In the Matter of	)	
	)	
THOMAS DEAN, SR.,	)	
	)	
Claimant,	)	
	)	
v.	)	AHD No. 07-088
	)	OWC No. 612882
WASHINGTON METROPOLITAN AREA,	)	
TRANSIT AUTHORITY,	)	
	)	
Self-Insured Employer.	)	

Appearances:

ALLEN J. LOWE, ESQUIRE
For the Claimant

MARK H. DHO, ESQUIRE
For the Self-Insured Employer

Before:

AMELIA G. GOVAN
ADMINISTRATIVE LAW JUDGE

COMPENSATION ORDER

STATEMENT OF THE CASE

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code 2001, §§32-1501 *et seq*. (hereinafter, the "Act").

After timely notice, a full evidentiary hearing was held on March 12, 2007 before Amelia G. Govan, Administrative Law Judge. Thomas Dean, Sr. (hereinafter, claimant) appeared in person and by counsel. Washington Metropolitan Area Transit Authority (employer) appeared by counsel. Claimant testified on his own behalf. Sterling Brown and Kenny M. Maxfield testified on behalf of employer. Claimant Exhibit (hereinafter, CX) Nos. 1 - 5 and Employer Exhibit (hereinafter, RX) Nos. 1 - 8, described in the official Hearing Transcript (hereinafter, HT) were admitted into evidence. The official record closed on March 26. 2007, the date HT was filed with this Division.

ISSUES

1. Whether claimant's bilateral foot condition arose out of and in the course of his employment and is medically causally related thereto.

2. Whether there was timely notice of injury.

CLAIM FOR RELIEF

Claimant seeks an award under the Act for payment of causally related medical benefits for his bilateral foot condition.

BACKGROUND

Claimant worked as a mechanic in employer's motor vehicle repair shop. In November of 2003, he underwent tri-level fusion surgery to repair three ruptured cervical discs, returning to full duty at the end of March of 2004. He began to experience debilitating symptoms in both feet in April of 2004. Surgery to address the foot condition was performed in July of 2004; claimant returned to full duties by August 30, 2004. He has continued to experience bilateral foot pain.

FINDINGS OF FACT

The parties stipulated, and I find, claimant's employment is principally localized in the District of Columbia; there is an employer/employee relationship present pursuant to the Act; that April 19, 2005 is the date claimant was first informed, by a medical expert, that there was a causal connection between his foot condition and his employment; the average weekly wage is $1,017.23; and, there is no dispute regarding the nature and extent of disability. (HT 6 -8).

Based upon the evidence of record, I find the following to be facts.

Claimant worked full-time in employer's service department, between June 16, 1998 and August of 2005. He underwent two neck surgeries, the first in 1999. In November of 2003, he underwent tri-level fusion surgery to repair three ruptured cervical discs, returning to full duty at the end of March of 2004.

Claimant's usual work duties as a mechanic in the service department required wearing steel-tipped work boots while standing/walking on cement garage floors for seven hours daily. By April of 2004, claimant began to experience debilitating pain and stiffness in both feet. Between April of 2004 and June of 2004, claimant advised his supervisor, Kenny Marion Maxwell III, that the steel-toed work shoes were uncomfortable and that the shoes hurt his feet. He asked Mr. Maxwell whether alternative foot gear was acceptable, and was advised that he must wear the steel-toed shoes while working.[1]

Medical notes (dated June 9, 2004 and June 10, 2004) from a Dr. Reibman, of Maryland Primary Care Physicians, attribute claimant's complaints of severe bilateral foot pain to gout. Dr. A. Calle, who is also associated with Maryland Primary Care Physicians, provided a June 10, 2004 disability certificate to claimant restricting claimant from working for the following ten days. The diagnosis reflected on

[1]The requirement that steel-toed foot gear be worn while working was instituted as part of a policy which was in effect for several years. During the time claimant reported foot soreness, many workers, including claimant's supervisor, experienced problems with foot soreness related to the fit of the required work shoes.

the certificate was "bilateral foot arthritis". The record also includes a June 28, 2004 report of Jack R. Lichtenstein, M.D., a specialist in rheumatology/internal medicine.[2] Dr. Lichtenstein's report reflected his concern that claimant had bilateral stress fractures. Dr. Lichtenstein suggested a bone density scan and referral to an orthopedist; he did not provide a definitive diagnosis to explain claimant's bilateral foot pain.[3]

When Dr. Edward Holt, a specialist in orthopedic and sports medicine, first examined claimant on July 8, 2004, he reported that claimant's foot pain was aggravated by walking and standing and unrelieved by stiff soled shoes. Claimant's foot condition was diagnosed as bilateral hallux rigidus in July of 2004 by Dr. Holt. [4] Claimant knew, or should have known, that his working conditions caused or aggravated his foot problems by July 8, 2004. On July 14, 2004, Dr. Holt performed cheilectomy surgery to the first metatarsal of each of claimant's feet.

On April 19, 2005, Dr. Holt suggested that claimant's foot condition was "an arthritic issue" and reiterated his July 2004 opinion that claimant's foot pain is significantly exacerbated by prolonged standing, heavy lifting and carrying. Dr. Holt further noted that claimant's foot condition makes the wearing of the required steel toed shoes quite painful. (CX 4).

On or about May 11, 2005, claimant filed a Notice of Accidental Injury (OWC form 7) and Employee's Claim Application (OWC form 7A) with the District of Columbia Office of Workers' Compensation (OWC). In May of 2005 claimant also filed a Report of On the Job Injury, reporting a June 8, 2004 date of injury, with employer. (CX 1, HT 99, 102-103).

Dr. Holt discharged claimant from active treatment for his foot problem by August 2, 2005, noting that although he complained of pain issues in most of his body parts, claimant appeared to have received an "excellent surgical result". His report of that date further indicated that claimant was seeing a pain management specialist, and would follow up with Dr. Holt on an as-needed basis.

DISCUSSION

The arguments of both parties on the issues presented for resolution were given equal consideration. To the extent an argument is consistent with my findings and conclusions, it is accepted; to the extent an argument is inconsistent, it is rejected.

Claimant's position is that he sustained a compensable work injury related to cumulative trauma. Claimant further avers that the record factual and medical evidence fully supports the existence of a causal relationship between his usual work duties and the worsening of his foot symptoms. Further, claimant avers his claim for medical benefits is not barred by untimely filing of his notice of injury because he did not receive a definitive medical opinion regarding causation until April of 2005. Finally, claimant requests that employer provide ongoing medical treatment for his work-related foot condition.

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[2] Dr. Lichtenstein's opinion is addressed to Drs. Riebman and Calle.

[3] Results of a three-phase bone scan of both feet ruled out fractures, but were consistent with some type of healing bone injury. (CX 3).

[4] Hallux rigidus is a painful flexion deformity of the great toe in which there is limitation of motion at the metatarsophalangeal joint. DORLAND'S MEDICAL DICTIONARY, pgs.783 and 1096 (29th ed. 2000).

Claimant relies on the medical opinions of his treating physicians.

Employer's position is that claimant did not provide timely notice to employer as soon has he he knew or should have known his foot problem was related to his employment; employer also contends claimant's bilateral foot condition is not legally or medically causally related to his employment, in that the onset of foot stiffness and pain was solely age-related and did not arise out of claimant's employment activities.

CAUSATION

Injured workers are provided with a statutory presumption of the compensability of their claims by D.C. Code § 32-1521(1) which provides, in the absence of evidence to the contrary, that a claim comes within the provision of the chapter. *Otis Dunston v. District of Columbia Department of Employment Services,* 509 A.2d 109 (D.C. 1986). This presumption is indicative of the strong humanitarian purpose of the Act. *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d. 264, 267 (1981); *Ferreira v. District of Columbia Department of Employment Services,* 531 A.2d 651 (D.C. 1987).

A claimant may meet this initial burden by simply showing an injury or death and a work-related event, activity, or requirement that has the potential of resulting in or contributing to the injury or death. In a case where the burden is met, the presumption establishes a causal connection between the injury and the work-related event, activity, or requirement. *Id.* at 655.

Once the presumption has been invoked, the employer must come forth with specific credible evidence that is comprehensive in order to sever the now presumed causal relationship between claimant's claim of injury and his or her employment. *Hensley, supra* at 268. Should employer produce such specific and comprehensive evidence, the presumption's bubble bursts and any conflicting evidence is weighed without further benefit thereof. *Parodi v. District of Columbia Department of Employment Services*, 560 A.2d 524, 525-26 (D.C. 1989); *John Howard v. Fairfax Investment Corporation, and PMA Group,* OWC No. 94946, H&AS No. 91588B (June 17, 1997).

In effect, the statutory presumption also confers a medical causal relationship between the claimant's employment and the condition of his feet during the period for which benefits are claimed. *Whittaker v. District of Columbia Department of Employment Services*, 688 A.2d 844 (D.C. 1995).

The benefit of the presumption is conferred on the instant claimant because he has made an initial showing that he *could have* sustained an cumulative traumatic injury to his feet as a result of his required work activity of prolonged standing/walking on concrete while wearing steel toed boots. Claimant meets this threshold through his own testimony, the contemporaneous medical notes and reports, and Dr. Holt's opinion letter of April 2005.

Employer's contention is that claimant's bilateral foot condition, hallux rigidus, was not caused or aggravated by his work activities. Rather, employer contends, claimant's foot problem is solely related to the degenerative arthritic process of aging and has no correlation with any type of work trauma. Employer relies on the expert opinion of examining orthopedic

physician Marc B. Danziger, M.D.

Employer has adduced medical evidence, i.e., Dr. Danziger's IME opinion, sufficient to rebut the statutory presumption. Claimant loses the benefit of the presumption that his claim for benefits related to his work activities is compensable, and the record evidence will be weighed without further reference thereto. When considering the evidence, the administrative law judge must resolve "doubts as to whether the injury arose out of the employment. . . in the claimant's favor." *Washington Hospital Center (Callier) v. District of Columbia Department of Employment Services, 744 A.2d 992, 1000* (D.C. 2000); *Baker v. District of Columbia Department of Employment Services*, 611 A.2d 548, 550 (D.C. 1992)(citing *Wheatley*, 132 U.S. App. D.C. at 182, 407 F. 2nd at 312); *Ferreira, supra.*

There is a also a preference for according the testimony of treating physicians more weight. *See Steven Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998); *Harry Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992). This rule has at its core the reasonable assumption that a physician who has treated a patient numerous times over a number of weeks, months or years is likely to have a greater and more reliable insight into the condition of a patient than does a physician who has had a more limited exposure to the patient.

After reviewing and considering claimant's medical records, I was persuaded that claimant's bilateral foot condition, during the period at issue, is causally related to cumulative trauma incident to his employment activities. Further, there is no testimonial or documentary evidence which contradicts the existence of the potentially traumatic activities - standing, walking and lifting while working on a hard surface wearing rigid, uncomfortable steel-toed boots - described by both claimant and his supervisor.

Dr. Holt's opinion is that claimant's foot condition was caused or aggravated by the specific work activities required of him. Dr. Holt and Dr. Danziger agree that there is an arthritic component to claimant's bilateral foot impairment. However, Dr. Danziger does not acknowledge the existence of any correlation between claimant's work activities and the disabling aggravation of his foot symptoms. With no supporting rationale, Dr. Danziger states that "there is no way to correlate his job description. . . . or anything else with the normal degenerative process of aging that happens in many people at the first MTP joints. . . . Any and all treatment of the feet is relegated to the personal insurance and has nothing to do with his workers' compensation claim." (RX 1).

Dr. Danziger's opinion regarding the question of causation was rejected. The reports of claimant's care providers and treating physician fully support this claim for medical benefits. The more persuasive evidence of record in this case fully supports a determination that claimant's bilateral foot impairment, which began in April of 2004 and became disabling by June of 2004, arose out of and in the course of his employment.

TIMELY NOTICE

On the issue of notice, the Act requires a claimant provide written notice of an injury within thirty days of the date on which he is aware of the relationship between the injury and his employment. D.C. Code §32-1513 (a). Failure to provide such notice does not, however, bar a claim for benefits where the

employer, his agent or the carrier has actual notice of the injury and its relationship to the employment; employer has not been prejudiced by the failure to provide written notice; or, such failure is excused by the Mayor on the ground that for some satisfactory reason such notice could not be given. D.C. Code §32-1513(d). *See Jiminez v. District of Columbia Department of Employment Services*, 701 A.2d 837 (D.C 1997).

In order to determine the date from which the statutory thirty day notice period begins to run, the date of injury must be established. When a discrete trauma results in a physical impairment, the date of injury is the date of the traumatic occurrence. For an injury resulting from a repetitive or cumulative trauma, the date of injury is fixed at the date the injury becomes manifest. A cumulative traumatic injury manifests itself on either the date the employee first seeks medical treatment for his symptoms, regardless of whether he stops working, or the day on which the employee stops working due to his symptoms, whichever occurs first. *King v. District of Columbia Department of Employment Services*, 742 A.2d 460 (D.C. 1999); *Bagbonon v. Africare and Federal Insurance Co.*, CRB No. 03-121, OHA No. 03-340, OWC No. 579350 (November 1, 2005) *citing Franklin v. Blacke Realty Company*, H&AS No. 84-26, OWC No. 25856 (Director's Decision, August 18, 1985).

In this case, the parties have stipulated that April 19, 2005 is the date claimant was first informed, by a medical expert, that there was a causal connection between his foot condition and his employment. (HT 7). However, it is undisputed that by June of 2004 claimant was experiencing debilitating foot symptoms which impeded his work performance, sought medical treatment therefor, and began losing time from work as a result.

The credible testimony of claimant's supervisor, Mr. Maxfield, indicates claimant suspected there was some relationship between his debilitating foot symptoms and his steel-toed boots by then. Claimant knew his work activities were causing or aggravating his foot condition by June of 2004, at which time he gave actual notice to employer via his supervisor. The fact that claimant knew, or should have known, his foot problems were related to his work is evidenced by his so stating to his supervisor.

However, claimant made no attempt to file written notice of his claim for a work-related foot injury until May of 2005. Further, employer was prejudiced by claimant's failure to provide written notice until almost a year after his surgery for the foot condition. The fact that no medical expert told claimant, or provided written verification, that his foot problems were related to his work activities does not satisfactorily excuse his failure to provide written notice to employer. *See Jiminez, supra.*

In the case at bar, claimant seeks medical benefits related to his bilateral foot condition. The Act separately defines eligibility to recover compensation for lost income and medical expenses; therefore, the fact that an employee failed to timely notify the employer of a work-related injury only precludes eligibility for income replacement benefits, not eligibility to recover medical expenses of an admittedly work-related injury. *Safeway Stores, Inc. v. District of Columbia Department of Employment Services*, 832 A.2d 1267, 2003. Thus, the question of timely notice does not impact the actual claim at issue here.

In this case, claimant does not prevail on the

issue of timely notice for the bilateral foot symptoms which began to manifest in April of 2004. While claimant's failure to provide timely notice will have an impact on any future claim for disability benefits, it does not preclude him from receiving reimbursement of medical expenses under D.C. Official Code §32-1507. As the Court of Appeals stated, '[T]he right to medical benefits is separate and distinct from the right to income benefits." *Santos v. District of Columbia Department of Employment Services*, 536 A.2d 1085, 1089 (D.C. 1988), *citing* 2 A. Larson, *The Law of Workmen's Compensation*, §61.11(b), at 10-773 (1987).

CONCLUSIONS OF LAW

Based upon the record evidence, I conclude that claimant's bilateral foot symptoms arose out of and in the course of his employment, and are medically causally related to his work activities for employer herein. I further conclude this claim for medical benefits is not barred by failure to provide timely written notice.

ORDER

It is hereby **ORDERED** that this claim for relief be **GRANTED,** consistent with the above findings, discussion and conclusions. Employer is **ORDERED** to pay those medical costs which are reasonably related to claimant's bilateral foot symptoms.

AMELIA G. GOVAN
ADMINISTRATIVE LAW JUDGE

DECEMBER 20, 2007
DATE