

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 12-107**

**LINDA M. HENDERSON**  
**Claimant–Petitioner,**

v.

**FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP,**

**and**

**THE HARTFORD,**  
**Employer/Insurer - Respondents.**

Appeal from a Second Errata Compensation Order on Remand by  
The Honorable Leslie A. Meek  
AHD No. 11-263, OWC No. 678522

Michael Kitman, Esquire for the Petitioner  
Chad A. Michael, Esquire for the Respondent

Before HEATHER C. LESLIE,<sup>1</sup> MELISSA LIN JONES, and JEFFREY P. RUSSELL,<sup>2</sup> *Administrative Appeals Judges.*

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**OVERVIEW**

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Petitioner) of the Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that COR, the ALJ denied the

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<sup>1</sup>Judge Heather C. Leslie is appointed by the Director of DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

<sup>2</sup> Judge Russell is appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

Claimant's request for ongoing disability benefits based on the finding that the Claimant had failed to provide the Employer with timely notice. WE REVERSE and REMAND.

### FACTS OF RECORD AND PROCEDURAL HISTORY

On July 29, 2010, the Claimant was employed as a secretary for the Employer. On that date, the Claimant sustained injuries to her low back while moving boxes and other materials and equipment from her previous work station to her new permanent work station. The Employer contested whether she had sustained such an injury, and claimed that even if she had sustained the injuries as alleged, her claim for indemnity benefits was barred due to her failure to give adequate and timely notice of the injury to the Employer.

On November 22, 2011, a formal hearing was held. The issues presented were whether or not the Claimant sustained a work related injury, and whether she had provided adequate and timely notice of the injury to the Employer. The Claimant testified on her own behalf and the Employer presented three witnesses.

On January 20, 2012, the ALJ issued a Compensation Order (CO). The ALJ found the testimony of the Claimant to be credible based upon her demeanor and the consistency of her testimony with the record evidence. The ALJ also found the testimony of Ferronnie Sampson, a witness for the Employer, to be incredible. The CO concluded that the Claimant did sustain an accidental injury arising out of and occurring in the course of her employment on July 29, 2010, that her undisputed disability is causally related to that work injury, and awarded medical benefits. However, the CO also concluded that the Claimant had failed to demonstrate that she had given timely notice of the injury to the Employer, and denied temporary total disability benefits.

The Claimant timely appealed the finding that the Claimant failed to give timely notice to the CRB.<sup>3</sup> The CRB issued a Decision and Remand Order (DRO) on March 27, 2012.<sup>4</sup> The CRB found the ALJ had wrongly summarized the record evidence and based her conclusions, in part, on this erroneous summarization. Furthermore CRB found the ALJ applied the statutory presumption of notice incorrectly by placing the burden on the Claimant to demonstrate compliance with D.C. Code §32-1521. The DRO remanded the case to apply the statutory presumption correctly and to make findings of fact regarding (a) the date that the Claimant first became aware of the relationship between her injuries and her employment, (b) the date that she gave the Employer notice of the injuries and their relationship to employment, and (c) whether that notice was timely under the Act.

A Second Errata Compensation Order on Remand (2COR) was issued.<sup>5</sup> In that 2COR, the ALJ, after correcting the factual mistakes pointed out by the CRB, denied the Claimant's request for

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<sup>3</sup> The Employer did not appeal the findings that the Claimant sustained a work related injury on July 29, 2010, the Claimant was disabled as a result of that injury, or that the Claimant was a credible witness.

<sup>4</sup> *Henderson v. Finnegan, Henderson, et al*, CRB No. 12-018, AHD No. 11-263 (March 27, 2012).

<sup>5</sup> At this juncture, we are unfortunately forced to address what seems to be a typographical error that resulted in two errata orders, neither one of which seemingly fixed the original mistake. The first Compensation Order on Remand (COR) was dated January 20, 2012, the date of the original CO with a certificate of service dated July 22, 2012. The Errata Compensation Order on Remand in the administrative file is incomplete, with several missing pages. The certificate of service page to this incomplete errata order is dated July 22, 2012. A Second Errata Compensation

disability benefits due to untimely notice.<sup>6</sup> The Claimant timely appealed. The Claimant argues that the ALJ's finding that she was unable to determine the date the Claimant was aware that her injuries were employment related, thus unable to determine if the date of November 19, 2010 provided timely notice, was in error. The Employer argues in opposition that the 2COR's determination that there was insufficient evidence to invoke the presumption that notice was given is supported by the substantial evidence in the record and should be affirmed.

### **THE STANDARD OF REVIEW**

The scope of review by the CRB 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. See District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

### **DISCUSSION AND ANALYSIS**

We must first address what seems to be a clerical error in the findings of fact section. The COR states "Claimant's notice to Dr. Finnegan was untimely." COR at 3. A review of the evidence reveals that there is not a Dr. Finnegan. We assume the ALJ is referring to the Employer in the case *subjudice*, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP. Based upon the misidentification of doctors in the prior CO, as addressed by the CRB in the DRO, we find it prudent to mention this error. As we are remanding the case, explained fully below, the ALJ provided an opportunity to correct this error.

Prior to addressing the Claimant's arguments, we note that a review of the transcript reveals that three witnesses testified on behalf of the Employer, Mr. Ferronnie Sampson, Ms. Elizabeth Kane, and Ms. Mary Catherine Leftwich. In the introductory paragraph of the Order on review, the ALJ only acknowledges the testimony of Mr. Sampson and Ms. Leftwich. The testimony of Ms.

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Order on Remand was issued, with a signature page reflecting a date of July 20 and a certificate of service page dated July 20, 2012, two days prior to the date on the COR and the first Errata Order.

The CRB received the Claimant's Application for Review, (AFR) attaching the first COR, on July 17, 2012, which characterizes the COR as being issued on June 22, 2012. The Claimant also certified that the AFR was sent to the Employer and the Chief Administrative Law Judge on July 16, 2012. The Employer's opposition to the Claimant's AFR was received by the CRB on July 30, 2012 and references the COR as being dated July 22, 2012. The referenced order, which was attached to the Employer's opposition, was the COR, dated January 20, 2012.

It is clear to this Review Panel, that based on the date the CRB received the Claimant's AFR - July 17, 2012- that the July dates referenced by the ALJ on the COR, the incomplete Errata Compensation Order on Remand, and the Second Compensation Order on Remand are all incorrect. Based upon the Claimant's representation, and the lack of any opposition to the Claimant's assertion that the COR was issued on June 22, 2012, we adopt that date as the date the COR was issued. We will assume that the date of the Second Errata Order on Remand is also June 22, 2012. As this is the last order in time, we review the Second Errata Order on Remand.

<sup>6</sup> The COR again analyzed whether or not the Claimant suffered a work related injury on July 29, 2010. This finding was not appealed by the Employer or raised in the DRO. Indeed, the DRO specifically notes that issue was not appealed. It was unnecessary for the ALJ to revisit this un-appealed issue.

Kane for some reason is not acknowledge, leaving us to guess whether or not the ALJ took into consideration this witness' testimony. As it appears the 2COR is based upon an incomplete review of the evidence, the ALJ upon remand is directed to reconsider all the evidence, including the testimony of Ms. Kane, in coming to the conclusion of whether or not notice was timely.

We also must address the 2COR's omission of the credibility findings that were made in the first CO issued on January 20, 2012. In that CO, the ALJ found,

Claimant's testimony at hearing was credible based upon her demeanor at hearing and the consistency of her testimony when compared with other record evidence. The testimony of Ferronnie Sampson however lacks credibility based upon his demeanor at hearing and the consistency of his testimony when compared with other record evidence.

CO at 4.

This finding was not appealed by the Employer. Without explanation or even acknowledgement of the change, the 2COR omits the above quoted language, and seemingly reverses these credibility determinations.<sup>7</sup> These credibility determinations are critical in several ways.

First, notice is presumed, in *absence* to the contrary.<sup>8</sup> The 2COR, after noting that Act incorporates this rebuttable presumption, states,

Employer's assertion that claimant failed to mention her alleged work injury until months after it is alleged to have occurred, is enough to rebut the presumption.

2COR at 4.

What is problematic with this conclusion is that we are uncertain what "assertion" the ALJ is relying upon. In the first CO, the ALJ found Mr. Sampson to be an incredible witness and was silent as to the credibility of the other witnesses. If the only assertions from the Employer come from one or all of the three witnesses, when one witness is deemed to be incredible (as he was in

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<sup>7</sup> The CO also stated, in the discussion section,

Claimant further testified that she did not relate her pain to the work activity surrounding the move of her work station until she sought medical treatment with Dr. Miriam [sic]. *While I find Claimant's testimony to be credible in this regard*, I am unable to make any determination that Claimant provided timely notice of her injury to Employer." (Emphasis added.)

CO at 5.

The COR removes the language, "while I find Claimant's testimony to be credible in this regard..." without explanation.

<sup>8</sup> D.C. code §32-1521, titled "Presumptions", reads in pertinent part:

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

(Emphasis added.)

the CO) and the ALJ is silent as to the other two, then the conclusion that the Employer has rebutted the Claimant's claim of timely notice needs to be clarified and explained.

Secondly, the Claimant testified that is was during her visit with Dr. Bahrami on November 22, 2010 that she first realized from a physician the work relatedness of her injury. Hearing Transcript 38-40. The ALJ's conclusion that "the evidence failed to show what she discussed when meeting with said doctor", is thus in error and contrary to the evidence in the form of Claimant's testimony. Moreover, if the ALJ continues to find the Claimant credible, as found in the original CO, it does not flow rationally to discount the November 22, 2010 conversation with her doctor in which she claims to have discovered the work relatedness of her injury.

The ALJ indicated,

I am unable to make any determination that Claimant provided timely notice of her injury to Employer.

2COR at 5.

However, the ALJ also stated the "Claimant testified she first advised Employer of her work injury during her annual review which was held November 19, 2010." 2COR at 4. Again, if the ALJ continues to find the Claimant credible, then there is evidence in the record of when the Claimant first advised the Employer of her work injury.

To remove the critical credibility determinations, without further explanation, can only be described as arbitrary and capricious. Moreover, we when there are two differing versions of the same happening or event, a clear and unambiguous credibility finding of the Claimant and the witnesses are necessary to ultimately determine whether or not the 2COR is supported by the substantial evidence in the record.<sup>9</sup>

Upon remand, the ALJ is to make credibility findings regarding the Claimant and the Employer's witnesses, taking into account the conflicts between the Claimant's testimony surrounding the events that took place during the performance review of November 19, 2010 and the conflicting testimony of the Employer's witnesses on the subject of when they were first made aware that the Claimant alleged that she had sustained a work related injury, as well as Claimant's testimony concerning her visit with Dr. Bahrami on November 22, 2010. After making clear and unambiguous credibility findings, the ALJ must support her conclusions in light of the credibility findings and the evidence of record.<sup>10</sup>

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<sup>9</sup>See *Letren v. DC Child and Family Svcs*, CRB No. 11-021, AHD No. 09-089A, DCP No. 30090951004-0001, (August 16, 2011).

<sup>10</sup> The ALJ should also bear in mind that doubts, including the factual, are to be resolved in the Claimant's favor. It has been repeatedly held in this jurisdiction workers' compensation laws are to be "liberally construed for the benefit of the employee." *Jimenez v. District of Columbia Department of Employment Services*, 701 A.2d 837 (October 9, 1997). See also *Harris v. Office of Worker's Comp.*, 660 A.2d 404, 408 (D.C. 1995) (quoting *Railco Multi-Constr. Co. v. Gardner*, 564 A.2d 1167, 1169 (D.C. 1989)). "Doubts, including the factual, are to be resolved [in the employee's favor.]" *Id.* (quoting *J. V. Vozzolo, Inc. v. Britton*, 126 U.S. App. D.C. 259, 262, 377 F.2d 144, 147 (1967))

Because we remand the case back to the ALJ for further findings of fact and conclusions of law, we do not reach the Claimant's arguments as we deem them premature.

**CONCLUSION AND ORDER**

The Second Errata Compensation Order on Remand of June 22, 2010 is REVERSED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE  
*Administrative Appeals Judge*

September 18, 2012  
DATE