

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-AA-522

MICHELLE T. MORROW, PETITIONER,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*, INTERVENORS.

On Petition for Review of an Order of the
Compensation Review Board of the District of Columbia
(CRB-154-14)

(Hon. Karen R. Calmeise, Administrative Law Judge)

(Submitted April 22, 2016

Decided May 11, 2016)

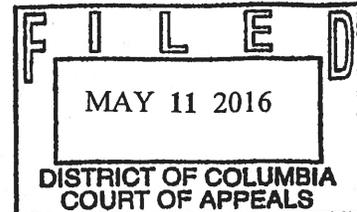
Before THOMPSON and EASTERLY, *Associate Judges*, and REID, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant Michelle Morrow petitions for review of a decision of the Compensation Review Board (“CRB”) affirming the finding of the Department of Employment Services’ Administrative Law Judge (“ALJ”) that she failed to give the required statutory notice to her employer, Washington Metropolitan Area Transit Authority (“WMATA”), of the relationship between her injury and her employment. For the reasons stated below, we affirm.

FACTUAL SUMMARY

During the May 15, 2012, hearing before the ALJ on her workers’ compensation claim, Ms. Morrow testified as follows. On November 3, 2004, she awoke to find that her “entire foot was swollen, and [she] had a lot of pain in the



back of the heel of [her] foot, to where it was very painful to [her] to stand up on [her] foot, [so she] went to the doctor.” She saw her nurse practitioner, Kay Sophar,¹ who examined Ms. Morrow’s foot and concluded that Ms. Morrow had plantar fasciitis (known colloquially as a “heel spur”). Ms. Sophar also informed Ms. Morrow “that in her opinion, the primary cause was [Ms. Morrow’s] job.” Ms. Morrow stayed home from work that day on Ms. Sophar’s orders. She claimed that when she returned to work, she gave Mr. Michael Lassiter, a “Return to Duty” form notifying him of the reason for her absence. She also “told him that [she] had the problem with [her] foot, and that [her] doctor said [she’s] not supposed to be really standing on my feet as much”

In early 2012, Ms. Morrow filed a claim, under the District of Columbia Workers’ Compensation Act of 1979, for causally related medical expenses and for disability income benefits. WMATA opposed her claim. In addition to Ms. Morrow’s testimony, summarized above, Mr. Lassiter, a field coordinator for WMATA who assigned work to traffic and field supervisors at the time of Ms. Morrow’s foot complaint, testified as follows. At the time of Ms. Morrow’s injury, he “was not a manager [] or a supervisor,” but he “was the person who . . . put out ‘fires’ and just made sure the day to day operations were carried out properly.” He “would have been aware” of any medical reports related to Ms. Morrow’s injury at the time. However, “[t]here was no report to [him], whatsoever.”²

¹ Although at many times in the record, Ms. Sophar is referred to as “Dr. Kay Sofar,” her signature block, which appears on two letters submitted as exhibits, lists her name as “Kay Sophar, CFNP [“Certified Family Nurse Practitioner”]; these exhibits are headed, Office of Family Health Care of Silver Spring” and above Ms. Sophar’s name is that of Mona Ellis, MD.

² The parties also submitted multiple exhibits into the record for the ALJ’s examination. Included among those exhibits were Ms. Morrow’s Exhibit 2, which included a copy of a medical form signed by Ms. Sophar that indicated Ms. Morrow was treated for plantar fasciitis on November 3, 2004, and was ready to return to work the next day, and Court Exhibit 1, which was a copy of a medical form also signed by Ms. Sophar that indicated Ms. Morrow was treated for plantar heel on November 4, 2004, and was ready to return to work that day. Mr. Lassiter testified that he had reviewed Ms. Morrow’s “division file” and “attendance records” prior to the compensation hearing. He recalled a document or medical absenteeism slip (he believed it was dated in March 2005) indicating Ms. Morrow’s absence due to “plantar fasciitis.” He confirmed on cross-examination
(continued...)

On July 27, 2012, the ALJ issued an initial Compensation Order, finding that Ms. Morrow's claim for disability benefits was barred for "fail[ure] to give adequate or timely notice to [WMATA] of the work injury," and that her "current right foot condition is not medically causally related to the work injury." In response, Ms. Morrow filed an Application for Review with the CRB challenging the ALJ's decision. The CRB issued a decision and remand order, affirming the ALJ's ruling on the notice issue, but concluding that the ALJ's determination of the issue concerning causally related medical expenses was not supported by substantial record evidence and was not in accordance with the law.

After review on remand, the ALJ issued a Compensation Order on Remand, dated November 26, 2014, incorporating the findings of fact in the July 2012 Compensation Order, and reiterating that Ms. Morrow failed to provide WMATA with written or actual notice of her work injury in accordance with the statutory requirement. However, contrary to the initial Compensation Order, the ALJ found that Ms. Morrow was entitled to causally related medical expenses for the work injury. Ms. Morrow filed a second Application for Review; the only issue raised for review concerned the notice to WMATA. The CRB affirmed the Compensation Order on Remand, and Ms. Morrow filed a Petition for Review with this court, addressing only the notice issue.

ANALYSIS

Standard of Review

We review the decision of the CRB, not the ALJ's decision, and "affirm [that] decision unless it was '[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Jones v. District of Columbia Dep't of Emp't Servs.*, 41 A.3d 1219, 1221 (D.C. 2012) (quoting D.C. Code § 2-510 (a)(3)(A) (2012 Repl.)). "We must determine first, whether the agency has made a finding of fact on each material contested issue of fact; second, whether the agency's findings are supported by substantial evidence on the record as a whole; and third, whether the Director's conclusions flow rationally from those findings and comport with the applicable law." *Mills v. District of Columbia Dep't of*

(...continued)

that the records showed that Ms. Morrow missed a day of work on November 4, 2004.

Emp't Servs., 838 A.2d 325, 328 (D.C. 2003). “Substantial evidence is relevant evidence such as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (internal citation and quotation marks omitted).

Ms. Morrow's Argument

Ms. Morrow argues that “substantial evidence in the record supports a finding that [she] provided timely notice of her right foot condition to [WMATA].” She claims that the ALJ “erred in not performing the presumption analysis.”³

Applicable Statutory and Legal Principles

A claimant seeking worker's compensation benefits must give notice to the employer “of any injury . . . in respect of which compensation is payable . . . within 30 days after the date of such injury . . . or 30 days after the employee or beneficiary is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury . . . and the employment.” D.C. Code § 32-1513 (a). The notice must be “in writing” and must contain “a statement of the time, place, nature, and cause of the injury or death.” D.C. Code § 32-1513 (b). However, failure to give written notice may be excused

[i]f the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and its relationship to the employment and the Mayor determines that the

³ Ms. Morrow argues that the ALJ should have explicitly analyzed (1) whether she presented sufficient evidence to invoke the presumption of proper notice and (2) whether WMATA presented sufficient evidence to rebut that presumption. Because Ms. Morrow raises this argument for the first time on appeal and presents no justification for her failure to raise it before the agency, we need not address it. *See Goodman v. District of Columbia Rental Housing Comm'n*, 573 A.2d 1293, 1301 (D.C. 1990) (“[C]ontentions not urged at the administrative level may not form the basis for overturning the decision on review.”). Furthermore, even assuming Ms. Morrow preserved her claim regarding the presumption, we are satisfied that the ALJ recognized in its initial Compensation Order that the ALJ correctly analyzed the presumption issue relating to notice to the employer.

employer or carrier has not been prejudiced by failure to give such notice[.]

D.C. Code § 32-1513 (d)(1). To satisfy this exception, “an employer must know that the injury arose out of the employment and that the injury occurred in the course of the employment, and an employer must have actual knowledge of the injury and its relationship to the employment.”⁴ *Howard Univ. Hosp. v. District of Columbia Dep’t of Emp’t Servs.*, 960 A.2d 603, 609 (D.C. 2008). “In any proceeding for the enforcement of a claim for compensation . . . , it shall be presumed, in the absence of evidence to the contrary, . . . (2) That sufficient notice of such claim has been given.” D.C. Code § 32-1521 (2). “[O]nce rebutted, [the presumption] drops out of the case entirely, leaving the burden on the employee to prove timely notice.” *Howard Univ. Hosp.*, 960 A.2d at 611 n.27 (quoting *Dillon v. District of Columbia Dep’t of Emp’t Servs.*, 912 A.2d 556, 560 (D.C. 2006)) (internal quotation marks omitted).

Discussion

The claimant in *Howard Univ. Hosp.*, *supra*, suffered a stroke caused by job-related stress. 960 A.2d at 607. She was informed by her treating physician “on or about October 12, 2000, that her stroke was causally related to the stress associated with her volume of work and lack of sleep.” *Id.* at 609. Despite this information, claimant did not notify her employer about the causal relationship between her stroke and her employment until May 29, 2001, well after the 30-day period during which the claimant was required to inform her employer of that causal relationship. *Id.* In light of those circumstances, we were “compel[led] to conclude as a matter of law that [the claimant] did not furnish timely notice of injury, and that her failure to do so was not excused under either statutory exception to the notice requirement.” *Id.* at 610. In reaching this conclusion, we deferred to the CRB’s interpretation of the notice exception found in D.C. Code § 32-1513 (d)(1), which “rejected a ‘should have known’ standard and concluded that subsection (d)(1) requires an employer to have ‘actual knowledge.’” *Id.* at 609.

⁴ “While the failure to give proper notice does not preclude a claim for causally related medical expenses . . . , it ordinarily does bar a claim for disability income benefits.” *Howard Univ. Hosp.*, 960 A.2d at 607 (citation omitted).

Similarly, in this case, the ALJ found, based on Ms. Morrow's own testimony, that she "was aware of the possible relationship of the injury to her employment on November 3, 2004, when she first sought medical care for the injury. She was informed by [Ms.] So[ph]ar . . . that the primary cause of her right foot condition was due to her work duties." The ALJ further found that Ms. Morrow "has not proven that she provided [WMATA] with written or actual notice of the work injury within 30 days of when she was made aware that her injury was work-related." In support of this finding, the ALJ cited Ms. Morrow's testimony and records, as well as Mr. Lassiter's testimony, all of which established that at most, Ms. Morrow informed WMATA that her right foot was injured, not that her injury arose out of her employment.⁵ In its decision and remand order, the CRB examined the notice issue in detail, including the ALJ's analysis, and determined that the ALJ's conclusion that Ms. Morrow "failed to give timely notice" was supported by "the evidence submitted as well as [Ms. Morrow's] testimony." The CRB's final decision and order appropriately reiterated the ALJ's summary conclusion in its compensation order on remand concerning the notice issue that had been resolved in the initial compensation order. On this record, and in light of our decision in *Howard Univ. Hosp.*, we are satisfied that the CRB's decision affirming the ALJ's ruling regarding the notice issue was based on substantial record evidence and was in accordance with the law.

⁵ For this reason, even were we to accept Ms. Morrow's contention that the standard articulated in the agency's case, *Keith v. Unity Constr. Co. of the District of Columbia*, Dr. Dkt. 89-58, H&AS 89-202 (July 12, 1990), applies, she has failed to satisfy that standard. Under her own proposed interpretation of *Keith*, she was required to show that "the employer and insurer must know as much about the claimant's condition as could be reported." However, she admitted that she knew that her condition was caused by her employment on the day she first sought treatment for the injury, yet she presented no evidence that she gave WMATA that information. As a result, WMATA did not "know as much about [Ms. Morrow's] condition as could be reported" because she did not report as much as could be reported.

Accordingly, for the foregoing reasons, we affirm the CRB's Decision and Order.

So ordered.

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Karen R. Calmeise

Timothy Fitzpatrick
Program Analyst
Department of Employment Services –
Compensation Review Board

David J. Kapson, Esq.
Chasen & Boscolo
7852 Walker Drive – Suite 300
Greenbelt, MD 20770

Sarah O. Rollman, Esq.
Assistant General Counsel
Washington Metropolitan Area Transit Authority
600 5th Street, NW
Washington, DC 20001

Todd S. Kim, Esq.
Solicitor General – DC