

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services



MURIEL BOWSER
MAYOR

ODIE DONALD II
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 17-091

**ANGELA M. LONDON,
Claimant–Petitioner,**

v.

**HOWARD UNIVERSITY HOSPITAL and
SEDGWICK CMS,
Self-Insured Employer/Third Party Administrator-Respondent.**

Appeal from an August 23, 2017 Order
by Administrative Law Judge Gwenlynn D’Souza
AHD No. 14-026A, OWC No. 707212

(Decided November 8, 2017)

William H. Schladt for Employer
Matthew Peffer for Claimant

Before JEFFREY P. RUSSELL, LINDA F JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The following is taken from *Angela London v. Howard University Hospital*, CRB No. 14-046 (June 25, 2014) (“London”), a Decision and Order issued by the Compensation Review Board (“CRB”):

Claimant was employed by Employer as a data entry clerk. Claimant’s duties included inputting data into a computer by scanning documents. Claimant had to handle large files when accomplishing this task.

Around the beginning of November 2012, Claimant began to experience bilateral hand and wrist pain when performing her duties at work. On November 3, 2012, Claimant sought treatment with Dr. Rana Siddabattuni. Dr. Siddabattuni opined

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Claimant's bilateral wrist and hand pain was exacerbated by her work duties. Conservative care was recommended, including physical therapy, medications and wrist splints.

Claimant continued to work and wore wrist splints while at work. Claimant also continued to seek medical treatment. Claimant provided written notice to her Employer of her work-related injury on April 24, 2013. Claimant was terminated on June 13, 2013, due to reasons unrelated to her work injury.

A full evidentiary hearing was held on February 19, 2014. Claimant sought an award of temporary total disability benefits from June 13, 2013 to the present and continuing along with interest, and payment of causally related medical expenses. The issues to be adjudicated were whether Claimant suffered a work injury on April 24, 2013, that arose out of an in the course of employment, whether Claimant's current condition is medically causally related to her employment, whether Claimant timely notified the Employer of a work injury, and the nature and extent of Claimant's disability, if any. A CO was issued on March 19, 2014. The CO found Claimant did suffer a work-related injury which came under the District of Columbia Workers' Compensation Act and that Claimant's bilateral wrist and hand injuries were medically related to the work injury. However, the CO also concluded that Claimant failed to timely notify her Employer of the work injury. The CO granted Claimant's request for causally related medical expenses, but denied wage loss benefits.

Claimant timely appealed. Claimant argues that the CO erred in finding Claimant did not provide timely notice and was not temporary and totally disabled. The Employer opposes the appeal, arguing the CO is supported by the substantial evidence in the record and is in accordance with the law.

London, supra, at 1-2.

In addressing the untimely notice issue, the CRB wrote:

In essence, Claimant is arguing that the Employer "should have known" of the work-relatedness and this is sufficient to establish notice. The CRB and the District of Columbia Court of Appeals has previously rejected this argument. In *Howard University Hospital v. DOES*, 960 A.2d 603, 608-609 (D.C. 2008), (*Tagoe*), the Court reasoned:

The CRB reasoned that because the Workers' Compensation Act defines a compensable "injury" as an "accidental injury or death arising out of *and* in the course of employment," the notice exception in D.C. Code § 32-1513 (d)(1) requires an employer's knowledge to encompass both components of the definition. In addition, relying on an earlier decision by the Director, the CRB rejected a "should have known" standard and concluded that subsection (d)(1) requires an employer to have "actual knowledge." Thus, the CRB concluded, "[i]n order for [D.C. Code] § 32-

1513 (d)(1) to be satisfied, an employer must know that the injury arose out of the employment and that the injury occurred in the course of the employment, and an employer must have actual knowledge of the injury and its relationship to the employment." While the CRB's interpretation of subsection (d)(1) may not be compelled by the statutory language, it comports with the general rule throughout the United States and is not foreclosed by any prior decisions of this court. It is a reasonable construction; since subsection (d)(1) allows the employer's knowledge to substitute for timely written notification of the cause of the injury, it is logical that the employer must have actual knowledge of the cause for the subsection to be satisfied. Deferring to the CRB, we accept its answers to our questions as binding. Footnotes omitted.

Nowhere in argument does Claimant state that she reported to Employer that her bilateral wrist pain and symptoms which necessitated the use of wrist splints, was caused by her work duties. Reviewing the hearing transcript, Claimant testified she told her supervisor in April 2013 that she was "having pain in my wrists and that I needed to see Employee Health" and that prior to her termination in June of 2012 she had notified her supervisor that she thought her hand problems were related to her job. Hearing transcript at 19 and 22. However, Claimant failed to prove that she reported her work injury to her Employer within 30 days of November 3, 2012. Claimant's notice to Employer was untimely. We affirm the CO's conclusion.

Claimant next argues that she is entitled to temporary total disability benefits under *Logan v. DOES*, 805 A.2d 237 (D.C. 2002) and that the CO erred in denying disability benefits. We disagree but on different grounds. While the ALJ did analyze whether Claimant was entitled to disability benefits, such analysis was unnecessary as Claimant was found not to have given proper notice under the Act. In such situations, while Claimant is still entitled to causally related medical benefits, Claimant is no longer entitled to disability benefits. As the Court stated in *Tagoe*,

The purposes of this notification requirement are to enable the employer to investigate the facts surrounding the injury and to provide prompt medical attention. While the failure to give proper notice does not preclude a claim for causally related medical expenses (which may include the cost of vocational rehabilitation services), it ordinarily does bar a claim for disability income benefits. Footnotes omitted.

Tagoe, supra at 607.

Claimant is not entitled to disability benefits as notice was untimely. We affirm the denial of disability benefits.

CONCLUSION AND ORDER

The March 19, 2014, Compensation Order is supported by the substantial evidence in the record and in accordance with the law and is AFFIRMED.

Id., at 4-5.

The Decision and Order of June 25, 2014 was not appealed to the District of Columbia Court of Appeals (“DCCA”), and became final.

On April 28, 2017, Claimant filed with Administrative Hearings Division (“AHD”) a new Application for Formal Hearing (“AFH”), seeking an award of permanent partial disability benefits under the schedule to both arms.

On August 14, 2017, Employer filed a Motion to Dismiss the AFH. No response having been filed by Claimant, the Administrative Law Judge (“ALJ”) to whom the matter had been assigned issued an order dismissing the AFH on August 21, 2017.

That following day, on August 22, 2017 Claimant filed an Opposition to Employer’s motion. On August 23, 2017, the ALJ issued a second order, (“Order”) in which she vacated the order issued on August 21, 2017, and again dismissed the AFH.

On August 24, 2017, Claimant filed a Motion for Reconsideration, which the ALJ denied on September 11, 2017.

On September 22, 2017, Claimant filed “Ms. London’s Application for Review” and “Memorandum of Points and Authorities in Support of Application for Review” (“Claimant’s Brief”), appealing the August 23, 2017 Order.

On October 10, 2017, Employer filed “Employer/Insurer’s Opposition to Claimant’s Application for Review” and “Employer/Insurer’s Memorandum of Law in Support of the Opposition to Claimant’s Application for Review” (“Employer’s Brief”).

Because the issue of untimely notice has been fully litigated, we affirm the dismissal of the AFH.

ANALYSIS

In the August 23, 2017 Order the ALJ wrote:

Collateral estoppel bars relitigation of an issue of fact or law when “(1) the issue has been fully litigated; (2) determined by a valid, final judgement on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; and (4) under circumstances where the determination was essential to the judgment, and not merely dictum.” *Hogue v. Hopper*, 728 A.2d 611, 614 (D.C. 1999)(brackets, ellipses, and internal quotation marks omitted). *Accord* [,] *Montana v. United Sates*, 440 U.S. 147, 153 (1979); *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services* [,] *et al.*, 981 A.2d 1216 (D.C. 2009)(WMATA); and RESTATEMENT (SECOND) OF JUDGMENTS § 27. The determination of the prior proceeding “is conclusive in a subsequent action between the parties, whether on the same or a different claim.” *Ali Baba Co. v. Wilco, Inc.*, 482 A.2d 418, 421 (D.C. 1984).

Claimant contends that the current requests for benefits is a separate claim, which triggers a new notice requirement. Claimant relies on the interpretation of D.C. Code § 32-1514 (a) as stated in *WMATA, supra*. The facts in this case are distinguishable from *WMATA* where the Claimant was awarded temporary total disability benefits and sought temporary partial disability benefits after an aggravation of the injury. Here, the Claimant was not awarded temporary total disability benefits in the prior case and has not alleged an aggravation of the injury.

The Act does not generally provide for a separate filing of a “claim” for each type of compensation sought. D.C. Code § 32-1514 (a) bars “compensation” in general for an untimely claim of injury.

The undersigned finds Claimant does not seek a claim for a new injury. Claimant seeks a different form of compensation for the same injury claimed in previously [sic] litigation. The undersigned finds that the issue of notice, pursuant to D.C. Code § 32-1514 (a), was actually litigated in the prior claim, specifically AHD No. 14-206, and determined by a valid, final judgment on the merits, after a full and fair opportunity for litigation by the parties, and under circumstances where the determination was essential to the judgment. Accordingly, the undersigned concludes that the doctrine of *collateral estoppel* bars rehearing of the same issues of fact and law regarding notice of an injury previously claimed.

Order at 1-2.

The ALJ refers to the previously litigated issue as arising under D.C. Code § 32-1514 (a), which is the 1-year statute of limitations within which a claim must be filed. What was actually previously litigated was whether Claimant’s claim for wage loss compensation benefits was barred due to the failure to give Employer timely notice of the injury under the 30 days allotted for that purpose under D.C. Code § 32-1513.

We conclude that this error does not require reversal. The ALJ’s reasoning and discussion applies equally to the notice provisions as they would if it were an untimely claim that had been previously litigated.

In seeking reversal of the Order Claimant argues:

The “law of the case” doctrine states that “once the court has decided a point [it] becomes and remains settled unless or until it is reversed or modified by a higher court.” See *Minick v. United States*, 506 A.2d 1115, 1116 (D.C. 1986). There are two reasons why a Court would abandon the law of the case, as part of the general principles in conserving judicial time and resources by discouraging multiple attempts to prevail on a single question: (1) When the first ruling has little or no finality or (2) the first ruling is clearly erroneous in light of newly presented facts or a change in substantive law. See *id.* at 1117.

While the agency had previously determined that Ms. London failed to properly give her Employer notice, Ms. London contends that the law of the case doctrine should not apply to her scenario. Ms. London notes that [the CRB] and the D.C. Court of Appeals have altered the date by which an injured employee must give notice to the Employer: when an injured employee realizes the severity of their injury is bad enough that they will miss work.

Claimant's Brief at 3-4.

We note that Claimant does not directly address the basis upon which the ALJ made her decision that the temporary total disability ("TTD") claim is barred by collateral estoppel. Rather, Claimant argues that (1) the "law of the case doctrine" does not apply, despite the fact that the ALJ did not base her decision on that doctrine, (2) "*Res Judicata* does not bar Ms. London's claim for benefits, since it is a new claim", another basis that the ALJ did not refer to, (3) "The original Compensation Order and CRB's determination of Notice are based on an error of law that was later clarified by the Court of Appeals", citing *Brown v. DOES*, 140 A.3d 1144 (D.C. 2016) and *Poole, supra* and (4) "Even if Ms. London failed to give timely notice of her injuries, the previous Orders are...erroneous because they fail to follow the statute in determining if untimely notice is excused."

We do not address arguments (3) and (4), inasmuch as the prior Orders (the Compensation Order and the CRB's Decision and Order) are not before us, and cannot be before us, the times for reconsideration and appeal having run long ago.

Regarding argument (2) Claimant appears to be arguing that the question of timely notice should be re-litigated any time a claimant seeks additional benefits under the D.C. Workers' Compensation Act, citing *WMATA v. DOES and Millhouse*, 981 A.2d 1216 (D.C. 2009) ("*Millhouse*").

We reject the argument that *Millhouse* has any application to this case. The facts in *Millhouse* are that the claimant injured one body part, was successful at bringing a claim for medical care and disability compensation for that body part, and years later brought a claim for injuries to a different body part, which the employer conceded was causally related to the original injury. The employer argued that the claim was barred by the 1-year statute of limitations related to modifications of Compensation Orders. The matter was appealed to the CRB which decided that the limitations statute on modifications was not a bar, and the DCCA affirmed the CRB.

Millhouse stands for the proposition that the 1-year modification limitations period does not bar a later claim that the original injury has caused additional injuries different from those previously litigated. That is not the situation presented here: this case involves the same injury for which there has been a prior determination that the initial claim was barred for lack of timely notice to Employer, and does not involve a claim in which there was a prior award for a different injury arising out of the same work accident.

The remaining argument relates to the law of the case doctrine. In response to that argument as well as in addressing collateral estoppel, Employer argues:

The evidence in this case is uncontradicted that Claimant failed to provide timely written notice to the Employer. Dr. Siddabattuni, her treating physician, found that Claimant's work was exacerbating her wrist and hand pain in November 2012. She could have notified Employer that the pain started after she began working. Claimant possessed a personal belief and the medical opinion that the hand and wrist condition was work related, but failed to convey that information to Employer. Accordingly, the decision of the Administrative Law Judge is legally correct and supported by substantial evidence.

Claimant in this case wants to ignore the fact that this matter was fully adjudicated and affirmed on appeal. The Claimant attempts to argue that there has been a "material misconception of the law" and that somehow the Court of Appeals has corrected this misconception. A close reading of the case cited by the Claimant, *Brown v. DOES*, 140 A.3d 1144 (D.C. 2016) does not support their position. In the *Brown* case, the Court of Appeals does not give a new interpretation of the law. Rather, the Court of Appeals merely interpreted the law as it stands in that particular case. The Court found that there was insufficient evidence in the *Brown* case to find that the Claimant was aware that the injury would affect her work performance.

The Claimant cannot at this point challenge that position. The Claimant had the opportunity to appeal her case to the Court of Appeals when the Compensation Review Board rendered its decision finding that the Claimant had failed to give timely notice in June, 2014. The Claimant had the same opportunity to allege that the Claimant was not aware that the injury would affect her work performance. This is the law of the case.

Nevertheless, in this case, this is not only the law of the case, the matter has been conclusively determined because all appeals have been exhausted. When the Claimant did not appeal the Compensation Review Board decision of June 25, 2014, all appeals were exhausted. Having failed to appeal, Claimant is now bound by the decision that she did not give timely notice.

Employer's Brief at 3-4.

It should be noted that Employer appears to be referring to *Brown-Carson*, not *Brown v. DOES*, 140 A.3d 1144 (D.C. 2016). The second of these two cases has nothing to do with notice of injury, and was cited by Claimant for a different concept, that being that the CRB cannot affirm a Compensation Order that reflects a fundamental misunderstanding of the law. *Brown-Carson*, on the other hand, conforms to the factual scenario recited by Employer.

We agree with Employer that the DCCA in *Poole* and *Brown-Carson* did not change the substantive law.

From *Poole*:

We begin with the language of the statute. According to the leading commentator on workers' compensation law, statutes generally adopt either "accident" or "injury" as the trigger for requiring notice of a potential worker's compensation claim. 7 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 126.06 [1], [2] (Rev. ed. 2007). Our statute not only uses "injury" language, but also refers specifically to "injury . . . in respect of which compensation is payable" under the Act. D.C. Code § 32-1513 (a). This means that "the claim period runs from the time compensable injury becomes apparent." LARSON, *supra*, at § 126.06 [1]. To be "compensable," an injury must result in "disability," which we have often said is primarily an economic — not medical — concept that encompasses "any incapacity arising from a work-related injury that results in lost wages." *Wash. Metro. Area Transit Auth.*, 926 A.2d at 149 n.12; see *Stancil*, 436 F.2d at 276 n.4 ("'Disability' . . . is a medico-economic term, meaning actual incapacity because of injury to earn the wages which the claimant was receiving."). Disability compensation is meant to address that partial or total loss, temporary or permanent, in earning capacity. See *Howard Univ. Hosp./Prop. & Cas. Guarantee Fund*, 952 A.2d at 176. Thus, an injury "in respect of which compensation is payable" under the Act, D.C. Code § 32-1513 (a), of which the claimant must give notice to the employer, is an injury that is (or at least is capable of becoming) disabling in the economic sense. The statutory language of the notice requirement therefore indicates that *the 30-day notice period is triggered when the employee is or should have been aware that an impairment (physical or psychological) may be compensable because it is likely to result in loss of wages. Cf. Stancil*, 436 F.2d at 279 (formulating the question as *whether employee "reasonably believed" he had — or had not — "suffered a work-related harm which would probably diminish his capacity to earn his living"*). This awareness will usually come about because of an actual inability or impaired ability to perform usual work duties, from the nature of the trauma sustained, or on advice from a physician. In many cases where there is a discrete incident in the workplace, the severity of the trauma might suffice to make the fact or likelihood of compensable injury apparent to the employee. *The presence of momentary pain or discomfort, however, does not necessarily indicate the presence of an underlying disabling impairment and will not always trigger the requirement to give notice of injury that is compensable, particularly where the employee is able to continue to work as before. See generally Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136-37 (Del. 2006) (discussing a conflict in medical evidence and noting that "evidence of pain without loss of use is not a compensable permanent impairment").

Poole, supra, at 467-468 (italics added).

Although the DCCA in *Poole* did not cite any prior cases arising under the present Act in support of the two-pronged nature of what triggers an employee's obligation to give notice of injury to an

employer (i.e., knowledge of a work-related injury and apprehension of its likelihood to impair earnings), the concept was established when the District of Columbia workers' compensation law was the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, ("LHWCA"), made applicable to the District of Columbia by the 1928 D.C. Workmen's Compensation Act, 36 D.C. Code § 501, *et seq.* ("the old Act"). The 1928 D.C. Act was superseded by the District of Columbia Workers' Compensation Act of 1979, 36 D.C. Code. §§ 36-301 to 36-345 (1981 & Supp. 1987) ("the Act"), which became effective in July 1982. The Act has been recodified and is now D.C. Code § 32-1501, *et seq.*

Under the old Act, the District of Columbia Court of Appeals for the District of Columbia Circuit ruled:

Sections 12(a) and 13(a) of the [LHWCA] expressly provide that the limitation periods for notice and filing do not begin to run until the employee or beneficiary is or should be aware "of the relationship between the injury or death and the employment." This language has been interpreted by courts to mean that the limitation period begins only when the employee knows or should know that (1) his injury is causally related to his employment and (2) his injury is impairing his capacity to earn wages. *See, e.g., Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 1141-42 (5th Cir. 1984); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 401-02 (9th Cir. 1982), *cert. denied*, 459 U.S. 1034, 74 L. Ed. 2d 600, 103 S. Ct. 444 (1982); *see also Stancil v. Massey*, 436 F.2d 274, 276 (D.C. Cir. 1970). Thus, petitioners' allegation that Sweeney was aware since the early seventies that his lung condition was work-related is not enough to start the running of the notice and filing limitation periods. Nor is it sufficient for the purposes of § 12(a) and § 13(a) that Sweeney may have suspected that his lung problems would be aggravated by continuing to work in the tunnels. For the statutory notice and filing limitation periods to begin, Sweeney had to be aware that his lung condition was impairing his capacity to earn wages.

Bechtel Assoc., P.C. v. Sweeney, 834 F.2d 1029 (D.C. Cir. 1987) at 1033.

The notice provisions cited in *Bechtel* are identical to those adopted by the District of Columbia when the Act was first enacted. The court in *Poole*, by citing *Stancil*, another case arising in this jurisdiction under the LHWCA¹, signals that it does not view *Poole* or *Brown-Carson* as a change in substantive law.

Therefore we conclude that the determination of untimely notice is the law of the case and departure from that doctrine is not warranted by reason of there being a change in the substantive law.

¹ Although not directly relevant to this case, it is worth noting that, because the Act is derived from the LHWCA, decisions interpreting the LHWCA are persuasive authority when considering the meaning of the Act. *See Dunston v. DOES*, 509 A.2d 109 (D.C. 1986) at 111, n. 2; *also, Millhouse, supra*, at 1223, n. 5.

Claimant would have us depart from the law of the case doctrine because she maintains that the CRB committed manifest error in the original Decision and Order. We must disagree that reversal is warranted under that exception. Our disagreement stems from the fact that, even if Claimant is correct, the alleged error in “the first ruling” was not rendered erroneous because of “newly presented facts or a change in substantive law.”²

For whatever reason, no appeal was taken. The failure to take an appeal of the June 25, 2014 Decision and Order to the DCCA renders final the denial of TTD and prevents relitigating that claim under principals of *res judicata*, and under the circumstances presented here, it also bars a claim for schedule benefits.

Claimant asks that a new formal hearing be ordered to reconsider the original determination that the TTD claim was barred. However, not only has no appeal of that Decision and Order been taken to the DCCA, we are beyond the time for considering a motion for reconsideration, and hence we have no statutory mechanism, and thus, no statutory authority or jurisdiction to entertain that request.

CONCLUSION AND ORDER

The determination that Claimant’s request to obtain schedule awards is barred by the unappealed determination that her wage loss benefits claim is barred for failure to provide timely notice of injury to Employer is **AFFIRMED**.

So ordered.

² We do not view this case as being governed by Collateral estoppel which, generally speaking, precludes the relitigating of an issue that has been conclusively determined in a *prior action* between the same parties (and/or those in privity with the parties) in which the issue was an essential one to the outcome and judgment in the prior action, is not dicta, and was litigated under circumstances where the parties had a full and fair opportunity to present their legal and factual positions prior to the rendering of the judgment. This claim is not a new action. The Act contemplates only one claim being filed to instate a workers’ compensation claim. Even if it were to be determined to be a new action, though, collateral estoppel would cause us to reach the same result.