COMPENSATION REVIEW BOARD

CRB No. 12-095

DONALD POOLE,

Claimant–Respondent,

v.

BENEDICT METAL WORKS and CINCINNATI INSURANCE COMPANY,

Employer and Carrier-Petitioners.

Appeal from a Compensation Order by
The Honorable Nata K. Brown
AHD No. 11-062, OWC No. 673724

Joel E. Ogden, Esquire for the Petitioner
Mark L. Schaffer, Esquire for the Respondent

Before HEATHER C. LESLIE,[1] LAWRENCE D. TARR, and JEFFREY P. RUSSELL,[2] *Administrative Appeals Judges*.

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

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the May 25, 2012, Compensation Order (CO) 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 CO, the ALJ granted the Claimant's request for temporary total disability benefits from December 20, 2010 to the present and continuing and causally related medical expenses. We AFFIRM the award of causally related medical expanses, and VACATE the award of temporary total disability.

[1]Judge Heather C. Leslie is appointed by the Director of DOES as a CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 2, 2012).

[2]Judge Russell has been appointed by the Director of the DOES a CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 2, 2012).

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was a Project Manager for the Employer. The Claimant had been employed by the Employer since 2005, initially holding the position of sheet metal worker. As a Project Manager, the Claimant's duties included administrative duties as well as design work, installation of materials, driving, and delivering materials.[3]

On May 10, 2010, the Claimant injured his right shoulder when attempting to catch a ladder to stop it from falling. The Claimant did not seek medical treatment immediately afterwards. The pain in the Claimant's shoulder increased between May 10, 2010 and July 6, 2010, causing the Claimant to seek medical treatment with Dr. Andrew L. Tislau on July 6, 2010. Thereafter, the Claimant notified his Employer of the work injury on July 13, 2010.

The Claimant continued to treat for his injury. After conservative treatment failed, the Claimant underwent shoulder surgery on September 3, 2010. Subsequently, the Claimant's neck became symptomatic. The Claimant was diagnosed with a disk herniation which Dr. Scott McGovern opined was causally related to the work injury. The Claimant has not returned to work for the Employer. On December 30, 2010, the Employer terminated the Claimant's employment.

A Formal Hearing was held on July 11, 2011. The Claimant requested an award of temporary total disability from December 20, 2010 to the present and continuing and payment of causally related medical bills. The issues presented were (1) whether the Claimant's neck and biceps injury arose out of or in the course of his Employment[4] and whether those conditions were medical causally related to the work injury, (2) whether the Claimant gave timely notice of injury to the Employer, (3) the nature and extent of the Claimant's disability, if any, and (4) whether the Claimant had voluntarily limited his income. A Compensation Order issued on May 25, 2012, granting the Claimant's relief in its entirety. Significantly for purposes of this appeal, the ALJ found the Claimant's testimony to be credible and found the Claimant had given timely notice.

The Employer timely appealed on June 22, 2012.[5] The Employer argues the ALJ was in error in finding the Claimant gave timely notice and in error in finding the Claimant's testimony to be credible. The Claimant timely opposed, arguing that the CO's findings were supported by the substantial evidence in the record.

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[3] *Poole v. Benedict Metal Works*, AHD No. 11-062, OWC No. 673724 (May 25, 2012).

[4] Hearing Transcript at 8.

[5] The Employer did not appeal the finding that the Claimant's neck and biceps injury arose out of and in the course of the Claimant's employment and was medically causally related to the work injury, that the Claimant is temporarily and totally disabled from December 20, 2010 to the present and continuing, and that the Claimant had not voluntarily limited his income. As such, those issues will not be addressed.

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. S*ee* 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

The Employer first argues that the ALJ erred in finding the Claimant provided timely notice under the statute. The Employer specifically argues that the ALJ erroneously stated that for the time requirements of notice to begin to run, the Claimant must be aware of the "extent" of his injury. Employer's Argument at 3.

A review of the CO reveals the ALJ first correctly noted that D. C. Code § 32-1513, "Notice of injury or death", provides:

> 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.

CO at 4-5.

The ALJ, after stating the "Claimant did not know, within the first thirty days after the accident, that he had a compensable injury", then analogized the facts of the case to that of *King v. DOES,* 742 A.2d 460 (D.C. 1999). As the Employer correctly notes, *King* dealt with a possible cumulative trauma injury. Indeed, the ALJ quotes a footnote[6] in *King* which distinguished the terms "accident" and "injury" that was utilized by the Court to explain that a "cumulative traumatic injury becomes manifest only after the body's repeated exposure to individually minor traumas, insults, or harmful employment-related conditions." Id at 469. Finally, the ALJ then concluded "At the time of the accident on May 10, 2010, he did not know the *extent* of the injury (HT 67)." [7]

The ALJ's reliance upon *King* is misplaced. Neither party argued at the Formal Hearing that the Claimant's shoulder and neck injury was the result of cumulative trauma. While the Claimant

[6] "Accident refers to the event causing the harm, 'injury' to the harmful physical (in some instances, psychological) consequences of that event which need not occur or become obvious simultaneously with the event." *King, supra* at fn 7.

[7]. *Poole v. Benedict Metal Works*, AHD No. 11-062, OWC No. 673724 (May 25, 2012).at 5.

seems to allude cumulative trauma conditions in argument[7], both parties agree that a distinct accidental injury occurred on May 10, 2010.

Moreover, a review of the hearing transcript relied upon by the ALJ reveals the following discussion:

> Q. At any rate, you knew that you had hurt your shoulder on that date, is that right?
> A. No.
> Q. You did not?
> A. I did not. I felt a pain. To the extent of the injury, I did not know.
> Q. You didn't know the extent of the injury but you knew there was an injury?
> A. Something had happened, yes, my arm got pulled.
> Q. And you knew that there was a relationship between that injury and the act of trying to hold this ladder up. Is that right?
> A. Yes.

Hearing Transcript at 67.

Based on the above, it is seems that the ALJ may have conflated the notice requirement in the above case where a distinct injury occurred with the special circumstances involving cumulative trauma injuries.[8] In any event, the ALJ was in error in inserting the requirement that the 30 day notice provision was not triggered until the Claimant knew of the *extent* of his injury, rather than when the Claimant was aware of the relationship between his injury[9] and the work accident on May 10, 2010.

It is clear that the Claimant was aware of the relationship between the injury of May 10, 2010 and his employment based upon his testimony at the hearing that he felt pain and a pulling sensation when he attempted to catch the ladder. This evidence and his affirmative response to the question of whether or not he knew there was a relationship between the injury and the May 10, 2010 accident began the 30 day notice requirement on the date of injury. Thus, notice had to be given to the Employer on or before June 9, 2010 to be timely. As the Claimant did not notify his Employer until July 13, 2010, notice was untimely.

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[7] "If the Employer's line of reasoning in its Petitioner were to be accepted, then a claim for compensation would run not form the date of injury, but rather the date of accident. This would bar claims for many injuries and occupational diseases, which go undiagnosed or do not manifest themselves for weeks, months, or years." Claimant's argument at 5.

[8] In cases where a condition is the result of cumulative trauma**,** the date of injury is either the date a claimant is disabled from her usual employment as a result thereof, the date on which said injury becomes manifest, or the date on which the claimant seeks medical treatment for that condition. See *King, supra; Railco Multi-Construction Co. v. Gardner, 564 A.2d 1167 (D.C. 1989).* A cumulative injury may become manifest only after repeated exposure to individual traumas or harmful employment-related conditions. *Id.* Until a cumulative trauma injury has manifested, either by requiring an employee to seek medical care, or causing an employee to lose time from work, there has been no "injury", and thus, there is no triggering event for the giving of notice to an employer of such an injury.

[9] Described by the Claimant as a "total body injury." Claimant's argument at 5.

As notice was untimely, the Claimant cannot recover wage loss benefits under the statute.[10] Thus, the Employer's other assignments of error are rendered moot.

However, claims for causally related medical expenses are not barred by the failure of the employee to give the notice.[11] The Claimant is entitled to continuing medical care for conditions causally related to the May 10, 2010 injury, including the Claimant's neck and biceps condition, as the Employer did not appeal the findings that these conditions were causally related to the work accident.

CONCLUSION AND ORDER

The determination that the Claimant's neck and biceps injuries are the result of the work injury is not the subject of an appeal. The determination that the Claimant gave timely notice of the work injury is not supported by substantial evidence, and the award of temporary total disability is not in accordance with the law. The award of temporary total disability benefits is VACATED. The award of causally related medical care is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

July 25, 2012
DATE

[10] *Howard University Hospital v. DOES*, 960 A.2d 603(DC 2008).

[11] *Safeway Stores v. DOES*, 832 A.2d 1267 (DC 2003). Under our Workers' Compensation Act we have held that "medical benefits are not subject to the same limitations as are disability income benefits. . . ." *Id.* quoting *Santos v. District of Columbia Dep't of Employment Servs.*, 536 A.2d 1085, 1089 n.6 (D.C. 1988). Based upon the language of the Act we held that there was no indication that the legislature intended to "limit the employer's liability for medical services and supplies to the period of time during which the injured employee receives disability income compensation," *id*., but rather that the right to medical expense are to be addressed "separate and distinct from the right to income benefits." *Santos, supra* at 1089 n.6; *see also*, 2 A. LARSON, THE LAW OF WORKMENS' COMPENSATION § 61.11 (b), at 10-773 (1987).