columbia Municipal Regulations, Chapter 1, section 118, and Chapter 2, sections 250 et seq., established a Compensation Order Review Board and set forth the authority and responsibilities thereof. The letter head used for decisions and orders refer to the entity as the "Compensation Review Board", which is the shorter-form designation the Director of Department of Employment Services used in Administrative Policy Issuance No. 05-01(February 5, 2005). Pursuant to that Policy Issuance, the Director of the Department of Employment Services realigned the

Board's January 11, 2006 Decision and Order the Compensation Order of October 31, 2005 was Affirmed in Part and Remanded in Part. The denial of benefits in connection with the claimed injury to the left arm and shoulder was affirmed. The case was remanded to the undersigned for further consideration of the defense of untimely notice under the Act.

In its January 11, 2006 Decision and Order, the Board stated:

... the ALJ never discussed any of the facts concerning the issue of timely notice, made no findings thereon, and reached no legal conclusions related thereto. In that both parties to this appeal assert that the claim for wage loss benefits was not dependant upon the allegation that the left arm and shoulder problems are causally

Office of Hearings and Adjudication to include, inter alia, establishment of the Compensation Order Review Board in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, codified at D.C. Official Code § 32-1521.01.

In accordance with the Director's Directive, the CRB now replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia's Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

related to the stipulated work injury, we must assume that the claim for temporary total disability was based, in part at least, upon the effects of that stipulated injury. Accordingly, there remains a need for resolution of the notice issue in order to fully adjudicate this claim.

A Compensation Order on Remand, which is incorporated herein, issued on May 27, 2008 wherein it was concluded claimant's claim for benefits was not barred by failure to give timely written notice as the undersigned concluded employer had actual notice of claimant's injury and was not prejudiced by not receiving written notice.

On June 16, 2008, counsel for claimant filed Claimant's Motion for Reconsideration of Compensation Order on Remand and Request for Amended Compensation Order Awarding Benefits. In support thereof, counsel asserts that at the Formal Hearing employer stipulated that claimant was temporarily and totally disabled for the period of relief claimed and therefore nature and extent of disability was not raised as an issue. As further evidence counsel points to a letter dated March 11, 2005 to the original ALJ specifically withdrawing the issues of accidental injury and nature and extent of disability.

As of the date of the instant Amended Compensation Order on Remand, employer has not filed a response to claimant's motion. A review of the hearing transcript in fact confirms claimant's assertion as was noted in the Compensation Order on Remand, footnote 3. Accordingly, the Order contained herein, on Page 7, has been amended to include an order granting claimant's claim for temporary total disability benefits.

CLAIM FOR RELIEF

Claimant seeks an award under the Act of temporary total disability benefits from October 28, 2004 to date and continuing with interest and accrued benefits for injury to his left shoulder and authorization for medical care.²

ISSUE

1. Whether claimant gave employer timely notice of the January 7, 2003 work injury.³

FINDINGS OF FACT

The Findings of Fact and Conclusions of Law of the October 31, 2005 Compensation Order are hereby adopted, incorporated herein and shall not be disturbed.

Claimant had a spinal fusion prior to January of 2003. On January 7, 2003, claimant (a commercial "Class B" union plumber) was working with a plumbing foreman, Mark Woolfenden, in the basement of 1735 K Street, N.W. in the District of Columbia. Because this was a plumbing emergency involving the possibility of imminent flooding with sewage water, claimant and his co-worker were rushing to complete the job. Claimant ran up a ladder while carrying some wrenches and struck his head on a pipe, experiencing immediate pain on the top of his

²Employer and claimant have agreed to a physician for a second opinion and examination; the medical authorization claim is made for the record only. (HT 11)

³The issues of nature and extent of disability and authorization to change physicians were withdrawn.

head, his neck and his right arm. Because he was present when claimant struck his head on the pipe, witnessed claimant's reactive symptoms and complaints, and was fully aware of the exigent circumstances which made immediate completion of the job necessary (possibly precluding claimant from leaving to seek medical treatment before finishing the job), Mr. Woolfenden had actual notice that claimant was injured at work that day. Claimant and Mr. Woolfenden continued to work, together, until the job was completed; at the end of the day, Mr. Woolfenden carried claimant's tools to the truck because claimant was experiencing incapacitating neck and arm pain.

Within two days of the January 7, 2003 work accident, claimant told employer's office manager Kathy Hoffman, during the course of a telephone conversation, that he hurt himself while working on K Street. After the January 7, 2003 incident, claimant continued his regular duties and continued to complain to his co-workers of neck and right shoulder pain which he self-treated with over the counter medication.

Claimant continued working through January and February of 2008. During those two months, he repeatedly complained to Kelly Troxler, a superintendent and steam fitter working for employer, of pain. This pain caused him to take extra breaks, stopping his work activities and resting for up to twenty minutes until the pain subsided. Mr. Troxler was aware of claimant's discomfort and of its relationship to claimant's January work injury; he accommodated claimant's debilitating symptoms by allowing him to take extra, extended breaks. In their supervisory capacities, both Mr. Woolfenden and Mr. Troxler would normally report any employee

injuries to the employer.

Prior to his first examination with orthopedic specialist H. Edward Lane, III M.D., in March of 2003, claimant told Kathy Hoffman he was going to see Dr. Lane due to his increased back and arm pain. By March 13, 2003, after reviewing an MRI of claimant's neck, Dr. Lane advised him to stop working. Dr. Lane referred claimant to Dr. Robert Gorsen for neurological evaluation and corresponding treatment.⁴ Dr. Lane initially treated claimant conservatively with therapy, medication and rest from work. Claimant continued to complain of neck and right shoulder pain. I find on March 13, 2003, claimant stopped working on advice of Dr. Lane.

On May 9, 2003, claimant had cervical fusion surgery. Immediately after awakening from the surgery, and thereafter, claimant had severe left shoulder and left upper extremity pain. The results of MRI testing of claimant's left shoulder disclosed an impingement syndrome. Claimant became frustrated and on the advice of a friend consulted Dr. William Lennen, orthopedic surgeon for treatment for this left upper extremity pain on September 22, 2003. Dr. Lennen performed left shoulder surgery on October 21, 2003; this surgery alleviated claimant's left shoulder discomfort.

DISCUSSION

I have reviewed the arguments of counsel on the issues present for resolution. To the extent an argument is consistent with the findings of facts and conclusions of law contained herein,

⁴Dr. Lane and Dr. Gorsen, treated claimant for his prior neck injury. Both physicians participated in treating claimant for the 2000 cervical injury as well as the 2003 neck surgery.

it is accepted; to the extent an argument is inconsistent therewith, it is rejected.⁵

The issue to be addressed is whether claimant complied with the notification requirements of D.C. Official Code § 32-1513(a) or if not, whether such failure was or should have been excused. An injured employee is required to provide written notice to an employer of a work injury either “within 30 days after the date of such injury” or “within 30 days after the employee . . . is aware or in the exercise of reasonable diligence should have been aware or a relationship between the injury . . . and the employment.” D.C. Official Code § 32-1513(a). An employee’s failure to provide such notice will nevertheless not bar a claim where either the employer has actual knowledge of the injury and has not been prejudiced by the claimant’s failure to provide written notice, or where the claimant’s failure is excused upon a showing of a satisfactory reason for not submitting the required notice. See D.C. Official Code §§ 32-1513(d)(1) and (d)(2).

Claimant contends his actual notice to Mark Woolfenden, a foreman for the Arthur D. Heath Corporation, and the actual notice to Kelly Troxler, outside superintendent for the employer, constitutes sufficient notice within thirty days of the incident, satisfying the requirement of the Act. Employer contends claimant Employer argues that claimant failed to notify the appropriate individual in its office, within thirty days, that the January 7, 2003 injury occurred and thus failed to provide timely notice of the injury in

accordance with the Act.

It is not claimant’s initial burden to prove he provided employer with timely written notice or that employer otherwise had timely actual notice of the January 7, 2003 injury. Rather, D.C. Official Code §32-1521(2) affords claimant a rebuttable presumption that he gave employer notice of the injury in a timely fashion, in accordance with the humanitarian purposes of the act. Said presumption applies to both the written notice requirement and to the alternative provision for actual knowledge by the employer. *Dillon v. D.C. Department of Employment Services*, 912 A.2d 556 (D.C. 2006), citing *Howrey & Simon v. D.C. Department of Employment Services*, 531 A.2d 254, 256 n.2 (D.C. 1987).

Thus, the presumption applies to the issue of timely notice. Employer’s rebuttal argument includes reference to the testimony of employer’s witness, Katherine Hoffman, who indicated claimant did not report the injury to her until March 3, 2003. Employer further argues that the information provided to Mr. Woolfenden and Mr. Troxler was insufficient to constitute actual notice. Once the presumption has been rebutted, it drops out of the case entirely, leaving the burden on claimant to prove timely notice. *Washington Post v. D.C. Department of Employment Services*, 852 A.2d 909, 911 (D.C. 2004); *Dillon, supra.*; *VanHoose, supra.* Claimant has met that burden here, having adduced persuasive evidence sufficient to support a determination that employer’s foremen had actual notice of claimant’s work accident.

As the Board has noted, the notice requirement of the Act serves two purposes; it enables an employer to provide immediate medical diagnosis and treatment with a view

⁵While each of the parties exhibits is not specifically referenced in this discussion, each was reviewed, considered and weighed during the course of this deliberation.

to minimizing the seriousness of the injury; and, it facilitates the earliest possible investigation of the facts surrounding the injury. *VanHoose v. Respicare Home Respiratory Care*, CRB No. 07-022, AHD No. 06-3342, OWC No. 626066 (July 23, 2007); *Dillon, supra*. In the case at bar, employer had actual notice sufficient to alert claimant's supervisors to his need for medical diagnosis/treatment and employer was fully aware of the pertinent facts surrounding the injury.

Claimant's contentions are consistent with the facts, as I have found them, and with applicable legal precedent. The Act states that if the employer (or his agent in charge of the business in the place where the injury occurred) had knowledge of the injury or death and its relationship to the informant and it later determines that the employer or carrier has not been prejudiced by the failure to give such notice, the failure to give written notice that is required under the Act shall not bar the employee's claim. This exception has been interpreted by the Director as including the foreman or other agents for the employer even though they may not have been on the job where the injury occurred. As such, notice to

a foreman under these circumstances will be imputed and is sufficient to satisfy the strictures of the Act. See *Wahlne v. District of Columbia Department of Employment Services*, 704 A.2d 1196 (D.C. 1997); *Wahlne v. Mona Electrical Company*, Dir. Dkt. No. 94040, H&AS No. 92-280, OWC No. 0226416 (Remand Order, June 15, 1998).

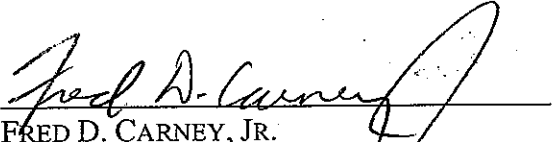
The oral notice provided to Mark Woolfenden and Kelly Troxler, within thirty days of the date of the accident, constitutes sufficient notice to the employer to satisfy the requirements of the Act. Employer did not argue, nor is there persuasive evidence to support the supposition, that it has been prejudiced by the lack of written notice within thirty days. The claim for benefits is not barred by untimely written notice of the January 7, 2003 work injury.

CONCLUSIONS OF LAW

It is hereby concluded the claim for benefits related to claimant's January 7, 2003 injury is not barred by failure to give timely notice pursuant to D.C. Official Code, as amended, §32-1513(a).

ORDER

Claimant's claim for temporary total disability benefits from October 28, 2004 to date and continuing is hereby **GRANTED**.



FRED D. CARNEY, JR.
ADMINISTRATIVE LAW JUDGE

June 25, 2008

Date

RE: **Roy T. Eckert v. Arthur D. Heath Corporation/Erie Insurance Group,**
OWC No. 586974, AHD No. 05-120.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this 25th day of June, 2008 to the following:

Mohammad R. Sheikh, Acting Assistant Director
Labor Standards
64 New York Ave., N.E., Suite 3923
Washington, D.C. 20002

Hand Delivery

Charles Green, Associate Director
Department of Employment Services
64 New York Ave., N.E., Second Floor
Washington, D.C. 20002

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William S. Hopkins, Esquire
Duncan and Hopkins, P.C.
11130 Main Street, Suite 310
Fairfax, Virginia 22030

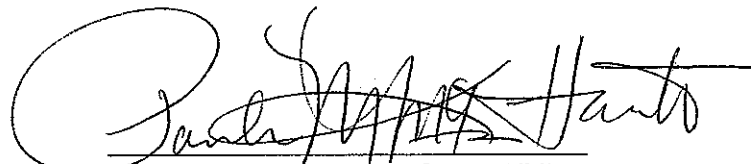
Certified

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Certified

Roy Eckert
45 Bluevalley Road
Linden, VA 22642

Certified


for **LINDA F. JORY, ACTING CHIEF ALJ**
ADMINISTRATIVE HEARING DIVISION

RE: *Roy T. Eckert v. Arthur D. Heath Corporation/Erie Insurance Group*,
OWC No. 586974, AHD No. 05-120.

APPEAL RIGHTS

This order is effective upon filing with the Mayor pursuant to §21 of the Act, D.C. Code, as amended, §32-1520. 7 DCMR §230.12; §23a of the Act, D.C. Code, as amended, 2001, §32-1522a. Any party aggrieved by this Order may file an application for review with the Chief Judge Compensation Order Review Board, Labor Standards Bureau, Department of Employment Services.

Send Application for Review to:

**Compensation Order Review Board/Chief Judge
Department of Employment Services
Labor Standards Bureau
64 New York Ave., N.E.
Third Floor
Washington, D.C. 20011**

The Application for Review must be filed within 30 days of the date of the filing of this Order with the Mayor as provided in §23a(a) of the Act, D.C. Code, as amended, §32-1522a(a). An Application for Review is perfected by filing with the Chief Judge, Compensation Order Review Board, Labor Standards Bureau two (2) copies of an Application for Review, two (2) copies of a memorandum of points and authorities in support of the application and certification that copies of the application and memorandum have been served, by mail or delivery, upon the opposing party(ies) and. 7 DCMR §§230.1, 230.2; §23a of the Act, D.C. Code, 2001, §32-1522a.