

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-002

NEMEIKA JOHNSON,
Claimant-Respondent,

v.

HOWARD UNIVERSITY HOSPITAL and
SEDGWICK CMS,
Employer and Third-Party Administrator-Petitioner.

Appeal from December 5, 2014 Compensation Order
by Administrative Law Judge Amelia G. Govan
AHD No. 14-315, OWC No. 712584

William H. Schladt for the Employer
Michael J. Kitzman for the Claimant

Before MELISSA LIN JONES, JEFFREY P. RUSSELL, and HEATHER C. LESLIE *Administrative Appeals Judges.*

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Since approximately 2000, Ms. Nemeika Johnson has worked as a laundry technician with Howard University Hospital ("HUH"). Ms. Johnson maneuvered a laundry cart which requires bending, reaching, lifting, standing, walking, and carrying.

On October 26, 2013, a linen cart struck the back of Ms. Johnson's left leg. She reported to the nurse staffing office for an admission slip to HUH's emergency room where she was examined on November 2, 2013. Ms. Johnson was taken off of work and was referred to orthopedic specialist Dr. Shelton McKenzie.

On November 27, 2013, Dr. McKenzie placed Ms. Johnson on light duty with no heavy lifting or prolonged walking or standing; these restrictions were imposed until December 4, 2013. On December 19, 2013, Ms. Johnson was excused from work for a work-related medical condition;

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this excuse was imposed again on January 13, 2014. Ms. Johnson was released to full duty on February 13, 2014.

A dispute arose over Ms. Johnson's entitlement to workers' compensation benefits, and the parties proceeded to a formal hearing to resolve whether Ms. Johnson sustained an accidental injury to her left knee or back on October 26, 2013 which arose out of and in the course of employment, whether Ms. Johnson gave timely notice, and the nature and extent of Ms. Johnson's disability, if any. In a Compensation Order dated December 5, 2014, an administrative law judge ("ALJ") granted Ms. Johnson temporary total disability benefits from October 26, 2013 through March 25, 2014 with interest and payment of causally related medical expenses on the grounds that Ms. Johnson's left knee injury arose out of and the course of her employment and Ms. Johnson gave timely notice. *Johnson v. Howard University Hospital*, AHD No. 14-315, OWC No. 712584 (December 5, 2014).

On appeal, HUH asserts the ALJ applied the wrong legal standard to the notice issue. HUH also contends the ALJ's finding that HUH had actual notice is not supported by substantial evidence nor is the ruling that the presumption of timely notice was invoked. Finally, HUH asserts the ALJ's award of temporary total disability benefits is not supported by substantial evidence. HUH requests the Compensation Review Board ("CRB") reverse the Compensation Order.

In response, Ms. Johnson argues

[t]he Compensation Order correctly held that the employer presented no evidence that notice was not provided, but rather, only presented evidence that at some stage in the internal bureaucracy, the paperwork was not properly transmitted. The evidence further supports the contention that the claimant followed the instructions of her employer in how she reported her injury and to whom she reported it. Further, the evidence supports the Compensation Order's conclusion regarding the claimant's entitlement to temporary total disability is consistent with the opinion of the treating physician as well as Employee Health.

Memorandum of Points and Authorities in Opposition to Application for Review, unnumbered p. 3. For these reasons, Ms. Johnson requests the CRB affirm the Compensation Order.

ISSUES ON APPEAL

1. Did the ALJ properly apply the law regarding timely notice including the burden-shifting scheme of the presumption of timely notice?
2. Are the ALJ's findings of fact supported by substantial evidence and conclusions of law in accordance with the law?

PRELIMINARY MATTER

Ms. Johnson filed her Memorandum of Points and Authorities in Opposition to Application for Review on January 16, 2015. Pursuant to 7 DCMR §258.10, "Within five (5) calendar days of receipt of a memorandum filed in opposition to an Application for Review, the petitioner may file a reply memorandum (original and three copies) with the Board, and serve copy of same

upon the respondent.” Eleven days after Ms. Johnson filed her opposition, HUH filed Employer/Insurer’s Motion to Accept Late Filing. Because HUH’s motion was filed beyond the deadline established in 7 DCMR § 258.10, the motion is denied, and Employer/Insurer’s Reply to Claimant’s Opposition to Application for Review has not been considered in the resolution of this appeal.

ANALYSIS¹
TIMELY NOTICE

In the Compensation Order, the ALJ adjudged the notice issue based upon the following standard:

The Act requires a claimant to provide written notice of an injury within thirty days of the date on which he is aware of the relationship between the injury and his employment. D.C. Code §32-1513(a). Failure to provide such notice does not, however, bar a claim for benefits where the employer, his agent or the carrier has actual notice of the injury and its relationship to the employment; employer has not been prejudiced by the failure to provide written notice; or, such failure is excused by the Mayor on the ground that for some satisfactory reason such notice could not be given. D.C. Code §32-1513(d). *See Jiminez v. DOES*, 701 A.2d 837 (D.C. 1997). The presumption of compensability also applies to timely notice. *Dunston, supra*.

Employer relies on the testimony of Mr. Patillo, arguing that because he never received paperwork to support the occurrence of the October 2013 work injury there was no timely notice. However, the failure of Employer’s agents to properly process the documents prepared and signed by Claimant and by supervisors, such that Mr. Patillo did not receive them, does not rebut the presumption. Claimant returned to the workplace on several occasions to deliver updated medical reports, and Employer’s records specifically describe a work injury occurring on October 26, 2013. I credited Claimant’s testimony, which was consistent with the documentary evidence of record, that Employer had actual notice that she was injured while she was working on October 26, 2013.

The presumption that Claimant’s actual notice to Employer was timely is not rebutted. Therefore, I was persuaded that Employer had actual notice of Claimant’s back injury, and the relationship to Claimant’s work activities, within thirty days after the accidental injury. The record evidence does not support a determination barring the instant claim for benefits; Employer had actual notice of Claimant’s work-related injury. D.C. Code §32-1513(d); *See Jiminez, supra*.

¹ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers’ Compensation Act of 1979, as amended, D.C. Code § 32-1501 *et. seq* (“Act”). Consistent with this standard of review, the CRB is constrained to uphold a compensation order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

Johnson, supra, at 6. There are several errors in the ALJ's analysis.

First, pursuant to § 32-1513 of the Act

(a) Notice of any injury or death in respect of which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death, or 30 days after the employee or beneficiary is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury or death and the employment. Such notice shall be given to the Mayor and to the employer.

(b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or, in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.

(c) Notice shall be given to the Mayor by delivering it to him or sending it by mail to him, and to the employer by delivering to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any partner, or, if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.

(d) Failure to give such notice shall not bar any claim under this chapter:

(1) If the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and its relationship to the employment and the Mayor determines that the employer or carrier has not been prejudiced by failure to give such notice; or

(2) If the Mayor excuses such failure on the ground that for some satisfactory reason such notice could not be given; or unless objection to such failure is raised before the Mayor at the 1st hearing of a claim for compensation in respect of such injury or death.

In other words, a claimant must supply the employer with written notice of an injury and the cause of such injury within thirty days of the date on which the claimant becomes aware of the work-injury relationship. If notice has not been provided in accordance with §§ 32-1513(a)-(c), the claimant must show the employer had actual knowledge of both the injury and its relationship to the employment. § 32-1513(d) of the Act; *Tagoe v. Howard University Hospital*, CRB No. 03-119, OHA No. 03-287, OWC No. 568310 (September 27, 2006). If the claimant can make such a showing, the trier of fact must determine whether the employer was prejudiced by the claimant's failure to provide proper notice. § 32-1513(d)(1) of the Act. The ALJ created a disjunctive test which is not condoned by the plain language of the Act.

Next, the ALJ permits actual notice to be attributed to “the employer, his agent or the carrier.” *Johnson, supra*, at p. 6. The Act requires that in the absence of written notice, actual notice may suffice if given to “the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier.” § 32-1513(d)(1) of the Act.

Although the distinctions are important, in this case, the errors are harmless. The ALJ determined that

Claimant worked on the night shift, from 11:00 p.m. until 7:30 a.m.; there was no supervisor on duty assigned to this shift. Because there is no supervisor on duty, employees assigned to the night shift must report injuries to the nurse staffing office, which provides referrals to the Employee Health Unit, from where the employee is provided emergency medical services. HT 19, 50-52.

Johnson, supra, at pp. 2-3. This ruling is based upon the testimony of HUH’s witness, Mr. Demetrius Patillo who stated

[w]e have a policy that employees, managers and directors should follow for the Worker’s [*sic*] Compensation process. When you injure yourself – if it’s late at night like in her particular case, she would go to emergency room and immediately she would to go Employee Health so we can do an assessment of her medicals and then that information would come to me and I process it. And it never happened.

Hearing Transcript, p. 50. The ALJ found Ms. Johnson followed this process for giving notice thereby invoking the presumption of timely notice and rendering Employee Health HUH’s agent in charge. That Mr. Patillo did not get the information from Employee Health or that Employee Health did not secure additional information cannot be equated to a failure on Ms. Johnson’s part nor does it qualify to rebut the presumption of timely notice.² The CRB finds no reason to disturb the ALJ’s ruling on the notice issue under these circumstances.

There may be substantial evidence in the record to support a conclusion favorable to HUH. The CRB, however, is constrained to uphold a compensation order supported by substantial evidence even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott, supra*.

NATURE AND EXTENT OF MS. JOHNSON’S DISABILITY

At the formal hearing, Ms. Johnson requested temporary total disability benefits from October 26, 2013 through March 25, 2014. The ALJ granted Ms. Johnson’s request, but the ALJ’s findings in support of the award are confusing:

Claimant was injured on October 26, 2013. While on an elevator, one of the two loaded linen carts in the elevator with her rolled and struck the back of

² This presumption operates only “in the absence of evidence to the contrary” and once rebutted, drops out of the case entirely, leaving the burden on the claimant to prove timely notice. *Washington Post v. DOES*, 852 A.2d 909, 911 (D.C. 2004); *Dillon v. DOES*, 912 A.2d 556, 562 (D.C. 2006).

Claimant's left leg in the area behind her knee. Immediately, she felt a lot of pain in the left leg; she turned the cart over to a co-worker and went upstairs to the nurse staffing office for a slip for admission to Employer's emergency room. At first, Claimant was sent home. When she returned to the nurse staffing office for a referral slip to Employer's emergency room, she was restricted from returning to work and referred to orthopedic specialist Shelton McKenzie, M.D.

* * *

Claimant continued to work until Dr. McKenzie, on November 27, 2013, restricted her from returning to her usual work duties. He specifically restricted her from performing those duties from November 27, 2013 – December 4, 2013 and from January 13, 2014 – February 13, 2014. The physical activities he proscribed included heavy lifting, prolonged walking or standing. [Footnote omitted.] CX8.

The record includes a December 19, 2013 Employee Health Medical Illness/Injury Evaluation Report from employer's Health Provider excusing Claimant from duty for a work related medical condition. CX5, p. 59. It also includes a January 13, 2014 Employee Health Medical Illness/Injury Evaluation Report indicating that Claimant is excused from duty due to a work-related injury CX5, p. 63. The record also includes a December 5, 2013 Referral Form, on Employer's letterhead and signed by Employer's Employee Health Provider, which indicates that there was a referral to Mr. Patillo. CX5, p. 62. Demetrius Patillo is Employer's Benefits Manager, who was cognizant of matters related to Claimant's previous work injury.

The results of MRI testing of Claimant's left knee, on January 24, 2014, showed moderate joint effusion and degenerative changes with bone marrow edema. A lumbar spine MRI taken on the same day was largely unremarkable, showing disc bulges at three levels as well as degenerative disc disease. CX6. Claimant was not released for return to full duty employment until February 13, 2014. CX8.

Johnson, supra, at p. 3. Based upon these findings, the ALJ concluded

Claimant's left knee impairment, following her work accident, prevented her from returning to her usual employment prior to March 25, 2013. Claimant's credible testimony that she could not perform her usual duties, combined with Dr. McKenzie's restrictions on the heavy lifting required to perform those duties, supports her claim for temporary total disability benefits during that period. Dr. Levitt's IME does not address the period of wage loss at issue. There is no reason to credit his opinion, which indicates that Claimant could have returned to unrestricted work two months after the injury, over that of Claimant's treating physician. No alternative employment was offered to Claimant by Employer after her work injury. Employer has not met its burden of providing suitable work for which the Claimant is qualified was, in fact, available.

Id. at 7. Based upon the ALJ's various findings, it is unclear when Ms. Johnson was totally disabled, when Ms. Johnson was on light duty, when Ms. Johnson was capable of full duty, and when Ms. Johnson worked. Although the ALJ granted HUH a credit for any wages earned during the benefit-period, the CRB is unable to resolve the ALJ's unclear findings of Ms. Johnson's work capacity in regards to the time period of her claim for relief; therefore, the CRB is unable to perform an appellate review and is constrained to remand this matter. *Jones v. DOES*, 41 A.3d 1219, 1221 (D.C. 2012).

CONCLUSION AND ORDER

The ALJ properly applied the law regarding timely notice including the burden-shifting scheme of the presumption of timely notice, and the ruling that Ms. Johnson gave timely notice is AFFIRMED. Because the ALJ's findings of fact regarding the nature and extent of Ms. Johnson's work capacity are unclear, the CRB is unable to perform an appellate review of that issue; therefore, the portion of the December 5, 2014 Compensation Order discussing the nature and extent of Ms. Johnson's disability is VACATED, and this matter is REMANDED for clarification of the ALJ's findings of fact and conclusions of law regarding Ms. Johnson's work capacity from October 26, 2013 through March 25, 2014.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES
Administrative Appeals Judge

May 14, 2015
DATE