

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-037

**BERNICE BLAKNEY,
Claimant - Petitioner,**

v.

**MARRIOTT INTERNATIONAL,
and MARRIOTT CLAIM SERVICES,
Self-Insured Employer-Respondent.**

Appeal from a March 6, 2014 Order By
Administrative Law Judge Joan E. Knight
AHD No. 12-328, OWC No. 687105

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
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Rebekah Miller for the Petitioner
Todd Sapiro for the Respondent¹

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, and MELISSA LIN JONES, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board; MELISSA LIN JONES, *dissenting.*

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by Claimant - Petitioner (Claimant) of the March 6, 2014, Order issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that Order, the ALJ denied the Claimant's request for disability and medical benefits. We REVERSE and REMAND.

¹ Jeffrey Ochsman represented the Employer at the Formal Hearing

BACKGROUND AND FACTS OF RECORD

Claimant was employed by the Employer as a housekeeper. Her duties included cleaning hotel rooms and bathrooms which required Claimant to get on her knees to scrub and clean floors. In 2007, Claimant began to experience bilateral knee pain. Claimant testified, that in accordance with Employer's procedures she told her supervisor and her employer's loss prevention representative, Lena, numerous times starting in 2007 of her knee problems.

On June 4, 2010, Claimant sought treatment with her primary care physician, Dr. Suja Thrasybule for problems with both knees. Dr. Thrasybule referred Claimant to a specialist for further treatment and testing. Dr. Thrasybule noted Claimant worked on her knees and started to develop knee problems "from the constant kneeling 2 years ago and it has progressively worsened." Claimant's exhibit 1 at 003. Claimant received conservative care, including injections into her knees. Employer denied payment of medical bills and treatment on the basis that Claimant did not give timely notice pursuant to the Act.

A full evidentiary hearing was held on October 18, 2012. Claimant sought an award of causally related medical treatment to her left knee and payment of causally related medical bills. Per the CO, the issues raised to be adjudicated was whether or not Claimant suffered an accidental injury that arose out of and in the course of her employment, whether Claimant's current condition is causally related to her work injury, whether timely notice was given, and the nature and extent of Claimant's disability, if any.

A CO was issued which found that Claimant suffered a cumulative injury on June 4, 2010² which arose out of and in the course of Claimant's employment and was casually related to said employment. However, the CO found that Claimant failed to give timely notice and concluded the issue of nature and extent was therefore moot. The CO denied Claimant's request in its entirety.

Claimant timely appealed. Claimant argues that the CO erred in finding that Claimant did not provide timely notice, specifically that as Employer had knowledge of Claimant's injury and its relationship to her employment, Employer was not prejudiced by Claimant's untimely written notice. Employer opposes, arguing the Order should be affirmed.³

THE STANDARD OF REVIEW

The scope of review by the Compensation Review Board ("CRB") is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is

² The conclusions of law section referred to an injury date of April 27, 2007. We will treat this date as a typographical error and that the date the ALJ meant to refer to is June 4, 2010. As we are remanding the case, the ALJ is directed to correct this error.

³ Employer did not appeal the finding that the Claimant suffered a cumulative accidental injury which arose out of and in the course of her employment or that her bilateral knee injuries are medically causally related to her employment.

supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

DISCUSSION AND ANALYSIS

Preliminarily, we note that the CO erroneously identifies nature and extent of Claimant's disability as an issue to be adjudicated. This is in error as the Claimant only sought causally related medical care and expenses for treatment to her knees. Hearing transcript at 7.⁴ As we are remanding the case, the ALJ should correct this error and remove any reference to any disability benefits being adjudicated or denied.

Turning first to the CO, a review of the CO reveals after finding the Claimant's testimony credible, the CO further finds:

In 2007, Claimant began experiencing bilateral knee pain while scrubbing ceramic bathroom floors. In 2008 Claimant reported the problems she was having with her knees to her supervisor and Employer's Loss Prevention department. Claimant did not seek medical attention and continued to perform her usual duties. In 2009, Claimant reported her knee pain and swelling worsened and she began using a bath towel to take some of the strain off of her knees when scrubbing bathroom floors. HT pp. 23-33; 90, 102-106.

On October 20, 2010, Claimant reported her knee pain to Employer and the alleged connection between her symptoms and her work duties. On October 20, 2010, Employer had actual knowledge of Claimant's knee condition and its work relatedness. Employer's First Report of Injury or Occupational Disease was filed on June 23, 2011, with the Office of Workers' Compensation. Said report indicated Employer first had knowledge of Claimant's October 20, 2010, left knee injury on June 22, 2011. CE 1, CE 7; EE 1, EE 2; HT pp. 22-33; 64-67, 85-86.⁵ (Footnote omitted.)

CO at 3-4.

⁴ We also note that on the joint pre-hearing statement, the parties had switched nature and extent from a contested issue to not contested and affixed their initials to signify this change.

⁵ On page 23 of the hearing transcript, the following is recorded:

- Q. Did there come at time when you started experiencing some problem with your knees?
A. Yes. I started to experience a little pain in my knee, I'd say it was like a year, and to me going into my second, working there. At the time the pain started and I --
Q. Did you report the pain?
A. Yes, ma'am.
Q. Who did you --
A. I went downstairs and I reported it to Loss Prevention. So-
Q. Is that the procedure that's required?
A. Yes, for work-related injuries, you go --
Q. Do you remember who, in Loss Prevention, you reported to?
A. I talked to Lena. I don't recall her last name.

Furthermore, in the discussion section, the CO states:

Testimony elicited from Claimant established that she genuinely believed her knee symptomatology was attributed to her employment beginning in 2008 and she first sought treatment in June 2010. Claimant's testimony is supported by medical records from Dr. Thrasybule who evaluated Claimant's knees on June 4, 2010 and noted employment factors as the likely cause of the aggravation of her knee pain.

CO at 8.

With these facts and discussion in mind, we address Claimant's argument that the ALJ erred in finding that the Claimant did not provide timely notice under the Act. Claimant relies on the CO's finding that Claimant's testimony was credible, and that testimony was that she began to tell the Employer repeatedly from 2007 that her knees were hurting because of work and that Lena from loss prevention wrote down each instance, including the aggravation of October 20, 2010.

We turn first to the CO's conclusion that the date Claimant's trauma manifested was June 4, 2010. The CO relied upon the treating notes of Dr. Thrasybule to determine that June 4, 2010 was the date Claimant first sought medical treatment. The CO relies on *King v. DOES* which states that where a condition is the result of cumulative trauma, the date of injury is either the date a claimant is disabled from her usual employment as a result thereof, the date on which said injury becomes manifest, or the date on which the claimant seeks medical treatment for that condition. *See King v. DOES, 742 A.2d 460 (D.C. 1999); Railco Multi-Construction Co. v. Gardner, 564 A.2d 1167 (D.C. 1989)*. The two dates in question are June 4, 2010 and October 20, 2010. The June date is the date Claimant first sought medical treatment. The October 2010 date is the date that Employer's loss prevention representative told the Claimant to use when filing a claim.⁶ While Claimant testified to numerous times of notifying her Employer of her knee pain beginning in 2007 Claimant could not remember any specific dates. Thus, we find no error in the CO's determination that June 4, 2010 was the date Claimant first sought medical care, and was the date used when determining when notice should be given. The record supports this, it is consistent with the Claimant's testimony and is in accord with the rationale enunciated in *King*.

Thus, pursuant D.C. Code § 32-1513, the claimant is required to provide the employer written notification within 30 days after an injury or the onset of a condition or within 30 days of becoming aware of the relationship between the injury and employment.⁷ However, as Claimant and the parties point out, there are exceptions to the requirement to give timely notice.

Section 32-1513(d) states:

(d) Failure to give such notice shall not bar any claim under this chapter: (1) If the employer (or his agent in charge of the business in the place where the injury

⁶ Hearing transcript at 67.

⁷ Such notice shall be given to the Mayor and to the employer. Written notice or timely notice may be waived where the employer is aware of the injury and its employment relationship and it is determined the employer is not prejudiced by the claimant's failure to give written notice as codified in D.C. Code § 32-1513(d).

occurred) or the carrier had knowledge of the injury or death and its relationship to the employment and the Mayor determines that the employer or carrier has not been prejudiced by failure to give such notice; or (2) If the Mayor excuses such failure on the ground that for some satisfactory reason such notice could not be given; or unless objection to such failure is raised before the Mayor at the 1st hearing of a claim for compensation in respect of such injury or death.

The CO concluded that,

Employer asserts Claimant's failure to provide timely written notice prejudicial and impaired Employer's ability to investigate the circumstances of the claimed injury and properly evaluate medical treatment. The record evidence does not support Employer had knowledge of the Claimant's June 4, 2010 work injury pursuant to the provision of the Act. Although Claimant testified she complained about her knee condition to her supervisors, credible and substantial evidence in the record comports with the Employer's assertion they did not have knowledge her condition was related to employment conditions until October 20, 2010, approximately 136 days after she first sought medical treatment for said injury.

CO at 8-9.

We cannot agree with Employer's assertion that "based on the Claimant's own testimony, it is clear that the earliest date she provided notice was in June 2011." Employer's argument at 8. The CO found, as quoted above, Claimant credibly testified to notifying Employer several times over several years.

We cannot reconcile the CO's finding the Employer was prejudiced by untimely notice with the finding that the Claimant credibly testified to continually reporting her work related injury to loss prevention, specifically Lena, several times beginning in 2007. This credible testimony, that Employer was notified several times over the course of several years of Claimant's bilateral knee pain and its work relatedness, is uncontested. Such contradictory findings require remand. If the ALJ continues to find the Employer was prejudiced, the CO must explain *how* in light of the earlier findings of fact. Until such time as the several contradictory findings are reconciled by the ALJ, we cannot determine whether the CO is supported by the substantial evidence in the record and in accordance with the law. As the Court in *King* stated,

Fact-intensive determinations, essential to resolving the issue of coverage, turn in large measure on the evaluation of the medical testimony and evidence. The appellate court does not have the authority to examine this evidence and make its own conclusions. Factual inquiry is the responsibility of the hearing examiner.

King, supra at 470.

Also, the CO did find that Claimant's bilateral knee injuries are medically causally related to the cumulative work injury. Employer did not appeal this finding. It is settled that failure to provide timely notice does not bar Claimant from receiving medically causally related treatment or expenses.⁸ To deny the Claimant's claim for relief is in error. Upon remand, the ALJ is directed to award Claimant's claim for relief.

⁸ See *Safeway Stores v. DOES*, 832 A.2d 1267 (DC 2003). "Under our Workers' Compensation Act we have held that "medical benefits are not subject to the same limitations as are disability income benefits. . . ." *Id.* quoting

CONCLUSION AND ORDER

The March 6, 2014 Order is REVERSED and REMANDED for further findings of fact and conclusions of law consistent with the above instructions.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE

Administrative Appeals Judge

July 1, 2014

DATE

Melissa Lin Jones *dissenting*.

Ms. Bernice Blakney began to experience bilateral knee pain in 2007. Starting in 2008, Ms. Blakney complained to Marriott International's loss prevention representative about that pain.

In 2007, Claimant began experiencing bilateral knee pain while scrubbing ceramic bathroom floors. In 2008 Claimant reported the problems she was having with her knees to her supervisor and Employer's Loss Prevention department. Claimant did not seek medical attention and continued to perform her usual duties. In 2009, Claimant reported her knee pain and swelling worsened and she began using a bath towel to take some of the strain off of her knees when scrubbing bathroom floors. HT pp. 23-33; 90, 102-106.^[9]

On June 4, 2010, Ms. Blakney sought treatment with Dr. Suja Thrasybule, and based upon that evidence, an administrative law judge ("ALJ") ruled that Ms. Blakney had suffered a cumulative injury on June 4, 2010.

During the period from May 2006 to April 21, 2011 the Claimant continued to work full-time and perform her duties that consisted of scrubbing bathroom floors and tubs on her hands and knees. June 4, 2010, was the date

Santos v. DOES, 536 A.2d 1085, 1089 n.6 (D.C. 1988). Based upon the language of the Act we held that there was no indication that the legislature intended to "limit the employer's liability for medical services and supplies to the period of time during which the injured employee receives disability income compensation," *id.*, but rather that the right to medical expense are to be addressed "separate and distinct from the right to income benefits." *Santos, supra* at 1089 n.6; *see also*, 2 A. LARSON, THE LAW OF WORKMENS' COMPENSATION § 61.11 (b), at 10-773 (1987).

⁹ *Blakney v. Marriott International*, AHD No. 12-328, OWC No. 687105 (March 6, 2014), p. 3.

Claimant first sought medical attention for knee pain associated with her work duties.

On October 20, 2010, Claimant reported her knee pain to Employer and the alleged connection between her symptoms and her work duties. On October 20, 2010, Employer had actual knowledge of Claimant's knee condition and its work relatedness.

* * *

The record reflects Claimant first sought medical treatment for her knee pain with Dr. Thrasybule on June 4, 2010. Dr. Thrasybule made reference in the medical report to employment factors based upon Claimant's statement of developing knee pain when working.

* * *

Testimony elicited from Claimant established that she genuinely believed her knee symptomatology was attributed to her employment beginning in 2008 and she first sought treatment in June 2010. Claimant's testimony is supported by medical records from Dr. Thrasybule who evaluated Claimant's knees on June 4, 2010 and noted employment factors as the likely cause of the aggravation of her knee pain. At the formal hearing, Claimant was unable to recall a specific date when she became aware that her knee pain was associated with her work duties and the absence of a showing of her inability to work due to her condition, the date of injury and its work relatedness is drawn from the date Claimant first sought medical treatment. Therefore, there is compelling evidence to establish the date of the manifestation of the Claimant's cumulative injury was on June 4, 2010. *King, supra.*^[10]

Because Ms. Blakney did not give timely notice regarding this date of injury, the ALJ denied Ms. Blakney's request for medical benefits.

The ALJ ruled Ms. Blakney reported her knee pain and the alleged connection between her symptoms and her work duties to Marriott International on October 20, 2010. This date, per the ALJ, is the first time Marriott International had actual knowledge of Ms. Blakney's injury and its connection to her employment. On appeal, the majority finds "no error in the CO's determination that June 4, 2010 was the date Claimant first sought medical care, thus the date used when determining when notice should be given;" however, when assessing whether substantial evidence supports Ms. Blakney did not give timely notice within 30 day of the date of injury, the majority relies upon Ms. Blakney's testimony that she had notified Marriott International about her knee problems several times since 2007, years before the date of injury. The notice provision in the Act requires more.

¹⁰ *Id.* at 3-4, 7, 8.

The plain language of the Act requires actual notice:

(a) Notice of any injury or death in respect of which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death, 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 or death and the employment. Such notice shall be given to the Mayor and to the employer.

(b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or, in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.

(c) Notice shall be given to the Mayor by delivering it to him or sending it by mail to him, and to the employer by delivering to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any partner, or, if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.

(d) Failure to give such notice shall not bar any claim under this chapter:

(1) If 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 employer or carrier has not been prejudiced by failure to give such notice; or

(2) If the Mayor excuses such failure on the ground that for some satisfactory reason such notice could not be given; or unless objection to such failure is raised before the Mayor at the 1st hearing of a claim for compensation in respect of such injury or death.^[11]

No one disputes that Ms. Blakney did not provide written notice, but constructive notice is not enough.¹² For similar reasons, the D.C. Court of Appeals has interpreted the statutory requirements such that pain or discomfort does not necessarily trigger the notice conditions:

¹¹ Section 32-1513 of the Act.

¹² *Howard University Hospital v. DOES*, 960 A.2d 603 (D.C. 2008).

We begin with the language of the statute. According to the leading commentator on workers' compensation law, statutes generally adopt either "accident" or "injury" as the trigger for requiring notice of a potential worker's compensation claim. 7 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW §126.06 [1], [2] (Rev. ed. 2007). Our statute not only uses "injury" language, but also refers specifically to "injury . . . in respect of which compensation is payable" under the Act, D.C. Code §32-1513 (a). This means that "the claim period runs from the time compensable injury becomes apparent." LARSON, *supra*, at §126.06 [1]. To be "compensable," an injury must result in "disability," which we have often said is primarily an economic — not medical — concept that encompasses "any incapacity arising from a work-related injury that results in lost wages." *Wash. Metro. Area Transit Auth.*, 926 A.2d at 149 n.12; see *Stancil*, 436 F.2d at 276 n.4 ("Disability" . . . is a medico-economic term, meaning actual incapacity because of injury to earn the wages which the claimant was receiving."). Disability compensation is meant to address that partial or total loss, temporary or permanent, in earning capacity. See *Howard Univ. Hosp./Prop. & Cas. Guarantee Fund*, 952 A.2d at 176. Thus, an injury "in respect of which compensation is payable" under the Act, D.C. Code §32-1513 (a), of which the claimant must give notice to the employer, is an injury that is (or at least is capable of becoming) disabling in the economic sense. [Footnote omitted.] The statutory language of the notice requirement therefore indicates that the 30-day notice period is triggered when the employee is or should have been aware that an impairment (physical or psychological) may be compensable because it is likely to result in loss of wages. Cf. *Stancil*, 436 F.2d at 279 (formulating the question as whether employee "reasonably believed" he had — or had not — "suffered a work-related harm which would probably diminish his capacity to earn his living"). This awareness will usually come about because of an actual inability or impaired ability to perform usual work duties, from the nature of the trauma sustained, or on advice from a physician. In many cases where there is a discrete incident in the workplace, the severity of the trauma might suffice to make the fact or likelihood of compensable injury apparent to the employee. The presence of momentary pain or discomfort, however, does not necessarily indicate the presence of an underlying disabling impairment and will not always trigger the requirement to give notice of injury that is compensable, particularly where the employee is able to continue to work as before. See generally *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136-37 (Del. 2006) (discussing a conflict in medical evidence and noting that "evidence of pain without loss of use is not a compensable permanent impairment").¹³

Pain alone, such as the pain Ms. Blakney reported several times since 2007, is not a compensable injury resulting in a disability;¹⁴ therefore, although Ms. Blakney may have given Marriott International actual knowledge that her knees hurt, "such an event alone, without some

¹³ *Poole v. DOES*, 77 A.3d 460, 468 (D.C. 2013).

¹⁴ *Enser v. Corbett Technologies*, CRB No. 08-100, AHD No. 04-055D, OWC No. 585940 (June 13, 2008).

indication that Petitioner had sustained any injury resulting in any disability is not actual notice under the Act.”¹⁵ Under these conditions, the Act required notice within 30 days of the date of injury, June 4, 2010, and the ALJ determined Ms. Blakney did not provide the requisite notice timely:

The record evidence does not support Employer had knowledge of the Claimant’s June 4, 2010 work injury pursuant to the provision of the Act. Although Claimant testified she complained about her knee condition to her supervisors, credible and substantial evidence in the record comports with the Employer’s assertion they did not have knowledge her condition was related to employment conditions until October 20, 2010, approximately 136 days after she first sought medical treatment for said injury.

There was no satisfactory reason provided by Claimant to support why timely notice of her work injury could not be given within the statutory 30 day period to excuse her failure to do so. Based on the facts in this matter, it is evident Claimant’s failure to provide timely notice does not meet the exception provision contained in §32-1513(d). Thus, she has not carried the burden to show Employer had timely notice pursuant to the Act.^[16]

Unlike the majority, I see no contradiction between Ms. Blakney’s reporting pain and her failure to provide proper notice under the Act after June 4, 2010, the date of her cumulative injury.

Ultimately, the ALJ ruled Ms. Blakney sustained an accidental injury that is medically causally related to her on-the-job cumulative injury:

Claimant sustained a cumulative injury to her knees and she sought medical diagnosis and treatment. Claimant’s testimony regarding her duties is sufficient to show a work related activity which has to potential of resulting in her bi-lateral knee condition. Thus, an accidental injury arising out of in the course of employment within the scope of the Act has been established.

* * *

Claimant has shown by a preponderance of the evidence that her left knee condition is medically causally related to her employment.

Because these rulings have not been appealed, even without having given timely notice Ms. Blakney is entitled to medical benefits;¹⁷ therefore, there is but one result that can be reached in this case - Ms. Blakney is entitled to “causally related medical treatment to her left knee and

¹⁵ *Peterson v. Em-Kay Liquor Store*, CRB No. 09-038, AHD No.08-224, OWC Nos. 636644 and 637719 (March 12, 2009).

¹⁶ *Blakney*, pp. 8-9.

¹⁷ *Safeway Stores v. DOES*, 832 A.2d 1267 (D.C. 2003).

payment of medical expenses.”¹⁸ The Compensation Order in this case should be affirmed, and pursuant to 7 DCMR §267.1¹⁹ and 7 DCMR §267.5,²⁰ Ms. Blakney should be awarded the requested medical benefits. For these reasons, I dissent.

/s/ Melissa Lin Jones
MELISSA LIN JONES
Administrative Appeals Judge

¹⁸ *Blakney, supra*, at p. 2.

¹⁹ 7 DCMR §267.1 states

The designated Review Panel shall dispose of the matter under review, utilizing the standards of review contained in section 266 of this Chapter, by issuing a decision:

- (a) affirming the compensation order or final decision;
- (b) reversing it in whole or in part;
- (c) amending the compensation order or final decision based on the Review Panel's findings; or
- (d) remanding the case to the issuing Administrative Law Judge or claims examiner for further action as is warranted including, *inter alia*, further hearing and evidentiary development, additional findings of fact or conclusions of law, and the issuance of a new compensation order on remand.

²⁰ 7 DCMR §267.5 states

The Review Panel shall only issue an amended compensation order where a remand to the Administrative Hearings Division or the Office of Workers' Compensation would be unnecessary (e.g. where there is but one action that the Review Panel decision would permit), and thus remand would be superfluous.