

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB (Dir.Dkt.) No. 02-107

OLGA I. PEREZ,

Claimant - Respondent,

v.

MORGANS, INC. AND NATIONWIDE MUTUAL INSURANCE COMPANY,

Employer/Carrier - Petitioner.

Appeal from the Compensation Order of Karen R. Calmeise
Administrative Law Judge, Department of Employment Services
OHA No. 02-119; OWC No. 5712

Jeffrey W. Ochsman, Esq., for Employer/Carrier – Petitioner

Matthew Pepper, Esq., for Claimant - Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS and SHARMAN MONROE, *Administrative Appeals Judges*

E. COOPER BROWN, *Chief Administrative Appeals Judge*, for the Review Panel:

Amended DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers'

PRIOR PROCEEDINGS; DECISION AND REMAND ORDER OF DIRECTOR VACATED

Following an evidentiary hearing before the Office of Hearings and Adjudication (now the Administrative Hearings Division), a Compensation Order was issued by the presiding Administrative Law Judge on November 27, 2002 finding that Claimant-Respondent (hereafter, Respondent) had sustained an accidental injury to her cervical spine and left wrist which arose out of and in the course of her employment. The ALJ also found that Respondent failed to provide Employer-Petitioner (hereafter, Petitioner) with timely notice of her injury, and further that the exceptions to the notice requirement as set forth under D.C. Code § 32-1513(d) had not been met. Accordingly, Respondent's claim for disability compensation benefits was denied, while her claim for payment of medical expenses related to her injuries was granted.

Following a timely appeal by Petitioner to the Office of the Director (now the Compensation Review Board), a Decision and Remand Order of the Director was entered in this matter on April 25, 2003, followed by an "Errata" Order issued October 16, 2003 amending said decision. Pursuant to the Director's decision, as amended, the ALJ's denial of temporary total disability benefits was vacated, and the case ordered remanded to the Office of Hearings and Adjudication for further proceedings consistent with the Director's decision. The ALJ's award of medical benefits was affirmed.

A timely joint motion of the parties, accompanied by stipulation, was subsequently filed seeking reconsideration and vacatur of the Director's Decision and Remand Order, as amended. Said motion has been pending without action since the parties' submission.

By this Amended Decision and Order, the Compensation Review Board grants the parties' motion, vacates the prior decision of the Director (as modified by the "Errata" Order), and issues the instant Amended Decision and Order affirming the Compensation Order of November 27, 2002 for the reasons hereafter set forth.

FACTUAL BACKGROUND

Respondent worked for Petitioner as a seamstress for more than eighteen years. In 1997 Respondent sought medical treatment for complaints of headaches, neck pain, left arm pain and numbness, which conditions her treating physician, Dr. Alberto Borges, diagnosed in 1997 as related to her work (and so informed Respondent). Respondent commenced medical treatment from Dr. Borges through and until 2000, during which time she also continued to work for Petitioner as a seamstress. In 2000 Dr. Borges referred Respondent to a neurosurgeon for diagnosis and further treatment, resulting in surgery to her spine and left wrist in January and February of 2001. Following recovery from her surgeries, Respondent returned to work for Petitioner in June of 2001 in her former capacity as a seamstress.

Respondent did not notify Petitioner of her physical condition and need for spinal surgery until some time in late 2000, when she spoke with her supervisor. Respondent never provided Petitioner with written notice of her work-related injuries.

ANALYSIS

The issues on appeal, based upon the Petitioner's Application for Review, are whether the ALJ erred in the application of the presumption of compensability under the Act, and whether the ALJ erred in awarding Respondent medical benefits when Respondent had failed to provide timely notice of her alleged injury to Petitioner. Petitioner argues that the ALJ erred by finding that Respondent's disability was causally related to her employment, and further that that the ALJ erred in awarding Respondent medical benefits when Respondent had failed to provide timely notice of her injury to Petitioner. Respondent filed no opposition on appeal.

The scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Review Panel) as established by the Act and as contained in the governing regulations 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. D.C. Official Code § 32-1521.01(d)(2)(A). "Substantial evidence", as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this Review Panel are 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 reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In order to benefit from the presumption of compensability under the Workers' Compensation Act, the claimant must make an initial showing of employment relationship of the disability. This initial showing consists of some evidence of the disability and the existence of a work related event, activity, or requirement which has the potential to cause or contribute to the disability. *See Ferreira v. D.C. Dept. of Employment Services*, 611 A.2d 548, 550 (D.C. 1992). "[O]nce an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act." *Washington Hospital Center v. D.C. Dept. of Employment Services*, 744 A.2d 992, 996 (D.C. 2000). Where the employee presents sufficient evidence to trigger the Act's presumption of compensability, the burden shifts to the employer to submit substantial evidence showing that the disability did not arise out of and in the course of the claimant's employment. *Ferreira*, 531 A.2d at 655. *See also, Parodi v. D.C. Dept. of Employment Services*, 560 A.2d 524, 526 (D.C. 1989). The employer must come forth with evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Waugh v. D.C. Dept. of Employment Services*, 786 A.2d 595, 600 (D.C. 2001).² Upon a successful showing by the

² Beyond stating that "substantial evidence" means "more than a mere scintilla," the Court of Appeals has declined to establish a precise quantum of proof needed to meet the substantial evidence threshold. Required is only that an employer offer "substantial evidence" to rebut the statutory presumption, "not to disprove causality with an absolute certainty." *Safeway Stores, Inc. v. D.C. Dept. of Empl. Services*, 806 A.2d 1214, 1220 (D.C. 2002) (quoting

employer, the burden returns to the claimant to prove by a preponderance of the evidence, without the benefit of any evidentiary presumption, that the complained-of injury arose out of and in the course of his/her employment. *Ferreira, supra; Spartin v. D.C. Dept. of Employment Services*, 584 A.2d 564 (D.C. 1990).

In the instant case, the ALJ properly concluded that Respondent had, through her testimony and her medical reports, satisfied the initial showing required to invoke the Act's presumption of compensability. The ALJ next properly concluded that Petitioner had submitted sufficient evidence to rebut this presumption (*i.e.* the IME opinion of Dr. Gary London that Respondent's neck and cervical spine problems were the result of degenerative changes and not related to her employment, and the opinion of Dr. Jerold Mikszewski, one of Respondent's treating physicians, who attributed her complaints to a prior slip and fall injury).

The Act's presumption of compensability having been rebutted, the ALJ properly continued the inquiry into the issue of causality by weighing the competing evidence of record as required under the statutory scheme. *See Georgetown University v. D.C. Department of Employment Services*, 830 A.2d 865, 870-871 (D.C. 2003). Although the ALJ poorly described her analytical effort,³ the ALJ nevertheless clearly weighed the evidence and concluded, based thereon, that Respondent had met the burden of proof required of her in order to establish that her injury arose out of and in the course of her employment. Substantial evidence of record supports the ALJ's conclusion in this regard.

We next turn to the issue of the notice an employee is required to provide upon experiencing a work-related injury. The Act requires that written notice be provide to the Mayor and to the employer within 30 days after the date of the injury or within 30 days after the employee "is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury . . . and the employment." D.C. Official Code § 32-1513(a), (b) and (c). Failure to comply with this requirement will serve to bar a claim for benefits under the Act unless the employee's non-compliance is excused pursuant to the provisions of D.C. Official Code § 32-1513(d):

- (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

Washington Hospital Center v. D.C. Dept. of Employment Services, 744 A.2d 992, 1000 (D.C. 2000)). At the same time, the Court has indicated that the statutory presumption "is not so strong as to require the employer to prove causation is *impossible* in order to rebut it." *Id.* Thus, "it is sufficient for the employer to present substantial medical evidence - as opposed to unequivocal medical evidence - to rebut the statutory presumption." *Id.* at 1221.

³ Upon an initial first reading, the ALJ seemingly made inconsistent findings resulting in an unsupportable conclusion on the causal relationship issue. After determining that the presumption had been rebutted (Comp Order, p. 4), the ALJ also stated that Petitioner "failed to provide 'substantial evidence' of a non-employment related basis to sever the potential employment connection" Respondent had proven, and then went on to state that Respondent "gains the benefit of the presumption." A more careful reading of the ALJ's analysis convinces us that notwithstanding the conflation of the terminology, her analytical approach was nevertheless correct, resulting in a weighing of the competing evidence and the determination (whether stated as such or not) that Respondent had met the requisite burden of proof with respect to the issue of causality.

(2) If the Mayor excuses such failure on the grounds 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.

Substantial evidence of record supports the ALJ's finding that Respondent failed to provide Petitioner with written notice of the injury. Substantial evidence of record further supports the finding that Respondent's noncompliance is not excused by either of the exceptions set forth under D.C. Official Code § 32-1513(d). Consequently, the ALJ correctly held that Respondent's failure to comport with the notice requirements of D.C. Official Code § 32-1513 bars Respondent's claim for disability compensation benefits under the Act.

Finally, as to the award of medical benefits notwithstanding Respondent's failure to comply with the notice requirements of the Act, Respondent's failure does not serve as a bar against receiving medical coverage for the work-related injuries Respondent has sustained. Petitioner is still required to pay for Respondent's causally related medical expenses. *Gray v. Washington Nursing Facility*, Dir. Dkt. No. 02-14, OHA No. 01-460 (August 29, 2002). *Accord, McIntyre v. Safeway Stores, Inc.*, Dir. Dkt. No. 01-41, OHA No. 00-309 (April 23, 2002); *Washington v. Pro-Football, Inc.*, Dir. Dkt. No. 98-37, H&AS No. 97-186 (July 14, 1999).

CONCLUSION

Substantial evidence of record supporting the ALJ's determination that Respondent's injury arose out of and in the course of her employment, Respondent is nevertheless barred from receiving disability compensation benefits under the Act due to her failure to provide timely written notice of her work-related injury pursuant to D.C. Official Code § 32-1513(a), (b) and (c), or to be excused from such notice requirement pursuant to D.C. Official Code § 32-1513(d). Respondent is nevertheless entitled to payment of causally related medical expenses.

ORDER

The Decision and Remand Order of the Director entered in this matter on April 25, 2003, and the subsequently issued "Errata" dated October 16, 2003, are hereby VACATED, and in place thereof this Amended Decision and Order is entered AFFIRMING in all respects the November 27, 1002 Compensation Order herein appealed.

FOR THE COMPENSATION REVIEW BOARD:

E. COOPER BROWN
Chief Administrative Appeals Judge

____ June 21, 2006 _____
DATE