GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-028

SHELTON H. GREEN,
Claimant–Respondent,

v.

FEDERAL EXPRESS CORPORATION,

and

SEDGWICK CMS,
Third-Party Administrator -Petitioners.

Appeal from a Compensation Order by
The Honorable Anand K. Verma
AHD No. 11-247, OWC No. 677890

Lisa A. Zelenak, Esquire for the Petitioner
Krista N. DeSmyter, Esquire for the Respondent

Before HEATHER C. LESLIE,[1] HENRY W. MCCOY, and JEFFREY P. RUSSELL,[2] *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the February 10, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted the

[1]Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-04 (October 5, 2011).

[2] Judge Russell is appointed by the Director of the DOES as a interim CRB Member pursuant to DOES Administrative Policy Issuance No. 11-03 (October 5, 2011).

Claimant's request for temporary total disability benefits from May 6, 2008 to the present and continuing and authorization for medical treatment. The ALJ also ordered the Employer to pay a civil penalty of $1,000.00 pursuant to §32-1532(e). WE AFFIRM in part, and VACATE, in part.

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was a courier/driver for the Employer for nine years. The Claimant's duties involved picking up packages from various locations, which entailed walking, lifting and loading boxes for delivery. On May 6, 2008, the Claimant injured his back while in the course of his duties.

The Claimant verbally told Aretha Cole, his manager. The Claimant sought treatment that day with Dr. Oleg Shpak. The Claimant has undergone objective testing and treated with several different doctors. Ultimately, the Claimant underwent a lumbar discectomy at L4-5 and L5-S1 performed by Dr. Kaixuan Liu. The Claimant has not been able to return to work.

A Formal Hearing was held on October 13, 2011. The Claimant requested an award for temporary total disability benefits from May 6, 2008 to the present and continuing and payment of causally related medical expenses. Hearing Transcript at 20. The issues raised were whether or not the Claimant gave timely notice of the injury and whether or not a claim was timely filed. The Claimant also raised at the Formal Hearing the issue of penalties for "failure to a pay Mr. Green's benefits in a timely fashion." Hearing Transcript at 8. The Employer opposed the raising of this issue as untimely. The ALJ stated that he would take the Employer's opposition under consideration. Hearing Transcript at 11.

A CO was issued on February 10, 2012. In that CO, the ALJ granted the Claimant's request for ongoing temporary total disability benefits. The ALJ also awarded authorization for medical treatment and ordered the Employer to pay a civil penalty in the amount of $1,000.00.

The Employer timely appealed. The Employer argues several points. First, the ALJ erred in finding that the Claimant gave timely notice. Second, the ALJ erred in finding that the Claimant filed a timely claim. Third, that the ALJ erred in considering or awarding penalties as the issue was raised the morning of the Formal Hearing. And finally, that the ALJ erred in awarding medical treatment as no medical treatment was identified or even discussed in the CO.

The Claimant opposed the application for review, arguing that the CO was supported by substantial evidence in the record and should be affirmed.

THE STANDARD OF REVIEW

The scope of review by the CRB 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. S*ee* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. ("Act") at §32-1521.01(d) (2) (A). and *Marriott International v. DOES,* 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id*. at 885.

DISCUSSION AND ANALYSIS

The Employer first argues that the ALJ erred in finding the Claimant gave proper and timely notice under the statute. We disagree.

D. C. Code § 32-1513, "Notice of injury or death", provides:

> (a) Notice of any 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.
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> (b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or, in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.
>
> (c) Notice shall be given to the Mayor by delivering it to him or sending it by mail to him, and to the employer by delivering to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any partner, or, if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.
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> (d) Failure to give such notice shall not bar any claim under this chapter:
> (1) If the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and its relationship to the employment and the Mayor determines that the employer or carrier has not been prejudiced by failure to give such notice; or
> (2) If the Mayor excuses such failure on the ground that for some satisfactory reason such notice could not be given; or unless objection to such failure is raised before the Mayor at the 1st hearing of a claim for compensation in respect of such injury or death.

It was undisputed at the formal hearing that the Claimant did not provide written notice. Thus, the ALJ addressed whether or not the exception of subsection (d)(1), above applies. The ALJ first took into consideration that the Claimant testified that on the date of the injury he told his supervisor, Ms. Cole, that he hurt his back while moving boxes. The ALJ found that through this verbal communication, the Employer "acquired knowledge" of the Claimant's injury. CO at 3.

The ALJ also acknowledged that the Act affords Claimant's with the rebuttable presumption that notice is given to Employers.[3] The ALJ then turned to the Employer's evidence and found the Employer failed in rebutting the presumption that notice was given. The ALJ rejected the Employer's argument that as written notice was not given, the Claimant failed to give timely notice. The Employer again raises this issue on appeal, stating that the Employer was severely prejudiced by not receiving notice until three years later. Employer's Argument at 10.

Simply put, the Claimant's uncontroverted testimony is that he told his supervisor, Ms. Cole, on the date of the injury. Thus, the Employer had actual knowledge on the date of the injury. The Employer failed to rebut this testimony, either through witness testimony or documentary evidence. The fact written notice was not received until later does not negate the fact that the supervisor had knowledge on the day of the incident and the Employer could have begun any necessary investigation into the injury as the Employer deemed fit.

However, the ALJ did not end his analysis there.

The ALJ went one step further and also stated that the "Claimant's treatment with Dr. Shpak and other physicians to whom he was referred following his injury on May 6, 2008 would constitute notice to the Employer of the injury and its relationship to claimant's employment." CO at 4. We agree with the Employer that this statement is in error and conflicts with the Court of Appeals discussion in *Howard University Hospital v. DOES*, 960 A.2d 603 (D.C. 2008) ("*Tagoe*"). In *Tagoe,* the Court found that although treating with a physician who was employed at the hospital where the Claimant suffered a work related stroke, the Claimant did not give timely notice to the Employer even though the treating physician was aware of the work relatedness of the stroke. The Court found the physician did not fit the statutory requirements of being either an agent of the employer or a supervisor.

Here, the ALJ seemingly ascribes notice on the Employer through the physicians the Claimant treated with after the injury because the Employer provided health insurance. This is in error as a treating physician is not an agent of the employer or a supervisor to whom notice would be proper under the act. To assume that medical reports would reach the Employer within 30 days is speculative at best and cannot be used as a basis to find timely notice.

We reject this reasoning and find the ALJ was in error. However, we find this error to be harmless as the ALJ did find that the Claimant had, in fact, verbally told Ms. Cole, the manager, on the date of the injury and the Employer had not offered any evidence to rebut the testimony, as discussed above.

The Employer's next argument is that the CO erred in finding that the Claimant filed a timely claim. As the ALJ properly notes in the CO, § 32-1532(f)[4] states:

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[3] D.C. Code §32-1521, titled "Presumptions", states "in any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary:….(2) that sufficient notice of such claim has been given."

[4] Similarly, as set forth in 7 DCMR § 203.3, "the time limit for filing a claim shall not begin until a Report of Injury is filed." Finally, 7 DCMR § 205.1 requires:

> Where the employer or the carrier has been given notice, or the employer . . . or the carrier has knowledge of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subsection (a) of this section, the limitations in § 32-1514(a) shall not begin to run against the claim of the injured employee . . . or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subsection (a) of this section [which reads within] 10 days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Mayor a report setting forth: (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Mayor may require. The employer shall also send a copy of the report together with such other information as may be required by the Mayor to the Department of Employment Services. The employer shall send to the employee or the employee's next of kin, by certified mail, return receipt requested, concurrent with the submission of the report to the Department of Employment Services, a statement of the employee's rights and obligations pursuant to this chapter, including the right to file a claim for compensation within one year from the date of injury or death.

The ALJ was also correct in noting that "because compliance with § 32-1532 of the Act and its implementing regulations is an element of employer's defense regarding the timeliness of the claim, employer, not claimant, has the burden to prove each element of that defense." CO at 4. *See Proctor v. General Conference of Seventh Day Adventists,* Dir. Dkt. 97-46, H&AS No. 95-501, OWC No. 145176 (December 13, 2000). The ALJ further went on to note that the Employer did not present any evidence of when a copy of the first report was sent or if it was sent at all, pursuant to the statute and regulations.

The Employer's defense is that as it did not have notice of the injury, it did not file a first report. However, as we discussed above, we find the Employer did have actual notice of the injury the day the injury occurred. The Employer's argument is rejected and we affirm the finding that the Claimant timely filed a claim.

The ALJ then went on to address the Claimant's request for penalties. Preliminarily, we note that the transcript reveals that when requesting penalties to be assessed, Counsel for the Claimant, while not identifying the applicable statute does state that penalties are being sought for "failure to pay Mr. Green's benefits in a timely fashion." Hearing Transcript at 8. While the statute the Claimant was pursuing was not identified in the transcript, we find the Claimant was pursuing penalties pursuant to § 32-1528, which states

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> The employer shall send to the employee, or to the employee's next of kin, by certified mail, return receipt requested, a statement of the employee's rights and obligations pursuant to the Act, including the right to file a claim for compensation within one year from the date of the injury or death.

> If the Mayor or court determines that an employer or carrier has delayed the payment of any installment of compensation to an employee in bad faith, the employer shall pay to the injured employee, for the duration of the delay, the actual weekly wage of the employee for the period that the employee is eligible to received workers' compensation benefits under this chapter. The penalty shall be in addition to any amount paid pursuant to § 32-1515.

We also note that the Claimant raised the issue of penalties on the day of the Formal Hearing. The Employer objected to the late raising of this issue, arguing that it was prejudiced by the late filing as it may have changed the Employer's defense. The ALJ, after hearing the Employer's objection, stated he would take the objection "into consideration." Hearing Transcript at 11. Without ruling upon the objection which was taken into consideration, the ALJ then granted penalties under a different section of the statute § 32-1532(e).[5] We find this in error.

We find that fundamental due process and the rationale enunciated in *Transporation Leasing Co. v. DOES*, require that a party be on notice of the issues that are to be litigated.[6] As it is undisputed that there was no such notice, we vacate that portion of the CO that awards penalties pursuant to § 32-1532(e).

Finally, in the Order section the ALJ summarily grants Claimant's request for medical treatment. No such issue is listed as an issue to be addressed. A review of the hearing transcript reveals some discussion over whether or not authorization for switch of physicians was an issue but the parties agreed that the issue was for the Office of Workers' Compensation to decide. Hearing Transcript 20-24. In the analysis section of the CO, no discussion ensues over what medical treatment is being sought. As we cannot ascertain what medical care the ALJ is authorizing, and

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[5] § 32-1532 states ,

> (e) Any employer who fails or refuses to send any report required of him by this section shall be subject to a civil penalty not to exceed $ 1,000 for each such failure or refusal.

[6] In *Transporation Leasing Co. v. DOES*, 690 A.2d 487 (D.C. 1997) the District of Columbia Court of Appeals found that the Employer had received inadequate notice of a claim for relief sought and as such, was prejudiced in its ability to prepare for a defense. "We have held that 'in general, an individual is entitled to fair and adequate notice of administrative proceedings that will affect his [or her] rights, in order that he [or she] may have an opportunity to defend his [or her] position.'" *Transporation Leasing* at 489, quoting *Ridge v. Police & Firefighters Retirement and Relief Bd., 511 A.2d 418, 424 (D.C. 1986)* (alterations in original) (quoting *Carroll v. District of Columbia Dep't of Employment Servs., 487 A.2d 622, 623 (D.C. 1985))*. We have observed, moreover, that this notice guarantee has its "'roots in constitutional due process.'" *Abia-Okon v. District of Columbia Contract Appeals Bd*., 647 A.2d 79, 84 (D.C. 1994) (quoting *Ammerman v. District of Columbia Rental Accommodations Comm'n*, 375 A.2d 1060, 1062 (D.C. 1977)). We also have stressed that this notice requirement embraces the proposition that an agency "may not change theories in midstream without affording reasonable notice of the change." *Arthur v. District of Columbia Nurses' Examining Bd.*, 459 A.2d 141, 145 (D.C. 1983) (citing *Rodale Press, Inc. v. Federal Trade Comm'n*, 132 U.S. App. D.C. 317, 321, 407 F.2d 1252, 1256 (1968)). Nonetheless, the "'requirements of procedural due process are met if upon review the court is satisfied that a complainant was given adequate opportunity to prepare and present his [or her] position to the [hearing examiner] and that no prejudice resulted from the originally deficient notice." *Ridge*, 511 A.2d at 424 (first alteration in original) (quoting *Watergate Improvement Ass'n v. Public Serv. Comm'n*, 326 A.2d 778, 786 (D.C. 1974)).

because it appears that the parties agreed that this issue was not before the ALJ, we vacate the medical care award.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the February 10, 2012 Compensation Order are AFFIRMED with respect to the finding that the Claimant timely gave actual notice to his employer and filed a timely claim.

That portion of the CO which granted authorization for medical treatment and penalties pursuant to § 32-1532(e) is VACATED.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

June 15, 2012
DATE