

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-037**

**KEITH CUNNINGHAM,  
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA OFFICE OF THE CHIEF FINANCIAL OFFICER,  
Employer-Petitioner.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 JUN 18 PM 12 04

Appeal from February 2, 2015 Compensation Order  
by Administrative Law Judge Fred D. Carney, Jr.  
DCP No. 30120321386-0001, AHD No. PBL12-043

Andrea G. Comentale for the Employer  
Harold L. Levi for the Claimant

Before MELISSA LIN JONES, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

MELISSA LIN JONES for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

On March 28, 2012 while working as an information technology specialist for the District of Columbia Office of the Chief Financial Officer, Mr. Keith Cunningham bent over to insert a disk into a server. He felt a sharp pain in his abdomen, and when trying to stand, his left knee gave way causing him to fall to the floor. In an email sent the next day, Mr. Cunningham notified his supervisor of a groin injury.

Mr. Cunningham already had an appointment scheduled with the Veterans Medical Center on April 2, 2012, and that appointment was the first time he sought treatment for his injury. In a Physician's Report of Employee's Injury and Disability dated May 14, 2012, Mr. Cunningham was diagnosed with severe osteoarthritis and pain related to his fall at work "which caused [the] spasms." Claimant's Exhibit H.

In the meantime, Mr. Cunningham completed an Employer & Employee First Report of Injury or Occupational Disease dated April 24, 2012. Mr. Cunningham wrote

I was bending down to insert CD into server when I felt a sharpe [sic] pain in my right groin. While trying to stand up my L knee gave way and I fell..."

Employer's Exhibit 6.

On June 25, 2012, the Public Sector Workers' Compensation Program denied Mr. Cunningham's request for disability compensation benefits. Consequently, the parties proceeded to a formal hearing, and in a Compensation Order dated February 2, 2015, an administrative law judge ("ALJ") awarded Mr. Cunningham temporary total disability compensation benefits for the period of April 2, 2012 to May 7, 2012. *Cunningham v. D.C. Office of Chief Financial Officer*, AHD No. PBL12-043, PSWCP No. 30120321386-0001 (February 2, 2015).

On appeal, Employer asserts the ALJ erred by ruling Mr. Cunningham had given timely notice of a back injury; although Mr. Cunningham may have given timely notice of an abdominal injury, Employer argues it had no notice of a back injury. Furthermore, even if Mr. Cunningham's back injury was a latent disability, Employer argues he still failed to give timely notice of that injury. Employer also asserts the ALJ erred in relying upon 7 DCMR §§ 111.7 – 111.9 to assess whether Mr. Cunningham had timely filed his back claim because those regulations were not in effect until after Mr. Cunningham submitted the Physician's Report of Employee's Injury and Disability. For these reasons, Employer requests the Compensation Review Board ("CRB") reverse the Compensation Order.

In response, Mr. Cunningham asserts the Compensation Order is supported by substantial evidence because he gave timely notice of his injury to his supervisor and he timely filed his claim. Specifically, Mr. Cunningham asserts Employer confuses the requirements for timely notice and timely claim such that he was not required to "file a full and complete claim for workers' compensation benefits with the supervisor. ... Furthermore, nowhere does the provision which Petitioner quotes [§1-623.19] provide that an employer notice is defective or incomplete if it fails to recite each and every body part injured in a work-related accident covered by the Code as that is not the function of the employer notice." Claimant-Respondent's Opposition to Petitioner's Application for Review of Compensation Order, pp. 6-7. Finally, Mr. Cunningham asserts he was not required to file a second claim for his back injury so long as he provided "all of the medical and other claim information that was required at the time." *Id.* at p. 9. Mr. Cunningham requests the CRB affirm the Compensation Order.

#### ISSUES ON APPEAL

1. Did the ALJ err by ruling that Mr. Cunningham had given timely notice of a back injury or that Employer had actual notice?
2. Did the ALJ err by ruling Mr. Cunningham timely filed a claim for his back injury?
3. Is the February 2, 2015 Compensation Order supported by substantial evidence and in accordance with the law?

## ANALYSIS<sup>1</sup>

To resolve the issue of whether Mr. Cunningham provided timely notice of his back injury, the ALJ wrote:

Here, Employer contends Claimant failed to provide timely notice about a specific injury to his back. Claimant provided notice on March 29, 2012, by e-mail, about the March 28, 2012 incident. Claimant specified he landed on the right side and referenced a video. (EE 5) On April 2, 2012, Claimant consulted with Ms. Di Cola of Veterans Medical Center. At that time, he became aware that the March 28, 2012 injury resulted in lumbar spasms, which probably were work-related. Between April 18, 2012, and May 7, 2012, Claimant further provided notice to his supervisor of “degenerative joint disease of lumbar spine” on the return to work form completed by Dr. White. (CE H) On May 14, 2012, 2012, [sic] Ms. Di Cola completed a Form 3 and reported the injury as pain caused by lumbar spasms and restricted Claimant from any bending, prolonged standing, or carrying heavy parcels. (EE 8).

Claimant’s injury occurred on March 28, 2012. Claimant provided general notice about an injury to his right side on March 29, 2012. Claimant provided specific notice about an injury to his back, which was work-related about May 14, 2012. I find that Claimant timely provided notice to the employer about an injury to his right side. Although Claimant did not timely provide notice of an injury to his back within 30 days, I excuse the lack of notice because employer was on actual notice of a general injury to the right side; Claimant provided notice of a video, which if investigated showed Claimant attempting to stand; and employer does not appear to be prejudiced by the delayed receipt of this information.

*Cunningham, supra*, at p. 5. The ALJ’s analysis is internally inconsistent and is fraught with errors.

There is no provision in the act for “general notice about an injury.” Section 1-623.19 of the Act states

(a) An employee injured in the performance of his or her duty, or someone on his or her behalf, shall give notice thereof. Notice of a death believed to be related to the employment shall be given by an eligible beneficiary specified in § 1-623.33, or someone on his or her behalf. A notice of injury or death shall:

(1) Be given within 30 days after the injury or death;

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<sup>1</sup> The scope of review by the 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 are in accordance with applicable law. *See* § 1-623.28(a) of the D.C. Comprehensive Merit Personnel Act of 1978, as amended. D.C. Code § 1-623.01 *et seq.*, (“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).

(2) Be given to the immediate superior of the employee by personal delivery or by depositing it in the mail properly stamped and addressed;

(3) Be in writing;

(4) State the name and address of the employee;

(5) State the year, month, day, hour when, and the particular locality where the injury or death occurred;

(6) State the cause and nature of the injury, or in the case of death, the employment factors believed to be the cause;

(7) Be signed by and contain the address of the individual giving the notice; and

(8) Be accompanied by a form approved by the Mayor authorizing access to all related medical and earnings data concerning the claimant.

(b) Failure to give the notice shall not bar any claim under this chapter:

(1) If the employer or the Disability Compensation Fund had actual knowledge of the injury or death and its relationship to the employment and the employer has not been prejudiced by failure to give the notice;

(2) If the Mayor or his or her designee excuses the failure on the ground that for some satisfactory reason the notice could not be given; or

It is clear that the day after Mr. Cunningham's accident he sent an email to his supervisor. Mr. Cunningham's March 29, 2012 email states in full:

Let this email serve as my Official Statement of events that occurred yesterday, 3/28/2012 between 3:35 and 3:50 p.m:

While performing duties as assigned in the role of Information Technology Specialist (Network) I had an incident where I fell to the floor in the server room. There were no witnesses to the incident, except the security camera located in the room.

Leading up to the incident I spent three quarters of the day in and out of the server room standing, bending and keeling inserting and removing installation media into the five servers I was working on. Sometime between 3:35 and 3:50pm while keeling to insert the installation disk into the bottom server of the rack when I felt a sharp pain in the right abdomen area: while trying to stand up my right knee gave way and I fell to the floor on my right side.

The pain was in the same area of my body from a previous injury while working at DC Lottery in 2008. According to DC Official Code 1-623.22 the time period has elapsed to make a claim against the previous DCLB Case. As a result I would like to open a new claim.

I will have the area examined on Monday 4/2/2012, since I already had a scheduled Doctor's appointment at the VA.

Employer's Exhibit 5. There is no indication in Mr. Cunningham's email to his supervisor that he suffered a back injury. Furthermore, by his own admission, "[t]here were no witnesses to the incident, except the security camera located in the room;" *Id.*, therefore, Employer could not have had actual notice of any back injury that would excuse Mr. Cunningham's failure to provide written notice. In addition, the May 14, 2012 Physician's Report of Employee's Injury and Disability and other medical documents in the record do not rectify the problem; even if a medical report could satisfy a claimant's requirement of providing timely written notice, the Physician's Report of Employee's Injury and Disability referenced by the ALJ is dated more than thirty days after Mr. Cunningham's accident and more than thirty days after April 2, 2012 when he was aware that his March 28, 2012 injury resulted in work-related lumbar spasms. As a matter of law, Mr. Cunningham has not provided timely notice of his back injury, and Employer did not have actual notice of Mr. Cunningham's back injury.

Turning to this issue of timely claim, contrary to the ALJ's ruling that "Claimant filed a claim the next day on March 29, 2012 (DE3)," *Cunningham, supra*, at p. 5, the claim in the First Report of Injury or Illness submitted as Employer's Exhibit 3 lists the part of body affected as "abdomen including groin." Similarly, the Employer & Employee First Report of Injury or Occupational Disease Mr. Cunningham completed on April 24, 2012 states

I was bending down to insert CD into server when I felt a sharpe [*sic*] pain in my right groin. While trying to stand up my L knee gave way and I fell..."

Employer's Exhibit 6. There is no evidence in the record that Mr. Cunningham timely filed any claim for a back injury.

#### CONCLUSION AND ORDER

As a matter of law Mr. Cunningham did not give timely notice of a back injury, and Employer did not have actual notice of a back injury. There is no evidence in the record that Mr. Cunningham timely filed any claim for a back injury. The February 2, 2015 Compensation Order is not supported by substantial evidence, is not in accordance with the law, and is VACATED.

FOR THE COMPENSATION REVIEW BOARD:

  
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MELISSA LIN JONES  
*Administrative Appeals Judge*

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June 18, 2015

DATE