

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. 07-142

ROBERT HERRING,

Claimant – Petitioner

v.

PEPCO/COLONIAL HEALTHCARE AND PREMIER PERSONNEL/UTICA INSURANCE,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Amelia G. Govan
AHD No. 04-371B, OWC Nos. 596107, 593221

Matthew Peffer, Esquire for the Petitioner

Emily C. Hvizdos, Esquire, for the Respondent

Before: LINDA F. JORY, FLOYD LEWIS and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

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 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, 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. 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.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD), the Office of Hearings and Adjudication (OHA), in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on June 27, 2007, the Administrative Law Judge (ALJ) concluded that Claimant-Petitioner (Petitioner) did not suffer an accidental injury arising out of and in the course of his employment in January of 1999 and that Petitioner failed to timely file a claim for benefits related to the 1999 incident. The ALJ also concluded that Petitioner's current lumbar symptoms which became disabling in July of 2003 arose out of and in the course of his employment, but that Petitioner failed to provide timely notice of the July 2003 work injury. Petitioner now appeals that Order.

As grounds for this appeal, Petitioner alleges that the ALJ's decision is erroneous and should be reversed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review 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 §32-1522(d)(2). "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. 2003). Consistent with this scope of review, the CRB and this Review Panel are constrained 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 alleges that the ALJ's conclusion that Petitioner failed to timely notice to Employer-Respondent (Respondent) is erroneous, as there is substantial evidence that Respondent had notice of the injury within 30 days of the injury of July 15, 2003 and the ALJ's finding that Respondent was prejudiced by Petitioner's failure to give notice is not supported by substantial evidence.

Respondent counters that the ALJ's conclusion that Petitioner did not comply with the mandatory notice provisions of the Act is supported by substantial evidence and is in accordance with the law.

In the Compensation Order, the ALJ found that Petitioner failed to establish by substantial credible evidence that he had sustained a work-related back injury in January of 1999, and because of that finding, the ALJ never reached the issue of whether a timely claim for benefits in connection with such an injury had been filed. Petitioner did not appeal the findings concerning the lack of such an injury having been demonstrated, and makes no reference whatsoever to that claimed injury in this appeal. Accordingly, this Panel affirms the unappealed findings of fact and conclusions of

law, and the denial of benefits related thereto, in connection with an alleged injury on January 27, 1999.

As to the issues raised on appeal by Petitioner, under D.C. Official Code § 32-1513(a), an injured employee must provide written notice of an injury to the employer within 30 days of the date he or she became aware of the relationship between the injury and his or her employment. However, the failure of an employee to provide this notice does not bar the employee's claim for benefits when the employer/carrier has actual notice of the injury and its relationship to the employment and the employer has not been prejudiced by the employee's failure to provide written notice; or, the failure to provide written notice has been excused because for some satisfactory reason, such notice could not be given. D.C. Official Code § 32-1513(d).

In this matter, Petitioner had 30 days, until August 15, 2003 to give Respondent notice of his alleged July 15, 2003 injury, but Petitioner did not file a claim form until October 30, 2003. In analyzing the notice issue, the ALJ found that Petitioner's testimony that Respondent had immediate actual notice that he was injured while working on January 27, 1999 or July 15, 2003 was not credible and not consistent with the medical reports and other evidence of record. As such, the ALJ concluded that Respondent did not have actual notice of Petitioner's injury. Therefore, the ALJ found that Petitioner's failure to timely give timely written notice of the 1999 and 2003 injuries barred his claim wage loss benefits. Compensation Order at 8.

The record reveals that Petitioner acknowledged that he did not tell his supervisors that he sustained a work injury on July 15, 2003. Hearing transcript (HT) at 52-53, 93. In addition, Respondent's supervisors also testified that Petitioner did not inform them of an injury. HT at 152, 154. However, Petitioner contends that Respondent had notice of his injury and the relationship to this employment since his supervisor knew he was being treated by a chiropractor and he had been placed on work restrictions and as such, he assumed that Respondent knew of his injury and the relationship to his employment.

On this point, as Respondent points out, at the hearing on cross-examination, Petitioner admitted that he did not tell his supervisor that the acupuncture treatment and work restrictions were causally related to his employment. HT at 90-92. Moreover, Petitioner's supervisor, Stacy Rice, testified that Petitioner, at no time, informed him that his work restrictions or treatment were related to his employment. HT at 165-166.

On appeal, Petitioner argues that the ALJ committed factual errors in concluding that Petitioner failed to give notice, as Petitioner argues that he told Mr. Rice that the back injury "might have happened at work." However, Petitioner does not refer to any part of the record that gives support to this contention. Moreover, the ALJ concluded that there was no support in the evidence record for Petitioner's argument that he informed anyone at his employment that his July of 2003 pain was work-related. In addition, as Respondent points out, the ALJ specifically found that those parts of Petitioner's testimony that were not corroborated by other evidence of record were not credible. Compensation Order at 3, 8.

In addition, Petitioner argues that the ALJ's conclusion that Respondent was prejudiced by Petitioner's failure to give written notice was not supported by substantial evidence, as the ALJ did

not cite any evidence to support this finding. However, as to this argument by Petitioner, this Panel must point out that in this matter, the ALJ's finding on prejudice was not required or relevant to the ALJ's denial of this claim for Petitioner's failure to provide timely notice.

Under D.C. Official Code § 32-1513(d)(1), a finding on whether an employer was or was not prejudiced is only required after it has been determined that the employer, in fact, had notice other than the written notice that the Act requires. The failure to give written notice does not bar a claim if an employer had knowledge of the injury the relationship to the employment “and . . . the employer . . . has not been prejudiced by the failure to give such notice” (emphasis added).

In this matter, the ALJ found that the evidence revealed that Respondent did not have any other notice of Petitioner's injury and its relationship to the employment and as such, under the Act, there was no requirement for a finding by the ALJ on prejudice to Respondent. Therefore, even if the ALJ did not cite to evidence that Respondent was prejudiced, as Petitioner claims, any such failure would be unnecessary and harmless error, as the ALJ found that Employer did not, in fact, have knowledge of Petitioner's injury and the relationship to his employment, and this finding is supported by substantial evidence.

Accordingly, after carefully reviewing the record in this matter, Petitioner's arguments must be rejected and as the ALJ's decision is supported by substantial evidence, is in accordance with the law and should not be disturbed.

CONCLUSION

The Compensation Order of June 27, 2007 is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order of June 27, 2007 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

October 3, 2007
DATE