

**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. 06-71

EDMOND WHITLEY,

Claimant – Petitioner

v.

HOWARD UNIVERSITY AND LIBERTY MUTUAL INSURANCE,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Linda F. Jory
OHA No. 03-500, OWC No. 578967

Heather C. Leslie, Esq., for the Petitioner

Thomas E. Dempsey, Esq., for the Respondent

Before E. COOPER BROWN, Chief Administrative Appeals Judge, SHARMAN J. MONROE and FLOYD LEWIS, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND REMAND 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

BACKGROUND

This appeal follows the issuance of a Compensation 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 Compensation Order, which was filed on June 26, 2006, the Administrative Law Judge (ALJ) denied temporary total disability benefits and causally related medical expenses on the bases that the Claimant-Petitioner's (Petitioner) disability was not causally related to his March 13, 1986 work injury and that his claim was not timely filed in accordance with D.C. Official Code § 32-1514. The Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the Compensation Order is not supported by substantial evidence and 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 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 herein, the Petitioner alleges that the ALJ failed to accord him the presumption of compensability in finding that his disability is not causally related to his March 13, 1986 work injury. The Petitioner asserts that the statutory presumption was expanded in *Whittaker v. D.C. Department of Employment Services*, 668 A.2d 844 (1995) to include a causal relationship between a current disabling condition and a work injury and that, therefore the Respondent has the burden of producing substantial evidence to rebut the presumption of causal relationship. The Petitioner asserts that the medical opinion of Dr. Robert Gordon, upon whom the Respondent relied, is not "specific and comprehensive enough to rebut 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.

presumption.” With respect to the finding of untimely claim, the Petitioner agrees that he did not file a claim within one (1) year of the date of his injury. However, he argues that 7 DCMR § 203.3 and the holding of *Proctor v. General Conference of Seventh Day Adventists*, Dir.Dkt. No. 97-46, H&AS No. 95-501, OWC No. 145176 (December 13, 2000) indicate that the limitations period of D.C. Official Code § 32-1514 does not begin to run until the employer sends a copy of its first report to the employee. Therefore, the Petitioner asserts that since the Respondent did not show that it sent a copy of its first report to him via certified mail, the one year limitations period has not begun to run and his April 10, 2002 claim is timely.

The issue of whether the Petitioner’s claim was timely filed is a dispositive jurisdictional issue and will, therefore, be addressed first. If the finding below is upheld, then the question of whether the presumption was correctly applied need not be examined as it is moot. If the finding below is reversed, then the question of whether the presumption was correctly applied must be examined.

On appeal, the Petitioner essentially argues that the legislative changes to D.C. Official Code § 32-1532² which were enacted after his injury occurred, should be given retroactive effect thereby making his April 10, 2002 filing of his claim for his March 13, 1986 injury timely. Via the Workers’ Compensation Amendment Act of 1998, which became effective April 16, 1999, D.C. Official Code § 32-1532(a) was amended to add a new sentence which states:

The employer shall send to the employee or the employee's next of kin, by certified mail, return receipt requested, concurrent with the submission of the report to the Department of Employment Services, a statement of the employee's rights and obligations pursuant to this chapter, including the right to file a claim for compensation within one year from the date of injury or death.

In finding that the Petitioner’s claim herein was not filed timely, the ALJ stated that when the Petitioner injured his knee in 1986, there was no requirement for an employer to send a copy of its first report to an injured employee in order for the time period for filing a claim to begin to run. The ALJ determined that the later amendment to the Act was not retroactively applicable and that there was no precedential case applicable making such a requirement applicable to this case. *See* Compensation Order at pp. 5-6. The ALJ was correct in part.

The CRB recently re-examined the retroactivity of legislation in *Huber v. J.D. Long Masonry, Inc.*, CRB No. 07-03, AHD No. 03-255, OWC No. 580022 (January 11, 2007). Consistent with prior decisions, the CRB held that legislation is considered prospective in nature, unless there is statutory direction or legislative history for retroactive application. *See also Lloyd v. Giant Food*, Dir.Dkt. No. 03-70 OHA No. 97-110E OWC Nos. 501519, 230297 265731 (September 30, 2004)(legislation must be considered to be prospective in nature, unless retroactive application is the “unequivocal and inflexible import of the [legislation's] terms.”); *Nixon v. D.C. Housing Authority*, CRB No. 06-80, AHD No. PBL 06-013, OWC/DCP No. LTUNK0090 (November 29, 2006)(holding in *Lloyd* on the prospective nature of legislation adopted for application to cases under D.C. Official Code § 1-623.1 *et seq.*). Thus, in order for the Petitioner’s argument to prevail, the Workers’ Compensation Amendment Act of 1998 must

² Formerly D.C. Code § 36-332. To facilitate reading, the current citations to the D.C. Code will be used in the text of the decision with a footnote to the former citation.

show statutory direction or legislative history providing for retroactive application of D.C. Official Code § 32-1532(a).

The legislative history for the Workers' Compensation Amendment Act of 1998 indicates that its provisions are only applicable to workers' compensation injuries occurring *after* the enactment of the legislation. There is no language in the legislative history indicating that the D.C. City Council intended an exception with respect to the application of D.C. Official Code § 32-1532(a). COMMITTEE ON GOVERNMENT OPERATIONS, REPORT ON THE WORKERS' COMPENSATION ACT OF 1998, Bill 12-192, at 1 and 8 (October 29, 1998). Therefore, the Petitioner's argument for retroactive application of D.C. Official Code § 32-1532(a) is rejected.

However, our examination of the question of timeliness does not end with the 1998 amendments to the Act. Contrary to the ALJ's determination, our review of the law in this jurisdiction on the filing of claim pursuant to D.C. Official Code § 32-1514³ reveals that prior to the enactment of D.C. Official Code § 32-1532(a), the Director issued *Rhodes v. Washington Hospital Center*, Dir.Dkt. No. 92-28, H&AS No. 91-765, OWC No. 0175405 (March 6, 1995). In *Rhodes*, the Director held that the limitations period of the then existing provision of D.C. Official Code § 32-1514 did not begin to run until the employer sends a copy of its first report to the injured employee. The Director revisited the holding of *Harris v. D.C. Department of Employment Services*, 592 A.2d 1014 (D.C. 1991)(*Harris I*), although that holding was later vacated by the Court⁴, and adopted the Court's reasoning, based upon a reading of the then regulations stating:

Under the regulations, the limitations period does not begin to run until the employer has filed its report with the Agency. 7 DCMR § 203.3 (1986). A document is deemed to be filed only when it is either hand delivered or sent by registered or certified mail to the Agency, and a copy is sent to all interested parties. *Id.* § 228.2. The employee is defined under the regulations as an interested party. *Id.* § 299.1. Accordingly, unless the employer sent a copy of its report to the employee, the limitations period did not begin to run.

Rhodes, supra.

The *Harris I* Court examined both the Act and the regulations. With respect to the Act, the Court stated that while it did not expressly require that a copy of an employer's report of injury be provided to the injured employee, "consistent with the humanitarian purposes of the Act, it necessarily follows that until the employee has notice that the employer's report has been filed with the Agency, the limitations period of § 36-314 (a) cannot begin to run." *Harris I*, 592 A.2d at 1017. The Court then pointed out D.C. Official Code § 32-1532(g)⁵ which required that DOES, on receiving the employer's report provided by subsection (a), notify the injured employee of the employee's rights and obligations under this chapter and D.C. Official Code § 32-1532(f)⁶ which indicated that the limitations period in § 32-1514(a) shall not begin to run

³ Formerly D.C. Code § 36-314.

⁴ *Harris v. D.C. Department of Employment Services*, No. 90-AA-657 (1992)(*Harris II*).

⁵ Formerly D.C. Code § 36-332(g).

⁶ Formerly D.C. Code § 36-332(f).

until the employer's report has been furnished as required by the provisions of subsection (a). The *Harris I* Court also realized that the language of D.C. Official Code § 32-1532(f) was identical to the language of 33 U.S.C. § 930(f)⁷ of the Longshore and Harbor Workers Act, the predecessor to the instant Act, which had been strictly interpreted against the employer because of Congressional concern that:

reports of injuries have not been transmitted as required by [§ 30 (a) of] the Longshoremen's Act and, subsequently, when the injured workman has filed [a] claim for compensation after the time limitation fixed in the act has expired, this delay, rather than any lack of merit in the claim, has been relied on to avoid payment of compensation. No doubt in some cases the delay in filing [the] claim has been due to ignorance on the part of the employee, which would have been remedied if the procedures under the act had been set in motion by the filing of the report of injury. It may be that in some cases the report of injury has been withheld by the employer with the intention of defeating the employee's claim through the delay which might thus result. . . . The purpose of this amendment [adding section 30 (f)] is to remove any possible motive to withhold such reports of injury by making the bar of the limitation upon the right to file a claim begin to run only after such report of injury has been filed, in all cases in which the employer or insurance carrier in fact possessed the information upon which to make the report.

Harris I, 592 A.2d at 1018.

It is reasonable to assume that the Director recognized and accepted the bases of *Harris I* as sound in revisiting the vacated holding and adopting it anew. See *Proctor, supra*. It should be noted that neither the *Harris I* Court nor the Director, while holding that the limitations period did not begin to run until the employer sent a copy of its report to the employee, dispensed with the requirement of D.C. Official Code § 32-1532(g). See *Harris I*, 592 A.2d at 1018, n. 7.

Thus, prior to the enactment of D.C. Official Code § 32-1532(a), the case law in the District of Columbia established that the limitations period of D.C. Official Code § 32-1514, then D.C. Code § 36-314, does not begin to run until the employer sends a copy of its first report to the injured employee or the employee is otherwise notified or on notice that the first report was filed. At this juncture, the question is whether the holding of *Rhodes* is applicable to this case. The Petitioner's injury occurred in 1986, nine (9) years before *Rhodes* was issued.

With respect to judicially-crafted interpretations in the law, the general rule in the District of Columbia, unlike with legislative changes, is that such legal pronouncements, because they are

⁷ 33 U.S.C. § 930(f) reads:

Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 13 of this Act [33 USCS § 913(a)] shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section.

considered interpretations of existing law even though not previously applied, have retroactive effect. See *Davis v. Moore*, 772 A.2d 204, 230 (D.C. 2001). In *Davis*, the en banc Court discarded the prior rule announced in *Mendes v. Johnson*, 389 A.2d 781 (D.C. 1978) requiring a balancing of four criteria to determine whether a judicial holding was to be applied retroactively either totally or partially or not at all. The Court conformed the District's jurisprudence to that announced by the U.S. Supreme Court in *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993). In *Griffith*, the Supreme Court indicated that retroactivity applies to "criminal cases pending on direct review or not yet final." *Griffith*, 479 U.S. at 328. In *Harper*, the Supreme Court extended *Griffith* to civil cases and indicated that a ruling is to "be given full retroactive effect in all cases still open on direct review and as to all events, regardless of *whether* such events predate or postdate our announcement of the rule." *Harper*, 509 U.S. at 97.

The Panel recognizes that at the time *Rhodes* was issued, this matter was not pending appeal. *Rhodes*, however, did not pronounce new law, but merely interpreted the then provisions of the Act and its regulations. Therefore, upon application of the general rule in the District of Columbia on retroactivity of judicial interpretations, the holding of *Rhodes* is applicable to this case.

In the instant case, the ALJ found that the Respondent filed its first report in 1986 at the time the Petitioner sustained his work injury. However, the ALJ made no findings as to whether the Respondent sent a copy of the report to the Petitioner or whether DOES notified the Petitioner that the Respondent had filed the report or whether the Petitioner was otherwise notified of the filing of the report. Without such findings, it cannot be determined if the limitations period of D.C. Official Code § 32-1514 expired before the Petitioner filed his claim on April 10, 2002. The issue of timely claim must, therefore, be remanded for further findings and application of the appropriate law.⁸

In the event that the ALJ, upon remand, determines that the Petitioner's claim was timely filed, we address the merits of this case and determine that the presumption was not applied correctly. The issue, as stated in the Compensation Order, was whether the Petitioner's alleged disability is causally related to an injury which arose out of and in the course of his employment on March 13, 1986. See Compensation Order at p. 2. The Petitioner injured his right knee at work on March 13, 1986. After returning to work, he continued to experience pain and swelling in his knee. He underwent an arthroscopy of his right knee on April 1, 2004 and a total knee replacement on July 23, 2004. The Petitioner asserted that his 2004 knee problems and surgeries are causally related to his 1986 injury.

The parties stipulated that the Petitioner sustained an accidental injury on March 13, 1986 which arose out of and in the course of his employment. The ALJ correctly stated the law in this jurisdiction on the statutory presumption of compensability, *i.e.*, it is invoked by the claimant's initial showing of an injury and a work place incident with the potential to cause the injury and once invoked, the burden shifts to the employer to present "specific and comprehensive" evidence to rebut the presumption, and the presumption extension to medical causal relationship. The ALJ then recognized that the Respondent stipulated to the work-relatedness of the March 13,

⁸ The evidentiary record suggests that the Petitioner may have been aware in 1986 that the Respondent had filed its first report of injury. See Transcript (TR) at p. 43. However, without the necessary findings, the Panel can take no further action with respect to the merits of the untimely claim issue.

1986 injury. This stipulation had the effect of “invoking” the statutory presumption and leaving the presumption un rebutted. However, in analyzing the facts of this case, the ALJ placed the burden anew on the Petitioner to make the *initial* showing required to invoke the statutory presumption of compensability. The ALJ stated,

Without some sort of documentation that claimant sustained an injury to his right knee and sought treatment for such an injury, the undersigned cannot find claimant has met his burden of showing an injury or disease and a work place incident, condition or event that has the potential of causing an injury to is right knee that necessitated surgery. The presumption of compensability is accordingly not invoked and employer retains no further burden to disprove that the 1986 work incident precipitated the need for his knee replacement.

Compensation Order at p. 4.

This burden was improper given the parties’ stipulation. The presumption was in place, un rebutted and it, therefore, extended to the medical causal relationship between the Petitioner’s current disability and his March 13, 1986 work injury. Under the law in this jurisdiction, the burden was now on the Respondent to produce “specific and comprehensive” evidence to rebut the extended presumption of medical causal relationship, or in other words, to rebut the medical causal relationship between the Petitioner’s current disability and his March 13, 1986 work injury. This issue of causal relationship must be remanded for a proper application of the presumption.

CONCLUSION

The Compensation Order of June 26, 2006 is not supported by substantial evidence in the record and is not in accordance with the law for the reasons stated above

ORDER

The Compensation Order of June 26, 2006 is hereby REMANDED.

On remand, the ALJ shall conduct further proceedings as may be necessary to make further findings of fact and conclusions of law on the question of whether the Petitioner’s claim was timely file and shall review the evidence and properly apply the presumption of compensability consistent with the above discussions.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

February 16, 2007
DATE