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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB (Dir.Dkt.) No. 05-256

SLATEL DILLON,

Claimant - Petitioner

v.

D. C. WATER & SEWER AUTHORITY AND GALLAGHER BASSETT SERVICES INC.,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Henry W. McCoy
OHA No. 05-032, OWC No. 603500

Jonathan L. Gould, Esquire for the Petitioner

Douglas A. Datt, Esquire for the Respondent

Before LINDA F. JORY, FLOYD LEWIS, *Administrative Appeals Judges* and, E. COOPER BROWN, *Chief Administrative Appeals Judge.*

LINDA F. JORY, *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 Act of 20024, Title J, the 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. Official Code §§ 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.

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 July 11, 2005, the Administrative Law Judge (ALJ), concluded claimant had sustained an accidental injury on September 16, 2003, which arose out of and in the course of his employment but since he failed to provide employer with timely notice of said injury, his claim was denied.

Claimant-Petitioner's (Petitioner) Petition for Review alleges as grounds for its appeal that the ALJ denied Petitioner a full and fair hearing on his claims by refusing to admit a leave request form signed and by him and his supervisor and failed to provide a presumption of timely notice. Petitioner also asserts the ALJ erred by denying medical benefits the ALJ asserted Petitioner never claimed. Employer-Respondent (Respondent) has filed a response asserting the ALJ did not refuse to admit the leave request form as it was never offered into evidence and the ALJ's finding that Petitioner did not provide timely notice is supported by substantial evidence. Lastly Respondent asserts the ALJ correctly ruled Petitioner was not entitled to medical expenses and treatment as Petitioner did not make a claim for such benefits.

PROCEDURAL HISTORY

In response to an application for a formal hearing filed by employer, a formal hearing commenced on January 18, 2005. The parties submitted their respective exhibits, all of which were admitted into the record along with the Joint Pre-Hearing Statement which listed the issues to be addressed at the hearing as: whether or not an accidental injury arose out of and in the course of claimant's employment; whether there exists a medical causal relationship between said injury and the employer; the nature and extent of disability and whether timely of notice pursuant to the Act was provided to Employer. *See* HT 1 at 6. The parties did not stipulate to the date of accident as Petitioner raised for the first time his contention that the date of injury was September 16, 2003 and not September 17, 2003, which was the date of injury Petitioner initially alleged at the Informal Conference and adopted by the claims examiner in the Memorandum of Informal Conference. The Formal Hearing subsequently was adjourned and the parties were provided a briefing schedule.

After consideration of Respondent's brief in support of his petition for costs to be assessed against Petitioner and Petitioner's response, the ALJ issued an order on March 18, 2005, advising the parties that he was granting Petitioner's motion to change the injury date to September 16, 2003 and to appear for a Formal Hearing on April 26, 2005.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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 §

32-1521.01(d)(2)(A). "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 panel are bound 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 asserts that the ALJ denied him a full and fair hearing on his claims by refusing to admit into evidence, a leave slip, signed by Petitioner's supervisor on October 13, 2003, as a business record. Petitioner further asserts the ALJ did not evaluate this evidence in light of the presumption of timely notice and Respondent's evidentiary burden to rebut in a comprehensive manner each instance where Petitioner showed he gave such notice.

With regard to the rejection of the leave slip, Respondent has asserted that after it objected to the introduction of the exhibit, (because, *inter alia*, the proper time to impeach Mr. Chapman would have been during his testimony) Petitioner's counsel took no additional steps to introduce the document; the document was never marked as an exhibit and formally offered into evidence; and the document never became a part of the official record of the Formal Hearing.

The regulations governing the conduct of hearings and the acceptance of evidence are 7 D.C.M.R § 223.3 and § 223.5. §223.5 states:

> The order in which evidence and allegations shall be presented and the procedures at the hearing generally, except as this chapter otherwise expressly provides, shall be in the discretion of the Hearing or Attorney Examiner and of the nature as to afford the parties a reasonable opportunity for a fair hearing.

In *Williams v. Providence Hospital and INA Insurance*, (Dir. Dkt. No. unknown) OHA No. 85-302, OWC No. 0045766 (March 1988), the Director has further expounded "that discretion should only be used to exclude evidence which is irrelevant, or whose probative value is substantially outweighed by the danger of unfair prejudice, or which confuses the issues, or which by consideration of undue delay leads to a waste of time or needless presentation of cumulative evidence".

Review of the hearing transcript for the second hearing which took place on April 26, 2005, reveals that Petitioner did not submit the leave slip in question until after all four of the witnesses had testified and Petitioner was permitted to be recalled in rebuttal of his supervisor, Ms. Chapman's testimony. At that time, Counsel for Petitioner attempted to introduce into the record, the leave slip, stating that it was not previously introduced as he was holding it as rebuttal evidence. When asked by the ALJ what testimony he expected the leave slip to rebut, counsel responded: "It just undercuts Mr. Chapman's testimony that he had no discussions about Mr. Dillon's condition or any injury prior to November 2003". When asked by the ALJ how the document accomplishes the "undercutting", Counsel answered "Well, because there's (sic) check

marks on the document indicating what Mr. Dillon was—why he was requesting leave at that time that indicated otherwise". HT at 177

Thereafter, counsel objected, stating that the proper time to impeach Ms. Chapman would be while she was testifying. Although the Panel notes the ALJ shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure[2], the Panel agrees the leave slip would not be sufficient to impeach Ms. Chapman's testimony that she did not have a discussion about Petitioner's condition or any injury prior to November 2003. There is nothing that has been described about said leave slip that would infer any discussion was held between Ms. Chapman and Petitioner.

A review of the entire record, particularly the transcript from the previously scheduled hearing, reveals the ALJ and counsel for Respondent have made many concessions in response to Petitioner's failure to submit exhibits according to the date provided in the scheduling order and his failure to timely modify the scheduling order to change the date of injury. The Panel accordingly cannot conclude Petitioner was not provided a fair hearing by the ALJ. Notwithstanding Petitioner's delinquency, the Panel does question why Petitioner would hold back a piece of evidence to use only as rebuttal evidence at the end of the second Formal Hearing, if he felt it might help him establish timely notice. The Panel acknowledges that Respondent has submitted Petitioner's leave slip for September 17, 2003, into evidence which shows the area which is used for checking off the reason for the requested leave[3]. The slip however does not provide an area where an employee is required to explain why he is claiming the leave is related to a work injury or provide a space to advise the date of the injury and a description of the injury. *See* RE 9.

Given that the Act requires the written notice to include a statement of the time, place, nature and cause of the injury, the Panel finds this employer's leave slip, whether or not it contains check marks as to why he was requesting leave, as described on the record is not relevant to issue of timely notice. *See* D.C. Code §32-1513 (b).*See Jimenez v. District of Columbia Dept. of Employment Services,* 701 A.2d 837 (1997).(Court affirmed finding that a claimant's request for medical leave for corrective surgery to his knees did not establish claimant had complied with the statutory requirement of providing timely notice of his work-related injuries.

In concluding that the ALJ has the discretion to admit evidence that has more probative value than prejudicial harm, the Panel finds the ALJ did not exceed his authority or abuse his discretion in excluding the leave slip in question and the ALJ's determination that claimant did not provide timely notice of injury pursuant to the Act should be affirmed.

In support of Petitioner's second argument, that the Act provides a presumption that an employee's notice is timely, and the ALJ erred by not requiring Respondent to rebut this presumption, Petitioner announces the following standard:

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[2] D.C. Code § 32-1525*; see also Jerome Oubre v. District of Columbia Department of Employment Services,* 630 A.2d 699 (1993) *citing Ferreira v. District of Columbia Department of Employment Services,* 531 A.2d 651(1987).

[3] RE 9, Petitioner's leave slip for September 17, 2003, the day after the alleged injury states Petitioner requested annual leave for 9/17/03 and did not check off the box which states leave is being requested due to a work related injury.

> Under this statute, once the employee presents evidence that he provided some notice of his injury to his employer within 30 days of the injury there is a presumption that the employee's notice was timely. In order to rebut ***any*** presumption in §32-1521, the employer must present evidence 'sufficient and comprehensive' enough to contradict employee's claims'.

(emphasis added).

Petitioner relies on the Court of Appeals decisions in *Sibley Memorial Hospital v. Department of Employment Services*, 805 A.2d 974 (2002)(*Sibley*) and *Whittaker v. District of Columbia Dep't of Employment Services*., 668 A.2d 844 (1995).(*Whittaker*) to support his standard..

Notwithstanding the fact that timely notice was not an issue in *Sibley* or *Whittaker*, Petitioner appears to have created his own threshold test for timely notice by interpreting §32-1521(2) which states it shall be presumed "That sufficient notice of such claim has been given" to mean there is a presumption that timely notice of injury has been given to employer. While somewhat creative, the Panel concludes this argument is unfounded and incorrect and must be rejected. The Act has provided the necessary requirements needed in order to provide employer with timely notice in §32-1513 and neither the Court of Appeals, the Director, nor the CRB has interpreted §32-1521(2) to mean there is a presumption that an employee's notice of injury to employer is timely. To the contrary, the Court in *Jimenez*, supra at 840, stated "Formal/written notice set out in §36-313 (now §32-1513) must be made with adherence to several delineated formalities". The Panel concludes the record contains substantial evidence to support the ALJ's conclusion of untimely notice and that Petitioner failed to provide a satisfactory reason timely notice was not given. *Jimenez, supra*.

Lastly, the Panel shall address the ALJ's statement "claimant made no such request (for medical expenses), thus, obviating the need for such an award herein" which is the subject of Petitioner's final argument. CO at 7. Upon review of the hearing transcript, the Panel must agree with Petitioner that this finding is erroneous and should be reversed. As Petitioner asserts, counsel clearly stated when asked to state his claim for relief, that he was requesting "reimbursement for medical care for the injuries, for all the care he received for the injuries from his physicians and medical professionals". HT at 10, line 11-15. Respondent has not opposed the ALJ's conclusion that Petitioner sustained an accidental injury on September 16, 2003 and that his injury arose out of and in the course of his employment and is medically causally related to his employment. Accordingly, the Panel concludes Petitioner did include medical benefits in his claim for relief before the ALJ and petitioner is entitled to payment for causally related medical benefits pursuant to the prevailing case law. *See Safeway Stores Inc. v. D.C. Dept. of Employment Services*, 832 A.2d 1267 (D.C. 2003).

CONCLUSIONS

The ALJ did not abuse his discretion by rejecting an exhibit submitted by Petitioner after submitting his case in chief as the exhibit has not been found to be relevant. The ALJ's conclusion that Petitioner did not provide timely notice to employer, nor some satisfactory reason such notice could not be given, is supported by substantial evidence. The ALJ's

conclusion that Petitioner was not making a claim for medical expenses is not supported by the record.

ORDER

The Compensation Order of July 11, 2005 is hereby AFFIRMED IN PART, REVERSED IN PART AND AMENDED IN PART. The ALJ's conclusion that Petitioner did not provide timely notice pursuant to §32-1513 (a)-(d) is affirmed. The ALJ's finding that that Petitioner was not entitled to an award of medical expenses is reversed. The Compensation Order is amended to award causally related medical expenses[4].

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

October 6, 2005
Date

[4] Where there is but one action that the Review Panel decision would permit, a remand is superfluous. *See* CRB Emergency Rules of Practice and Procedure, Chapter 2, 7 D.C.M.R. § 267.5