

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 15-156**

**SHEILA MCCLARY,  
Claimant-Petitioner,**

v.

**LOWE ENTERPRISE, INC., and  
LIBERTY MUTUAL INSURANCE COMPANY,  
Employer/Insurer-Respondent,**

and

**CHUBB SERVICES CORP.,  
Insurer-Respondent.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 MAR 8 PM 12 21

Appeal from a Compensation Order by  
Administrative Law Judge Joan E. Knight  
AHD No. 12-328, OWC No. 705744

(Decided March 8, 2016)

Krista N. DeSmyter for Claimant  
Melissa J. Townsend for Employer and Insurer Liberty Mutual<sup>1</sup>

Before JEFFREY P. RUSSELL, LINDA F. JORY, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

**DECISION AND REMAND ORDER**

<sup>1</sup> One of the issues decided in the Compensation Order under review is which of two different insurers were on the risk for this injury. The ALJ determined that the proper insurer is Liberty Mutual. That decision was not appealed by any party, and Chubb did not participate in this appeal.

## FACTS OF RECORD AND PROCEDURAL HISTORY

Sheila McClary (Claimant) was employed in the laundry in Lowe Enterprises' (Employer) hotel, a position she has held for over 30 years. The job required repetitive reaching and pulling linens and towels from an overhead laundry chute, repetitive folding, and pushing heavy laundry carts.

On September 10, 2010, Claimant sought treatment for, among other things, bilateral hand and wrist pain, which was ultimately determined to be bilateral carpal tunnel syndrome (CTS), from Dr. Robert Hejl.

Claimant sought benefits for this injury at a formal hearing conducted before an administrative law judge (ALJ) in the Administrative Hearings Division of the District of Columbia Department of Employment Services..

At the formal hearing, Claimant testified that she provided her supervisor with an off-work slip from Dr. Hejl, and advised her supervisor that her hands and wrists were painful due to her being worked too hard. However, Claimant did not file a written claim or written notice of injury until August 12, 2013.

At the formal hearing, Employer contested liability for these conditions, denying that Claimant's injury was work related and claiming that Claimant's claim is barred for failure to give Employer notice of the injury and its connection to her employment in a timely fashion.

In a Compensation Order issued August 25, 2015 (the CO) the ALJ found that Claimant did suffer CTS as a result of her employment, that the date of injury was September 10, 2010 and that Claimant knew or in the exercise of reasonable care should have known it was work related as of that date, that Employer did not have actual knowledge of the injury and its connection to Claimant's job within 30 days of that date, and denied Claimant's claim for wage loss benefits.

Claimant appealed the CO to the Compensation Review Board (CRB), arguing that the decision is not in accordance with the law inasmuch as Claimant testified she advised her supervisor of the injury and that it was work related, and the ALJ improperly failed to accord her the benefit of the presumption that adequate and timely notice had been given.

Employer did not appeal the finding that Claimant sustained bilateral CTS which eventually required surgical release of the right carpal tunnel, or that she missed time from work as a result. Employer opposed Claimant's appeal, arguing that the ALJ's assessment of Claimant's testimony as not establishing that Employer had actual knowledge of the injury and its connection to the job was supported by substantial evidence and that the CO should be affirmed.

Because the ALJ failed to provide Claimant the benefit of the statutory presumption of adequate and timely notice, we vacate the denial and remand for further consideration.

## STANDARD OF REVIEW

The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act (the Act) and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). "Substantial evidence", as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). Consistent with this scope of review, the CRB is bound 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

## DISCUSSION

Claimant argues in this appeal that the ALJ and the CO are legally deficient, because there is no discussion or analysis of whether Claimant was entitled to a presumption that "adequate and timely notice" had been given to Employer concerning Claimant's injury and her employment, and no analysis or discussion of how, if at all, Employer overcame that presumption.

Employer argues that the ALJ's findings that Claimant's testimony was "nebulous, vague, and inconsistent" are sufficient to support the ALJ's findings that Employer did not have actual notice of the injury and its connection to Claimant's employment.

D.C. Code § 32-1521 provides that:

In any proceeding for enforcement of a claim under this chapter it shall be presumed, in the absence of evidence to the contrary:

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(2) That sufficient notice of such claim has been given ....

This provision has been addressed by the District of Columbia Court of Appeals (DCCA) in *Dillon v. DOES*, 912 A.2d 556 (D.C. 2006), wherein the court wrote:

We proceed, then, to the evidence Dillon claims to have presented sufficient to invoke the presumption, and the contrary evidence that WASA contends rebutted it. The parties do not dispute that Dillon's testimony that he notified supervisor Chapman and risk assessment manager Deleon of the injury within thirty days sufficed to raise the presumption. On the other hand, Dillon no longer disputes, see page 2, *supra*, that the contrary testimony of Chapman and Deleon on this point, which the ALJ credited over Dillon's, rebutted the presumption and, indeed,

was substantial evidence supporting the ultimate finding that Dillon had not given WASA timely notice. So much is not in controversy before us.

Dillon argues, however, that the ALJ failed to apply the presumption to -- indeed failed to weigh at all in the equation -- two additional pieces of evidence that support his claim of notice. First, he points to his testimony that he told another supervisor, Rigby, of the injury well within the thirty-day period. And he is correct that neither the ALJ nor the CRB mentioned that testimony in deciding that he had not given notice. In general, where an agency has failed to address and "make . . . finding[s] on a material, contested issue of fact, this court . . . must remand the case for findings on that issue." *Jimenez, supra* note 4, 701 A.2d at 840 (citation omitted). We view that as the proper course here. On remand the ALJ must apply the statutory presumption to Dillon's testimony that he timely notified Rigby -- a matter WASA contests -- and decide whether the presumption has been rebutted and, if so, whether that testimony satisfied Dillon's burden of proving notice. *See Clark v. District of Columbia Dep't of Employment Servs.*, 772 A.2d 198, 204 (D.C. 2001) (court remanded to agency where it could not "be confident that either [the hearing examiner or the Director on review] properly considered [certain] deposition testimony in coming to a decision").

*Dillon, supra*, at 561.

Our review of the CO leads us to conclude that the ALJ failed to adequately assess the timely notice issue in light of the presumption. We are particularly struck by the fact that the ALJ wrote "Claimant has the burden to show Employer had actual knowledge of both the injury and its relationship to employment" (CO, at 8) and "Claimant has not carried the burden to show she provided Employer timely notice of her injury and its work relatedness" (CO at 10), without any reference to or apparent recognition that there is a presumption of timely and adequate notice. Nowhere in the CO does the ALJ state what "evidence to the contrary" exists to demonstrate that Employer did not have actual notice.

We also must take issue with the statement that "there must be a showing employer was not prejudiced by failure to provide written notice", citing *Jimenez v. DOES*, 701 A.2d 837 (D.C. 1997).

First, *Jimenez* did not deal with the "actual notice" exception found in D.C. Code § 32-1513(d)(1), which is the provision at issue here. Rather, The DCCA in that case remanded the matter to consider whether D.C. Code § 36-313(d)(2) (now § 32-1513 (d)(2)) applied, the provision excusing the giving of timely notice (whether written or actual) where the "Mayor excuses such failure on the ground that for some satisfactory reason such notice could not be given".

Second, the language employed by the ALJ suggests that she was under the impression that the burden of demonstrating a lack of prejudice would be placed upon Claimant. As we have recently noted, the limitations provisions in the Act are in the nature of affirmative defenses, waivable for numerous reasons, including where the defense is not "raised before the Mayor at

the first hearing of a claim for compensation...". *Id.*, See also *Johnson v. Hamilton Crowne Plaza Hotel*, CRB No. 15-136 (January 27, 2016) at 7. The apparent implication that the burden rests upon a claimant to disprove prejudice is error.

Third, as we also recently wrote in *Johnson*:

It is noteworthy that this provision does not state that it shall be presumed that a claimant gave proper written [notice] [sic] containing the details as set forth in § 32-1513. Rather, it is presumed that "sufficient notice" has been given. This would appear to mean that even where the detailed written notice is not provided, an employer nonetheless is presumed to have actual timely notice of the work injury and its work connection. In other words, merely establishing that the written detailed notice was untimely is not sufficient to meet the burden of overcoming the presumption that "sufficient notice" has been given. As the DCCA wrote in *Howard University Hospital v. DOES and Maryanne Tagoe, Intervenor*, 960 A.2d 603 (D.C. 2008) at 611:

We recognize that "[i]n any proceeding for the enforcement of a claim for [worker's] compensation . . . it shall be presumed, in the absence of evidence to the contrary . . . [t]hat sufficient notice of such claim has been given." D.C. Code § 32-1521 (2) (2001). This presumption "applies both to the written notice requirement and to the alternative provision for actual knowledge by the employer." *Dillon v. DOES*, 912 A.2d 556 at 560 n.6 (citations omitted). But "the 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 employee to prove timely notice." *Id.* at 560 (quoting *Washington Post v. District of Columbia Dep't of Employment Servs.*, 852 A.2d 909, 911 (D.C. 2004)). The Hospital rebutted the presumption in the present case.

Nowhere in the CO is this presumption mentioned, and there is no analysis concerning how Employer has overcome it.

*Johnson, supra*, at 5.

Lastly, we note that the ALJ wrote:

Based [sic] Claimant's testimony as a whole, the undersigned is unable to *clearly determine* whether Claimant provided Employer notice of bilateral carpal tunnel injury and its job relatedness within 30 days of the [sic] September 15, 2010 or by 145 [sic] 2010.

CO at 9 (emphasis added).

The Act does not require that a fact that is otherwise subject to the presumption be "clearly determinable." Rather, where the presumption is implicated, the DCCA has written:

[A claimant] is entitled to a statutory presumption of compensability, which provides, in the absence of substantial evidence to the contrary, that a claim is compensable in accordance with the worker's compensation provisions. See D.C. Code § 32-1521(1) (2001) ("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 [the worker's compensation] chapter. . . ."); see also *Dunston v. D.C. Dep't of Employment Servs.*, 509 A.2d 109, 111 (D.C. 1986) ("This preliminary shifting of the burden to the employer exemplifies the humanitarian nature of the Act []' and the strong legislative policy favoring awards in arguable cases." (citations omitted)).

*Jackson v. DOES*, 955 A.2d 728, 731 – 732 (D.C. 2008).

This CO suffers from the same failure to acknowledge, apply or analyze the facts, in light of the presumption as we confronted in *Johnson*. We must therefore vacate the finding and remand the matter for further consideration.

Consistent with *Dillon*, on remand the ALJ must apply the statutory presumption to Claimant's testimony that she notified Employer, a matter Employer contests. The ALJ must then decide, based on the direct testimony, cross-examination and the other evidence in the record, (including the ALJ's assessment of credibility) whether the presumption was rebutted and if so, whether Claimant satisfied her burden of proving notice. In the event the ALJ concludes Employer had actual notice of the injury and its work-relatedness, then the ALJ must consider the other issues that were not resolved; whether Claimant filed a timely claim, and the nature and extent, if any, of Claimant's disability.

#### CONCLUSION AND ORDER

The finding that Claimant's wage loss claim is barred due to untimely notice is vacated, and the matter is remanded with instructions to further consider the claim including consideration of the statutory presumption that such notice has been given.

*So ordered.*