

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

**Office of Hearings and Adjudication
Compensation Review Board**

**(202) 671-1394 - Voice
(202) 673-6402 - Fax**



CRB No. 07-58

MARIA CRUZ,

Claimant – Petitioner

v.

HILTON GARDEN INN AND ZURICH AMERICAN INSURANCE CO.,

Employer/Carrier – Respondent.

Appeal from an Order of
Claims Examiner Toni Green
OWC No. c2006-629441

Heather C. Leslie, Esq., for the Petitioner

Jamie L. DeSisto Esq., for the Respondent

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

BACKGROUND

This appeal follows the issuance of an Order from the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on February 5, 2007, the Claims Examiner (CE) determined that the Claimant-Petitioner's (Petitioner) claim was untimely filed and also denied the Petitioner's request for a change of physicians. The Petitioner now seeks review of that Order.

As grounds for this appeal, the Petitioner alleges that the decision below is arbitrary, capricious, unsupported by substantial evidence and not in accordance with the law. The Employer-Respondent (Respondent) filed an Opposition.²

ANALYSIS

In the review of an appeal from OWC, the Board must affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, §51.93 (2001).

Turning to the case under review herein, the Petitioner alleges that the CE's decision should be reversed because the CE, in denying the request for change of physician, failed to explain how the denial was in the "best interest" of the Petitioner as required by the law in this jurisdiction. Further, the Petitioner alleges that the CE's determination that her claim was untimely filed is erroneous. She maintains that her work injury occurred on April 16, 2006, which is supported by the medical reports of Dr. Christopher Raffo and of the Metro Orthopedics and Sports Therapy, and that the requisite claim application was filed within one year of April 16, 2006. The Petitioner also notes that the Respondent did not raise untimely claim as an issue.

In its Opposition, the Respondent asserts that it argued before the CE that authorization for change of physician could not be addressed until the threshold issue of the compensability of this matter was determined. The Respondent also asserts that the CE was not required to apply the "best interest" test per *Raynor v. May Company*, CRB No. 06-10, OWC No. 603440 (December

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.

² On March 23, 2007, the Respondent filed a Motion to Hold Record Open for Filing the Opposition to Claimant's Application for Review on the basis that the CRB's Notice of Assignment to Panel was issued before the fifteen (15) day period indicated in its Notice of Application expired. After a review of the file, the Respondent's request was granted. The Opposition was timely filed and will be considered in rendering this decision.

27, 2005), in determining whether the Petitioner was entitled to receive the requested authorization since her is not compensable.

In the Order, the CE determined that the Petitioner's work injury occurred on May 24, 2003 and that, therefore, her claim filed on June 7, 2006 was untimely and barred. The stated basis for this determination was the information submitted via the Respondent's Form 8.³ The CE rejected the date of injury indicated on the Petitioner's Form 7,⁴ April 16, 2006, because there was no independent factual and/or medical evidence to corroborate that date of injury. Because the CE determined the claim was barred, the CE flatly denied the request to change physician.

The OWC file contains the Respondent's First Report of Injury filed on June 19, 2006 indicating the date of injury as May 24, 2003. Its Notice of Controversion filed on December 29, 2006 indicates the date of injury as April 16, 2006. The file also contains the Petitioner's Notice of Injury showing the date of injury as April 16, 2006. The medical reports from Secure Medical Care indicate that the Petitioner received medical treatment for sciatica, lumbar strain and left leg pain on May 4, 2006 and May 12, 2006. The medical report from Dr. Raffo, treating in a medical practice called Metro Orthopedics and Sports Therapy, indicates that the Petitioner received medical treatment for left-sided low back pain on June 1, 2006. None of the medical reports reflect that the medical condition for which the Petitioner sought treatment was work-related.

After a review of the entire OWC file, the Panel determines that the CE's decision that the Petitioner's work injury occurred on May 24, 2003 and that her claim is barred is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law for the several reasons.

Before doing enunciating the reasons, however, the Panel will address the Petitioner's assertion that the Respondent did not raise untimely claim as an issue before the CE. The issue of whether an injured worker's claim is timely filed is a dispositive jurisdictional question and must be addressed first. If a claim is untimely, the right to receive workers' compensation benefits under the Act is barred. In this case, the CE acted correctly in deciding whether the Petitioner's claim was timely regardless of whether the Respondent raised the issue.⁵

Reason One for determining that the Order is arbitrary and capricious, an employer is required to file a first report as soon as possible after it gains knowledge of a work-related injury. Failure to do so will result in a penalty not to exceed \$1,000. *See* D.C. Official Code § 32-1532; 7 DCMR § 203. The employer's reporting obligation and the resultant penalty for failing to report are clearly stated on the Form 8. Given the punishment for failing to comply with the reporting requirement, it is not reasonable for the Respondent to wait three (3) years before filing

³ The Form 8 is the Employer's First Report of Injury or Occupational Disease.

⁴ The Form 7 is the Employee's Notice of Accidental Injury or Occupational Disease.

⁵ The Panel notes that D.C. Official Code § 32-1514(b) requires the defense of untimely claim be raised at the first hearing on a claim. In this jurisdiction, the "first hearing" is a proceeding before AHD, not before the OWC. *See Karis v. Edwin T. Elliot Tile & Marble Co.*, H&AS No. 86-91, OWC No. 000407 (Director's Remand Order, January 12, 1988).

the Form 8 in this case.⁶ An argument that the Respondent just gained knowledge of the injury in June 2006 is not persuasive because the attending physician and address named on the Form 8 is Secure Medical Care in Gaithersburg, Maryland from whom the Petitioner received medical treatment on May 4, 2006 and May 12, 2006.⁷ Given the totality of the information in the OWC file, it is reasonable to assume that the year in the date of injury showing on the Respondent's Form 8 was a typographical error.

Moreover, and more importantly, D.C. Official Code § 32-1532(c) provides:

Any report provided for in subsection (a) or (b) of this section *shall not be evidence of any fact stated in such report* in any proceeding in respect of such injury or death on account of which the report is made.

[emphasis added]

Thus, the CE's determination that the Petitioner's date of injury is May 24, 2003 "in accordance with form-8 filed by the employer" is in contradiction to a specific provision in the Act and a reversible error. Under the Act, the information reported on an employer's First Report of Injury cannot be accepted as evidence of a fact. In other words, the First Report serves to verify that an employer is aware of the occurrence of a work-related injury and, in order for the information contained therein to be accepted as a fact in a case, it must be independently proven with either other documents or credible oral statements or both. *Assuming arguendo* that the information on a Form 8 was acceptable as evidence, the information on the Respondent's Form 8 is contradictory and thus not credible. At the top, the day of the week that the Petitioner's injury occurred is reported as "Saturday" whereas at the bottom in the description of the events, the occurrence date is reported as "Sunday".

Reason Two, under the Act, an injured worker has one year after she knows or should have known that a work injury has occurred in which to file a claim for benefits. *See* D.C. Official Code § 32-1514(a). However, the one year statute of limitations does not begin to run until the First Report is filed with the OWC with a copy sent to the injured employee. *See Whitley v. Howard University*, CRB No. 06-71, OHA No. 03-500, OWC No. 578967 (February 16, 2007); D.C. Official Code § 32-332(f); 7 DCMR § 203.3. *Assuming arguendo* that if the Petitioner sustained a work injury in 2003 and if the Respondent just became aware in 2006 of the 2003 work injury and thereafter filed its First Report on June 19, 2006, then the Petitioner's one year time-frame to file her claim began to run not on May 24, 2003, but on June 19, 2006. From reading of the Order, the CE did not consider all the requirements that must be met to trigger the running of the one year limitations period in reaching her decision.

Reason Three, in the Order the CE writes "[t]here is no independent factual and/or medical evidence to corroborate that the claimant sustained injuries on April 16, 2006." There are several medical reports in the OWC file showing that the Petitioner received medical treatment for back and left leg pain in May and June 2006. Although these reports do not specify an injury date or make any causal findings, they nevertheless diagnose a condition which the Petitioner

⁶ There is no indication in the OWC file that the Respondent was fined for failing to file its Form 8 in a timely manner.

⁷ There is no indication in the OWC file, *ex. exculpatory explanation* from the Respondent, that the Respondent just became aware of a 2003 injury in 2006.

alleges resulted from an accident in April and are corroborative evidence supporting her testimony that she was injured at work in April 2006.

Reason Four, in the Order, the CE writes “[t]he employer filed a notice of controversial [sic] on December 24, 2006, stating that the employee did not report any work related injury.” Order at p. 1. This statement is not an accurate reflection of the information on the Notice of Controversion. In the section entitled “Explanation”, the Respondent stated, “Ms. Cruz did not report that her injury was work related.” As written, the Respondent is not indicating that the Petitioner did not report a work injury. Rather, the Respondent is indicating that the Petitioner reported an injury, but did not attribute it to work. The Panel notes that the date of injury showing on this Notice is not May 24, 2003, as reported on its First Report, but April 16, 2006.

In sum, the Respondent’s submissions do not amount to acceptable evidence that the Petitioner’s claim was not timely filed.

As stated earlier herein, the CE’s decision is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. Therefore, this matter must be vacated and remanded for such further proceedings as may be necessary. On remand, the CE shall ascertain the Petitioner’s date of injury and whether her claim for benefits for that injury was timely filed. If the CE determines that the claim is untimely, the CE shall clearly state the bases for this decision. If the CE determines that the claim is timely, the CE shall decide whether to grant or deny the Petitioner’s request for authorization to change physicians. In so doing, the CE shall be mindful of the “best interest” test and the need to specify the reason(s) why the request is granted or denied. *See Jones v. Washington Hospital Center*, CRB No. 04-86, OWC No. 598413 (April 7, 2006).

CONCLUSION

The Order of February 5, 2007 is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law and must be remanded.

ORDER

The Order of February 5, 2007 is VACATED AND REMANDED for further action consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

April 10, 2007

DATE