GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
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CRB No. 04-79

FATIMA DARBO,

Claimant – Petitioner,

v.

SAPPHIRE TECHNOLOGIES /TRAVELERS INSURANCE

and

LOCKHEED MARTIN/ACE USA,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Jeffrey P. Russell
OHA No. 03-418, OWC No. 576777

Matthew Peffer, Esquire, for the Petitioner

Amy I. Epstein, Esquire, for the Respondent-Sapphire Technologies

W. John Vernon, Esquire, for the Respondent Lockheed Martin

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[1]

[1] Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on March 29, 2004, the Administrative Law Judge (ALJ) concluded that Claimant-Petitioner (Petitioner) was solely an employee of Employer-Sapphire/Respondent (Respondent-Sapphire) and not a lent or joint employee of Employer-Lockheed/Respondent (Respondent-Lockheed). In addition, the ALJ concluded that Petitioner failed to give adequate and timely notice to Respondent-Sapphire of the work injury and her claim for disability benefits was barred by that failure. The ALJ also concluded that the medical care rendered by Dr. Richard Tu on October 2, 2001, rendered by Dr. Michael Dennis from February 15 through November 21, 2002, and rendered by Dr. Mayo Friedlis from January 16, 2003 through August 29, 2003, were reasonable and necessary as a result of the work injury. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that ALJ's decision is arbitrary, capricious, unsupported by substantial evidence and is not in accordance with the law.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, 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. D.C. Official Code §32-1522(d)(2). "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 Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this scope 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.

Turning to the case under review herein, Petitioner alleges that the ALJ's decision is erroneous in concluding that Petitioner did not give timely notice of her injury within 30 days, as required by D.C. Official Code § 32-1513(a). Petitioner contends that her failure to give timely notice of her injury was excusable, because Respondent-Lockheed's employee, Theresa Janifer, had knowledge

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Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

of Petitioner's fall and Ms. Janifer was Respondent-Sapphire's agent in charge of the business where the injury occurred. Petitioner also alleges that the ALJ committed error in determining that Petitioner was no longer in need of medical treatment after August 29, 2003. Both Respondents counter that the ALJ's decision on the notice issue is fully supported by the evidence of record and that the ALJ's conclusion that Petitioner was in no further need of medical care after August 29, 2003, is supported by substantial evidence in the record and should be affirmed.

On the notice issue, the ALJ found and the record reveals that Ms. Janifer was an employee of Respondent-Lockheed and not an employee of Respondent-Sapphire. Since Ms. Janifer did not have any employment or contractual relationship with Respondent-Sapphire, Ms. Janifer could not be Respondent-Sapphire's agent under the Act. The ALJ properly found that Petitioner was not "lent" by Respondent-Lockheed to Respondent-Sapphire, nor was Petitioner a "joint" employee of Respondent-Lockheed and Respondent-Sapphire, citing *Union Light and Power, et. al, v. Dist. of Columbia Dep't. of Employment Servs.,* 796 A.2d 665 (D.C. 2002) ("*Glasby*").

In *Glasby,* the Court of Appeals approved a three part test to determine if an employee is a "joint" or "lent" employee. The three-part test requires that (1) the employee has made a contract of hire, express or implied, with the second employer, (2) the work being done is essentially that of the second employer, and (3) the second employer has the right to control the details of the work.

In this matter, the ALJ found that the evidence was clear that there was no express or written contract between Petitioner and Respondent-Lockheed. In addition, the ALJ found that there was no implied contract, as there "is no evidence or suggestion on this record that Claimant was engaged in work for Lockheed for which there was an expectation of payment to Claimant by Lockheed. There is, therefore, no contract of employment between them, and Lockheed is not liable or responsible for any part of this compensation claim." Compensation Order at 7.

Thus, on the notice issue, this Panel concludes that Petitioner's notice of her fall to Ms. Janifer, an employee of Respondent-Lockheed, cannot be considered notice to Petitioner's employer, Respondent-Sapphire. As such, the ALJ's conclusion that Petitioner failed to give adequate and timely notice of her work injury to Respondent-Sapphire is supported by substantial evidence and is in accordance with the law, and her claim for benefits is barred by that failure.

Petitioner also argues that the ALJ erred by concluding that Petitioner did not need medical treatment after August 29, 2003, as Petitioner contends that the report of Dr. Dennis supports her assertion that she still needed medical treatment after that date. The record reveals that Petitioner returned to see Dr. Dennis on August 29, 2003, after Respondent-Sapphire scheduled her for a return visit on that date. Before that day, Petitioner had not seen Dr. Dennis for over nine months, since November of 2002.

In his report of August 29, 2003, Dr. Dennis indicated that there were no objective neurological impairments, no evidence of disc herniation, and that Petitioner could be employed in at least a sedentary to a light position. He also noted the need to maintain an exercise program and that she would "otherwise return in three months." Petitioner argues the statement that she would "otherwise return in three months" indicates that Dr. Dennis believed that she needed further treatment when he saw Petitioner on August 29, 2003.

However, Respondent-Sapphire contends this statement is not tantamount to a finding that Petitioner actually needed further ongoing treatment, as the physician did not indicate that she needed further ongoing treatment other that an exercise program, which Respondent presumes could be done on her own. Moreover, in the letter that Dr. Dennis sent to Respondent-Sapphire's counsel on August 29, 2003, Dr. Dennis clearly states, "I do not believe that the patient at the present time requires any ongoing treatment other than the use of occasional analgesics for controlling her pain." Moreover, as Respondent-Sapphire points out, there is no indication in the record that Petitioner ever returned to see Dr. Dennis after August 29, 2003 and there is no indication that Petitioner even tried to obtain any additional treatment from Dr. Dennis after August 29, 2003.

On this point, the ALJ indicated that he considered Dr. Dennis and Dr. Friedlis to be Petitioner's treating physicians, and as such, their opinions were entitled to great weight, citing *Short v. Dist. of Columbia Dep't. of Employment Servs.,* 723 A.2d 845 (D.C. 1998). The ALJ specifically noted that to the extent that these two physicians had conflicting opinions, the opinion of Dr. Dennis was accepted since Dr. Dennis had treated Petitioner more often and more extensively than Dr. Friedlis and the treatment by Dr. Dennis started much closer in time to the date of Petitioner's work injury. Thus, in ultimately resolving this issue, the ALJ stated, "…I accept Dr. Dennis' view that Claimant is in need of no further medical care or prescription medication for the work related injury, from and after August 29, 2003." Compensation Order at 11. After a complete review of record, this Panel concludes that the ALJ's determination on this issue is supported by substantial evidence and should not be disturbed.

Accordingly, the ALJ's conclusions are supported by substantial evidence, are in accordance with the law and the Compensation Order must be affirmed.

CONCLUSION

The Compensation Order of March 29, 2004 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of March 29, 2004 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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FLOYD LEWIS
Administrative Appeals Judge

May 18, 2006
DATE