

DISTRICT OF COLUMBIA, DEPARTMENT OF EMPLOYMENT SERVICES,  
COMPENSATION REVIEW BOARD

Dir. Dkt. No. 89-58

WILLIAM H. KEITH, IV,  
Claimant

v.

UNITY CONSTRUCTION of D.C.,  
and HARTFORD ACCIDENT and INDEMNITY COMPANY,  
Employer/Carrier

Appeal from the Compensation Order of Karen L. Tibbs, Esquire  
H&AS No. 89-202; OWC No. 0500412

July 12, 1990

Eric W. Borda, Esquire, for the Claimant  
Bonnie Brownell, Esquire, for the Employer/Carrier

DECISION OF THE DIRECTOR F. ALEXIS H. ROBERSON

**OPINION**

I. Preliminary Statement

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Law 3-77, D.C. Code, § 36-301 et seq. (1981 Edition, as amended) (hereinafter, the "Act").

On July 14, 1989, Hearing Examiner Tibbs issued a Compensation Order holding that: (1) claimant's notice of injury was untimely but was not barred because the employer had notice of the accident and had not shown that it was prejudiced; (2) claimant's notice of claim was timely filed; (3) claimant was disabled from February 23, 1987 through February 1, 1989 because of his work injury on February 10, 1987; (4) claimant did not make an unauthorized change of physician; (5) claimant was seen by a panel physician; and (6) claimant did not receive unauthorized medical treatment. The Hearing Examiner ordered employer to pay claimant [\*2] temporary total disability benefits from February 23, 1987, to April 19, 1987, and from December 8, 1988 to February 1, 1989. Employer filed an Application for Review on August 30, 1989. Claimant filed a Response on September 12, 1989.

II. Background

Claimant worked for employer as a lineman installing cable for cable television. On February 10, 1987, while working, claimant fell from a tree injuring his left wrist. The accident was witnessed by claimant's foreman, Mr. Tommy Burris, and one Matt Rossee, a supervisor for employer. They administered first aid to claimant and, on the date of his injury, claimant went to employer's main office and talked with Mr. Miranda, employer's operational manager. During this conversation, claimant testified he gave Mr. Miranda a piece of paper describing the incident and Mr. Miranda made notes on his calendar. Claimant also contended that he sent his medical records to employer and insurer describing his injury. In the alternative, claimant argues that there has been no prejudice to employer because it did not receive written notice within the time prescribed by statute. Claimant alleges that although employer had received his physician's [\*3] report in February, 1987, had talked with claimant in May, 1988, and the carrier had taken his recorded statement in August, 1988, employer did not undertake to investigate the matter by scheduling a medical examination until December, 1988.

Employer contends on this appeal that the Hearing Examiner erred in concluding that: (1) claimant's claim was not barred by his failure to give proper notice; (2) that the statute of limitations does not bar the instant case; (3) that the claimant was disabled as a result of work injuries he suffered in February, 1987; (4) that the claimant had not engaged in an unauthorized change of physicians; and (5) that Dr. Robb is a panel physician.

### III. Discussion

The Director of the Department of Employment Services (hereinafter, "Director") must affirm the Compensation Order under review if the findings of fact contained therein are supported by substantial evidence in the record considered as a whole and if the law has been properly applied. See D.C. § 36-322; 7 D.C.M.R. Employment Benefits § 230. Substantial evidence is defined as such relevant evidence as a reasonable mind might find as adequate to support a conclusion. *George Hyman Construction Company v. Department of Employment Services*, 498 A.2d 563 (D.C. App. 1985). [\*4]

Employer argues that as the Hearing Examiner concluded that formal written notice was not given to the employer, her finding that claimant's claim was not barred because employer had notice of the accident and has not shown that it was prejudiced, is inconsistent. The Director does not agree.

The Hearing Examiner, discussing her findings in this regard stated:

"The record reflects that formal written notice was not given to the employer and the Mayor until May 1988, which is outside of the 30 days required by law. However, the claimant has given credible testimony that he informed the employer of his injury on the date of the injury and gave them a written note which cannot be found by either party. Also claimant testified that he informed the employer after his treatment from Bowie Health Center of his diagnosis. Also, at the time of the injury a representative of the employer witnessed the incident. The employer testified he was informed of the incident. Accordingly, claimant's claim should not be barred for failure to give written notice within the time frame required by law because the Employer had knowledge of a work related incident and employer has not been prejudiced." [\*5] Compensation Order p. 4.

The Director is satisfied that the evidence of record supports these conclusions of the Hearing Examiner. Claimant's supervisors, Messrs. Burris and Rossee, witnessed claimant's February 27, 1987, accident. They took claimant back to employer's main office where he admittedly related to Mr. Miranda, employer's operational manager, that he had been injured and gave him a written account of the accident which cannot be found by either party. Where the employer's representatives were aware of the circumstances surrounding the occurrence of the injury and knew as much about it as the claimant could report, such knowledge is imputed to the employer and excuses lack of notice. 3 A. Larson's, *The Law of Workmen's Compensation*, § 78.31(a) at p. 15-85, cited in *Foster v. Howery & Simon*, H&AS No. 83-105 (June 27, 1985). Under these facts, the Director concludes that the Hearing Examiner committed no error in finding that claimant's claim was not barred by the notice provisions of the Act.

Employer next argues that the Hearing Examiner erred in concluding that claimant's claim is not barred by the statute of limitations. Section 36-314 (a) of the D.C. [\*6] Code provides:

"(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 therefor 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 for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the 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." (Emphasis Supplied).

In the instant case, employer made voluntary payments of compensation from August 8, 1988 to December 7, 1988, when it ceased payments, relying on the medical opinion of Dr. Robert J. Neviasser who performed an independent medical examination on claimant. Under the statutory provision, claimant had until December 7, 1989, to file his claim. The record reflects that claimant's claim was filed on August 19, 1989. The [\*7] Director concludes that the Hearing Examiner's finding that claimant's claim was timely filed is based upon substantial evidence of record and a proper application of the law.

In contending that the Hearing Examiner erred in concluding that the claimant was disabled as a result of his February, 1987 work injury, employer appears to reargue the evidence presented below and take issue with the credibility and evidentiary findings of the Hearing Examiner. Much of the argument in this regard centers around employer's ex-

hibit No. 14, which employer alleges: (1) the Hearing Examiner failed to fully review; (2) that they were impeaching in nature of the claimant's testimony; and (3) proved an injury to the same part of claimant's body. This exhibit is a series of documents pertaining to a May 17, 1986, automobile accident, ostensibly involving injuries, treatment records and a release of a William Hugh Keith, IV. At the hearing below, employer asserted its entitlement to a \$ 20,000.00 lien against a settlement claim received from this accident. In disposing of this matter the Hearing Examiner stated:

"Employer also argues that it is entitled to \$ 20,000.00 lien against a settlement claim [\*8] received from an automobile accident. Claimant argues that he did not received settlement from an accident case. The record indicates that the automobile accident which employer is referring to took place on May 17, 1986 prior to the work injury February 10, 1987. The automobile accident injuries are to different parts of the body. Employer argues its entitled to a lien against this monies but cites no authority for its position. Therefore, I need not make any findings on this issue."

Claimant denied that he was ever involved in this accident, or that he was injured thereby, Hearing Transcript p. 94. Employer's counsel, at the hearing below, devoted considerable energy to examining claimant regarding this accident, the treatment rendered by a Dr. Falek, and the injuries recounted in this exhibit. Claimant persisted in denying that he was in an auto accident on the date in question, or that he was treated by (or even knew) a Dr. Falek, or that his left arm had been injured on May 17, 1986. In these circumstances, the Director fails to appreciate employer's argument that this exhibit somewhat impeached claimant's testimony that he had not obtained medical treatment for previous [\*9] injuries to his left arm and/or contravened the Hearing Examiner's finding that the claimant's testimony was credible. Whatever probative inference there is to be drawn from this automobile accident (which occurred some nine months prior to claimant's work injury) is overcome by the fact that claimant's work injury was witnessed by employer's representatives and reported to employer's operational manager on the date it occurred (February 27, 1987). These facts are amply supported by the record evidence. The Director will therefore not disturb the Hearing Examiner's finding that the claimant was disabled as a result of the work injury he suffered in February, 1987.

Employer next contends that the Hearing Examiner erred in concluding that the claimant had not engaged in an unauthorized change of physicians. Claimant first went to the Bowie Health Center on February 10, 1987, where he was X-rayed and referred to Prince George's Orthopaedic Associates (an association of orthopaedic surgeons operating out of some four different locations). Claimant was first seen there by one Dr. David Dorin on February 12, 1987, and placed in a fiberglass along arm cast. On the following day, claimant [\*10] went to a different office of Prince Georges Orthopaedics, because he was experiencing pain and swelling, and saw Dr. Kevin Hanley, an associate of Dr. Dorin's. He returned on February 19, 1987, and his arm was placed in a new cast by Dr. Hanley. Claimant states that when he returned in March 1987, he was refused treatment because the medical bills had not been paid. His medical treatment stopped at this point and he resumed treatment with his family doctor, Dr. David Robb on September 2, 1988. Claimant testified that in August, 1988, after returning to work with Unity Construction Company, he had a telephone conversation with a representative of the insurance carrier during which time he requested permission to see his family physician because he was still having problems with his arm. He states that he was granted permission. The Hearing Examiner made no finding with respect to claimant's account of this authorization, holding instead that claimant's first choice of a treating physician was made when he chose Dr. Robb. Employer argues that as the claimant had treated with Drs. Dorin and Hanley, he had established a doctor-patient relationship with a physician and was thus [\*11] precluded from changing physician's without the prior approval of employer. The Director does not agree.

The record clearly indicates that claimant's initial visit to Bowie Health Center (hereafter "Center") February 10, 1987, did not evince a "choice of an attending physician" under the rule in *Perry v. Madison Hotel*, H&AS No. 83-254m OWC No. 22987 (November, 1984). This is clear because the Center operates as a clinic and afterwards makes referrals to specialists. Likewise, the referral of the claimant to Prince Georges Orthopaedic Services (hereafter Services) did not establish the confidential doctor-patient relationship under the rule of *Perry*, supra, and the rationale set forth in *A. Larson, The Law of Workmen's Compensation*, § 61.12(b). The record evinces that "Services" is a group of ten physicians, who are board certified orthopaedic surgeons who operate out of offices in Upper Marlboro, Maryland, Clinton, Maryland; West Hyattsville, Maryland and Bowie, Maryland. While orthopaedic services are provided at either of these locations, the patient is not free to choose his physician, but is rather treated by the physician on duty at the particular office he/she [\*12] visits at the time of the appointment. The record evidence reveals that on claimant's first visit, he saw Dr. Dorin. Thereafter, he visited a different office and saw Dr. Hanley in reference to his arm cast on two occasions. Under these facts, the Hearing Examiner, applying the rule in *Perry*, supra, held that the claimant did not choose a treating physician when he visited Services. The Director finds no reason to disturb this finding owing to the fact that the evidence of record does not show that claimant enjoyed the benefits of a confidential doctor-patient relationship or of the trust in a physician which a choice of physician is likely to bring.

Finally, employer's contends that the Hearing Examiner erred in concluding that Dr. Robb, claimant's family physician, is a panel physician. The Hearing Examiner took judicial notice of the fact that Dr. Robb was a member of the Physician Panel at the time that claimant received treatment from him. She attached copies of the Addendum to the Physicians Panel effective June 1, 1987 to July 26, 1988, wherein Dr. Robb's name is indicated. Employer makes no showing in support of his contention that Dr. Robb had been dropped from the [\*13] Physician's Panel. It merely argues that: (1) there are inconsistencies in the panel lists officially released by the Office of Workers' Compensation; (2) the list released to employer's counsel by OWC did not contain Dr. Robb's name; (3) the panel lists presented do not cover the period for which Dr. Robb treated the claimant (August 2, 1988 until December 9, 1988); and (4) the Hearing Examiner's findings on this matter must be reversed. At the hearing below, employer's counsel expressly requested the Hearing Examiner "to take judicial notice of who is on the list and who isn't on the list" . . . . " As well as the lists that were published to the public . . . ." Hearing Transcript p. 27. The Hearing Examiner did this and found that Dr. Robb was in fact on the Physician's Panel. But employer, while tacitly admitting that the Hearing Examiner's finding that Dr. Robb's name appears on the Addendum to the Physician Panel attached to the Compensation Order, now argues that as the Addendum listed is not coterminous with the period for which claimant treated with Dr. Robb, this finding must be reversed. The Director does not agree. Absent any showing by employer that Dr. Robb, having [\*14] applied and been admitted to the Physician's Panel, had somehow been removed prior to treating the claimant, the Director rejects employer's challenge to this finding.

#### IV. Disposition

Accordingly, for the reasons more fully set forth above, the Compensation Order of July 14, 1989, is hereby affirmed, adopted and incorporated by reference herein.

F. Alexis H. Roberson

Director

Date JUL 12 1990