GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-035

WINIFRED SPEIGHT,
Claimant–Petitioner,

v.

GEORGE WASHINGTON UNIVERSITY HOSPITAL/UHS,
Self-Insured Employer-Respondent/Cross-Appellant

Appeal from a February 25, 2013 Compensation Order on Remand by
Administrative Law Judge Gerald D. Roberson
AHD No. 12-233, OWC No. 684145

Michael J. Kitzman, Esquire, for the Claimant-Petitioner
David C. Schoenfeld, Esquire, for the Self-Insured Employer-Respondent/Cross-Appellant

Before: HENRY W. MCCOY, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was working for Employer as a workers' compensation administrator on March 31, 2011 when she claimed she experienced back and bilateral shoulder pains. Claimant's job was primarily sedentary in nature wherein she usually worked a 10 hour day with physical duties consisting of continuous typing and answering the telephone.

Claimant commenced treating with Dr. Rafael Lopez Steuart, an orthopedist, and eventually filed a claim for authorization for further medical treatment, *i.e.*, additional physical therapy, to treat her bilateral shoulder pain. Employer contested the claim by asserting there was no work-related injury on March 31, 2011 and to the extent there was, Claimant failed to give timely notice of that injury.

After a formal hearing on July 19, 2012, the presiding administrative law judge (ALJ) determined that while Claimant did sustain an accidental injury on March 31, 2011, she failed to

give timely notice and therefore denied her claim for relief, which he stated as being for causally related medical benefits.[1] Both parties filed an application for review (AFR), with each filing an opposition to the other's appeal.

On appeal, the Compensation Review Board (CRB) vacated and remanded the August 8, 2012 CO.[2] The ALJ was instructed to complete the presumption of compensability analysis by making a determination as to whether Employer's medical evidence rebutted the presumption and if so, to then weigh the evidence to determine if Claimant met her burden by a preponderance of the evidence. The ALJ also was instructed to reconsider Claimant's evidence on timely notice. Finally, the ALJ was instructed to take notice of established case-law that the failure to provide timely notice does not bar a claimant from receiving medical benefits provided the claimant has sustained a work-related injury with a resulting disabling condition that is medically causally related that the work injury.

On remand, the ALJ determined that while Claimant sustained an accidental injury on March 31, 2011 that arose out of and in the course of her employment and that her disabling condition was medically causally related to that work injury; she failed to provide Employer with timely notice of the injury. With Claimant's disabling condition being found to be medically causally related to the work injury, the ALJ granted the claim for causally related medical benefits.[3] Claimant filed a timely appeal, with Employer filing in opposition and cross appealing.

In her application for review, Claimant argues that the ALJ erred in determining that she failed to provide timely notice. In opposition, Employer counters that the ALJ's ruling on timely notice is supported by substantial evidence in the record. In addition, Employer argues in its cross-appeal that the ALJ erred in finding that its evidence did not rebut the presumption as to legal causation and that the evidence does not support the ALJ's finding the alleged work injury caused the current disabling shoulder condition.

STANDARD OF REVIEW

The scope of review by the CRB, 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 (CO) are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.[4] *See* D.C.

[1] *Speight v. George Washington University Hospital/UHS*, AHD No. 12-233, OWC No. 684145 (August 8, 2012).

[2] *Speight v. George Washington University Hospital/UHS*, CRB No. 12-142, AHD No. 12-233, OWC No. 684145 (January 18, 2013).

[3] *Speight v. George Washington University Hospital/UHS*, AHD No. 12-233, OWC No. 684145 (February 25, 2013) (COR).

[4] "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 International v. DOES,* 834 A.2d 882 (D.C. 2003).

Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a CO 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.

ANALYSIS

Turning to the case under review, we first address Claimant's argument that the ALJ erred in determining that she failed to provide Employer timely notice of her injury. Claimant contends that within 30 days of first seeking medical treatment for her shoulder pain, she informed Employer and also told Employer that it was work related. Claimant argues that insofar as the COR fails to acknowledge that Employer received actual knowledge of her shoulder condition and its relationship to her work, it is not based on substantial evidence in the record. We agree.

With regard to the providing timely notice, § 32-1513(a) of the Act states:

> Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death, or 30 days after the employee or beneficiary is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury or death and the employment. Such notice shall be given to the Mayor and to the employer.

This provision goes on to require in subsection (b) that the notice be in writing. Failure to give timely written notice does not bar a claim if pursuant to § 32-1513 (d)(1) the employer or his agent in charge had knowledge of the injury and its relationship to the employment and the employer is not prejudice by the failure to give written notice.

When this issue was addressed in the January 18, 2013 Decision and Remand Order (DRO), the CRB stated:

> In arguing that she provided timely notice, Claimant makes no claim that she provided timely written notice. Rather, she asserts under the exception provided by § 32-1513 (d)(1), Employer's agent in charge had knowledge of the injury and its relationship to her work and Employer incurred no prejudice by the failure to provide written notice. In determining that Claimant failed to provide timely notice, the ALJ, in his assessment of the evidence, concluded that Employer was not provided with "actual knowledge."
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> In his extensive review of the record evidence, the ALJ only evaluated the evidence to determine whether Claimant had provided

> Employer with actual knowledge of her work injury and he concluded "she failed to provide Employer of the time, place, nature, and cause of the injury within 30 days of injury or exposure as required by the Act."[5] However, the Act allows for notice to be timely if given 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.
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> While the ALJ acknowledged that Claimant filed a DC Form 7 on September 8, 2011, he characterized it as Claimant changing her legal theory regarding how her employment contributed to her shoulder condition and changed the date of injury. We accordingly take issue with what can reasonably be viewed as a mischaracterization of the document and the reason for its submission.
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> Prior to filing the DC Form 7, Claimant was initially under the impression that her shoulder pain was a further manifestation of her prior injury to her bilateral hands and her treating physician supported that interpretation. However, it appears that it was not until September 2011 that Claimant came to the knowledge that her shoulder condition constituted a separate new injury. She then filed a notice of accidental injury citing the original injury date, March 31, 2011, with a description of the injury being to the back and both arms and shoulders.
>
> In filing the DC Form 7, Claimant did not change her legal theory. Rather, she was stating in essence that she was now aware or became aware during the course of exercising due diligence of the relationship between her shoulder injury and her employment. In mischaracterizing and misstating Claimant's filing of the notice of accidental injury form on September 8, 2011 as a change in the legal basis of her claim with a change in the injury date, the ALJ has not evaluated the filing to determine whether it meets the language of § 32-1513(a) that would make Claimant's notice of injury timely. As we deem this to be error, the ALJ, on remand, shall make the appropriate findings and conclusion that are supported by substantial evidence in the record.

In the COR, the ALJ stated under the heading "Findings of Fact" that that he was adopting and incorporating the findings of fact and conclusions of law set forth in the August 8, 2012 CO except as abrogated by the CRB's DRO. In doing so, the ALJ made no additional findings of fact on the issue timely notice as directed. Rather, the ALJ now reasons:

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[5] *Speight, supra*, p. 9.

> The record reveals Dr. Lopez-Steuart examined Claimant on July 21, 2011, and he offered the diagnosis of overuse tendonitis of both hands involving right shoulder as well secondary to work. Dr. Lopez-Steuart does not examine Claimant again until April 19, 2012. While the report of July 21, 2011 does not refer to any specific employment factors, Claimant completed the Employee's Notice of Accidental Injury or Occupational Disease on September 8, 2011 identifying the date of injury as March 31, 2011. To satisfy the requirements of § 32-1513(a), Claimant would have been obligated to file the Employee's Notice of Accidental Injury or Occupational Disease within 30 days of July 21, 2011. This is not the case because Claimant filed the notice on September 8, 2011. Therefore, Claimant did not provide timely notice in accordance with the requirements of the Act.[6]

In focusing his attention on when Claimant filed the Employee's Notice of Accidental Injury or Occupational Disease, the ALJ has persisted in the belief that Claimant must provide Employer with written notice in order to meet the requirement of timely notice under the Act. As we have stated previously and emphasize here again, the failure to give timely written notice does not bar a claim if pursuant to § 32-1513 (d)(1) the employer or his agent in charge had knowledge of the injury and its relationship to the employment and the employer is not prejudiced by the failure to give written notice.

It is Claimant's contention that she provided timely "verbal" notice to the claims adjuster handling her previous disability claim and that she also told her supervisor. In addition, Claimant points to one of Employer's own exhibits, EE #13, as corroboration that she timely informed Employer of shoulder condition. There exists evidence in the record that Claimant's assertion meets the exception in the statute under § 32-1513 (d)(1) that she has provided timely notice. On remand, the ALJ is directed to assess all record evidence, *i.e.*, testimony and exhibits, and make new findings of fact that are supported by substantial evidence in order to determine whether timely notice has been given in this matter.

We next turn to Employer's arguments on cross-appeal. Employer argues that the ALJ erred in finding that the presumption was not rebutted with regard to determining legal causation, failed to give proper weight to its independent medical evaluation (IME) opinions, from Drs. Eckmann and Gordon, that Claimant did not sustain a work injury on March 31, 2011, and improperly found the alleged work injury caused an injury to Claimant's shoulders. We disagree.

In the January 18, 2012 DRO, it was determined that insofar as the ALJ had found that Claimant had presented sufficient evidence of an injury and a work-related evident so as to invoke the presumption of compensability, it was only necessary on remand to determine whether Employer's IMEs, which the ALJ erroneously stated had not been submitted, were sufficient to rebut the presumption.

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[6] COR, p. 8.

The ALJ first assessed the July 18, 2011 IME from Dr. Kenneth Eckmann where the doctor noted that Claimant was being seen in reference to an accepted date of injury of March 10, 2009 for thumb pain/tenosynovitis. After recounting what Dr. Eckmann found during his examination of Claimant, the ALJ repeated the pertinent opinions where the doctor stated he saw no relationship between Claimant's recent complaints of shoulder pain and the prior injury claim and that Claimant's shoulder pain did not appear to be work related.

As for Dr. Gordon, he performed an IME of Claimant on January 24, 2012 for a March 31, 2011 date of injury. While Dr. Gordon examined Claimant with reference to bilateral shoulder and parascapular complaints, the ALJ notes that the opinion by Dr. Gordon is largely a recitation of the findings and opinions of Dr. Eckmann which Dr. Gordon then adopts as his own that Claimant's recent complaints of shoulder pain are not related to the claim regarding Claimant's hands and wrists and further opined that her shoulder symptoms were not work related.

Based on his assessment of the IMEs of Drs. Eckmann and Gordon, the ALJ determined that their opinions did not rebut the presumption of compensability that Claimant's shoulder injuries arose out of and in the course of her employment. Specifically, the ALJ reasoned:

> The medical evidence from Dr. Eckmann and Dr. Gordon does not rebut the presumption of compensability. Both physicians appear to find the current right shoulder complaints were not causally related to the prior claim regarding the bilateral hand and wrist complaints. While Dr. Gordon understood Claimant attributed her right shoulder complaints to work activities and the improper ergonomic work station, he merely agreed with the conclusion of Dr. Eckmann, who found no relationship between Claimant's shoulder pain complaints and her previous claim regarding her hands or writs. EE 1, pp. 1-2. On July 18, 2011, Dr. Eckmann stated "I see no relationship between the more recent complaints of shoulder pain and the prior Workers' Compensation claim for thumb pain/tenosynovitis." EE 1, p. 3. Dr. Eckmann and Dr. Gordon failed to address whether a particular incident which caused an injury occurred under circumstances making the injury a compensable event under the Act. In fact, Dr. Gordon acknowledged the problems with Claimant's work station, stating Employer has made some changes to Claimant's work station due to the ergonomic assessment. He also stated Claimant had some symptoms in her shoulder and parascapular area. EE 1, p. 2. These findings appear to support Claimant's contention that the employment factors had the potential of causing the injury. As such, Claimant has provided sufficient evidence to causally relate her back and bilateral shoulder complaints to the employment factors identified.[7]

[7] COR, pp. 4-5.

In finding that Employer's IMEs have not rebutted the presumption of compensability, the ALJ bases this determination on Dr. Eckmann's opinion of no causal relationship between the recent shoulder pain and the prior accepted injury to Claimant's hands and wrists plus the specific statement that Claimant's shoulder pain is not work related. While these may be viewed as two separate statements, it appears that the ALJ reasonably interpreted both statements by Dr. Eckmann as being based on or sequelae of the March 10, 2009 accepted injury. And, as Dr. Gordon basically adopts Dr. Eckmann's analysis, no fault is found in the ALJ's reasoning that the presumption was not rebutted.

However, we would be remiss if we did not take issue with the ALJ's statement that there needed to be a "particular incident" for there to a compensable injury under the Act, when there is no such requirement.[8] In addition, in the last sentence of the quoted passage above, the ALJ unnecessarily interjects the concept of weighing the evidence when he has already determined that the presumption has not been rebutted. However, if the evidence had been weighed, the standard of proof would be by a preponderance of the evidence and not "sufficient evidence".[9]

CONCLUSION AND ORDER

The ALJ properly applied the presumption analysis and the determination that Employer's evidence did not rebut the presumption is supported by substantial evidence in the record and is affirmed. The ALJ's determination that Claimant failed to provide timely notice did not evaluate whether there was evidence in the record to meet the exception provided in § 32-1513 (d)(1) and is therefore VACATED. The February 25, 2013 Compensation Order on Remand is therefore REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

June 27, 2013
DATE

[8] See *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987) (A specific traumatic injury is not necessary to establish a prima facie case of an accidental injury.)

[9] *WMATA v. DOES*, 926 A.2d 140 (D.C. 2007).