GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

Compensation Review Board

CRB No. 12-142

WINIFRED SPEIGHT,
Claimant–Appellee/Cross-Appellant,

v.

GEORGE WASHINGTON UNIVERSITY HOSPITAL/UHS[1],
Self-Insured Employer-Appellant/Cross-Appellee

Appeal from a Compensation Order by
The Honorable Gerald D. Roberson
AHD No. 12-233, OWC No. 684145

Michael J. Kitzman, Esquire, for the Claimant/Respondent/Cross-Appellant
David C. Schoenfeld[2], Esquire, for the Self-Insured Employer/Petitioner/Cross-Respondent

Before: HENRY W. MCCOY, HEATHER C. LESLIE,[3] AND LAWRENCE D TARR, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq*., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

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[1] The Employer is stated in the caption above in accordance with the statement in his Application for Review by prior counsel for Employer, David C. Numrych, that this is the correct designation.

[2] On October 17, 2012, David C. Numrych, who represented Employer at the hearing and filed the briefs on appeal, filed notice with the CRB requesting that his appearance as counsel for Employer be stricken.

[3] Judge Leslie has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was working for Employer as a workers' compensation administrator on March 31, 2011 when she claimed she experienced back and bilateral shoulder pains. Claimant's job was primarily sedentary in nature wherein she usually worked a 10 hour day with physical duties consisting of continuous typing and answering the telephone.

On the same date she claimed injury, Claimant saw her treating orthopedist, Dr. Rafael Lopez Steuart, who noted subjective complaints of increased pain, numbness and weakness in her hands and right periscapular pain, *i.e.*, pain around the shoulder blade. His assessment was, overuse tendinitis and carpal tunnel syndrome with a recommendation for physical therapy.

At an April 28, 2011 office visit, Dr. Lopez Steuart examined the shoulder resulting again in an assessment of "persistent symptomatology." Monthly follow-up visits through the rest of 2011 were for complaints of persisting weakness and numbness in Claimant's hands, right shoulder pain with the same assessment of persistent symptomatology. Dr. Lopez Steuart alternately ordered an ergonomic assessment, physical therapy, and frequent breaks when working. In an April 19, 2012 report, Dr. Lopez Steuart's assessment was that Claimant suffered from overuse tendonitis involving both shoulders and both wrists and hands secondary to her workload at the computer.

Claimant had a previous work injury claim in 2009 for bilateral thumb problems where her treating orthopedist, Dr. Lopez Steuart, diagnosed tendonitis in both wrists secondary to trauma at work. Claimant's treatment at that time consisted of injections to both wrists and a course of physical therapy.

With a desire not to miss time from work, Claimant filed a claim solely for authorization for medical treatment, *i.e.*, additional physical therapy, to treat her bilateral shoulder pain. Employer contested the claim by asserting there was no work-related injury on March 31, 2011 and to the extent there was, Claimant failed to give timely notice of that injury.

After a formal hearing on July 19, 2012, the presiding administrative law judge (ALJ) determined that while Claimant did sustain an accidental injury on March 31, 2011, she failed to give timely notice and therefore denied her claim for relief, which he stated as being for causally related medical benefits.[4] Both parties filed an application for review (AFR), with each filing an opposition to the other's appeal.

In its September 4, 2012 AFR, Employer argues that while the Compensation Order was correct in denying Claimant's request for benefits, the ALJ erred in deciding Claimant sustained a work-related injury. In opposition, Claimant argues there is substantial evidence to support the determination that she sustained an accidental injury at work.

In her September 5, 2012 AFR, Claimant argues that while the CO properly determined that she sustained an accidental injury, error was committed in deciding that timely notice of the injury was not provided and, failure of timely notice does not bar the claim for causally related medical

[4] *Speight v. George Washington University Hospital/UHS*, AHD No. 12-233, OWC No. 684145 (August 8, 2012).

benefits. In opposition, Employer contends that substantial evidence in the record supports the decision of untimely notice and untimely notice constitutes a bar to an award of a lifetime of medical benefits.

STANDARD OF REVIEW

The scope of review by the CRB, 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.[5] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard 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.

ANALYSIS

Turning to the case under review, we first attend to the assignments of error raised by Employer as it was the first in time to file for review. Employer first asserts that the ALJ erred in determining that Claimant sustained an accidental injury on March 31, 2011 that arose out of and in the course of her employment and for finding that Employer submitted no evidence in opposition. Employer contends that Claimant failed to submit substantial evidence that she sustained an accidental injury on the date in question and even if she did, it submitted two independent medical evaluations in rebuttal of any presumption invoked and that the ALJ then failed to determine that Claimant met her ensuing burden by a preponderance of the evidence.

The ALJ initiated his analysis by correctly stating that the Act has been consistently interpreted that to show that an accidental injury[6] has been sustained a claimant only has to prove that something unexpectedly went wrong within the human frame.[7] The D.C. Court of Appeals not only accepted this interpretation as reasonable, it also acknowledged that it has been consistently recognized that in order to be compensable, the accidental injury must arise out of and in the course of employment.[8]

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[5] "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 International v. DOES*, 834 A.2d 882 (D.C. 2003).

[6] D.C. Code § 32-1501(12) states "Injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of third persons directed against an employee because of his employment.

[7] *WMATA v. DOES*, 506 A.2d 1127, 1128 (D.C. 1986).

[8] *Id.*, fn. 2.

In stating the issues to be resolved, the ALJ separately listed accidental injury and legal and medical causation and addressed accidental injury first. And, after reviewing the evidence as to whether Claimant sustained an accidental injury, the ALJ reasoned and concluded:

> The repetitive nature of Claimant's employment and her right shoulder symptomatology provide a sufficient basis for establishing accidental injury. Claimant testified her employment duties, such as constant typing and computer work, caused her bilateral shoulder conditions. The evidence in the record does not reflect the Employer has submitted any exhibits or testimony into evidence in opposition to the Claimant's evidence on this issue. Therefore, Claimant has sustained her burden to show an accidental injury occurred on March 31, 2011, when something unexpectedly went wrong within her human frame, specifically, an injury to her shoulder blades and right shoulder.[9]

Based on the reasoning used by the ALJ in reaching his conclusion that Claimant sustained an accidental injury, we find merit in Employer's assertion that the ALJ erred in finding it submitted no evidence in opposition.

In accepting Claimant's testimony that her work activities "caused her bilateral shoulder conditions", the ALJ in effect adopted the theory that this evidence causally related Claimant's shoulder condition to the March 31, 2011 work incident. In addition, by stating that it was the "repetitive nature of Claimant's employment" that established that an accidental injury had occurred, the ALJ also introduced the concept that the instant matter could be characterized as a cumulative trauma case.

In either event, but especially with regard to the ALJ conflating the issues of accidental injury and its causal relationship to the work incident, it was incumbent upon the ALJ to apply the presumption analysis.[10] As the ALJ has basically already determined that Claimant has presented sufficient evidence of an injury and a work-related event, thus invoking the presumption, he need only determine, on remand, whether Employer's independent medical evaluations (IMEs), one by Dr. Kenneth Eckmann, which he discussed on page 4 of the CO and the other by Dr. Robert Gordon discussed on page 5, are sufficient to rebut the presumption, notwithstanding the error committed in finding that Employer submitted no evidence in opposition, which alone would have constituted sufficient reason to return this matter.[11] If it is found that the presumption has been rebutted, the ALJ

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[9] *Speight, supra*, p. 6.

[10] Pursuant to D.C. Code § 32-1521(1), an employee's claim is presumed to come within the provisions of the Act. Upon presentation of credible evidence of an injury and a work-related event or activity that has the potential of resulting in or contributing to the injury, a claimant invokes the protection of the presumption. *Ferriera v. DOES*, 531 A.2d 651, 655 (D.C. 1987). The burden then shifts to the employer to produce evidence specific and comprehensive enough to sever the presumed connection between the work-related event and the injury. Without this production by an employer, the claim will be presumed to fall within the scope of the Act. *Parodi v. DOES*, 560 A.2d 524, 526 (D.C. 1989). In addition, the scope of the application of the presumption has been expanded to include the causal relationship between the current disabling condition and the injury. *Whittaker v. DOES*, 668 A.2d 844, 846-847 (D.C. 1995).

[11] See *Darden v. DOES*, 911 A.2d 410, 416 (D.C. 2006)("An agency fails to base its decision on substantial evidence in the record when it ignores material evidence in the record.").

shall then weigh the evidence without the benefit of the presumption to determine whether Claimant has proven she sustained a work-related injury by a preponderance of the evidence.[12]

Employer also asserts as error the exclusion of exhibits 9, 10, 11, and 17[13] from the evidentiary record which it claims unfairly prejudiced its case against Claimant as they went to her credibility. A review of the hearing transcript shows that when these exhibits were identified for admittance into the record, Claimant objected to them on the basis of relevance. While Employer proceeded to explain their relevance, the ALJ sustained Claimant's objections.

The ALJ determined that with regard to EE #9, 10, and 11 he did not see the relevance of those documents as they only evidenced that Claimant did not participate in discovery. Insofar as EE #17 consisted of Employer's own answers to Claimant's interrogatories, the ALJ stated that he did not want to see them.

It is generally recognized that an ALJ has broad discretion in conducting the formal hearing, including the admission and exclusion of evidence; with the proviso that the discretion exercised must be administered fairly and not in an arbitrary or capricious fashion.[14] Notwithstanding Employer's limited rebuttal at the formal hearing and its more extensive arguments of prejudice and reversible error in the exclusion of the exhibits in question, we discern no basis upon which to disturb the ALJ's ruling.

As to EE #9 and 10, Employer's interrogatories and request for production of documents, we agree with the ALJ that they only show that Claimant did not participate in discovery and we are unwilling to make the intellectual leap that it constitutes recalcitrant behavior on the part of Claimant which also impacts her credibility. As to EE #11, the only medical records contained there consists of three prescriptions, which are also included in Claimant's exhibit #1, p. 14. By excluding the exhibit from the record, the ALJ did not prejudice the Employer's case as no exhibits not otherwise available to Employer were excluded from the record. As to EE #17, Employer argued that its exclusion also unfairly prejudiced its case as it would have influenced the ALJ's credibility determination. We find no error because EE #17, like EE #12, which was also excluded, could have been used to impeach Claimant's testimony, but Employer elected not to pursue that line of questioning to undermine Claimant's credibility.

We next turn to Claimant's assertion that the ALJ erred in determining that she did not provide timely notice of her work-related injury and even if she failed to provide timely notice, it did not constitute a bar to her claim for medical benefits. Claimant contends that she provided oral notice of her work injury within 30 days of first seeking medical treatment for shoulder pain at which time she was made aware that it was work related.

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

[13] The exhibits in question were: #9 (Employer's Interrogatories to Claimant), #10 (Employer's Request for Production of Documents to Claimant), #11 (Claimant's Discovery Response of Available Medical Records); and, #17 (Employer's Answers to Claimant's First Set of Interrogatories and Request for Production of Documents).

[14] See *Goodwin v. Starbucks Coffee Co*., CRB No. 08-215, AHD No. 08-163, OWC No. 643564 (December 11, 2008); see, also *Weiner v. Kneller*, 557 A.2d 1306, 1309 (D.C. 1989), *quoting Henneke v. Sommer*, 431 A.2d 6, 8 (D.C. 1981).

With regard to the providing timely notice, § 32-1513(a) of the Act states:

> Notice of an 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. Such notice shall be given to the Mayor and to the employer.

This provision goes on to require in subsection (b) that the notice be in writing. Failure to give timely written notice does not bar a claim if pursuant to § 32-1513 (d)(1) the employer or his agent in charge had knowledge of the injury and its relationship to the employment and the employer is not prejudice by the failure to give written notice.

In arguing that she provided timely notice, Claimant makes no claim that she provided timely written notice. Rather, she asserts under the exception provided by § 32-1513 (d)(1), Employer's agent in charge had knowledge of the injury and its relationship to her work and Employer incurred no prejudice by the failure to provide written notice. In determining that Claimant failed to provide timely notice, the ALJ, in his assessment of the evidence, concluded that Employer was not provided with "actual knowledge."

In his extensive review of the record evidence, the ALJ only evaluated the evidence to determine whether Claimant had provided Employer with actual knowledge of her work injury and he concluded "she failed to provide Employer of the time, place, nature, and cause of the injury within 30 days of injury or exposure as required by the Act."[15] However, the Act allows for notice to be timely if given within 30 days after the employee is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury and the employment.

While the ALJ acknowledged that Claimant filed a DC Form 7 on September 8, 2011, he characterized it as Claimant changing her legal theory regarding how her employment contributed to her shoulder condition and changed the date of injury. We accordingly take issue with what can reasonably be viewed as a mischaracterization of the document and the reason for its submission.

Prior to filing the DC Form 7, Claimant was initially under the impression that her shoulder pain was a further manifestation of her prior injury to her bilateral hands and her treating physician supported that interpretation. However, it appears that it was not until September 2011 that Claimant came to the knowledge that her shoulder condition constituted a separate new injury. She then filed a notice of accidental injury citing the original injury date, March 31, 2011, with a description of the injury being to the back and both arms and shoulders.

In filing the DC Form 7, Claimant did not change her legal theory. Rather, she was stating in essence that she was now aware or became aware during the course of exercising due diligence of the relationship between her shoulder injury and her employment. In mischaracterizing and misstating Claimant's filing of the notice of accidental injury form on September 8, 2011 as a

[15] *Speight, supra*, p. 9.

change in the legal basis of her claim with a change in the injury date, the ALJ has not evaluated the filing to determine whether it meets the language of § 32-1513(a) that would make Claimant's notice of injury timely. As we deem this to be error, the ALJ, on remand, shall make the appropriate findings and conclusion that are supported by substantial evidence in the record.

Finally, Claimant argues that in denying his claim for medical benefits after finding that he had sustained an accidental injury, the ALJ committed error. We agree. It is well-settled that the failure to provide timely notice does not bar a claimant from receiving medical benefits.[16] The law requires that we remand this matter for further consideration of whether Claimant sustained an accidental injury arising out of and in the course of employment wherein her disabling condition is medically causally related to that work injury.

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant sustained an accidental injury on March 31, 2011 is VACATED due to the failure to apply the presumption analysis and the failure to apply Employer's medical evidence in opposition to rebut the presumption. The conclusion by the ALJ that Claimant failed to provide timely notice and denying the claim for causally related medical benefits is VACATED. The Compensation Order of August 8, 2012 is therefore REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

January 18, 2013
DATE

[16] *Safeway Stores, Inc. v. DOES*, 832 A.2d 1267 (D.C. 2003).