

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-158

**JIBRIL JETER,
Claimant–Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer–Respondent**

Appeal from an August 28, 2015 Compensation Order by
Administrative Law Judge Joan E. Knight
AHD No. 15-199, OWC No. 719268

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 MAR 15 AM 10 19

(Decided March 15, 2016)

Krista N. DeSmyter for Claimant
Mark H. Dho for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On July 7, 2015, Claimant sought medical and wage loss benefits at a formal hearing conducted before an administrative law judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia Department of Employment Services (DOES for a right elbow repetitive stress injury.

At the formal hearing, Employer contested liability for this condition, denying that Claimant’s injury was work related, claiming that Claimant’s claim for wage loss benefits is barred due to Claimant’s failure to give Employer notice of the injury and its connection to his employment in

a timely fashion, and arguing that there is no jurisdiction for this claim under the Act, asserting that the injury occurred in Maryland.

In a Compensation Order issued August 28, 2015 (the CO) the ALJ found that Claimant suffered a repetitive stress injury to his right elbow as a result of his employment, that the date of injury was April 9, 2013, that Claimant knew or in the exercise of reasonable care should have known it was work related as of that date, that Employer did not receive notice of the injury and its connection to Claimant's job within 30 days of that date, and that there was jurisdiction under the Act. The ALJ therefore granted the claim for medical benefits¹ but denied Claimant's claim for wage loss benefits.

Claimant appealed the CO to the Compensation Review Board (CRB), arguing that the decision is not in accordance with the law inasmuch as Claimant testified he had suffered an injury on April 9, 2013, but that that injury had resolved and he suffered a new injury, in the nature of an aggravation of the repetitive stress injury which he reported to Employer May 8, 2014, and the ALJ improperly failed to accord her the benefit of the "aggravation rule" by failing to find that his complaints to Dr. John Byrne of "worsening" right elbow pain on April 30, 2014 constituted a new injury, rendering his notice of May 8, 2014 timely.

Employer did not appeal the finding that Claimant sustained a work-related repetitive stress injury or the award of causally related medical care. Employer opposed Claimant's appeal, arguing that the ALJ's determination that Claimant's repetitive stress injury, epicondyle tendonitis, manifested and was known by Claimant to be work-related as of April 9, 2013, is supported by substantial evidence and should be affirmed.

Claimant raised no additional complaints of error in this appeal.

Because the ALJ's determinations that Claimant's work-related repetitive stress injury was made manifest and was known by Claimant to be work-related on April 9, 2013 and that Employer was not provided with notice of the injury until May 8, 2014 are supported by substantial evidence, the determination that the claim for wage loss disability benefits in connection with an injury sustained on April 9, 2013 is barred is affirmed. Because the CO fails to address a central argument and evidentiary issue concerning whether Claimant sustained a new injury on April 30, 2014, the denial of wage loss benefits for that injury is vacated and the matter is remanded for further consideration.

STANDARD OF REVIEW

The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act (the Act) and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). "Substantial evidence", as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a

¹ See *Safeway Stores, Inc. v. DOES*, 832 A.2d 1267 (2003), holding that failure to provide an employer timely notice of a work injury does not bar a claimant's claims for causally related, reasonable and necessary medical care.

particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). Consistent with this scope of review, the CRB is 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

DISCUSSION

In this appeal, Claimant does not contend that Employer had any notice, either written or actual, prior to Claimant's filing his notice of injury and claim for benefits prior to May 8, 2014. Claimant's sole contention is that the ALJ ignored and failed to address the argument that the record supports a finding that the time-barred injury had resolved, and that Claimant sustained a new injury for which adequate and timely written notice was given.

The following findings of fact are taken from the CO, and are not challenged by Claimant in this appeal:

In March of 2013, Claimant, who is right-hand dominant, began experiencing radiating right elbow and forearm pain with right hand weakness while performing his work duties operating the master controller lever. Claimant's symptoms persisted especially at the end of his shift. He sought medical attention and was seen by Sudha Sikri, M.D., his primary physician [footnote omitted]. Right arm x-rays taken were normal for fracture or dislocation, and Dr. Sikri referred Claimant for an orthopedic evaluation. On April 9, 2013, Jorge A. Mondino, M.D., orthopedic surgeon evaluated Claimant's right elbow and found tenderness on palpation over the lateral epicondyle area of the right elbow and flexion of the wrist. Dr. Mondino noted Claimant worked as a train operator and diagnosed epicondylitis of the right elbow (tennis elbow). Dr. Mondino administered a corticosteroid injection and issued a wrist brace. HT pp. 29-31, 37-39; CE 3, CE 4; EE 1.

Claimant continued to work in his full-duty capacity as a train operator. The repetitive use of his right forearm exacerbated his medical condition. On April 30, 2014, Claimant was seen by Dr. John Byrne, M.D., an orthopedic surgeon to re-evaluate "worsening" right elbow pain. Dr. Byrne noted Claimant's history of epicondylitis and found moderate tenderness over the lateral epicondyle, mild swelling with normal strength and range of motion. Dr. Byrne expressed in his treatment notes that Claimant's right epicondylitis with tendonitis was secondary to his repetitive activities [sic] his job as a train operator. Additional cortisone shots were administered and an MRI was ordered. HT pp. 31-34; CE 1.

Claimant continued to work as a train operator and treat with Dr. Byrne. Disability slips dated May 14, 2014 and June 13, 2014 issued by Dr. Byrne indicated Claimant had been under his care since April 5, 2013 for treatment of this condition. A right elbow MRI revealed severe inflammation and partial tear of the extensor tendon and surgical intervention was advised. CE 1.

On May 8, 2015, Claimant completed and signed a work injury report, notifying Employer of his right elbow and forearm condition/epicondylitis and its work-relatedness. Claimant indicated in his injury report that his condition began in 2013, as a result of operating the train and that he had been treated by an orthopedist since that time. EE 1; HT pp. 38-40, 47-49.

Claimant was aware or should have been aware of the relationship of his right elbow condition and his duties as a train operator that required him to use his right forearm manually [sic] use the master controller for acceleration and deceleration. HT pp. 38-40; 45-46. EE 2, EE 3.

CO at 3. All of the facts set forth are supported by the cited exhibits and transcript testimony, and none are contested in this appeal.

The ALJ, in her Analysis, wrote as follows:

The time or date of injury is a necessary determination that must be made in the construction of whether an employee has given timely notice of an injury or timely filed a claim pursuant to [D.C. Code] § 32-1513 and § 32-1514 of the Act. Claimant has the burden to show when his work related injury manifested. In cumulative, repetitive trauma injury cases where it may not be possible to readily identify a particular date guidance is found in *Franklin v. Blake Realty Company*, H & AS No. 84-26, OWC No. 25856 (Director's Decision, August 18, 1985). The Compensation Review Board (CRB) has embraced the *Franklin* rule in establishing the "time of injury" under D.C. Code § 32-1503 (a) for cumulative traumatic injury claims [citing *Bagbonon v. Africare*, CRB No. 03-121 (November 1, 2005) and *Hall v. Daughters of Charity*, CRB No. 05-245 (January 6, 2006)]. Under the *Franklin* rule, the date on which the cumulative trauma injury manifests itself is; 1) the date on which the employee first sought medical attention for his/her symptoms, whether or not he/she ceased work, or 2) the date the employee stops working due to his/her symptoms, whichever first occurred. The CRB has determined the *Franklin* rule shall be used for determining the "date of injury". Thus, the undersigned applies the manifestation rule adopted by the Director in *Franklin, supra*, and the CRB in determining the "time of injury".

The issue [of whether notice is timely] turns on when Claimant was aware or should have been aware of the relationship between performing his repetitive right upper extremity duties operating trains and the manifestation of his right lateral epicondylitis. The medical records in evidence establish that on April 9, 2013, Claimant sought medical attention and was seen by Dr. Mondino for persistent right elbow, forearm and wrist pain. Dr. Mondino noted Claimant worked as a train operator and on the visit he diagnosed epicondylitis of the right elbow. On April 30, 2014, Claimant was seen by Dr. Byrne, to re-evaluate "worsening" right elbow pain. Dr. Byrne noted Claimant's history of epicondylitis and indicated that he had been treating this condition since April of 2013.

Claimant's work injury report which he signed indicates the onset of his right arm pain began while operating the train in March of 2013 and diagnosed with epicondylitis.

Claimant testified that his right elbow symptoms developed in March of 2013 while operating the master controller using his right forearm. He also testified his symptoms were more pronounced at the end of his work day. Claimant acknowledged Dr. Byrne had been treating his right arm condition since April of 2013 and both Dr. [sic] Mondino and Byrne were aware he worked as a transit train operator. Claimant also testified when he filed [sic] out a work injury report in May of 2014, it was for a "reoccurrence" of his injury. It was made apparent to Claimant and his physician as of April 9, 2013, Claimant suffered a cumulative trauma work related injury stemming from his repetitive right arm movements, requiring medical evaluation and diagnosis. *Franklin, supra.*

Thus, Claimant was aware or should have been aware of his right elbow condition and its relationship to his job duties as of April 9, 2013. While Claimant's epicondylitis condition may have been aggravated and reconfirmed by a subsequent MRI in May of 2014; [sic] when applying the *Franklin* manifestation rule, and determining which came first, it was the April 9, 2013 diagnosis of epicondylitis along with Claimant's contemporaneous realization of its work relatedness; [sic] that occurred first. Finding compelling evidence to establish the date of the manifestation of Claimant's cumulative injury was on April 9, 2013; the date he sought medical treatment and was diagnosed with epicondylitis.

CO at 6-7.

This detailed and accurate description of the facts and citation to the applicable authorities fully supports the legal conclusion that Claimant suffered work-related epicondylitis which became manifest on April 9, 2013.

Following this discourse, the ALJ identified the proper statutory mandate concerning the timing of notice, and reached the inarguable conclusion that Claimant's notice to Employer was not given until May 8, 2014, which is clearly well beyond 30 days of the date of this particular injury and the date that Claimant was or should have been aware of the work connection.

However, we are also faced with an additional piece of evidence introduced, ironically enough, not by Claimant, but by Employer. It is a brief closing report authored by Dr. Mondino on May 7, 2013. It is short enough to be set forth in its entirety:

The patient comes today for followup after the injection of the epicondyle area of the right elbow.

On examination, he had no tenderness on palpation. He had full flexion and full extension of the right elbow.

Recommendations: The patient has *recuperated completely* after the injection of cortisone. He will return to see me, if symptoms recurred [sic] at any time.

EE 4 (emphasis supplied).

While it may not be dispositive as a matter of law, this opinion from a treating physician *contemporaneously* with an examination for the express purpose of determining whether Claimant required further medical care for the April 9, 2013 injury, is highly relevant and certainly comprises sufficient evidence that the ALJ, although correct that any wage claims for an injury sustained on April 9, 2013 are time barred, erred in not addressing whether under the facts of this case, Claimant sustained a new injury on April 30, 2014, when he was seen by Dr. Byrne for evaluation of a return of symptoms reminiscent of those experienced earlier but which, in the apparent of opinion of Dr. Mondino, had completely resolved.

As we have recently re-iterated in *Johnson v. D. C. Office of Unified Communications*, CRB No. 15-122, (December 18, 2015):

It is further well documented that in a contested case, to conform to the requirements of the District of Columbia Administrative Procedure Act, D.C. Code § 2-501 (APA), an agency's decision must (1) state findings of fact on each material issue in contest, (2) those factual findings must be supported by substantial evidence, and (3) the conclusions of law must flow rationally from those factual findings. The failure to satisfy these requirements renders an agency decision unsupported by substantial evidence. *Perkins v. DOES*, 482 A.2d 401 (D.C.1984).

Johnson, supra at 2, n. 1.

Review of Claimant's counsel's opening statement (HT 15) and more explicitly in closing argument (HT 52) confirms that Claimant raised this theory of recovery. Yet it is not addressed or resolved in the CO.

We must therefore vacate the denial of the claim and remand the matter for further consideration of the question of whether the conditions for which Claimant presented on April 30, 2014 constituted a new injury. In so considering this question, we remind all concerned that Dr. Mondino is a treating physician, and that rejection of his opinion on this central factual question will require sufficient explanation.

In closing we note that, while no issue was raised in this appeal explicitly referring to a presumption of timely notice, we do encourage that on remand, the ALJ make reference to that presumption in the further analysis.

CONCLUSION AND ORDER

The finding that Claimant's wage loss claim is barred due to untimely notice is vacated, and the matter is remanded with instructions to further consider the claim, including the effect, if any, of Dr. Mondino's expression of opinion that the injury of April 9, 2013 had resolved prior to the onset of Claimant's current condition.

So ordered.