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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB No. 05-245

CHERYL L. HALL,

Claimant – Respondent,

v.

DAUGHTERS OF CHARITY, D/B/A PROVIDENCE HOSPITAL,

Self-Insured Employer – Petitioner.

Appeal from an Order of
Administrative Law Judge Amelia G. Govan
OHA No. 01-094A, OWC No. 533978

Jeffrey W. Ochsman, Esq., for the Petitioner

Heather Leslie, Esq., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Law Judge*, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[1]

[1] Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of an Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on May 31, 2005, the Administrative Law Judge (ALJ) granted Respondent's claim for temporary total disability from January 21, 1999 to April 21, 1999, and for reasonable and necessary medical care, in connection with an accidental injury found by the ALJ to have been sustained by Respondent as a result of her employment with Petitioner on December 16, 1998. Petitioner now seeks review of that Order. [2]

Although there were multiple contested issues presented to the ALJ for resolution, the sole issue presented for appeal by Petitioner concerns whether Respondent's notice of injury given to Petitioner was timely. As grounds for this appeal, the Petitioner alleges that the ALJ's conclusion that Respondent gave timely notice of the injury is not in accordance with the law.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review Panel, 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. D.C. Official Code § 32-1521.01 (d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a

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[2] This matter reaches the CRB on Petitioner's Appeal, which was filed on June 30, 2005. This appeal was assigned to the instant panel for consideration on December 20, 2005. Upon review of the appeals file, the Panel Chair noted that it contained a letter from Respondent's counsel dated December 13, 2005, which read in its substantive entirety: "A Petition for Review of Compensation Order entered by the Administrative Hearings Department [sic] was filed on 6/30/2005. The briefs in support of and in opposition to the Petition for Review have all been filed. Please advise what, if any, additional information is required in order to enable you to act on this appeal." Further review of the appeals file revealed that it contained "Employer's Application for Review" (AFR)and an accompanying "Memorandum of Points and Authorities in Support of Employer's Application for Review", (Petitioner's Memorandum) filed, as previously noted, on June 30, 2005. However, there was no responsive brief in opposition or memorandum from Respondent therein. Accordingly, the matter was returned administratively to the CRB Clerk, who inquired of Respondent's counsel concerning the putative Opposition and/or Brief on Respondent's behalf. Following that inquiry, on December 29, 2005, Respondent's counsel, by fax, transmitted to the CRB a "Motion to File Claimant's to File [sic] Opposition to Employer's Application for Review Out of Time" (Respondent's Motion), and an accompanying "Claimant's Opposition to Employer's Application for Review" (Respondent's Opposition). After reciting the procedural posture from AHD, Respondent's motion stated "… Due to administrative error, claimant had not filed any opposition to date, …. If this extension of time is not granted, claimant will be severely prejudiced by not having the issues on appeal fully briefed [and that] The employer and insurer will not be prejudiced if this Motion is Granted." The motion contained no substantive explanation for the failure to file the opposition or the motion in a timely fashion, nor did it explain the inaccurate nature of the claim made in counsel's December 13, 2005 correspondence.
There being no legitimate basis alleged in connection with the failure to timely file an opposition to Petitioner's AFR, to seek an extension of time within which to file same, or explanation given as to the reason for the inaccurate misrepresentations contained in counsel's letter of December 13, 2005, the motion is denied. This matter will proceed solely based upon the AFR and Memorandum in support thereof.

reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). 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.

Turning to the case under review, Petitioner initially states that the ALJ found that (1) the date of injury was December 16, 1998, and (2) the date of notice, as found by the ALJ, was January 4, 1998. Petitioner's Memorandum, page 4. This citation of the date of notice by Petitioner is an apparent error, in that the discussion following this assertion refers repeatedly to an exhibit, RX 4, dated January 4, 1999, being a document bearing the partial title "Report of Employee Occupational Injury/Illness", with the remainder of the title being illegible due to misalignment in the copying process. RX 4 is a three part, one page document. The first two portions purport to have been completed and signed by Respondent, in her own hand, and state, *inter alia*, that Respondent sustained an injury on December 21, 1998, that the injury was "carpal tunnel syndrome" affecting her right and left thumbs and tips of fingers, and describing them as being "numb and painful". She described the cause of the injury as being the result of "lifting patients, feeding, transferring from bed to chair, taking off patients clothes" resulting in "pain in hands over an accumulated period".

While Petitioner makes a series of argumentative assertions concerning what, in Petitioner's view, Respondent knew or should have known about her condition and its connection with work prior to providing the written notice on January 4, 1999, the only specific assertion of error identified by Petitioner in its Memorandum is found on page 6, where it is asserted that "In essence, the Administrative Law Judge erred in accepting claimant's contention that December 16, 1998 should be considered the date of accident for this claim". Immediately following that assertion, in apparent explanation thereof, Petitioner writes "If the claimant's contention that there was a connection between her employment duties and her carpal tunnel syndrome is accepted, then it is equally apparent that claimant was well aware of this connection, long before she ultimately provided notice of her condition to the employer. Indeed, given that the claimant lost time from her **prior employment** due to these very same complaints, it is obvious that the claimant was aware of the connection, even if a formal diagnosis of the condition had not been made". Petitioner's Memorandum, page 6 (emphasis added).

What Petitioner's argument misses is that, until a cumulative trauma injury has manifested, either by requiring an employee to seek medical care, or causing an employee to lose time from work, there has been no "injury", and thus, there is no triggering event for the giving of notice to an employer of such an injury. *Bagbonon v. Africare*, CRB (Dir. Dkt.) No. 03-121, OHA No. 03-340, OWC No. 579350 (November 1, 2005), citing *Franklin v. Blake Realty Company*, H&AS No. 84-26, OWC No. 25856 (Director's Decision, August 18, 1985). In this case, the ALJ recognized that Respondent had a pre-existent underlying condition which had caused her to miss time from her previous employment. However, the ALJ, on page 4 of the Compensation Order, wrote as follows:

> It is axiomatic that aggravation of a pre-existing condition equates, for compensation purposes, to a new injury. *Harris v. Department of Employment Services*, 660 A.2d 404 (D.C. 1995). In the instant case, claimant had previous

> complaints of upper extremity symptoms which pre-existed the December 16, 1998 date on which Dr. Banton diagnosed her carpel tunnel condition. However, those symptoms had not prevented her performance from her usual work duties since the period in 1992 [note: Respondent was hired by Petitioner in 1995] when she lost time from work [with her prior employer] related upper extremity complaints. The core determination which affects the outcome of this dispute is whether claimant's necessary work duties caused, or aggravated, an impairment that became severely symptomatic by the date in question and required medical treatment. This determination turns, in part, on the persuasiveness of Dr. Hanley's [Petitioner's independent medical evaluation (IME) physician] medical opinion versus that of Dr. Banton [Respondent's treating physician].

Compensation Order, page 4. We detect no error in the ALJ's identifying the "core" issue as stated, nor do we detect any error in her proceeding to conclude, based upon Dr. Banton's opinion, contained in his February 15, 1999 report, that Respondent's daily duties of lifting and transferring patients to and from bed aggravated her bilateral carpel tunnel syndrome. See, CX 3, Report of Dr. Banton, February 15, 1999. Indeed, Petitioner does not challenge the propriety of the finding of an aggravation of the pre-existent condition in its appeal. To the extent that there is any error by the ALJ, it is only that the date of injury in this case should be found to have been December 11, 1998, the date that Respondent sought the medical care from Dr. Banton, as opposed to the date identified by Petitioner in RX 4, December 16, 1998, the date that Dr. Banton assigned the carpel tunnel diagnosis. In any event, the date of notice, January 4, 1999, uncontested on this appeal, is within the statutory 30 days prescribed by D.C. Code § 32-1513 (a). Such error, if error it is, was therefore harmless.

CONCLUSION

The Compensation Order of May 31, 2005 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of May 31, 2005 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

_____January 5, 2005_____
DATE