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 (Dir.Dkt.) No. 03-120

VICTORIA HUTCHERSON,

Claimant - Respondent

v.

PROVIDENCE HOSPITAL AND SEDGWICK, CMS,

Employer/Carrier - Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Amelia G. Govan
OHA No. 03-351, OWC No. Unknown

Steven H. Kaminski, Esquire for the Respondent

Jeffrey H. Ochsman, Esquire for the Petitioner

Before LINDA F. JORY, FLOYD LEWIS, *Administrative Appeals Judges* and, E. COOPER BROWN, *Chief Administrative Appeals Judge.*

LINDA F. JORY, *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 20024, Title J, the 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, 32-1522 (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. Official Code §§ 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

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 August 29, 2003, the Administrative Law Judge (ALJ) concluded Respondent's bilateral carpal tunnel syndrome arose out of and in the course of her employment; a medical causal relationship existed between Petitioner's left upper extremity symptoms and her employment; and there was timely notice of a work injury.

Employer-Petitioner's (Petitioner) Application for Review alleges as grounds for its appeal that the ALJ erred in concluding that the employer had actual knowledge of the Petitioner's injury and its relationship to the employment. Claimant-Respondent (Respondent) has filed a response asserting the ALJ's finding that Petitioner had actual notice of Respondent's injury was based on substantial evidence and should be affirmed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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 scope of review, the CRB and this panel are bound 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, Petitioner asserts that the ALJ erred in concluding that oral notice of upper extremity problem on February 7, 2002 and actual knowledge of the work duties is sufficient actual notice of Respondent's February 1, 2002 injury and it's relationship to her employment as Petitioner was not informed of an alleged relationship between the carpal tunnel syndrome and her work until April 5, 2002. Petitioner asserts this finding is unsupported by substantial evidence in the record and is contrary to the plain language off the statute.

Review of the Compensation Order reveals the ALJ made the following findings which relate to notice of Respondent's injury.

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and Anti-Fraud Amendment Act of 2004.

> Claimant sought treatment with her family doctor, Calvin Griffin, M.D., on February 7, 2002. That day his notes reflect, her chief complaint was a breathing problem, with congestion and wheezing; at the formal hearing, claimant testified that she'd thought she was having a heart attack or stroke because of her hand numbness and tingling. Claimant underwent a chest x-ray that day, which was normal. However, Dr. Griffin's notes for that first visit reflect neurological symptoms of tingling and numbness, and that claimant had some finger symptoms during the preceding month. Claimant returned to Dr. Griffin on February 21, 2002; he noted an assessment of CTS (carpal tunnel syndrome) and referred claimant to Dr. Adeshoye, a neurologist for further CTS care.
>
> Dr. Adeshoye saw claimant on March 7, 2002 and March 22, 2002. His diagnosis was moderate to sever CTS, for which he recommended left upper extremity surgery and referred claimant to Dr. Edward Rankin.
>
> When he next saw claimant on April 4, 2002, Dr. Griffin discussed the follow-up protocol of occupational therapy, noting that EMG results had confirmed the CTS diagnosis.
>
> On April 5, 2002, and again on May 8, 2002, claimant attempted to report her bilateral hand and arm condition to employer's Employee Health Office; on the earlier date, she was provided a employee health form to fill out and have completed by her supervisor. On May 8, 2002, employer gave claimant workers' compensation procedures and forms to file with OWC; that same day, claimant had a detailed discussion with employers' nurse regarding obtaining occupational therapy. The notes taken by the nurse in employer's health office, on both dates, indicate claimant was advised she needed to proceed through her health insurance unless or until she obtained a written report from her doctor to indicate her symptoms were work-related.
>
> On May 13, 2002, claimant filed written Notice of Injury with OWC reporting bilateral upper extremity problems, related to repetitive hand movement, which began while she was writing at her desk.

In discussing the twofold purpose of the notice requirement under now §32-1513[2] and "actual notice", the Director of the Department of Employment Services, (the Director) held:

> Bearing these purposes in mind, it is, therefore, reasonable to hold that in order to attribute actual knowledge to an employer, the injured employee must inform the employer that an injury occurred, when and where the injury happened, and the work activity that caused injury with a degree of specificity such that the employer gains

[2] As stated in voluminous notice cases in this jurisdiction, the notice requirement enables an employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and it facilitates the earliest possible investigation of the facts surrounding the injury. *See Teal v. D.C. Department of Employment Services*, 580 A.2d 647 (D.C. 1990), citing 2B A. Larson, The Law of Workmen's Compensation §78.10, at 15-102(1989).

> the quantum of information that would lead a reasonable man to conclude that liability is possible and an investigation should ensue. Without this degree of specificity, the purposes will not be served.

See Wanda McIntyre v. Safeway Stores, Inc., Dir. Dkt. No. 01-41, OHA No. 00-309, OWC No. 550033 (April 23, 2002)[3].

In the instant matter, neither party asserted, and the record does not reveal written notice was provided to employer within 30 days of February 1, 2002[4]. Instead the ALJ stated Petitioner had actual notice by February 7, 2002 that Respondent was having bilateral upper extremity symptoms. The ALJ explained:

> Claimant's testimony, which was not contradicted, was that she verbally reported her symptoms to one of her supervisors, Charlie Pointer, immediately after seeing Dr. Griffin on that date. She further testified again without contradiction, that she discussed her work duties with Dr. Griffin. Although his handwritten reports are somewhat illegible, the first mention of her work duties appears in his April 4, 2002 treatment notes. Employer was first informed of an alleged relationship between claimant's upper extremity problems and her work by April 5, 2002, when claimant attempted to file an Employee Report of Occupational Injury/Illness with Employee Health, which was noted and investigated by employer.

The Panel has reviewed the record and finds the record contains no evidence that employer was ever notified that an injury occurred, when and where the injury happened, or what work activity caused an injury on February 7, 2002. In other words, Petitioner was not notified that Respondent associated her upper extremity symptoms to her employment, thereby creating actual knowledge of a work injury pursuant to *McIntyre, supra*. Accordingly, the ALJ's finding in her discussion that Petitioner's had actual knowledge of Respondent's injury by February 7, 2002 is not supported by the evidence of record. *McIntyre, supra*.

The ALJ stated thereafter that Petitioner was first informed of an alleged relationship between claimant's upper extremity problems and her work by April 5, 2002 when Respondent attempted to file an Employee Report of Occupational Illness with Employee Health, which was noted and investigated by employer. The ALJ conceded that although Respondent's written notice to Petitioner was not timely, her timely oral notice to her supervisor, and employer's actual knowledge of claimant's condition and work duties, provided sufficient actual notice pursuant to D.C. Code, as amended, §32-1513, citing *See Jimenez v. District of Columbia Dept. of Employment Services,* 701 A.2d 837 (1997).

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[3] Following AHD's issuance of a Compensation Order on Remand, the matter was appealed to the Court of Appeals for the Court to determine if untimely notice bars the claim in its entirety and precludes payment of medical benefits. *See Safeway Stores Inc. v. D.C. Dept. of Employment Services*, 832 A.2d 1267 (D.C. 2003).

[4] Upon review of the Report of Employee Injury Report, RE 10, completed on April 5, 2002 by Respondent, the Panel notes Respondent reported an injury occurring in February 2002. Respondent's Form 7 submitted as RE 3 states February 1, 2002 is the date of injury.

The Panel concludes not only that the ALJ's finding of actual notice is not supported by substantial evidence, the Compensation Order is not in accordance with the law, as it appears the ALJ finds §32-1513 (d)(1) excuses employees from timely written notice if employer has actual notice and that there is no time requirement for employer to have actual notice. Inasmuch as the Petitioner did not have actual notice until Respondent attempted to file a report of occupation illness and injury in April and May and based on Respondent's testimony she was told by Dr. Griffin on February 7, 2002, her carpal tunnel syndrome was related to her work, Petitioner was clearly not provided with timely notice under the Act. *See* HT at 53. While it is clear §32-1513(d)(1), or as the Court in *Jimenez* called one of the "excuse provisions", provides an employee with an alternative means of providing notice, via actual notice, §32-1513(d)(1) does not remove the requirement that an employer have actual notice within 30 days of the injury. As is well settled, the §32-1513(d)(2) provision is the provision which provides an employee with an "excuse" for untimely written notice if he or she is found to have some satisfactory reason such notice could not be given. The Panel further notes that the Court in *Jimenez* affirmed that even actual notice must be given within 30 days as it stated:

> In this case, the Hearing Examiner noted that, a 'claimant must provide employer with either actual (i.e. oral) or formal (i.e. written) notice of injury within thirty days of its occurrence or of claimant's awareness of the relationship between the injury and his employment'. CO at 5 The examiner then reached the conclusion that, 'Based upon the requirements set forth in the D.C. Code, as amended §36-313[5] as applied to the foregoing facts, as were found, it was determined that claimant failed to notify employer of his injury within the statutory thirty (30) day time limit'. *Id*
>
> Formal/written notice, set out in §36-313(a)-(c) must be made with adherence to several delineated formalities. The only statutory reference to actual/oral notice is in §36-313(d)(1) one of the excuse provisions. The examiner's reference to actual/oral notice, therefore, leads to the conclusion that she considered and rejected appellant's possible excuse under the actual notice provision of subsection (d)(1) At no point in the decision, however does the examiner consider §36-313(d)(2) which excuses untimely notice. . .

Jimenez at 841.

As the ALJ found Petitioner "prevails on the issue of timely notice for the bilateral carpal tunnel symptoms which began to manifest in February 2002", CO at 6, the ALJ did not need to examine the §32-1513(d)(2) excuse provision. Thus in concluding the ALJ's finding that timely notice pursuant to the Act is not supported by substantial evidence and is not accordance with the law, the matter is remanded to AHD to determine if Respondent's failure to give timely notice is excused under §32-1513(d)(2) and enter appropriate findings and conclusions.

[5] D.C. Code §36-313 has been recodified as §32-1513.

CONCLUSION

The ALJ's conclusion that Petitioner did provide timely notice to employer is not supported by substantial evidence. The Compensation Order of August 29, 2003 is not in accordance with the law.

ORDER

The ALJ's conclusion that timely notice of a work related injury was provided under the Act is hereby REVERSED. The matter is remanded to AHD for the ALJ to determine whether Respondent's failure to give timely notice pursuant to D.C. Code §32-1513(a)-(c) is excused under D.C. Code §32-1513(d)(2) and enter appropriate findings and conclusions.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY
Administrative Appeals Judge

November 3, 2005
DATE