CRB No. 12-018

LINDA M. HENDERSON,

Claimant–Petitioner,

v.

FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
and THE HARTFORD INSURANCE GROUP,

Employer and Insurer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Leslie A. Meek
AHD No. 11-263, OWC No. 678522

Michael Kitzman, Esquire, for the Petitioner

Chad Michael, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[1] LAWRENCE D. TARR, AND MELISSA LIN JONES, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Linda Henderson is employed as a secretary at the law firm of Finnegan, Henderson, Farabow, Garrett & Dunner, LLP (Finnegan). Ms. Henderson alleged that she sustained injuries to her low back on July 29, 2010, while moving boxes and other materials and equipment from her previous work station to her new permanent work station. Finnegan contested whether she had sustained such an injury, and claimed that even if she had sustained the injuries as alleged, her claim for indemnity benefits was barred due to her failure to give adequate and timely notice of the injury to Finnegan.

[1] Judge Russell was appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance Nos. 11-02 (June 23, 2011).

On November 22, 2011, a formal hearing was convened to resolve the disputes as to whether Ms. Henderson had indeed sustained a work related injury, and whether she had provided adequate and timely notice of the injury to Finnegan. On January 20, 2012, the Administrative Law Judge (ALJ) issued a Compensation Order (CO) in which she found that Ms. Henderson did sustain an accidental injury arising out of and occurring in the course of her employment on July 29, 2010, that her undisputed disability is causally related to that work injury, and awarded medical benefits. However, the ALJ determined that Ms. Henderson had failed to demonstrate that she had given timely notice of the injury to Finnegan, and denied temporary total disability benefits.

Ms. Henderson filed a timely appeal of the finding of untimely notice, to which Finnegan filed an opposition. Finnegan does not challenge the findings that Ms. Henderson sustained a work related injury on July 29, 2010, or that the claimed disability is causally related to that injury.

STANDARD OF REVIEW

The scope of review by the CRB is generally 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. *See,* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES,* 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

D. C. Code § 32-1513, "Notice of injury or death", provides:

> (a) Notice of any 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.
>
> (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 or death, and shall be signed by the employee or by some person on his behalf, or, in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.
>
> (c) Notice shall be given to the Mayor by delivering it to him or sending it by mail to him, and to the employer by delivering to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any partner, or, if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may

> be served or who is in charge of the business in the place where the injury occurred.
> (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 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
> (2) If the Mayor excuses such failure on the ground 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.

It was undisputed at the formal hearing that the notice that Ms. Henderson alleges she gave was not a writing which contained all the details required by the statutory provision. It is her contention that the (d)(1) exception applies, because she advised Finnegan orally during her annual performance review meeting which occurred on November 19, 2010. See, HT 42; 45- 47. It was Finnegan's contention at the formal hearing that Ms. Henderson never advised them of any such injury, either orally or in writing, until sometime in the spring of 2011 when they were notified of the claim by Ms. Henderson's attorneys. See, testimony of Ferronie Sampson, HT 101 and Elisabeth Kane, HT 121.

In the CO, the ALJ couched her decision on the question of whether timely notice of the injury had been given somewhat differently in the "Conclusion" portion than she did in the "Discussion" and "Findings of Fact" sections. While in the Conclusion she wrote "I find and conclude Claimant failed to provide Employer timely notice of her work injury", in the Findings she wrote "Claimant has failed *to show* she provided timely notice of her injury" (emphasis added) and in the Discussion she wrote "Without knowing when Claimant first became aware of that [sic] her injuries were employment related, this Tribunal is unable to determine whether the alleged notice to Employer on November 19, 2010 was timely."

The usage employed in the Conclusion, and to a lesser extent that employed in the Discussion suggests a misconception on the ALJ's part regarding evidentiary burdens on the issue of notice. D.C. Code § 32-1521, "Presumptions", reads in pertinent part:

> 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;
> …

The ALJ found as facts that Ms. Henderson sustained a back injury at work on July 29, 2010 "in the normal course of her employment during the process of moving her permanent work station." Given that finding, § 32-1521 (2) supplies a presumption that she provided Finnegan with "sufficient notice of such claim". Yet the ALJ's phraseology suggests that Ms. Henderson not only needed to prove the work injury, but also was obligated to demonstrate compliance with the notice provisions of the Act, which is not the case. Having established a work injury, the Act

presumes adequate and timely notice has been given, making it an employer's burden to overcome the presumption by adducing substantial evidence in opposition to the presumed notice. Once the employer has done that, the presumption falls from the case, and the evidence is weighed, with the claimant bearing the burden of demonstrating adequate notice by a preponderance of the evidence. See, *Dillon v. DOES*, 912 A.2d 556 (2006), at 559-560.

As we often do in this jurisdiction, it is useful to consider how the issue is handled under the predecessor statute to our current statute. The presumptions in the Act are almost identical to the presumptions in the Longshoreman and Harbor Worker's Compensation Act, 33, U.S.C. 901, *et seq.*, (LHWCA). In *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 1120 (5th Cir. 1980), the LHWCA presumption in regards to notice was interpreted as follows:

> Our recapitulation of the facts serves not only to demonstrate the support for the ALJ's conclusion that Vinson established the existence of a compensable injury, but that Avondale received adequate notice. 33 U.S.C. § 912(a) and (b) require a claimant to file written notice of an injury within thirty days of its occurrence. It is undisputed that this notice was never given. Section 912(d) excuses the failure to provide notice, however, if the employer or his agent had knowledge of the injury, and the employer suffers no prejudice. As to the latter matter, the ALJ found that Avondale was not prejudiced by the lack of written notice. As to the former, under § 920(b) it is presumed, in the absence of substantial evidence to the contrary, that sufficient notice has been given. It must be presumed, therefore, that an employer has notice of the work-relatedness of an injury when the injury manifests itself on the job. See United Brands Co. v. Melson, 594 F.2d 1068, 1072 (5th Cir. 1979); Butler v. District Parking Management Co., 124 U.S. App. D.C. 195, 363 F.2d 682 (D.C.Cir.1966).

In addition, it appears that the ALJ made an error in assessing the contents of the medical records admitted into evidence which bears directly on her ultimate conclusion that Ms. Henderson failed to provide adequate notice of the work injury to Finnegan. In reading the following quotation from the Discussion, it is important to bear in mind that Ms. Henderson had several treating physicians involved in her care, of which one was named Mariam Bahrami, and another was named Parineet Bambrah. The ALJ appears to confuse one with the other in the text. After citing and quoting D.C. Code § 32-1513 (a)'s requirements concerning a claimant's obligation to give notice of injury within 30 days of the date of injury or the date the claimant "is aware or in the exercise of reasonable diligence should have been aware of the relationship between the injury … and the employment", she wrote:

> Claimant testified her back first started hurting "toward the end of July" (TR p. 33) and she attributed the pain to her being out of shape and not being accustomed to moving. (TR p. 34). Claimant further testified that she did not relate her pain to the work activity surrounding the move of her work station until she sought medical treatment with Dr. Miriam Bambrah. While I find Claimant's testimony to be credible in this regard, I am unable to make any determination that Claimant provided timely notice of her injury to Employer. The record is void of any evidence that shows when Claimant first became aware of the source of her

> injury. Claimant states she first became aware that she was injured at work when she discussed her injuries with Dr. Miriam Bambrah however, no evidence has been provided to show when Claimant met with Dr. Miriam Bambrah. Without knowing when Claimant first became aware of that [sic] her injuries were employment related, this Tribunal is unable to determine whether the alleged notice to Employer on November 19, 2010 was timely.

CO, page 4 – 5.

The November 19, 2010 date is the date that Ms. Henderson testified she first told Finnegan of her work injury, which notice she testified was given on that date during her annual performance review meeting. We note that, while the ALJ described Ms. Henderson's testimony regarding her conversations with her doctor to be credible, and elsewhere found the testimony of one of the two Finnegan employees present at the November 19 meeting to lack credibility, the ALJ did not make a specific finding as to whether November 19, 2010 is in fact the date that Finnegan was first made aware of the July 20, 2010 injury.

In any event, the ALJ's determination that she was "unable to determine" whether the alleged notice was timely (e.g. within 30 days of her first becoming aware herself that the injury was related to the work activities of July 29, 2010) was premised upon the ALJ's perception that "no evidence has been provided to show when Claimant met with Dr. Miriam Bambrah." This is where the confusion over the physicians' names becomes critical. There is no "Dr. Miriam Bambrah" in this case. There is Dr. *Parineet* Bambrah, and Dr. *Mariam* Bahrami.

Review of the portion of the hearing transcript to which the ALJ refers concerning Ms. Henderson's testimony about the physician with whom she was discussing her back problems and during which discussions she testified she was made aware of the relationship of her problems to the July 29, 2010 incidents (CO, page 4, and referencing TR. p.37) shows that the physician at issue is Dr. Mariam Bahrami. Thus, it appears that when the ALJ wrote that "no evidence has been provided to show when Claimant met with Dr. Miriam Bambrah", she intended to write that "no evidence has been provided to show when Claimant met with Dr. Mariam Bahrami." And that statement is inaccurate, because Finnegan produced EE 8, two disability slips authored by Dr. Bahrami, in both of which it is written that "Linda Henderson has been under my care since 11-22-10". Thus, while it is not overwhelming evidence, there is *some* evidence in the record that Ms. Henderson's conversation with Dr. Bahrami took place on November 22, 2010.

In conclusion, we recognize that it may well be that the ALJ's failure to address the notice presumption could ultimately turn out to have been harmless error, since it may well be that she determines that Finnegan overcame the presumption and that on reweighing the evidence she finds that Ms. Henderson has failed to meet the burden imposed by the preponderance standard. However, in this case, because there is no explicit finding on several of the necessary facts regarding whether there has been timely notice, and because the recitation of the contents of the records considered by the ALJ that were central to her findings and conclusions were erroneous, we conclude that a remand is the safest path to obtaining a clear determination of the intentions of the ALJ.

A remand is necessary, in order to permit the ALJ to address these matters: (1) consideration of the notice issue in light of the statutory presumption; (2) reconsideration of the evidence, in which reconsideration there is an accurate identification of the record evidence considered and an accurate assessment of the content of the record; and (3) findings of fact regarding (a) the date that Ms. Henderson first became aware of the relationship between her injuries and her employment, (b) the date that she gave Finnegan notice of the injuries and their relationship to employment, and (c) whether that notice was timely under the Act.

CONCLUSION

The Compensation Order failed to consider the issue of timely notice of injury in light of the statutory presumption that sufficient notice was given, and misstates the contents of the record regarding the date that Ms. Henderson first became aware of the relationship between her injury and her employment.

ORDER

The denial of the claim for temporary total disability benefits is vacated and the matter is remanded for further consideration in a manner consistent with the aforegoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

____March 27, 2012_____
DATE