GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-069

JENNIFER LAKE,

Claimant-Respondent,

v.

PITNEY BOWES, INC.,

Employer–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Nata K. Brown
AHD No. 11-320, OWC No. 679826

Michael H. Daney, Esquire, for the Petitioner

Matthew Peffer, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, HEATHER C. LESLIE,[1] AND MELISSA LIN JONES, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of Jennifer Lake for review of a Compensation Order issued April 6, 2012 (the CO) by an Administrative Law Judge (ALJ) in the hearings section of the District of Columbia Department of Employment Services (DOES). In the CO, the ALJ found that on April 22, 2011 Ms. Lake sustained an accidental injury arising out of and occurring in the course of her employment with her employer, Pitney Bowes, that as a result of that injury she was temporarily totally disabled from the date of the injury through the date of the hearing and continuing, that Pitney Bowes had failed to controvert Ms. Lake's entitlement to compensation in a timely fashion, and that Pitney Bowes was obligated under the Act to pay a 10% penalty on all benefits due through the date of the CO.

[1] Judge Russell and Judge Leslie are appointed by the Director of DOES as Board Members pursuant to DOES Administrative Policy Issuance No. 11-03 and 11-04 (October 5, 2011), respectively.

Pitney Bowes appealed, challenging all the decisions of the ALJ, arguing that (1) the ALJ improperly placed the burden of proof on it to disprove the happening of the alleged injury, (2) the evidence relied upon by the ALJ in concluding that Ms. Lake sustained an injury at work was not adequate to support that conclusion, (3) the ALJ improperly failed to deem compelling the testimony of its witness, (4) the ALJ improperly decided to make *in camera* review of a DVD containing video of Ms. Lake taken by a security surveillance camera rather than view it as part of the hearing proceedings, and (5) the ALJ's award of penalties is beyond that permitted under D.C. Code §32-1515 (d) and (e). Pitney Bowes does not contest the finding that Ms. Lake can not perform her pre-injury job, but contends that the back problems which prevent her from so performing were not caused by an accidental injury at work.

We affirm the award of temporary total disability from April 23, 2011[2] through the date of the formal hearing and continuing. We affirm the award of a 10% penalty on benefits owed for the dates April 23, 2011 through May 17, 2011, and reverse and vacate the award for penalties thereafter.

BACKGROUND

Ms. Lake was employed as a bio-technician, with duties involving package handling and inspection. Among the packages that she handled were diplomatic pouches and mail which were inspected for dangerous substances at the facility where she worked. In performing these duties, Ms. Lake wore a whole-body contamination suit. Her duties required her to lift up to 70 pounds.

She alleges that on April 22, 2011, she injured herself while working alone on a loading dock. She testified that a bag full of mail that she was handling had a hole in the bottom, and that when she noticed mail falling out she twisted to try to grab the bottom of the bag, resulting in immediate pain in her left leg.

She testified that she worked the rest of the day while experiencing increasing amounts of pain, and the next day, after being in so much pain that she was barely able to get out of bed, sought medical treatment at a hospital emergency room, where she complained of lower back pain, numbness and pain in her left leg and foot while walking, and bilateral groin pain. She was treated and released to follow up with her own physician, Dr. Tony Kannarkat, who she saw on April 25, 2011. Dr. Kannarkat placed her in an off-work status.

Ms. Lake was also seen in consultation by a neurologist, Dr. Matthew Ammerman, who after obtaining and reviewing an MRI of Ms. Lake's low back recommended surgery. Following the surgery Ms. Lake underwent a course of physical therapy, and throughout that time she was continually placed in off-work status by her doctors.

She was seen at Pitney Bowes's request by Dr. John Parkerson, an occupational medicine specialist, on October 24, 2011 for the purpose of an independent medical evaluation (IME). Dr. Parkerson

[2] Pitney Bowes points out in their brief, at footnote 2, that the date stated as the starting date of the claim for relief, April 22, 2011, is the date of the alleged injury, for which date Ms. Lake was presumably paid her normal wages. Thus the appropriate date for the claim to begin is April 23, 2011.

opined that Ms. Lake was at maximum medical improvement, and was capable of returning to full time, sedentary employment.

Ms. Lake has not worked since the alleged incident; employer presented no evidence that it has offered her a modified, sedentary job, nor did it proffer evidence of such jobs being available to her.

Pitney Bowes declined to accept Ms. Lake's claim that she had sustained a compensable work injury. It filed a Notice of Controversion with the Office of Workers' Compensation (OWC) on May 17, 2011, bearing the date May 4, 2011. According to the Notice of Controversion, the date that Pitney Bowes received the first report of the claimed injury was April 26, 2011.

Ms. Lake presented her claim for resolution to the ALJ at a formal hearing. At that hearing, she testified concerning the alleged incident and injuries, and presented the medical reports of her treating physicians containing their opinions that the back and leg injuries, and the resulting surgery, were related to the incident as she described it. She also submitted the Notice of Controversion.

Pitney Bowes presented the testimony of Michael Johnson, from Pitney Bowes's human relations (HR) department, the IME report from Dr. Parkerson, and a DVD purporting to show Ms. Lake on the loading dock at the time of the alleged injury. The ALJ did not view the DVD during the live formal hearing proceedings; rather, she viewed it later *in camera*. Pitney Bowes also submitted records pertaining to the investigation and settlement of a claim for personal injuries sustained in a motor vehicle accident occurring September 16, 2010, which settlement occurred April 27, 2011, a copy of Employer's First Report of Injury, copies of Ms. Lake's lumbar MRI and CT scan reports, and four written warnings for poor work performance issued by Pitney Bowes between October 9, 2009 and March 14, 2011.

Following the hearing, the ALJ issued the CO. In it the ALJ found that on April 22, 2011 Ms. Lake sustained an accidental injury arising out of and occurring in the course of her employment with Pitney Bowes, that as a result of that injury she was temporarily totally disabled from the date of the injury through the date of the hearing and continuing, that Pitney Bowes had failed to controvert Ms. Lake's entitlement to compensation in a timely fashion, and that Pitney Bowes was obligated under the Act to pay a 10% penalty on all benefits due through the date of the CO. This appeal followed.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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. *See*, D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code § 32-1501, *et seq.*, at § 32-1521.01 (d)(2)(A), (the Act), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

We start with Pitney Bowes's objection to the ALJ's handling of the surveillance DVD, EE 8. In the Memorandum in Support of The Application for Review (Pitney Bowes's brief), Pitney Bowes states that the ALJ abused her discretion "by refusing to play the surveillance video during the formal hearing", and argues that this error hampered its case because Mr. Johnson could have "clarified" the contents of the video, and "At the very least it would have given the Claimant an opportunity to identify the alleged torn bag with mail falling out and to show the area where the alleged twisting event took place". Pitney Bowes's Brief, unnumbered pages 1 and 9, respectively.

We are unable to determine why the procedure employed here is characterized as a "refusal" to show the DVD during the formal hearing. We have reviewed the hearing transcript (HT), and while it is 199 pages long and we may have missed something, we have identified nine places in the record where the DVD is discussed: HT 11, 19, 111, 133, 150, 159, 175, 185 and 186. In none of these places is there any discussion about why the DVD was not to be shown; there is no discussion that we have found or to which we have been directed concerning the matter at all. And specifically, nothing that we have seen or to which we have been directed reveals that Pitney Bowes lodged an objection to the procedure to be employed. The places where one would most expect the discussion—when the evidence is identified and introduced (HT 11), during opening statement by Pitney Bowes counsel (HT 18 – 20), at the opening of Pitney Bowe's case (HT 93), or in Pitney Bowes's closing argument (HT 185 – 193)—contain no objection to the procedure being employed.

D.C. Code §32-1525, "Hearings before Mayor" governs the formal hearing process. It provides, in pertinent part:

> (a) In making an investigation or inquiry or conducting a hearing the Mayor shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Prior to the hearing before the Mayor the parties may conduct such discovery, including but not limited to the use of interrogatories and depositions as, in the opinion of the Mayor, will be helpful in determining the rights of the parties.

Nothing therein prohibits the procedure employed. On the contrary, it is clear that the Act intends to afford the ALJ discretion in the procedures to be employed in the formal hearing process. Further, if Pitney Bowes wished to confront Ms. Lake with the video (or, as Pitney Bowes puts it in their brief, provide her with "an opportunity" to identify the supposed bag with a hole in it and the location of the incident) they presumably could have done so in a prehearing deposition. As the owner and possessor of the DVD, they had every opportunity to get Ms. Lake's reaction to the contents of the surveillance. And, if Pitney Bowes had sought to confront Ms. Lake with the video for the benefit of the reaction, a request to do so should have been made on the record.

In any event, in the absence of an objection by Pitney Bowes on the record to the procedure employed, we see no basis for the objection raised before us, nor do we detect any abuse of discretion in electing to follow the procedure.

Regarding the claim on appeal that the ALJ improperly placed the burden of proof on Pitney Bowes to disprove the happening of the alleged injury, Pitney Bowes states that, after finding the presumption of compensability[3] had been invoked and rebutted, the ALJ wrote "Employer has not shown that her injury was caused by another incident", and that Dr. Parkerson's opinion "does not explain how or why [the Claimant's] current symptoms came about." Pitney Bowes's brief, unnumbered page 5.

Taken out of context and in isolation, these quotes might suggest that Pitney Bowes's argument has merit. However, in context and out of isolation, they do not. The first quote is found in the Findings of Fact, and it is indeed a fact that Pitney Bowes did not show, at least to the ALJ's satisfaction, that the injury (which Dr. Parkerson appears to credit as being real, inasmuch as he only opines that sedentary work is appropriate for Ms. Lake) was caused by some other incident. This finding of fact follows five sometimes lengthy paragraphs containing other facts being found concerning the the incident, its medical sequalae, and the happening of the IME. Again, these are the facts as the ALJ found them. This sentence, coming as it does following dozens of other "facts", is not meant to be taken as part of the rationale of the decision. It is one of a series of facts that the ALJ found, not a statement concerning the burden of proof. Certainly, if Dr. Parkerson had expressed his view that the conditions that he observed *were* caused by some other accident about which he had been provided information that opinion could be taken into account by an ALJ considering causation. The absence of such a statement by Dr. Parkerson is likewise a reason an ALJ might question a medical opinion.

It is in the Discussion portion of the CO that the ALJ provides the reasoning behind her findings of fact. There she describes the evidence presented by both parties on the issues in dispute at some length, and gives cogent, reasonable reasons for deciding as she did. Regarding the second statement relating to Dr. Parkerson, the ALJ is not stating that Dr. Parkerson's failure to explain how the injury came about represents a failure to meet a burden of proof on Pitney Bowes's part. Rather, it is part of a larger discussion of why the ALJ found Dr. Parkerson's report and opinion unpersuasive: it is inconsistent in that he opines that the herniated disc on the MRI shouldn't be considered clinically significant, yet he concedes that Ms. Lake is limited to sedentary work and has restricted range of motion. Acknowledgement of debilitating symptoms without suggesting where they came from is a reasonable basis for rejecting an opinion that they didn't come from an incident which might appear to have the potential to have caused them, such as the work incident as described by Ms. Lake to him.

[3] D.C. Code §32-1521 provides that "In any proceeding for the enforcement of a claim under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter; (2) That sufficient notice of such claim has been given; (3) That the injury was not occasioned solely by the intoxication of the injured employee, and ; (4) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

In general, the remaining compensability arguments-- that the ALJ disregarded the testimony of Pitney Bowes's witness and that Ms. Lake's evidence doesn't support the finding of a compensable accidental work injury-- amount to nothing more than disagreement with the weight that was given to the witnesses' testimony and documentary evidence, which is not a matter with which we can intercede on a party's behalf, in the absence of clear error, which does not appear in this matter as it relates to the compensability determinations made by the ALJ. We note specifically Pitney Bowes's argument that in weighing the evidence the ALJ impermissibly "ignored" the evidence that she had earlier deemed adequate to overcome the presumption of compensability is seriously flawed as a matter of logic. Under that rationale, any time an employer adduces enough evidence to overcome the presumption the employer must *ipso facto* prevail when the evidence is weighed. There would thus be no presumption.

Lastly, we turn to the penalty for late controversion. D.C. Code § 32-1515, "Payment of compensation" provides in pertinent part:

> (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.
> (b) The 1st installment of compensation shall become due on the 14th day after the employer has knowledge of the job related injury … on which date all compensation due shall be paid.
> […]
> (d) If the employer controverts the right to compensation he shall file with the Mayor, on or before the 14th day after he has knowledge of the alleged injury … and its relationship to the employment, a notice … stating that the right to compensation is controverted …
> (e) If any compensation payable without an award is not paid within 14 days after it becomes due as provided by subsection (b) in this section, there shall be added to such unpaid installment an amount equal to 10% thereof … unless notice is filed under subsection (d) of this section …

The ALJ found that Pitney Bowes had knowledge of the alleged work injury on April 26, 2011, based upon the contents of the Notice of Controversion that was in evidence and was found to have been filed May 17, 2011. Fourteen days after April 26, 2011 was May 10, 2011, being the date that the first installment "became due", or the date that the Notice of Controversion should have been filed in order to be timely[4]. The ALJ's finding that Pitney Bowes's Notice of Controversion was not timely is thus supported by substantial evidence. It is undisputed that Pitney Bowes has not paid any compensation on this claim, thus the determination by the ALJ that it is liable for a 10% penalty for failing to timely pay compensation due without an award is in accordance with the law.

However, the ALJ erred in awarding the penalty for all payments due up to the date of the CO. She cites no authority for selecting the date of the CO as the date upon which the penalty assessment should end, and nothing in the statute supports that date.

[4] Despite being called the date that the compensation is "due", the statute gives an additional 14 days to the employer to actually get the payment to the claimant before the 10% penalty is owed.

While the statute is somewhat ambiguous with respect to how the end date for penalties is determined, there are at least two plausible options.

The first is to assess a penalty on the amount of benefits due equal to the duration of the lateness of the Notice of Controversion. In this case, the Notice was seven days late, and one might argue that the penalty should therefore be 10% of the first week of compensation.

The second is to assess the penalty from the date that compensation obligation commenced until the date the Notice of Controversion is filed. In this case, Pitney Bowes's obligation to pay compensation commenced April 23, 2011 (see footnote 2, *ante*), while the Notice was filed late on May 17, 2011.

As between these two options, the second is more sensibly designed for the obvious purpose of encouraging either payment or controversion within 14 days of an employers' awareness of a potential current compensation obligation. Thus, the point of the section, when read together, is to penalize the employer for doing neither act in a case where compensation is owed.[5]

Had Pitney Bowes accepted the claim but merely been late in making its first payment, the penalty would be assessed upon the payments that were late, but wouldn't continue to be added to the ongoing payments as they became due (assuming, of course, that they were paid on time). Similarly, therefore, a penalty premised upon the failure to file the Notice accrues for the duration of that failure, which ended May 17, 2011.

Accordingly, assessment of a penalty on compensation from April 23, 2011 through May 17, 2011 is in accordance with the Act, while assessment on amounts owed thereafter is not.

CONCLUSIONS

The ALJ's *in camera* review of EE 8 without it being shown at the formal hearing was not contrary to the Act or an abuse of discretion by the ALJ.

The findings of fact concerning Ms. Lake's fall on the loading dock, her subsequently being limited to sedentary duty as a result of that fall, the absence of an offer of modified employment by Pitney Bowes, and the late filing of the Notice of Controversion are all supported by substantial evidence.

The award of temporary total disability from April 23, 2011 through the date of the hearing and continuing, and the assessment of a 10% penalty on compensation owed for the period April 23, 2011 through the date the Notice of Controversion was filed are in accordance with the law.

The assessment of the 10% penalty on compensation owed after the filing of the Notice of Controversion is not in accordance with the law.

[5] If it had been determined in this case that there had been no accidental injury in the first instance, there would be no penalty for failing to file the Notice within 14 days or ever.

ORDER

The award of temporary total disability from April 23, 2011 through the date of the formal hearing and continuing, and the assessment of a 10% penalty on compensation owed from April 23, 2011 through May 17, 2011 are affirmed. The assessment of a 10% penalty thereafter is vacated and reversed.

FOR THE COMPENSATION REVIEW BOARD

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JEFFREY P. RUSSELL
Administrative Appeals Judge

June 20, 2012
DATE