GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-006

JOANN BAUER,
Claimant–Petitioner,

v.

SAFEWAY, INC.,
Self-Insured Employer - Respondent

Appeal from a December 13, 2012 Compensation Order by
Administrative Law Judge Gerald D. Roberson
AHD No. 12-425, OWC No. 685887

David J. Kapson, Esquire, for the Claimant/Petitioner
William H. Schladt, Esquire, for the Self-Insured Employer/Respondent

Before: HENRY W. MCCOY, HEATHER C. LESLIE, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked two jobs, full-time as a hotline operator for Child and Family Services Agency, and part-time as a cashier for Employer. Claimant finished her training as a cashier in February 2011. In addition to standing at the register and scanning items being purchased, Claimant physically had to lift heavy items during her entire shift. In May 2011, Claimant developed a twinge in the middle of her left arm and sought initial treatment at Kaiser Permanente.

Claimant was initially examined by Dr. Edwin Wilson on May 13, 2011 with complaints of left shoulder pain while extending her arms over her head. In his examination notes, Dr. Wilson noted that Claimant had recently started work as a checker at Safeway and the job involved repetitive motion and lifting. Dr. Wilson's diagnosis was myalgia, repetitive strain injury, and fibromyalgia.

Claimant continued working until her left shoulder pain along with left lateral hip pain caused her to seek treatment on October 10, 2011 where she was seen by Dr. Pamela Cobb, an orthopedist at Kaiser. Dr. Cobb diagnosed left shoulder rotator cuff tendinitis with restrictions on no pulling, pushing, lifting no more than 5 pounds with the left arm and no overhead activities with the left arm. Claimant reported her injury and restrictions at this time to Employer. As Employer did not provide light duty work until January 2012, Claimant filed a claim for temporary partial disability benefits from October 11, 2011 to January 12, 2012.[1]

At the formal hearing to consider Claimant's claim, the initial issue presented was whether Claimant had provided Employer with timely notice of her injury as required by D.C. Code § 32-1513. In a December 13, 2012 Compensation Order (CO), the presiding Administrative Law Judge (ALJ) held that Claimant did not provide timely notice and denied her claim for disability benefits.[2] Claimant filed a timely appeal with Employer filing in opposition.

Claimant asserts on appeal that the ALJ's ruling is not supported by substantial evidence because it was not until October 2011 that she became aware of the relationship between her injury and her work activities, thus notice was timely. Employer argues that Claimant was aware of this relationship in May 2011 and therefore the ALJ's determination of untimely notice is supported by substantial evidence in the record. After reviewing the record, we AFFIRM.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.[3] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (the "Act"), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

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[1] As Claimant noted in her *Memorandum of Points and Authorities in Support of Claimant's Application for Review*, she "continued to work in her primary position with CFSA as it is a sedentary desk job that requiring no lifting or overhead work." *Memorandum of Points and Authorities*, p. 4, fn. 2.

[2] *Bauer v. Safeway, Inc.*, AHD No. 12-425, OWC No. 685887 (December 13, 2012).

[3] "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. DOES 83*4 A.2d 882 (D.C. 2003).

With regard to providing timely notice of a work injury, D.C. Code § 32-1513(a) requires that notice be given within 30 days after the date of the injury or "30 days after the employee…is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury…and the employment." Subsection (b) requires that this notice be in writing and given to the employer. The failure to provide written notice will not bar a claim where according to § 32-1513(d), the employer had knowledge of the injury and it is determined that the employer has not been prejudiced, or it is determined there was a satisfactory reason why timely notice was not given.

After reviewing the record evidence, the ALJ determined:

> "The medical record dated May 13, 2011 along with Claimant's testimony establishes Claimant had sufficient knowledge of the relationship between her employment and the work injury on May 13, 2011. Therefore, Claimant had an obligation to notify Employer within 30 days after she sought treatment with Dr. Wilson on May 13, 2011. Claimant did not provide such notice. As such, the record establishes Claimant did not timely notify Employer of her injury as required under Section § 32-1513 of the Act." CO at 6.

Deeming this determination to be in error, Claimant argues that she satisfied the notice requirement under § 32-1513 by notifying Employer once she became aware after her initial visit with Dr. Cobb on October 11, 2011 that her shoulder problems could be caused by the repetitive use of her arm and shoulder while working as a checker. In addition, Claimant argues that she was entitled to a presumption, in the absence of evidence to the contrary, that she provided timely notice.[4] Claimant asserts that the ALJ ignored the evidence of Dr. Cobb's report, her subsequent prompt reporting of her injury, and that Employer failed to rebut the presumption. We do not agree.

While it is true that Claimant is entitled to a presumption that she provided "sufficient notice" of her claim, that presumption only operates in the absence of evidence to the contrary. Here there is evidence to the contrary, not only in the May 13, 2011 report of Dr. Wilson, but also Claimant's own testimony at the formal hearing and during an October 18, 2012 deposition.

A review of Dr. Wilson's report shows that Claimant went for treatment on May 13, 2011 complaining that she had experienced the onset of left shoulder pain one week prior while extending her arms overhead. As the ALJ noted, the report expressly stated that "[Claimant] noted pain in the left shoulder after raising her arm over her head." CE 4, p. 39. Dr. Wilson noted that Claimant had recently started working at Safeway where she performed repetitive motion and lifting. Dr. Wilson diagnosed repetitive strain injury and provided the instruction that she was to limit lifting as long as it caused pain. CE 4, p. 40.

With Dr. Wilson's diagnosis and instruction, the ALJ reasoned:

> "The findings and instructions from Dr. Wilson establish he provided a diagnosis of repetitive strain injury in connection with the repetitive

[4] See D.C. Code § 32-1521(2), which states: "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (2) That sufficient notice of such claim has been given;…."

> activities of Claimant's employment with Employer, which included lifting. His opinion provides sufficient detail to notify Claimant about the possible connection between the lifting activities of her employment and his diagnosis of repetitive strain injury." CO at 6.

The Hearing Transcript (HT) shows that under cross-examination Claimant did not refute her deposition testimony given October 18, 2012. There, Claimant testified that Dr. Wilson told her at the initial May 2011 examination that the pain she was experiencing in her left arm and shoulder was the use of her arm in her part-time job at Safeway. HT, p. 39-40. During her testimony, Claimant acknowledged that Dr. Wilson knew Claimant worked at Safeway and "talked about job". HT, p. 41.

It is Claimant's argument that she only became aware of the connection between her arm and shoulder pain and her work activities as a checker during her examination by Dr. Cobb on October 10, 2011. However, a review of that report shows that the causal connection comes from Claimant and not Dr. Cobb. In recording the "History of Present Illness", Dr. Cobb wrote:

> "The patient is a 58-year-old woman who reports to Orthopedic Clinic with left shoulder pain and left lateral hip pain. She works part time at Safeway as a cashier. She also has a full-time job. She states that with her cashier job she feels that her left lateral shoulder pain is aggravated and feels it is a result of her job." CE 1, p. 30.

Dr. Cobb diagnosed left shoulder rotator cuff tendinitis. A follow-up examination on November 30, 2011 ended with a diagnosis of left shoulder rotator cuff syndrome, possible tear and work restrictions. At neither of these examinations, especially not the initial one on October 10th, did Dr. Cobb express an opinion as to the etiology of Claimant's pain. All such statements of a causal connection to her work activities came from Claimant and were duly recorded by Dr. Cobb.

The Act requires written notice of a compensable injury within 30 days after the date of the injury or within 30 days after the employee is "aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury… and the employment." The Act does not require that the employee be specifically told of this relationship but rather places the obligation on the employee to become aware of that relationship by whatever means or in the exercise of reasonable diligence to become aware of the relationship between the injury and the employment.

While it is Claimant's contention that it was only after seeing Dr. Cobb on October 10, 2011 that she became of aware of this relationship, the substantial evidence in the record shows otherwise. Claimant would have it believed that it was only at her initial examination with Dr. Cobb that she was informed of this relationship. However, the doctor's report shows that it was she who informed Dr. Cobb and not the other way around. This lends credence to her testimony that it was Dr. Wilson in May 2011 that made and informed her of the correlation between her left arm and shoulder pain and her work activities.

Dr. Wilson's May 13, 2011 medical report contained sufficient information to allow the ALJ to draw the reasonable inference it provided Claimant with sufficient detail to notify her of the possible connection between her repetitive strain injury and her work activities at Safeway.

And, while Claimant asserted that she was not provided a copy of this report, she testified that Dr. Wilson specifically told of this connection.

Thus, there is substantial evidence in the record that Claimant was not only aware of the relationship between her injury and her work activities, but she had sufficient information that through the exercise of reasonable diligence she would have become and actually did become aware of that relationship as she informed Dr. Cobb on October 10, 2011. As such, Claimant's time to timely inform Employer of her workplace injury began to toll after the May 13, 2011 examination with Dr. Wilson and not the October 10, 2011 examination with Dr. Cobb.

CONCLUSION AND ORDER

The December 13, 2012 Compensation Order is supported by substantial evidence in the record and is in accordance with the law. Accordingly, it is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

March 26, 2013
DATE