

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 16-067**

**LARRY D. THOMAS,  
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA WATER & SEWER AUTHORITY and  
PMA MANAGEMENT CORPORATION,  
Employer/Third Party Administrator-Petitioner.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 OCT 4 PM 12 12

Appeal from an April 21, 2016 Compensation Order  
by Administrative Law Judge Gennet Purcell  
AHD No. 15-517, OWC No. 728107

(Decided October 4, 2016)

Allen J. Lowe for Claimant<sup>1</sup>  
Douglas A. Datt for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, *Administrative Appeals Judges* and LAWRENCE D. TARR *Chief Administrative Appeals Judge*.

LINDA F. JORY for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Larry D. Thomas (“Claimant”) worked for the District of Columbia Water & Sewer Authority (“Employer”) as a quality assurance technician. Claimant’s job duties were to inspect all of Employer’s maintenance equipment and service vehicles and equipment to ensure they are up to certain standards and safe to go back into service.

On June 24, 2014, Claimant was instructed by his supervisor to conduct an inspection on a heavy, six-wheel dump truck. To do this Claimant had to manually remove six large dump truck tires and brake drums, using a sledgehammer to loosen the brake drums from behind each tire. The tires weighed approximately 350 to 400 pounds. While removing the last tire and brake

<sup>1</sup> Eric M. May appeared on behalf of Claimant before the Administrative Hearings Division.

drum, Claimant began to feel pain in his back. Claimant advised his supervisor Anthony Lancaster he could not work further due to his pain. On the same day, Lancaster sent Claimant an email wherein Lancaster stated, "Per our conversation referencing your back will not let you go any further. Please discontinue the detailed and visual inspection and we will have someone else to complete it. In the meantime I would suggest that you take it easy for the rest of the day and see if it gets better. If not please let us (the fleet staff) know as soon as you know".

Claimant did not return to work for two days. On August 26, 2014 Claimant underwent a physical examination by his primary care physician and reported that he had back pain that "started while lifting at work".

Claimant filed an internal Employee Injury Report with Employer where he indicated he sustained an injury to his back on June 24, 2014 while removing heavy truck wheels and brake drums. Claimant did not seek further medical treatment until May 5, 2015, when he saw Dr. Wayne M. Roznan, orthopedic surgeon. Claimant was placed on a light duty status at work from June 1, 2015 to July 1, 2015. An MRI of claimant's back on May 18, 2015 revealed disc dissection at the L2-S1 level with mild spondylosis at L2-3.

A dispute arose as to whether Claimant had sustained an injury at work and whether Employer had been provided timely notice of his injury. A formal hearing was conducted by the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES") on January 2, 2016.

The issues presented to the Administrative Law Judge ("ALJ") at the formal hearing were:

1. Did Claimant have an accidental injury on June 24, 2014?
2. Did Claimant provide timely notice of his injury to his Employer pursuant to § 32-1513 of the Act?

The ALJ concluded that Claimant sustained an accidental work injury on June 24, 2014 and that Claimant's failure to give timely notice of his injury is within the exception provided by § 32-1513 (d)(1) and is excused. The ALJ awarded Claimant's claim for relief of medical treatment and medical expenses related to the June 24, 2014 injury.

Employer filed Employer District of Columbia Water and Sewer Authority and Third Party Administrator, PMA Management Corporation's Application for Review and Memorandum of Points and Authorities in support of Petitioner Employer and Third-Party Administrator's Application for Review (Employer's Brief) asserting the Compensation Order ("CO") is not supported by substantial evidence and not in accordance with the law. Claimant filed a Memorandum of Points and Authorities of Claimant/Respondent in Opposition to Mid-American/Petitioner's<sup>2</sup> Application for Review the Application for Review ("Claimant's Brief") arguing that the CO should be affirmed.

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<sup>2</sup> Notwithstanding the incorrect identity of Employer, the brief correctly identifies Employer as D. C. Water and Sewer Authority.

## ISSUE ON APPEAL

Is the January 2, 2016 CO supported by substantial evidence and in accordance with the law?

### ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act ("the Act") and as contained in the governing regulations is limited to making a determination whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). "Substantial evidence" as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). Consistent with this scope of review, the CRB is 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

#### ***Did the ALJ err in determining Claimant sustained an accidental injury June 24, 2016?***

On this issue Employer asserts:

The ALJ essentially decided that the testimony of the Claimant was credible, and accorded it greater weight than the evidence provided by the Employer. While Employer recognizes that a determination of credibility is certainly within the province of the ALJ and is difficult to overturn, in the instant matter the ALJ failed to even consider or did not focus on evidence that completely undermined the Claimant's version of events.

Although an Administrative Law Judge's decision regarding credibility must be given great deference (*Dell v. DOES*, 499 A.2d 102 (1985)), when a Claimant is determined to be an unreliable witness, Claimant's claim cannot stand.

It is well established that the testimony of a witness may be discredited or impeached with prior inconsistent statements. Standardized Civil Jury Instruction for the District of Columbia, No. 3-8 (1998); *Georgetown University v. D.C. Dept. of Employment Services*, 862 A.2d 387. 392 (D.C. 2004).

Claimant did not provide any written information regarding a work-related accident until April 25, 2015, notwithstanding the fact that he saw Dr. Davidson for treatment for his back on August 26, 2014 (CE 1 at 1). The ALJ did not focus on or failed to even mention several inconsistencies in the Claimant's testimony. First, Claimant is not an uneducated individual, having obtained an Associates Degree from Strayer University in Business Management, as well as serving in

the United States military, and being an ASE Certified Automotive and Truck Technician (HT at 58, 75-6).

Claimant specifically testified that prior to June 24, 2014 he had no back problems. (HT at 59) Despite that testimony, he confirmed advising Dr. Davidson that he had hurt his back before the day of the work related accident, lifting something as [sic] work, and then hurt it again when he lifted a heavy tire. (HT at 85).

Despite Claimant knowing that he had sustained a work related accident, he submitted the bills from Dr. Davidson and Dr. Rozran to his private health care insurer, BlueCross/BlueShield, and the bills were paid. (HT at 83, 84, 88).

Claimant provided three completely different dates for the happening of the accident. When he first saw Dr. Rozran on May 5, 2015, he reported the accident occurring on June 28, 2014. (EE 6 at 10) He had no plausible explanation for the incorrect date. (HT at 88, 89, 90, 93, 94).

When he completed the Employee Injury Report on April 29, 2015, he initially listed the Date of Injury as July 1, 2014. (EE 3 at pg. 3) He then had no research the issue to determine the correct date. (HT at 93, 94, 95).

Lastly, Claimant provides Dr. Davidson no date of injury, rather describing a condition consistent with someone who is a 60 years old – “He sort of gives it a little rest and takes a break and then it seems to get better.” (CE 1 at 1).

Thus, the ALJ’s determination that Claimant sustained an Accidental Injury, which was based entirely on the ALJ’s evaluation of Claimant’s credibility versus that of Anthony Lancaster, should be reversed, as the ALJ’s conclusion that Claimant’s evidence was entitled to greater weight is inconsistent with the record evidence.

Employer’s Brief at 23-25 (AHD case citations omitted).

Claimant responds:

The ALJ determined not only that the Claimant was credible, but ALJ that [sic] was Employer’s main witness Lancaster who was unreliable and inconsistent. CO p. 2

Employer makes various stabs at attacking Claimant’s credibility in its application for review. None of them strike to the heart.

That Claimant did not provide written information regarding a work-related accident (Employer & TPA’s Application for Review, hereinafter “ETAR”, p. 24)

is not disputed in the ALJ's findings, and certainly does not make him an unreliable witness.

ETAR would have us believe that claimant advised Dr. Davidson that he had hurt his back before the date of the here disputed work related accident. *Id.* In fact, Claimant states only that he may have hurt his back lifting something at work (which still does not negate the work relatedness of the injury), and that it was before lifting the heavy tire. HT 86-87.

ETAR suggests that it was improper for Claimant to submit medical bills for his work injury to his private insurance carrier. It would seem that he would have Claimant not get medical treatment.

ETAR would have us believe that Claimant's difficulty to pin down an exact date for an incident that grew worse over time makes him incredible.

Claimant's Brief at 4, 5.

At the outset we note that neither "injury arising out of or in the course of" or "causal relationship" were raised as contested issues in the instant matter and the ALJ correctly did not include a presumption analysis on the accidental injury issue.

Claimant asserts:

Claimant was consistent in his testimony; he was injured at work on June 24, 2014; he didn't realize how bad the injury was, but mentioned it to his supervisor. He later sought treatment for the injury, and the treatment, as well as the treating physicians' opinion are consistent with his testimony. Claimant's testimony could have been accepted by a reasonable person to support a particular conclusion. This constitutes substantial evidence. The law is clear "If substantial evidence exists to support the hearing examiner's findings, the existence of substantial evidence to the contrary does not permit the director to substitute his judgment for the of the examiner" *Marriott*, 834 A.2d at 885, as quoted in *Young, supra*.

Claimant's Brief at 5.

After review of the hearing transcript as well as the record evidence we do not agree with Claimant that "None of these alleged inconsistencies raise a lack of credibility", nevertheless we cannot agree with Employer that the ALJ failed to consider or did not focus on evidence that completely undermined the Claimant's version of events. The CRB "may not consider the evidence *de novo* and make factual findings different from those of the ALJ and "is bound by the ALJ's findings of fact even though the we may have reached a contrary result based on an independent review of the record. *Marriott, supra*. Thus we find no error made by the ALJ in reaching her conclusion that Claimant sustained an accidental work injury on June 24, 2014.

***Did the ALJ err in determining Employer had actual knowledge of Claimant's injury and its relationship to his employment?***

Although not acknowledged by the parties or the ALJ, pursuant to the DCCA precedent, a lack of timely notice bars claims for indemnity payments under the Act. It has no such effect upon a Claimant's entitlement to continuing medical care for work related injuries. *See Safeway Stores v. DOES*, 832 A.2d 1267 (D.C. 2003) (*Safeway*). Although no claim for indemnity benefits has been made, given that such claims may arise in the future, the ALJ's determination on the issue of notice would be the law of the case. Inasmuch as the Act provides an exception to its timely notice provisions contained in § 32-1513(a-c) if it is determined Employer had actual notice of an injury but Claimant failed to provide timely notice pursuant to § 32-1513 (a-c), that issue must be raised at the first hearing. We find no error in AHD adjudicating the issue of notice at this time. *See* § 32-1513 (d)(2).

In support of Employer's argument that the ALJ erred in determining Employer had actual knowledge of the injury and its relationship to his employment, Employer relies on the CRB's decision in *Hutcherson v. Providence Hospital*, CRB No. 03-120 (November 3, 2005) (*Hutcherson*):

In *Hutcherson*, Claimant alleged that she was injured at work on February 1, 2002, and sought treatment with her family doctor on February 7, 2002 where her chief complaint was a breathing problem. Her doctor's notes for that first visit reflect neurological symptoms of tingling and numbness, and that Claimant had some finger symptoms during the preceding month. Claimant's testimony, which was not contradicted, was that she verbally reported her symptoms to one of her supervisors immediately after seeing her doctor on that date. Claimant returned to the doctor on February 21 2002 when he noted an assessment of carpal tunnel syndrome and referred Claimant to a neurologist. The neurologist saw Claimant on March 7, 2002 and March 22, 2002 and diagnosed Claimant with carpal tunnel syndrome for which he recommended left upper extremity surgery. When Claimant next saw her family doctor on April 4, 2002, he discussed the follow-up protocol of occupational therapy, noting that EMG results had confirmed the diagnosis of carpal tunnel syndrome.

On April 5, 2002, and again on May 8, 2002, Claimant attempted to report her bilateral hand and arm condition to employer's health office. On April 5 [sic] she had been provided an employee health form to fill out and have complete by her supervisor. On May 8, 2002, employer Claimant workers' compensation procedures and forms to file with OWC. That same day, Claimant had a detailed discussion with employers' nurse regarding obtaining occupational therapy, and the notes taken by the nurse on both dates indicate Claimant was advised she needed to proceed through her health insurance unless or until she obtained a written report from her doctor to indicate her symptoms were work-related.

On May 13, 2002, Claimant filed a written Notice of Injury with OWC reporting bilateral upper extremity problems, related to repetitive hand movement, which

began while she was writing at her desk. The ALJ concluded that oral notice of an upper extremity problem on February 1, 2002 injury and its relationship to her employment and actual knowledge of the work duties was sufficient actual notice of Claimant's February 1, 2002 injury and its relationship to her employment.

The Board noted that the employer must be presented with a degree of specificity in order to, among other things, enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, citing *Teal v. DOES*, 580 A.2d 647 (D.C. 1990), and 2B A. Larson, *The Law of Workmen's Compensation* § 78.10 at 15-102(1989).

The Board found that although Claimant's testimony, which was not contradicted, was that she verbally report her symptoms to one of her supervisors immediately after seeing her doctor on February 7, 2002, and that she discussed her work duties with her doctor (the Board noted that the first mention of her work duties appeared in his April 4, 2002 treatment notes), the Board found, that, in fact, employer was not informed of an alleged relationship between the carpal tunnel syndrome and her work until April 5, 2002 when Claimant attempted to file an Employee Report of Occupational Injury/Illness with Employee Health.

The Board noted that the record contained no evidence that the Claimant associated her upper extremity symptoms to her employment, thereby creating actual knowledge of a work injury. Therefore the Board found that the ALJ's finding that employer had actual knowledge of Respondent's injury by February 7, 2002 was not supported by the evidence of record.

The Board noted that the ALJ found that Claimant's timely oral notice to her supervisor, and employer's actual knowledge of Claimant's condition and work duties, provided sufficient actual notice pursuant to D.C. Code, as amended, § 32-1513, citing *Jimenez v. DOES*, 701 A.2d 837 (1997). The Board concluded that not only was the ALJ's finding of actual notice not supported by substantial evidence, but the Compensation Order was not in accordance with the law, as the employer did not have actual notice of the relationship between the injury and Claimant's employment within the thirty day time requirement set forth in the D.C. Code § 32-1513.

Employer's Brief at 14-16.

Employer asserts the evidence in the instant matter likewise supports a conclusion that Employer did not receive actual notice, as alleged by Claimant. We agree. We note that the ALJ's conclusion that Employer had actual notice is based on the email Claimant received from supervisor Lawson on June 24, 2014. Concluding that Lawson was not a credible witness, the ALJ explained:

Despite his denial on the record, the record evidence supports that Lancaster, and as such, the Employer ostensibly had specific knowledge of Claimant's back pain

sustained on June 24, 2014, in the early afternoon. Despite his incredible, and at times, inconsistent testimony, Employer's witness and Claimant's supervisor, Lancaster, confirmed in his email written on June 24, 2014, that he was aware of the claimed work incident, the pain Claimant was experiencing and his immediate inability to continue working, Lancaster further wrote in that email, that Claimant was to "take it easy for the rest of the day and see if it gets better." Finally, Lancaster closed by stating "let us (the fleet staff) know as soon as you know. CE 5 at 19.

Surely as an Employer's supervisor and representative, Lancaster's attestation to Claimant was in reference to, at most his injury, and at the least, the onset of Claimant's pain, both of which would have to Lancaster's knowledge, occurred on that very same work day. Accordingly, notice albeit not formal, was given by Claimant to Employer on June 24, 2014.

CO at 6.

As we held in *Hutcherson*:

In discussing the twofold purpose of the notice requirement under now § 32-1513<sup>2</sup> and "actual notice", the Director of the Department of Employment Services, (the Director) held:

Bearing these purposes in mind, it is, therefore, reasonable to hold that in order to attribute actual knowledge to an employer, the injured employee must inform the employer that an injury occurred, when and where the injury happened, and the work activity that caused injury with a degree of specificity such that the employer gains the quantum of information that would lead a reasonable man to conclude that liability is possible and an investigation should ensue. Without this degree of specificity, the purposes will not be served.

*See Wanda McIntyre v. Safeway Stores, Inc.*, Dir. Dkt. No. 01-41, OHA No. 00-309, OWC No. 550033 (April 23, 2002)<sup>3</sup> (*McIntyre*).

<sup>2</sup> As stated in voluminous notice cases in this jurisdiction, the notice requirement 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. *See Teal v. D.C. Department of Employment Services*, 580 A.2d 647 (D.C. 1990), citing 2B A. Larson, *The Law of Workmen's Compensation* §78.10, at 15-102(1989).

<sup>3</sup> Following AHD's issuance of a Compensation Order on Remand, the matter was appealed to the Court of Appeals for the Court to determine if untimely notice bars the claim in its entirety and

precludes payment of medical benefits. *See Safeway Stores Inc. v. D.C. Dept. of Employment Services*, 832 A.2d 1267 (D.C. 2003).

*Hutcherson, supra* at 4.

The fact that Claimant's back began hurting while working, that he testified he was doing the work of younger men or that Claimant described his work for Employer as "back breaking" does not equate to a notice that an injury occurred as alleged on June 24, 2014. Although *McIntyre* was not cited by the ALJ, this Panel disagrees the email sent to Claimant by Lancaster on June 24, 2014, the date of the incident in question establishes that an injury occurred, when and where the injury happened, and the work activity that caused injury with a degree of specificity such that the employer gains the quantum of information that would lead a reasonable man to conclude that liability is possible and an investigation should ensue. Thus, this Panel concludes the ALJ's determination that Employer had actual notice of Claimant's injury within 30 days is not supported by substantial evidence and in accordance with the law and is reversed.

#### CONCLUSION AND ORDER

The conclusion that Claimant sustained an accidental injury on June 24, 2014 to his back is **AFFIRMED** as it is supported by substantial evidence and is in accordance with the law.

The conclusion of law that Claimant's failure to provide written timely notice of an injury to Employer is excused as Employer had actual knowledge of an injury is not supported by substantial evidence and is **VACATED**. The matter is remanded to AHD to issue an order which states Claimant's untimely notice is not excused; however, Claimant is not precluded from receiving medical benefits pursuant to *Safeway, supra*.

*So ordered.*