

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-136**

**ROBERT L. JOHNSON,**  
**Claimant-Petitioner,**

v.

**HAMILTON CROWNE PLAZA HOTEL**  
**and ZURICH AMERICAN INSURANCE Co.,**  
**Employer/Insurer-Respondent.**

Appeal from a July 31, 2015 Compensation Order by  
Administrative Law Judge Gregory P. Lambert  
AHD No. 14-389, OWC No. 712489

(Decided January 27, 2016)

Robert L. Johnson, *pro se* Claimant  
Mark T. Krause for Employer

Before JEFFREY P. RUSSELL, and LINDA F. JORY, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

This claim is one of multiple claims brought by Robert Johnson (Claimant) for injuries alleged to have been sustained while he was employed as a cook in the hotel kitchen operated by Hamilton Crowne Plaza Hotel (Employer). A formal hearing was conducted on July 20, 2015 following which a Compensation Order was issued on July 31, 2015 (the CO) by an administrative law judge (ALJ)

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in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES).

The claim and this appeal is limited to Claimant's seeking an award of disability for hearing loss to both ears alleged to be the result of exposure to noise in the working environment of the kitchen over the period of time that Claimant was so employed, beginning July 8, 1996 and ending March 22, 2011. *See* HT at 13 – 15; CO, at 3.

In the CO, the ALJ denied the claim for relief, in which Claimant sought "permanent total disability from March 23, 2011" to the date of the hearing and ongoing and permanent partial disability "based upon hearing loss to both ears at an unspecified percentage." CO at 2.

On August 25, 2015, Claimant filed a document titled "Order" with the Compensation Review Board (CRB) stating "I disagree with the Compensation Order that Judge Lambert sent me", and to which was attached a copy of the CO.

On September 8, 2015, Claimant filed a second document titled "Order Motion to Pursue My Case", attached to which was a document purportedly filed with a former ALJ in AHD on August 11, 2014 attaching medical records for a previously scheduled formal hearing. We shall treat these two filings collectively as Claimant's AFR.

On September 10, 2015, Employer filed Respondent's Opposition to Application for Review (Employer's Opposition).

Because the finding that Claimant did not give employer timely notice of the injury and its connection to employment pursuant to D.C. Code § 32-1513 is supported by substantial evidence, we affirm that finding and the denial of any claim for indemnity benefits. Because the finding that the claim was filed beyond 1 year from the date of injury is supported by substantial evidence, the denial on those grounds is affirmed.

#### ANALYSIS

Review of the AFR reveals that Claimant questions the honesty of the ALJ, and argues that Employer is responsible for his claimed hearing loss for reasons that appear to consist of allegations that Employer's workplace environment did not comport with standards and practices established by the Occupational Safety and Health Administration (OSHA) regulating workplace noise levels.

As the ALJ properly set forth in the CO and explained at the formal hearing, the workers' compensation system is separate and apart from OSHA, and neither AHD nor the CRB has legal authority to apply or enforce OSHA rules or regulations. Thus, these arguments and discussions set forth in the AFR are irrelevant to any issue before us, and will therefore not be considered except to the affirm that the ALJ's declining to entertain OSHA-based complaints is in accordance with the law.

The only portion of the AFR that addresses the bases of the ALJ's decision is found at pages 10 – 11 of the "Order Motion to Pursue My Case" which we have deemed the AFR, and they are as follows:

The evidence establishes that he [Claimant] gave the Employer Notice to Crown [sic] Plaza Hotel Employer. I Robert Johnson report [sic] it to Chef and report to the sous chef and I report it to [sic] Chief Engineer and the food and beverage manager. I reported to them about noise coming from the steamer, they never did anything. This is call [sic] bad faith.

And in the “Order” at 5 - 6:

There was time [sic] notice because I reported it to food and beverage manager the sue [sic] chef, the Executive Chef and the Chief Engineer, and they did nothing about the noise exposure. Why would the Hotel supply me with ear plugs, if they didn't think I had a problem. Why didn't they write up an accident report and give me a copy.

Employer's response is as follows:

With respect to the issue of timely notice of the claim, Petitioner argues that he let the engineer, the chef, and the food and beverage manager “know about noise from the steamer.” Indeed, Petitioner testified that he complained about noise coming from the steamer, the dishwasher and the oven from the time he began working for the Crowne Plaza Hotel in 1996. HT at 55 – 57. What Petitioner overlooks is the fact that while he may have complained to the engineer, the chef and the food and beverage manager about noise, he never reported to any of them that he believed the noise from the equipment caused his hearing loss.

Petitioner acknowledged that while he was still working for the Crowne Plaza Hotel he became aware that he was having difficulty hearing and that he attributed that hearing difficulty to noise coming from the steamer. HT at 74. Petitioner further acknowledged that the last day he worked for Crowne Plaza Hotel was March 22, 2014. HT at 75. Testimony from Vanessa Peters, the Director of Human Resources at Crowne Plaza Hotel, established that Petitioner did not give anyone at the Hotel notice of his hearing loss claim until January of 2014 when they received Employee's Notice of Accidental Injury in the mail. HT at 87 – 88.

D.C. Code § 32-1513 requires that notice of an injury be given to the Mayor and Employer within 30 days after the Employee is aware of the relationship between the injury and the employment, or else the claim is barred. As noted above, as late as his last working day for the Crowne Plaza Hotel, the Petitioner was aware of his claim that exposure to noise caused his hearing loss. The evidence establishes that he did not give notice until January 24, 2014—almost three years after the deadline for giving notice. As such, his claim is barred by his failure to give timely notice.

Employer's Opposition at 2 – 3.

As noted, Employer argues “What Petitioner overlooks is the fact that while he may have complained to the engineer, the chef and the food and beverage manager about noise, he never reported to any of them that he believed the noise from the equipment caused his hearing loss.” This is not entirely accurate. While it is a subtle difference, what is true is that Claimant never *testified* that he advised Employer that he was suffering a hearing loss and that it was attributable to his job. He also never testified that he did not tell Employer of his perceived connection between hearing loss and workplace noise.

D.C. Code § 32-1513 provides in pertinent part:

- (a) Notice of any injury ... in respect of which compensation is payable under this chapter shall be given within 30 days after the date of such injury ... or 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. Such notice shall be given to the Mayor and to the employer.
- (b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature and cause of the injury ..., and shall be signed by the employee or by some person on his behalf ....

\* \* \*

(d) Failure to give such notice shall not bar any claim under this chapter:

(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 ... and its relationship to the employment and the Mayor determines that the employer or carrier had not been prejudiced by failure to give such notice; or

(2) The Mayor excuses such failure on the ground that for some satisfactory reason notice could not be given; or unless objection to such failure is raised before the Mayor at the 1<sup>st</sup> hearing of a claim for compensation in respect of such injury....

It is true that Employer adduced evidence from the Human Resources Director that Employer never received written notice from Claimant of a work-related hearing loss until it received Employee’s Notice of Accidental Injury in the mail on January 24, 2014. However, this witness was not Claimant’s supervisor or “agent in charge of the business in the place where the injury occurred.” As the ALJ found in the CO, Claimant’s supervisor was the sous chef and possibly also the chef. Ms. Peters’ testimony is certainly sufficient to establish that the written notice provisions of the Act were not met in a timely manner, but it sheds no light upon whether Employer, through Claimant’s supervisor, had actual notice of the injury and its relationship to the job.

D.C. Code § 32-1521 provides:

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary:

\* \* \*

(2) That sufficient notice of such claim has been given ....

It is noteworthy that this provision does not state that it shall be presumed that a claimant gave proper written containing the details as set forth in § 32-1513. Rather, it is presumed that “sufficient notice” has been given. This would appear to mean that even where the detailed written notice is not provided, an employer nonetheless is presumed to have actual timely notice of the work injury and its work connection. In other words, merely establishing that the written detailed notice was untimely is not sufficient to meet the burden of overcoming the presumption that “sufficient notice” has been given. As the DCCA wrote in *Howard University Hospital v. DOES and Maryanne Tagoe, Intervenor*, 960 A.2d 603 (D.C. 2008) at 611:

We recognize that "[i]n any proceeding for the enforcement of a claim for [worker's] compensation . . . it shall be presumed, in the absence of evidence to the contrary . . . [t]hat sufficient notice of such claim has been given." D.C. Code § 32-1521 (2) (2001). This presumption "applies both to the written notice requirement and to the alternative provision for actual knowledge by the employer." *Dillon v. DOES*, 912 A.2d 556 at 560 n.6 (citations omitted). But "the presumption operates only 'in the absence of evidence to the contrary' and, once rebutted, 'drops out of the case entirely,' leaving the burden on the employee to prove timely notice." *Id.* at 560 (quoting *Washington Post v. District of Columbia Dep't of Employment Servs.*, 852 A.2d 909, 911 (D.C. 2004)). The Hospital rebutted the presumption in the present case.

Nowhere in the CO is this presumption mentioned, and there is no analysis concerning how Employer has overcome it.

Nonetheless we have reviewed the cross-examination of Claimant by Employer, particularly those portions cited by Employer in its opposition, and find that it supports the ALJ's finding that Claimant "waited years after he became aware of a possible workplace injury before providing notice." CO at 3.<sup>1</sup> In this instance, the failure to analyze the case pursuant to the presumption provisions was error, but it was harmless.

However, in finding that the claim is also barred as being untimely filed, the CO fails to acknowledge that D.C. Code § 32-1532, "Employer Reports", provides:

- (a) Within 10 days from the date of any injury ... the employer shall send to the Mayor a report setting forth: (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature

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<sup>1</sup> It is not a requirement of the Act that a claimant be able to inform employer of the intricacies of a final diagnosis prior to disclosure, merely that certain symptoms presently exist and that said symptoms may be related to a work-related event or activity. *See Teal v. DOES*, 58 A.2d 647 (D.C. 1990).

of the injury ...; (4) the year, month, day and hour when and the particular locality where the injury ... occurred; and (5) such other information as the Mayor may require. The employer shall also send a copy of the report ... to the Department of Employment Services. The employer shall send to the employee ..., by certified mail, return receipt requested, concurrent with the submission of the report to the Department of Employment Services, a statement of employee's rights and obligations under this chapter, including the right to file a claim for compensation within one year of the date of injury....

\* \* \*

(f) Where the employer or the carrier has been given notice (or his agent in charge of the business in the place where the injury occurred) or carrier has knowledge of any injury ... and fails, neglects, or refuses to file report thereof as required by subsection (a) of this section, the limitations in § 32-1514 (a) shall not begin to run against the claim of the injured employee ... or in favor of either the employer or carrier, until such report shall have been furnished as required by the provisions of subsection (a) of this section.

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).

Since no such claim for medical benefits was presented at the formal hearing, any erroneous finding with respect the claim being barred outright by the statute of limitations would be moot. However, given that such claims may arise in the future, it would become the law of the case and thus not be harmless.

The record contains insufficient evidence concerning whether Employer complied with subsections (a) and (f) of D.C. Code § 32-1532. Specifically, there is no evidence concerning whether and when subsection (a) was complied with, and if not, what if any effect that fact would have upon the running of the limitations period.

We note that while the DCCA at one time ruled that the limitations period does not begin to run until an employer has sent an employee a statement of "his rights and obligations" under the Act. *See Harris v. DOES*, 592 A.2d 1014 (D.C. 1991), (*Harris I*). However, that decision was vacated by the DCCA in *Harris v. DOES*, 648 A.2d 672 (D.C. (1994) (*Harris II*) and the court has subsequently made a point of stating that it is no longer valid. *See Washington Hospital Center v. DOES*, 712 A.2d 1018 (D.C. 1998). Since *Harris II*, neither the court nor the CRB have had occasion to revisit the question of under what circumstances the limitations statute is tolled. Given the lack of a claim for medical benefits, this case provides us the opportunity to do so without having any effect on the outcome of this appeal, specifically, without denying Claimant any requested relief should we conclude that the limitations period was not tolled, and affirm the CO on this point as well.

We shall do so at this time.

The purpose of statutes of limitations is promote the prompt bringing of a claim so that it can be resolved expeditiously and at a time when memories are fresh and relevant evidence is still available. See *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352 (1979); *Hobson v. District of Columbia*, 686 A.2d 194 (D.C. 1996); *District of Columbia v. Tinker*, 691 A.2d 57 (D.C. 1997).

However, they are not jurisdictional, in the sense that statutes of limitations are an affirmative defense, and waivable where, for example, untimely filing is not raised “at the 1<sup>st</sup> hearing of a claim for compensation in respect of such injury”. D.C. Code § 32-1513 (d)(2).

A literal reading of D.C. Code § 32-1532 (f) would seem to suggest that the 1 year statute of limitations does not begin to run until an employer has sent the employee the notice of his rights and obligations, and the subsection contains no exceptions for this rule. Thus, even if an employer has no knowledge of the injury for years (as is the case here), if the statute is read completely literally, limitations does not begin to run until the employer gets notified of the claimed injury and then sends the required documents to DOES and the employee. That was the one potential interpretation that could be given to the now-vacated *Harris I*.

Such an interpretation is highly problematic, in that it essentially renders the limitations provision meaningless in almost any conceivable scenario where an employer is unaware of an alleged injury and is therefore not in a position to file and mail the required materials.

But if one considers the structure of the Act, one can see that a sensible interpretation of the scheme envisions an employee providing notice (either written or actual) of an alleged work-related injury within 30 days of sustaining it (or becoming reasonably aware of it), and then the employer has 10 days within which to (a) notify DOES of the circumstances of the claimed injury, and (b) advise the employee of his rights and obligations, *i.e.*, his *right* to file a claim for compensation and his *obligation* to do so within 1 year of the date of the injury.

Where an employee does what is required of him (*i.e.*, give notice to the employer of the injury within 30 days), the employer is required to respond, and if the response is not timely (*i.e.*, within 10 days of the notice from the employee), the limitations period is tolled until the employer does what is required of it.

Requiring that the employee’s notice to the employer be timely (or at least be made within 1 year of the injury) in order to trigger the employer’s required response, or be denied the benefit of the statute of limitations, is a rational way to interpret the provision. Conversely, where an employee’s notice to the employer is not timely, or particularly, where that notice isn’t given until more than a year has passed, employer is deprived of the benefit of the statute of limitations. We do not see how the legislature could have intended to place the power of invalidating the statute of limitations in the hands of an employee by simply waiting a year before giving notice.

Accordingly, we hold that unless an employee’s notice of injury to an employer is given prior to the 1 year period, the statute of limitations is not tolled. Thus, where an employee gives notice within 30 days, employer must either respond within 10 days, or limitations is tolled until employer responds. Where an employee gives notice, but it is after 30 days but before 1 year, the employer

has 10 days to respond and advise the employee of the right to file a claim and his obligation to do so within 1 year of the injury date, or limitations are tolled until it does so. However, if notice to the employer is not given until after 1 year, the claim is barred because there was no triggering event to toll the limitations period until after it has already run. Employer is under no obligation to do anything until it has notice of a claimed injury. Thus it is not possible for an employer to be derelict, and hence not entitled to the benefit of the statute of limitations, when it has no obligation to do anything.

Accordingly, we conclude that the ALJ's conclusion that Claimant's claim was untimely is in accordance with the District of Columbia Workers' Compensation Act, and is affirmed.

#### CONCLUSION AND ORDER

The determinations that Employer was not given and did not have timely notice of the claimed injury, and that the claim was not filed timely, are neither arbitrary, capricious nor an abuse of discretion and is in accordance with the law. Accordingly the Compensation Order is affirmed.

*So ordered.*