

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-052

**TRACEY HORTON,
Claimant-Petitioner/Cross-Respondent,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Employer/Insurer-Respondent/Cross-Petitioner.**

Appeal from a April 11, 2013 Compensation Order By
Administrative Law Judge Karen Calmeise
AHD No. 12-372, OWC No. 688937

David Kapson, Esquire, for the Claimant
Donna Henderson, Esquire for the Employer

Before HEATHER C. LESLIE, HENRY W. MCCOY, *Administrative Appeals Judges* and LAWRENCE
D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the April 11, 2013, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ found the testimony of the Claimant to be incredible and denied the claim for temporary total disability benefits and medical benefits. We VACATE and REMAND.

BACKGROUND AND FACTS OF RECORD

The Claimant is a bus driver for the Employer, a position she held since 2003. The Claimant alleged she suffered from two injuries while working for the Employer, one on January 26, 2011 and one on February 21, 2012. On January 26, 2011, the Claimant began to experience pain in

her neck, right shoulder and right upper extremity. On February 21, 2012, the Claimant alleges she felt an increase in pain and spasms in her neck, right shoulder and right upper extremity after driving a bus. The Claimant has not returned to work as a bus driver since February 22, 2012.

The Claimant sought medical treatment for her injuries, eventually coming under the care and treatment of Dr. Hamid Qurashi. Dr. Qurashi diagnosed the Claimant with an acute strain of the cervical and lumbosacral spine. Dr. Qurashi recommended objective tests as well as physical therapy.

The Employer sent the Claimant for an independent medical evaluation (IME) with Dr. Mark Scheer on March 26, 2012. Dr. Sheer took a history of the Claimant's injury and symptoms, performed a physical examination, and reviewed medical reports outlining the Claimant's complaints and results of objective testing. Dr. Sheer opined the Claimant's neck, right upper extremity, and lower back symptoms were not causally related to anything that happened at work.

A full evidentiary hearing was held on December 19, 2012. The Claimant sought an award of temporary total disability benefits from February 22, 2012 to the present and continuing and authorization for causally related medical treatments. For the 2011 injury, the issues raised were: 1) did the Claimant suffer a work related accident on January 26, 2011 which arose out of and in the course of the Claimant's employment;¹ 2) medical causal relationship of the Claimant's injury and current condition; 3) timely notice; 4) timely filing; and 5) the nature and extent of the Claimant's disability, if any. For the 2012 injury, the issues raised were: 1) did the Claimant suffer a work related injury on February 22, 2012, which arose out of and in the course of Claimant's employment; 2) the medical causal relationship between the Claimant's injury and current condition; and 3) the nature and extent of the Claimant's disability, if any.

On April 11, 2013, a CO was issued which denied the Claimant's claim for relief. The ALJ found the Claimant failed to provide the Employer with timely notice of the 2011 injury and that the Claimant failed to invoke the presumption of a work related injury occurring on February 21, 2012. Notably, the ALJ found the Claimant to be an incredible witness.

The Claimant timely appealed. The Claimant argues that the CO's finding that the Claimant failed to provide timely notice of the 2011 injury is not supported by the substantial evidence in the record. The Claimant also argues that the conclusion that the Claimant failed to invoke the presumption of compensability for the 2012 injury is not supported by the substantial evidence in the record and should be reversed.

The Employer opposed the Claimant's application for review and cross appealed the lack of determination of whether or not the Claimant timely filed a claim for the 2011 injury.

THE STANDARD OF REVIEW

The scope of review by the Compensation Review Board ("CRB") is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts

¹The CO order describes the issue as whether the claimant suffered a work related injury which arose out of *or* in the course of Claimant's employment for both the 2011 and 2012 alleged injuries. The correct terminology for this issue is whether or not the Claimant suffered a work injury which arose out of *and* in the course of Claimant's employment. We will treat this as a typographical error as it is clear, based on the conclusion of law, the ALJ recognized that both arising out of *and* in the course of her employment was necessary.

are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

DISCUSSION AND ANALYSIS

We address the Employer's cross appeal first. The Employer argues that as a matter of law, the CRB should amend the CO and find the Claimant failed to timely file a claim for the 2011 injury.

We note that for the 2011 injury, five issues are identified in the CO. A review of the CO shows that the ALJ only addressed one of the five issues, that of timely notice. The CO states, "the discussion will begin with the notice issue, which will determine the outcome of this case." CO at 4. No discussion ensues over whether or not the Claimant suffered an accidental injury on January 26, 2011, whether or not said injury arose out of and in the course of the Claimant's employment, whether or not the Claimant's condition is causally related to the work injury,² whether or not the Claimant timely filed a claim, and the nature and extent of the Claimant's disability, if any. Whether or not an injury occurred that arose out of and in the scope of the Claimant's employment, whether a claim was timely filed³, and whether or not the Claimant's medical condition is causally related to the injury can be and often are determinative to the outcome of the case, not just the issue of timely notice.

It is well settled in this jurisdiction that to conform to the requirements of the D.C. Administrative Procedures Act (DCAPA), D.C. Code § 2-501 *et seq.* (2006), an administrative decision in a contested case, (1) must state findings of fact on each material, contested factual issue, (2) those findings must be based on substantial evidence, and (3) the conclusions of law must follow rationally from the findings. *Perkins v. DOES*, 482 A.2d 401, 402 (D.C. 1984); D.C. Code § 2-509. Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate body is not permitted to make its own finding on the issue; it must remand for the proper factual finding. *See Jimenez v. DOES* 701 A.2d 837, 838-840 (D.C. 1997). As the Court of Appeals explained in *King v. DOES*, 742 A.2d. 460 at 465 (D.C. 1999), basic findings of fact on all material issues are required, for "[o]nly then can this court determine upon review whether the agency's findings are supported by substantial evidence and whether those

²A determination of whether an injury is work-related is necessary notwithstanding a claimant's failure to comply with D.C. Official Code § 32-1513 as failure to comply with the notice requirements of Section 1513 will not bar an award of causally-related medical benefits. *Safeway Stores v. DOES*, 832 A.2d 1267, 1271 (D.C. 2003); *Washington v. Pro-Football, Inc.*, Dir. Dkt. No. 02-05, OHA No. 97-186 (Oct. 16, 2003); *Olga Perez v. Morgans, Inc.*, CRB No. 02-107, OHA No. 02-119 (June 21, 2006).

³ While a determination that the Petitioner has failed to comply with the notice requirements of D.C. Official Code § 32-1513, and that such failure is not excused pursuant to subsection (d)(2) thereof, will serve to bar the claim for compensation, it does not bar the Petitioner's claim for payment of causally-related medical benefits. *Safeway Stores, Inc. v. DOES*, 832 A.2d 1267, 1271 (D.C. 2003). In such an eventuality, the Petitioner's claim for medical benefits will only be barred should it be determined that the Petitioner also failed to timely file her claim. Thus, a determination on whether or not the Claimant timely filed a claim can affect whether or not the Claimant can be awarded causally related medical care.

findings lead rationally to its conclusions of law.” *See also Sturgis v. DOES*, 629 A. 2d 547 (D.C. 1993).

We agree with the Employer that failure to address the timely claim issue is error. However, because we cannot make our own findings of facts on all the issues listed but not addressed, we are forced to remand the case to address all contested issues raised regarding the 2011 injury.

Moreover, not only were the above contested issues identified to be addressed by the ALJ, but part of the claim for relief was authorization for causally related medical bills. With respect to this claim for relief, the CO ALJ inexplicably states that “no claim for medical benefits has been presented with regard to this claimed injury.” CO at 5. We are uncertain why, in light of the Claimant’s arguments and opening statement,⁴ the ALJ could so conclude. . We are aware that post hearing arguments were submitted that are not before us which may explain the ALJ’s conclusion. . Upon remand, the ALJ is to clarify this statement and address whether or not the claimed medical treatment is related to the 2011 injury.

Turning to the Claimant’s arguments, the Claimant first argues the ALJ erred in finding that the Claimant did not provide timely notice of the 2011 injury, specifically pointing out that “Ms. Horton testified and the ALJ made a finding that Ms. Horton informed her supervisor that she was seeking medical treatment on January 27, 2011 for right foot pain.” Claimant’s argument at 7.

Review of the CO reveals the following:

Claimant testified that she informed her supervisor, Mr. Hall, that she was seeking medical treatment on January 27, 2011 for right foot pain. (HT 40 and 47-50) Claimant's testimony was not corroborated by a written notice or claim form, and Employer witness, Priscilla Alston, WMATA superintendent, testified that she was not aware of Claimant's report of injury or claim in 2011. (HT 111-114) Claimant did not file or present written notice to Employer within 30 days of the alleged 2011 work incident; nor did she present any evidence that she gave verbal notice to any Employer representative on or near the January 2011 work incident.

CO at 5.

⁴ Claimant’s counsel stated,

You will see medical reports and hear testimony from Ms. Horton that these problems in fact go back to January of 2011 when she first sought treatment for problems in the right arm, in the right shoulder, and in the neck. And that’s why we’ve consolidated both of the claims for the purposes of today’s hearing to show that, you know, there is clear signs and symptoms, there’s objective evidence on an MRI of her cervical spine to show that she’s got disk bulges. She has complaints of radicular problems going down her right arm. And she has two worker’s comp claims, one from January of 2011 and one from February of 2012.

Hearing transcript at 16.

We are uncertain, based on the above passage, whether the ALJ is stating that verbal notice must be corroborated by written notice, which is in error. As the ALJ stated, failure to provide written notice will not bar a claim when the Employer has actual knowledge of the injury. Moreover, it appears based upon the above language that the ALJ placed the initial burden of proof on the Claimant. As the CRB has stated before,

As the Court in *Dillon*⁵ held, D.C. Official Code § 32-1521(2) affords the Petitioner a rebuttable presumption that the Respondent had timely notice of the Petitioner's injury.⁶ "The [Workers'] Compensation Act incorporates a rebuttable presumption that claimant gave her employer notice of her injury in a timely fashion[,] in accordance with the humanitarian purposes of the Act." 912 A.2d at 559 (quoting *Washington Hospital Center v. D.C. Department of Employment Services*, 859 A.2d 1058, 1061 (D.C. 2004)). This presumption, the Court noted, "applies both to the written notice requirement and to the alternative provision for actual knowledge by the employer." *Dillon*, 912 A.2d at 560 n. 6 (citing *Howrey & Simon v. D.C. Department of Employment Services*, 531 A.2d 254, 256 n.2 (D.C. 1987)).

In holding that D.C. Official Code § 32-1521(2) affords the claimant a rebuttable presumption of compliance with the notice requirements of D.C. Official Code § 32-1513, the Court was mindful of the importance and purposes to be served by timely notice to the employer. As the CRB has noted, the notice requirement of D.C. Official Code § 32-1513 "serves two purposes: it enables an employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and it facilitates the earliest possible investigation of the facts surrounding the injury." *Dillon v. D.C. Water & Sewer Authority*, CRB No. 05-256, AHD No. 05-032 (January 25, 2007) (quoting *Teal v. D.C. Department of Employment Services*, 580 A.2d 647 (D.C. 1990)). "[A]pplying the presumption to the timeliness requirement, however, creates no realistic disincentive to filing timely notice, because the presumption operates only 'in the absence of evidence to the contrary' and, once rebutted, 'drops out of the case entirely,' *Washington Post v. D.C. Department of Employment Services*, 852 A.2d 909, 911 (D.C. 2004), leaving the burden on the employee to prove timely notice." *Dillon*, 912 A.2d at 560.

Accordingly, upon remand the ALJ must revisit the issue of the Petitioner's compliance with D.C. Official Code §§ 32-1513(a) and (d)(1), extending to the Petitioner the benefit of the presumption required by *Dillon*. Moreover, assuming the ALJ determines upon remand that the Petitioner failed to provide timely notice and that the Respondent did not otherwise have timely actual notice, the ALJ must then make a determination under D.C. Official Code § 32-1513(d)(2) as

⁵ *Dillon v. DOES*, 912 A.2d 556 (D.C. 2006).

⁶ D.C. Code § 32-1521(2) states that, "[i]n any proceeding for the enforcement of a claim for compensation . . . it shall be presumed, in the absence of evidence to the contrary . . . [t]hat sufficient notice of such claim has been given."

to whether or not such failure is nevertheless excused. Contrary to the ALJ's assertion in the Compensation Order that the analysis required under D.C. Official Code § 32-1513 ends once it is established that the claimant failed to provide the employer with timely written notice and that the employer did not otherwise have timely actual notice, *see* Compensation Order at 6, the ALJ must determine "whether that failure was forgiven by the provision [at § 32-1513(d)(2)] allowing the agency to 'excuse[] such failure on the ground that for some satisfactory reason . . . notice could not be given.'" *Dillon*, 912 A.2d at 562 (quoting *Jimenez*, *supra*, 701 A.2d at 840).⁷

We are aware that the ALJ found the Claimant's testimony to be incredible, a finding not appealed by the Claimant, which the ALJ used as a basis to find the Claimant had not provided timely notice. However, as the District of Columbia Court of Appeals stated in *WMATA v. DOES and Payne Intervenor*⁸ that when there is apparent confusion

as to the correct allocation of the burden of proof, the court could not determine whether conclusions legally sufficient to support the decision flow[ed] rationally from the findings, and thus a remand was necessary for further consideration of the evidence by the examiner under the proper standards.

As we are remanding the case for further consideration and discussion on all the contested issues, the ALJ is directed to also reconsider the issue of notice in line with the discussion above.

The Claimant's next argument is that the finding that the Claimant did not invoke the presumption that she suffered a work injury on February 21, 2012 is not supported by substantial evidence in the record.

The ALJ correctly noted that,

D.C. Code § 32-1521 (1) provides claimants with a rebuttable presumption that a claim for workers' compensation benefits comes within the provisions of the Act. This presumption exists "to effectuate the humanitarian purposes" of the compensation statute, and evidences a strong legislative policy favoring awards in close or arguable cases. *Parodi v. District of Columbia Department of Employment Services*, 560 A.2d 524 (D.C. 1989). See also, *Spartin v. District of Columbia Department of Employment Services*, 584 A.2d 564 (D.C. 1990); and, *Muller v. Lanham Company, Dir. Dkt. 8601*, H&AS No. 85-36, OWC No. 0700456 (March 15, 1988).

CO at 5-6.

⁷ *Vanhoose v. Respicare Home Respiratory Care*, CRB No. 07-022, AHD No. 06-342, OWC No. 626066 (July 23, 2007).

⁸ 992 A.2d 1276 (D.C. 2010).

The ALJ found the Claimant had failed to invoke the presumption because the Claimant's testimony was deemed to be "unreliable and inconsistent with the written evidence of record." CO at 6.

The CO further indicated,

Furthermore Claimant's medical reports do not provide corroboration of a workplace activity or repetitive motion injury. The February 21, 2012 FWH intake records show that Claimant did not report this incident to the emergency room physician as work related (EE 1, pg 10) and she reported "no past history" of the claimed symptoms. (EE 1, pg 1 and CE 3, pg 44).

CO at 7.

However, as the Claimant correctly points out, contrary to the finding that there was a lack of medical reports to corroborate the Claimant's complaints, that Dr. Quraishi's report of November 16, 2012 states the Claimant "had been driving a bus which has aggravated her neck pain" that "started in February 2012 when she drove the metro bus." Claimant's Exhibit 7 at 61.

While great deference is given to ALJ's in credibility determinations, we point out that if record based reasons are used to deem a Claimant's testimony incredible, even in part, they must be supported by the substantial evidence. In light of Dr Quraishi's medical report supporting the claimant's testimony, on remand should the ALJ determine the presumption has not been rebutted, the ALJ should identify the specific records she relied upon in finding the claimant's testimony was "unreliable and inconsistent with the written evidence of record."

CONCLUSION AND ORDER

The April 11, 2013 is VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

June 21, 2013

DATE