

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-030

**TERRY HEDGEPEETH,
Claimant-Petitioner,**

v.

**SODEXO MARRIOTT SERVICES and BROADSPIRE,
Employer/Carrier - Respondent**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2013 JUL 9 PM 12 56

Appeal from a February 7, 2012 Compensation Order on Second Remand by
Administrative Law Judge Leslie A. Meek
AHD No. 08-334, OWC No. 533816

Michael J. Kitzman, Esquire, for the Claimant-Petitioner
Joel E. Ogden, Esquire, for the Employer/Carrier-Respondent

Before: HENRY W. MCCOY, MELISSA LIN JONES, 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 worked for Employer as a waiter and alleges that he injured his left and right shoulders on September 3, 1998. Employer made voluntary payments of temporary total disability benefits from September 7, 1998 to September 13, 1998. On June 13, 2006, Claimant filed a claim for permanent partial disability (PPD) benefits. A formal hearing was held on September 18, 2008 with the initial issue being whether Claimant had filed a timely claim.

On October 28, 2008, Compensation Order (CO) was issued where the presiding administrative law judge (ALJ) concluded Claimant was not entitled to PPD benefits because his claim was not filed timely in accordance with § 36-314 of the Act, the codified version of the

Act in effect at the time of Claimant's accident.¹ The ALJ held that the claim was not timely because it was not filed within one year of the date of injury or within one year of the last payment of voluntary benefits.² Claimant timely appealed.

On appeal, the CRB vacated and remanded the October 28, 2008 CO with instructions to make the necessary findings of fact required in order to determine the timeliness of Claimant's claim.³ The CRB noted that the CO lacked the necessary findings of fact that Claimant had received a copy of the First Report of Injury as that would determine if the limitations period of § 36-314 (now § 32-1514) expired before Claimant filed his claim. The established case law had already determined that the limitations period for timely filing of a claim did not begin to run until the employer had sent a copy of the First Report to the injured worker or until the injured worker had notice that a First Report had been filed.⁴

In a November 5, 2009 Compensation Order on Remand (COR), the ALJ again held that Claimant's claim for PPD benefits was not timely filed.⁵ The ALJ found that Employer had filed two versions of the First Report of Injury on September 3, 1998. The ALJ further found that insofar as Claimant did not file his claim for PPD benefits until June 13, 2006, which was over seven years after Employer's last voluntary payment on September 13, 1998, the claim was untimely filed. Claimant again timely appealed.

On appeal, the CRB reversed and remanded the COR. The CRB again held that Employer was required to send a copy of the First Report of Injury to the injured worker in order to start the one-year period in which to file a claim.⁶ For this proposition, the CRB relied upon the 1991 D.C. Court of Appeals decision in *Harris v. DOES*⁷ where the Court determined that, consistent with the humanitarian purposes of the Act, it was not until the injured employee had notice that the employer's report had been filed that the limitations period of the statute would begin to run.

¹ D.C. Code § 36-314, in effect at the time of Claimant's accidental injury, stated in relevant part:

- (a) Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim is filed within 1 year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within 1 year after the date of the last payment. Such claim shall be filed with the Mayor. The time of filing a claim shall not begin to run until the employee or beneficiary is aware, or by exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment. Once a claim has been filed with the Mayor, no further written claims are necessary.

² *Hedgepeth v. Sodexo Marriott Services*, AHD No. 08-334, OWC No. 533816 (October 28, 2008).

³ *Hedgepeth v. Sodexo Marriott Services*, CRB No. 09-017, AHD No. 08-334, OWC No. 533816 (January 29, 2009).

⁴ See *Rhodes v. Washington Hospital Center*, Dir. Dkt. No. 92-28, H&AS No. 91-765, OWC No. 175405 (March 6, 1995).

⁵ *Hedgepeth v. Sodexo Marriott Services*, AHD No. 08-334, OWC No. 533816 (November 5, 2009).

⁶ *Hedgepeth v. Sodexo Marriott Services*, CRB No. 10-021, AHD No. 08-334, OWC No. 533816 (March 22, 2011).

⁷ *Harris v. DOES*, 592 A.2d 1014, 1017-1018 (1991).

On remand, the ALJ again denied Claimant's claim for relief by first repeating her findings, discussion, and conclusion that Claimant filed his claim for PPD benefits untimely and also concluding that "Claimant failed to prove that he suffered a work related injury on September 3, 1998."⁸ It is from this Compensation Order on Second Remand (COR II) that Claimant has filed the instant appeal, with Employer filing in opposition.

On appeal, Claimant argues that the ALJ erred in finding that no injury occurred as it contradicts the stipulated fact that an accidental injury occurred; and, the ALJ also erred in ruling again that his claim was untimely filed without making a finding as to the provision of notice to him so as to toll the one year period within which he had to file his claim. As we agree on both assignments of error, this matter will be returned for further consideration.

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 are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.⁹ *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005) (the Act), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order (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.

In addressing Claimant's assignments of error, we undertake Claimant's second argument first, that the ALJ again found that Claimant filed his claim for disability benefits over seven years after Employer's last voluntary payment of temporary total disability; in effect ruling that the claim was filed untimely. This ruling inexplicably ignores the two prior remand orders from the CRB advising the ALJ that the case law interpreting the statutory limitation provision established that the one-year limitation for filing a claim did not begin to run until the employer sent a copy of the First Report of Injury to the injured worker or until the injured worker had notice the report had been filed.

In both of the prior CRB remand orders, the ALJ was instructed to make findings of fact not only as to when Employer filed the First Report of Injury but also whether or not Employer had sent a copy to Claimant or whether Claimant had been otherwise notified of the filing. While the ALJ specifically found that Employer filed two versions of the First Report of Injury to satisfy that statutory requirement, no finding was made as to when Claimant received notice of

⁸ *Hedgepeth v. Sodexo Marriott Services*, AHD No. 08-334, OWC No. 533816 (February 7, 2012) (COR II).

⁹ "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. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

that filing. While the ALJ acknowledged that the Court in *Harris* required Employer to provide such notice in order to start the limitations period, the ALJ asserted that the statute and the regulations were not in “harmony” and thus § 36-314, which did not require notice to Claimant was controlling. The ALJ persisted in this error after the CRB noted in its March 2011 Decision and Remand Order that the Court in *Harris* specifically stated “[T]his interpretation of the statutory scheme is consistent with the regulations promulgated under the Act by the Agency.”

The ALJ, in the instant COR II under review, has repeated almost verbatim her previous discussion of the timeliness of Claimant’s claim that was rejected in the November 5, 2009 COR, with the exception of the concluding phrase “and for this reason said claim is untimely.” However, as the ALJ does not use this discussion on the timeliness of the claim in any way to deny Claimant’s claim for relief, but proceeds to address the issue of whether there was a work-related injury, we deem the repeated timeliness discussion as mere dicta. However, as that discussion is not in accordance with the law, it is vacated, and on remand the ALJ is instructed to make the findings directed by the CRB in its January 29, 2009 DRO in order to resolve the timeliness issues in accordance with the Director’s decision in *Rhodes*.

Claimant’s initial assignment of error was to argue the ALJ erred in finding that no injury occurred on September 3, 1998. As Claimant points out, there is an element of both confusion and apparent contradiction by the ALJ when considering her findings of fact and conclusion of law on this issue. The ALJ’s findings of fact started with a statement that the parties stipulated to an accidental injury on September 3, 1998, then she proceeded to make a finding that “Claimant failed to prove he suffered a work related injury on September 3, 1998”, which led to the conclusion of law that “Claimant failed to prove he suffered an injury on September 3, 1998.”

Part of the confusion in the ALJ’s treatment of this issue stems from the initial failure to list accidental injury as one of the contested issues to be resolved. Although Employer clearly stated that accidental injury was being contested (Hearing Transcript (HT), p. 7) and the ALJ acknowledged it and stated “So I’ll write it down” (HT, p. 7), it was not listed as one of the issues. Rather, the ALJ proceeded to discuss whether Claimant “suffered a work injury” with the presumption of compensability invoked and rebutted leading to the assumption that the ALJ addressed the issue as whether Claimant sustained an accidental injury that arose out of and in the course of his employment.

Employer acknowledges in its opposition to Claimant’s appeal that it is undisputed that Claimant was involved in a work accident on September 3, 1998. The dispute between the parties arises in the mechanism of injury and the injuries sustained. In filing its First Report of Injury on September 3, 1998, Employer reported that Claimant slipped on a slippery floor and fell injuring his left arm and left ankle. In his claim filed in June 2006 and in his testimony at the formal hearing, Claimant stated that he sustained injury to his right arm and right shoulder while lifting a heavy serving tray. The ALJ resolves this discrepancy by finding that Claimant failed to prove he suffered a work related injury on September 3, 1998. As both parties agreed that some type of work injury occurred on September 3, 1998, the ALJ’s finding is not supported by substantial evidence in the record and this matter must be returned.

As stated, there is no dispute that a work accident occurred on September 3, 1998. On September 4, 1998, Claimant treated with Dr. Eduardo Haim who reported seeing Claimant for a work related injury sustained the previous day where Claimant stated he slipped and fell on a wet floor and injured his left elbow and shoulder.¹⁰ However, at the formal hearing, Claimant's testimony referenced two accidents. In the first incident and the subject of his instant claim, Claimant testified that he injured his right shoulder picking up a heavy serving tray. Claimant also testified that around the same time, there was a separate incident where he slipped on a wet floor primarily injuring his right Achilles tendon, but also injuring his "elbow and shoulder again." (HT, p. 23-24). Direct examination from Claimant's counsel relates this as the September 3, 1998 injury and Claimant agrees that he received two weeks of physical therapy, as also reported by Dr. Haim.

The ALJ found that Claimant's testimony lacked credibility. This was based on Claimant not being able to recall if he suffered any bruising from his injury and his inability to recall when he first saw his treating physician. While an ALJ's credibility determination is usually accorded due deference, it must be a reasonable determination based on the hearing record.¹¹ Such is not the case here as much of Claimant's uncertain responses could be attributed to his being asked to recall facts after the passage of 10 years.

The parties in this matter agree that there was a work accident. There appear to be two versions of how Claimant injured his shoulders. On remand, the ALJ shall determine, based either on the record already established or by reopening the record for additional evidence, which version Claimant has proven by a preponderance of the credible evidence in the record. Upon making that determination, the ALJ shall proceed to determine whether Claimant's present complaints are medically causally related to the incident as was found to have occurred.

CONCLUSION AND ORDER

The denial of permanent partial disability benefits in the February 7, 2012 Compensation Order on Second Remand is not supported by substantial evidence and is not in accordance with the law. The CO is REVERSED and REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

July 9, 2013

DATE

¹⁰ EE #1, p. 2.

¹¹ See *Dell v. DOES*, 499 A.2d 102 (D.C. 1985); *Davis v. Western Union Telegraph*, Dir. Dkt. 88-84, H&AS No. 87-751, OWC No. 098216 (March 4, 1992).