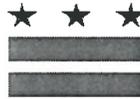


**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 16-065**

**SHEILA MCCLARY,  
Claimant–Petitioner,**

**v.**

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

Appeal from a March 8, 2016 Compensation Order on Remand by  
Administrative Law Judge Joan E. Knight  
AHD No. 12-328, OWC No. 705744

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 SEP 22 PM 12 27

(Decided September 22, 2016)

Krista N. DeSmyter for Claimant  
Melissa J. Townsend for Employer and Insurer Liberty Mutual

Before HEATHER C. LESLIE, LINDA F. JORY, and GENNET PURCELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board:

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

In a prior Decision and Remand Order, the Compensation Review Board (“CRB”) outlined Claimant’s injury, treatment, and the procedural history of Claimant’s claim as such:

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.

*McClary v. Lowe Enterprises, Inc.*, CRB No. 15-156 (March 8, 2016) ("DRO") at 2.

The DRO stated:

Consistent with *Dillon* [*v. DOES*, 912 A.2d 556 (D.C. 2006)], 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.

DRO at 6.

In a Compensation Order on Remand ("COR") issued March 8, 2016, the ALJ determined Claimant had failed in her burden in showing that she provided notice that her injury was work related pursuant to *Dillon*.

Claimant appealed. Claimant argues the COR's conclusion that the presumption that notice was timely given was rebutted is in error as the conclusion relies on negative evidence, citing *Shipman v. Fresenius Medical Care Holding*, CRB No. 16-13, (January 11, 2006) ("*Shipman*"). Even if the presumption was correctly rebutted, Claimant further argues there is not substantial evidence in the record to support a conclusion that Claimant failed to give actual notice to her Employer.

Employer opposes the appeal, arguing the COR is supported by the substantial evidence in the record and in accordance with the law.

#### ANALYSIS<sup>1</sup>

Claimant first argues the ALJ's reliance on the June 27, 2013 First Report of Injury or Occupational Disease ("Report") as evidence to rebut the presumption is in error as it constitutes negative evidence. Claimant relies upon *Shipman* for support when arguing the Report is not specific and comprehensive to rebut the presumption of compensability. We agree.

The CRB addressed negative evidence in *Fowler v. Howard University*, CRB No. 15-160 (March 23, 2016) (*Fowler*):

We take this opportunity to address one specific argument put forth by Claimant concerning "negative evidence". The argument is laid out in Claimant's Brief as follows:

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<sup>1</sup> The scope of review by the CRB is generally 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. See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, ("Act") at § 32-1521.01(d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

In a conclusory fashion, the Compensation Order on Remand cites the absence of mention of a right arm injury in various non-medical reports as enough to rebut the presumption. ... A lack of specificity of body parts in non-medical forms does not come close to fulfilling the *Reynolds* standard for rebuttal evidence. *Washington Post v. District of Columbia Dep't of Employment Servs. and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004), *see also Shipman v. Fresenius Medical Care Holding*, CRB No. 06-13, AHD No. 05-103A, OWC No. 603796 [*Shipman*] (holding negative evidence alone is insufficient to rebut the presumption).

\* \* \*

Claimant overstates and oversimplifies the law on this point. The following is the relevant portion from *Shipman*:

While it is true that any member of this panel could have reached another result, *i.e.*, that Petitioner's evidence, specifically Respondent's failure to tell Dr. Azer that she had suffered a work injury on March 31, 2004 was sufficient to rebut the presumption, the ALJ's approach is consistent with the Court of Appeals finding that negative evidence is not sufficient to rebut the presumption as it is neither specific nor comprehensive. *See Bobby Brown v. Dept. of Employment Services*, 700 A.2d 787 (1997) [*Brown*]; *Onofre v. Lorinczi*, Dir. Dkt. 95-48, OHA No. 92-302A, OWC No. 209231 (September 15, 2000).

The first sentence in the *Shipman* quote makes clear that a contrary result would have been permissible, and then the remainder of the quote explains that nonetheless the ALJ's analysis in that case was not without support from court precedent.

To accurately understand *Shipman*, one must also consider the underlying court ruling. The *Shipman* quote is a brief distillation of the District of Columbia Court of Appeals far less sweeping analysis in *Brown v. DOES*, 700 A.2d 787 (D.C. 1997):

Negative evidence, in some circumstances, may be adequate to inform a factual determination. *See Swinton v. J. Frank Kelly, Inc.*, 180 U.S. App. D.C. 216, 224, 554 F.2d 1075, 1083 (1976). The court in *Swinton* provided the example that "if a man has no blood in the sputum, no cough, no weakness, no headache, no elevation of temperature or pulse, no stuffiness or pain in the chest -- then from all these facts, a doctor can say 'with reasonable medical certainty,' or as a matter of probability that this man does not have

pneumonia." *Id.* (quoting *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 183, 407 F.2d 307, 313 (1968) [*Wheatley*]). The evidence relied on by WMATA is not of that nature. Evidence that *some* of the medical reports of 1990 and 1991 do not contain statements attributed to Brown about the nature of his work or the 1983 and 1987 accidents is not the caliber of evidence required to meet the burden of overcoming the presumption of compensability. "The statutory presumption *may be dispelled by circumstantial evidence* specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Id.* In order for the absence of statements in the reports in this case to have evidentiary significance, we must assume not only that Brown had the level of knowledge sufficient to make the association in 1990 and 1991 between his condition and the earlier injuries and was obliged to report it each time he saw a doctor, but also that any such statements, if made, would have been recorded in the reports. Such a leap would require undue speculation. Therefore, we do not view the absence of the statements attributed to Brown in some of the medical reports to rise to the level required to sever the connection between the 1992 injury and Brown's prior injury and disability.

*Brown*, 700 A.2d at 792, 93 (emphasis added).

Far from supporting a blanket rule that negative evidence can *never* be sufficient to overcome the presumption, *Brown* explicitly states the opposite, and *Shipman* allows that it would not have been error had the ALJ in that case so found. We emphasize the proposition enunciated in *Brown* that "Negative evidence, in some circumstances, may be adequate to inform a factual determination.; its reliance on *Wheatley* that "The statutory presumption may be dispelled by circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *cf. Swails v. Forever 21*, CRB No. 14-138 (March 2015) (the failure of a medical report for an alleged work-related injury to contain reference to a work-connection is insufficient to rebut the presumption).

*Fowler*, *supra* at 7-9.

With the above in mind, we turn to the COR. After having found Claimant invoked the presumption that notice was timely given, the COR state:

Employer has the burden to demonstrate that Employer was not notified of Claimant's work injury within thirty (30). Employer must show that either it had no actual knowledge of the injury and its work connection, or if it did have such actual knowledge, that it was in some way prejudiced by Claimant's failure to comply with the written notice and filing provisions.

As rebuttal, Employer contends it first learned of Claimant's carpal tunnel injury and its relationship to her laundry attendant duties in June of 2013. Employer implied the Verification of Treatment slip Claimant provided to Ms. O'Meara only indicated Claimant was under medical care for a diagnosis of bi-lateral carpal tunnel and there was no indication that it was a work injury. Employer argued that once Claimant gave notice of a work injury to her wrists, Employer completed and filed a First Report of Injury and accident report. Employer presented the First Report of Injury or Occupational Disease dated June 27, 2013 indicating Claimant has reported injury to her wrists working as a laundry attendant. By this evidence, Employer has overcome the presumption that timely notice was given and the presumption drops out the case entirely; thus Claimant must prove timely notice of injury was provided.

COR at 5.

To support his conclusion that Employer rebutted the presumption, the ALJ relied upon two pieces of evidence: 1) the Verification of Treatment ("VOT") slip dated September 15, 2010, and 2) the Report. The VOT did not indicate whether the carpal tunnel syndrome was work related, and the Report referenced a different date of injury.

We agree with Claimant that the evidence relied upon by the ALJ constitutes negative evidence that does not satisfy Employer's obligation to present evidence specific and comprehensive enough to rebut the presumption of compensability. The absence of any statement regarding the work relatedness in the VOT, is not specific and comprehensive enough to rebut the presumption of compensability that Claimant gave timely notice consistent with *Brown* and *Shipman*.

Under *Brown*, it is unduly speculative in this instance for the ALJ to conclude Employer rebutted the presumption of timely notice, based merely on an assumption that Claimant -- who the record indicates is not literate -- understood what was on the VOT disability slip.

We also cannot say the Report rises to the level of being specific and comprehensive enough to rebut the presumption of compensability. The date of injury, as found by the ALJ and not appealed by either party, is September 13, 2010. The Report references an entirely different date of injury. We are aware that initially there was an issue as to when the date of injury was, either on September 13, 2010 or in August of 2011. At the hearing, Employer's counsel stated that the

January 1, 2012 date was “just put there.”<sup>2</sup> However, it is the Employer’s burden, regardless of any issues in controversy, to submit evidence specific and comprehensive enough to rebut the presumption of compensability. The Report does not satisfy Employer’s burden. .

As the only evidence relied upon by the ALJ constitute negative evidence and are not sufficiently specific and comprehensive to rebut the presumption of compensability we are forced to remand the case. We hasten to add that our decision is not meant to sway the ALJ one way or the other on the issue. We remand the case as there may be other evidence which could rebut the presumption of compensability.

Upon remand, the ALJ is to reanalyze whether Employer has rebutted the presumption of compensability. As we stated in our prior DRO:

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.

DRO at 6.

If the Employer has rebutted the presumption, either through testimony or other record based evidence that is specific and comprehensive, that evidence must be described. If the Employer has not presented such evidence, Employer has failed to rebut the presumption and Claimant will prevail on the issue of notice. The ALJ would then be tasked with addressing the nature and extent of Claimant’s disability, if any.

Until such time as the ALJ fully and correctly analyzes whether the presumption has been rebutted, we decline to address Claimant’s further arguments.

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<sup>2</sup> Hearing transcript at 79. To place the quoted statement in context:

Judge Knight: Okay. All right. Okay. So I’m looking at Employer’s 1, on 7A, it says date and time of injury January 1, 2012.

Mr. Bernstein: Right. And then it says that they were – also that was just put there. There was no date of injury. That’s also a question as to when the date of injury was, but there’s no allegation, as we stand here today, that January 1<sup>st</sup>, 2012 was actually a date of loss or a date of accident for this cumulative trauma injury.

Mr. Bernstein was counsel for the Chubb Insurance Group, a carrier who did not cover Employer during September of 2010.

CONCLUSION AND ORDER

The Compensation Order on Remand is not supported by the substantial evidence in the record nor in accordance with the law. The case is remanded with directions to the ALJ to re-analyze whether or not Employer rebutted the presumption of compensability.

*So ordered.*