COMPENSATION REVIEW BOARD

CRB No. 12-033

TIFFIANE A. SANDERS,
Claimant–Respondent,

v.

METROPOLITAN WESLEY AME ZION CHURCH,
Self-Insured Employer-Petitioner.

Appeal from a Compensation Order by
The Honorable Nata K. Brown
AHD No. 11-013, OWC No. 670859[1]

Michael S. Rosier, Esquire for the Petitioner
Stephen A. Bou, Esquire for the Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and HENRY W. MCCOY *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*., ("Act"), 7 DCMR 250, *et seq*., and the Department of Employment Services Director's Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

On December 10, 2009, Ms. Tiffiane A. Sanders worked for Metropolitan Wesley AME Zion Church ("Metropolitan Wesley") as an administrative assistant and sound technician. On that day, while cleaning her office, she dropped a plastic paper-cutter on her right foot.

[1] The caption of the Compensation Order notes AHD No. 11-036, OWC No. 673935; however, both parties indicate the claim numbers as stated in this caption.

Ms. Sanders continued to work until December 14, 2009 when the pain became unbearable, and she went to the emergency room at Montgomery General Hospital. Ms. Sanders was admitted to the hospital, and Dr. Neil R. Ohora operated on her right foot on December 16, 2009. Ms. Sanders' injury required multiple surgeries until all 5 toes on her right foot were amputated.

When Ms. Sanders was discharged, she was sent to Manor Care Nursing and Rehabilitation Center to learn how to walk again. Dr. Ohora continued to treat Ms. Sanders.

Dr. Ohora released Ms. Sanders to return to work on March 8, 2010. Ms. Sanders was removed from her administrative assistant duties effective April 30, 2010.

A dispute arose over Ms. Sanders' entitlement to workers' compensation benefits, and following a formal hearing, an administrative law judge ("ALJ") granted Ms. Sanders temporary total disability benefits from December 15, 2009 through March 8, 2011 and permanent partial disability since March 9, 2011. In addition, the ALJ awarded Ms. Sanders a penalty for Metropolitan Wesley's failure to timely controvert the claim; the penalty was assessed on each unpaid installment of benefits not paid up to the date of the issuance of the Compensation Order.

On appeal, Metropolitan Wesley takes issue with the conclusion that Ms. Sanders' right foot condition is causally related to her on-the-job accident because Ms. Sanders did not cut her foot in the accident and could not have aggravated her pre-existing osteomylitis. The specific issue Metropolitan Wesley raises is "Did the 'blunt trauma' from the work injury cause a break in the Claimant's skin so as to allow microorganisms to enter her body and aggravate the preexisting bone infection?"[2]

In response,[3] Ms. Sanders asserts the Compensation Order is supported by substantial evidence. She requests it be affirmed in its entirety.

ISSUE ON APPEAL

1. Is the January 31, 2012 Compensation Order supported by substantial evidence and in accordance with the law?

[2] Metropolitan Wesley's Memorandum of Points and Authorities, p.2.

[3] Simultaneously with the filing of Claimant's Brief in Opposition to the Employer's Application for Review, Ms. Sanders filed Claimant's Motion for Leave to File Opposition Out of Time. Due to the CRB's relocation, Ms. Sanders asserts she did not receive correspondence from the CRB regarding a briefing schedule. Pursuant to 7 DCMR § 258.8, "[a]ny response in opposition must be filed with the Clerk of the Board within fifteen (15) calendar days from the date of filing of the Application for Review;" however, there being no opposition to Ms. Sanders' request, the Motion for Leave is granted.

ANALYSIS[4]

Preliminarily, Metropolitan Wesley requests oral argument in its Application for Review. No specific reason or argument has been made as to why oral argument is necessary, and the request is denied.

Pursuant to §32-1521(1) of the Act, a claimant is entitled to a presumption of compensability ("Presumption").[5] In order to benefit from the Presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.[6] "[O]nce an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act."[7]

Once the Presumption was invoked, it was Metropolitan Wesley's burden to come forth with substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."[8] Only upon a successful showing by Metropolitan Wesley would the burden return to Ms. Sanders to prove by a preponderance of the evidence, without the benefit of the Presumption, her injuries arose out of and in the course of employment.[9]

There is no dispute that the Presumption properly was invoked and rebutted. On appeal, Metropolitan Wesley disagrees that Ms. Sanders met her burden when the evidence as a whole was weighed by the ALJ, in part, because Dr. Ohora purportedly did not offer an opinion regarding causal relationship.

Dr. Ohora testified that blunt trauma can cause infection even without breaking the skin. Metropolitan Wesley protests that Dr. Ohora's testimony that blunt trauma can cause infection without breaking the skin was in response to a hypothetical question:

> Q: Can trauma which does not break the skin cause infection?

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[4] 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 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).

[5] Section 32-1521(1) of the Act states, "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter."

[6] *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

[7] *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000).

[8] *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (Citations omitted).

[9] See *Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003).

A: Yes.[10]

Nonetheless, an ALJ may draw reasonable inferences from the evidence,[11] including the reasonable inference that if Ms. Sanders did not cut her foot when she dropped a paper-cutter on it, she still developed an infection that led to the amputation of her toes on her right foot. Such an inference is particularly plausible given Dr. Ohora's consistent testimony that

> ulcers can develop from pressure, and that necrotic tissue can develop, depending on the individual and the circumstances, in a variable amount of time from very short to indeterminate. (DT 46, 56) He further explained that blunt trauma can cause infection, even if it does not break the skin. The trauma can cause a small hematoma that can be a nidus [footnote omitted] for infection. (DT 62,63) In addition, Dr. Ohora testified that if the skin did not break, the microorganisms can get to the site of the nidus in the blood, or that a microorganism can be introduced directly by a small wound or entry point on the skin that is not detectable with the naked eye. (DT 64)[12]

In the end, the ALJ rejected the opinions of Metropolitan Wesley's independent medical examiners who had never examined Ms. Sanders in person and who had only reviewed some unidentified medical records, in favor of the opinions of Ms. Sanders' treating physician.[13] We find no error.

The essence of Metropolitan Wesley's argument is that there is evidence in the record that if weighed in its favor is sufficient to support a finding that Ms. Sanders is not entitled to the benefits she has been awarded. The role of this tribunal, however, is not a *de novo* review of the evidence; so long as the Compensation Order 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, the CRB is constrained to affirm this portion of the Compensation Order.[14]

Regarding the nature and extent of Ms. Sanders' disability, Metropolitan Wesley asserts that because Ms. Sanders testified in her discovery deposition she could act as an administrative assistant, Ms. Sanders has rebutted her own claim for disability. First, Ms. Sander's deposition is not in evidence, and any documents not part of the record made before AHD cannot be considered.[15] Next, Ms. Sanders was not released to any type of work until March 9, 2011, and the ALJ awarded temporary

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[10] Dr. Ohora's deposition transcript at p.63. (Dr. Ohora's *de bene esse* deposition transcript was admitted into evidence but was not marked as an exhibit. *Sanders v. Metropolitan Wesley AME Zion Church*, AHD No. 11-036, OWC No. 673935 (January 31, 2012)).

[11] See *George Hyman Construction Co. v. DOES*, 498 A.2d 563, 566 (D.C. 1985).

[12] *Sanders*, *supra*, at 6.

[13] *Kralick v. DOES*, 842 A.2d 705, 712 (D.C. 2004) (In private sector workers' compensation cases, there is a preference for the opinions of a treating physician.)

[14] *Marriott*, *supra*.

[15] *Id*.

total disability benefits from October 10, 2009 to March 8, 2011. Ms. Sanders' deposition testimony of her self-assessment of her capacity at an undisclosed time presumably after the close of the period included in the claim for relief is irrelevant to her entitlement to temporary total disability benefits during the time when she had not been released to return to work, and Metropolitan Wesley has made no specific argument regarding Ms. Sanders' entitlement to a schedule award for permanent partial disability.

Finally, although Metropolitan Wesley has not appealed the imposition penalties for its failure to timely controvert Ms. Sanders' claim, as a matter of law, the penalty for a failure to controvert a claim is assessed from the date the compensation obligation commenced until the date the Notice of Controversion is filed.[16] Accordingly, assessment of a penalty on compensation from December 15, 2009 through the date of the issuance of the Compensation Order is not in accordance with the Act.

Section 32-1515(e) of the Act states

> If any installment of compensation payable without an award is not paid within 14 days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid installment an amount equal to 10% thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the Mayor after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

7 DCMR § 210.2 and 210.3 implementing §32-1515(e) of the Act state

> 210.2 If the right to compensation is disputed, an employer shall file Notice of Controversion with the Office on or before the fourteenth (14th) working day after the employer has knowledge of the injury and its relationship to the employment.
>
> 210.3 The Notice of Controversion shall contain the following:
>
> (a) The name of the employee;
>
> (b) The name of the employer;
>
> (c) The date of the injury;
>
> (d) A statement that the right to compensation is controverted;
>
> (e) The grounds upon which the right to compensation is controverted;
>
> (f) The name and address of the employer's representative and insurance carrier; and

[16] *Lake v. Pitney Bowes, Inc.*, CRB No. 112-069, AHD 11-320, OWC No. 679826 (June 20, 2012).

(g) Any other information required by the Office.

Employer's First Report of Injury or Occupational Disease[17] does not qualify as a Notice of Controversion as it does not include a statement that the right to compensation is controverted or the grounds upon which the right to compensation is controverted. Based upon the evidence in the record, the CRB is unable to determine when the Employer properly controverted the claim, and we must remand this matter for an assessment of the date Metropolitan Wesley properly controverted the claim; it is on that date that the assessment of penalties pursuant to §32-1515(e) of the Act should terminate.

CONCLUSION AND ORDER

The conclusions that Ms. Sanders' injury is causally related to her on-the-job accident, that she is entitled to temporary total disability benefits, and that she is entitled to permanent partial disability benefits are affirmed. The conclusion that Ms. Sanders is entitled to penalties for Metropolitan Wesley's failure to timely controvert the claim also is affirmed; however, this matter is remanded for the limited purpose of assessing the date Metropolitan Wesley properly controverted the claim.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

August 14, 2012
DATE

[17] Claimant's exhibit 5.