No. 15-AA-700

DISTRICT OF COLUMBIA COURT OF APPEALS

SYLVIA BROWN-CARSON,

Petitioner,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES,

Respondent.

ON PETITION FOR REVIEW FROM
THE COMPENSATION REVIEW BOARD
(2015-CRB-10)

PETITIONER'S BRIEF

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RULE 28(a)(2)(A) STATEMENT

The parties to the case are petitioner Sylvia Brown-Carson, the claimant-petitioner below, and respondent Department of Employment Services. In the proceedings before the Compensation Review Board, the Office of Unified Communications was the employer-respondent and was represented by Attorney General Karl A. Racine, Nadine C. Wilburn, Andrea G. Comentale, and Lindsay M. Neinast. Ms. Brown-Carson was not represented by an attorney in the administrative proceedings but was represented by non-attorney representative Richard A. Daniels. No intervenors or amici have appeared.

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PETITIONER'S BRIEF

ISSUES PRESENTED

1. Whether the Compensation Review Board erred in effectively reversing, without analysis, the Administrative Law Judge's factual finding that Ms. Brown-Carson's preexisting carpal tunnel syndrome was aggravated in 2012?

2. Whether the Compensation Review Board erred in failing to follow this Court's determination in *Poole v. DOES*, 77 A.3d 460 (D.C. 2013), which held that the time for a workers' compensation claimant to provide notice to an employer and to submit a claim does not begin to run until the claimant suffers a disabling injury?

STATEMENT OF THE CASE

Ms. Brown-Carson was employed by the District of Columbia government from 1987 until 2012, most recently for the Office of Unified Communications as a 911 call-taker. On March 28, 2012, she started experiencing debilitating wrist pain while at work and has been disabled since that date. On April 3, 2012, she filed a workers' compensation claim. Ms. Brown-Carson's claim was initially denied by the Office of Risk Management on September 21, 2012 on the basis that her disability was not related to her work. On September 27, 2013, Administrative Law Judge (ALJ) Joan E. Knight issued a Compensation Order granting Ms. Brown-Carson's claim on the basis that her injury (aggravation of preexisting carpal tunnel syndrome) was work-related and rendered her disabled. Upon further review, on January 24, 2014, the Compensation Review Board concluded that Ms. Brown-Carson had failed to file a timely notice or claim, and remanded the matter to the ALJ. On remand, on December 23, 2014, the ALJ issued a new Compensation Order denying Ms. Brown-Carson's claim based on failure to give timely notice. The Board affirmed that order on May 19, 2015. Ms. Brown-Carson lodged her petition for review on June 22, 2015.[1]

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[1] This Court dismissed the petition for review *sua sponte* because of Ms. Brown-Carson's failure to obtain *in forma pauperis* status or pay the filing fee. The Court subsequently granted her petition for rehearing and reinstated the petition upon her payment of the filing fee.

STATEMENT OF THE FACTS

A. Disability History

Ms. Brown-Carson worked full-time for the District of Columbia government from 1987 until 2012. For much of that time, she worked as a telecommunications operator and 911 call-taker with the Office of Unified Communications and the Metropolitan Police Department. Her duties required her to answer a high volume of emergency calls, obtain information from the callers, and type quickly and accurately into a computer-aided dispatch system. JA 48-51, 96-99. The average call-taker takes about 100 calls per day. JA 97.

In 1992, Ms. Brown-Carson, who is left-handed, was told at a routine checkup that she appeared to have carpal tunnel syndrome. JA 52-53. She began to use a wrist splint, which helped alleviate her symptoms. JA 53.

In 1993, Ms. Brown-Carson was detailed to a job in the time and attendance payroll section because that section needed help due to a retirement and because that position involved less typing. JA 50. She remained in this position through 2004. JA 51. During that time, her symptoms largely subsided but her wrist pain would come and go on occasion. JA 53, 59. She treated herself as needed with non-prescription pain medication. JA 54. The Record does not suggest that Ms. Brown-Carson's carpal tunnel syndrome impacted her job performance in any way.

In 2004, Ms. Brown-Carson transferred back to her position as a 911 call-taker. JA 51. Her previously diagnosed carpal tunnel syndrome did not prevent her from performing the duties of this position, which she held for eight more years. On March 28, 2012, Ms. Brown-Carson started to experience extreme pain at work while typing. JA 54-55. She immediately notified her supervisor and was sent to urgent care for evaluation. JA 112. The urgent care doctor imposed restrictions, including that Ms. Brown-Carson not use her left (dominant) hand. JA 57-59, 66-67. That was Ms. Brown-Carson's last day of employment, other than a brief attempt to return to work the following week, which was rebuffed by her employer because the doctor's restrictions precluded her usual work activities. JA 57-59. She remains disabled and unable to perform her work duties. JA 110, 114.

Soon after March 28, 2012, Ms. Brown-Carson was given a wrist splint and prescription pain medication. JA 56-57. She later received an injection in her wrist, which helped with her symptoms for a couple of weeks but did not completely alleviate her numbness and tingling. JA 59-60. At the time of her administrative hearing in this matter (February 6, 2013), Ms. Brown-Carson was still experiencing pain as well as numbness and tingling in her fingers. JA 60.

B. Administrative Proceedings

As noted above, Ms. Brown-Carson notified her employer immediately (on March 28, 2012) of her disabling pain. Less than one week later (on April 3, 2012)

she filed a disability claim with the District of Columbia Office of Risk Management. *See* JA 13, 109-110, 112, 116, 124, 126. That Office denied her claim on September 21, 2012, reasoning that her condition was not related to her employment. JA 13. The stated basis for this conclusion was a report by Steven Friedman, an orthopedic surgeon hired by the District to evaluate Ms. Brown-Carson's workers' compensation claim. The Office of Risk Management stated that Dr. Friedman had concluded that Ms. Brown-Carson was "*likely* suffering from an inflammatory arthritis," and was "*concerned* that [Ms. Brown-Carson's symptoms were] a consequence of an underlying inflammatory condition rather than being a work related phenomenon." JA 13 (emphasis added).[2]

1. Initial Proceedings Before the ALJ. Ms. Brown-Carson timely requested a full evidentiary hearing, which was held on February 6, 2013 before Administrative Law Judge Joan E. Knight. JA 14-106 (transcript). The issues before the ALJ were whether Ms. Brown-Carson provided timely notice of her injury, whether she timely filed her claim for benefits, whether her disability was causally

[2] The emphasized language demonstrates that Dr. Friedman was not definitive in his postulating that Ms. Brown-Carson's injuries might not be related to her work. Moreover, the Office of Risk Management's letter omitted other statements by Dr. Friedman tending to show that her injuries were work-related, including Dr. Friedman's diagnosis of Ms. Brown-Carson as having carpal tunnel syndrome and his conclusion that "her work as a telecommunications operator," was a factor in her condition, albeit, in his opinion, "a relatively minor factor." JA 5.

related to her employment, and the extent of her disability. JA 108, 110. The ALJ ruled in favor of Ms. Brown-Carson on all issues and granted her claim for relief. JA 114.

First, the ALJ addressed the timeliness issues raised by the employer, who alleged that the thirty-day notice period and the three-year claim period[3] for Ms. Brown-Carson's injury began to run when she was first diagnosed with carpal tunnel syndrome in 1992, and that she therefore failed to give timely notice or make a timely workers' compensation claim. The ALJ reviewed Ms. Brown-Carson's wrist-related medical history from 1992 to the date of the hearing in great detail. JA 110-112. That review included noting Ms. Brown-Carson's initial diagnosis with carpal tunnel syndrome at a routine checkup in 1992, her successful amelioration of that condition through a combination of using a wrist-splint, self-medicating, and, for a time, being employed in a position that required less typing, and then the manifestation of her extreme pain and inability to work starting on March 28, 2012. JA 111-112. Based on this evidence, the ALJ found that Ms. Brown-Carson had carpal tunnel syndrome at least as far back as 1992, but that her condition was not

[3] According to the Compensation Review Board, a statutory change in 2010 retroactively reduced the time to file a claim based on a 1992 injury from three years to two years. JA 117 n.5. That interpretation is highly questionable, but need not be analyzed here, as it is irrelevant to this petition for review whether the applicable claim period was two years or three years at any given time.

disabling until March 2012. *See* JA 111 n.6. Specifically, the ALJ found that the injury to Ms. Brown-Carson that manifested on March 28, 2012 was "an aggravation of a [preexisting] cumulative trauma work injury," JA 109; *accord* JA 114 (referring to Ms. Brown-Carson's "aggravation cumulative trauma injury"), meaning that Ms. Brown-Carson's non-disabling carpal tunnel syndrome, as diagnosed in 1992, was a cumulative trauma work injury (presumably caused by typing) which was, in 2012, aggravated to the point of becoming disabling.

The ALJ next noted this Court's holding that "'an aggravation of a preexisting condition may constitute a compensable accidental work injury.'" JA 112 (quoting *Ferreira v. DOES*, 531 A.2d 651, 660 (D.C. 1997)). Here, the ALJ noted, the date of manifestation of the aggravation of the preexisting injury was "March 28, 2012, when her left wrist condition became disabling." JA 112. Because Ms. Brown-Carson notified her employer on that same day and submitted her workers' compensation claim within a week, both her notification and her claim were timely. JA 109-110, 112, 114.

With respect to whether this aggravation of a previously existing condition was work-related, the ALJ noted that Ms. Brown-Carson needed to prove only that her condition was causally related to her employment. With such proof, "[t]he fact that other, non-employment related factors may also have contributed to, or additionally aggravated [claimant's] malady, does not affect her right to

compensation under the 'aggravation rule.'" JA 112. The ALJ treated this causation question as a conflict between the evidence of Ms. Brown-Carson's treating physician, Dr. Rida Azer, and a physician selected by the District, Dr. Steven Friedman.[4] The ALJ carefully reviewed the opinions of each of these doctors, concluding that "Dr. Azer's assessment is found more reliable and persuasive." JA 113. The ALJ noted that both physicians diagnosed Ms. Brown-Carson with longstanding carpal tunnel syndrome and that Dr. Friedman agreed that Ms. Brown-Carson's occupational typing was a contributing factor to her current disability, despite his ultimate conclusion that "her left carpal tunnel is *primarily* non-occupational in nature." JA 113 (emphasis added). Dr. Azer's records specifically supported Ms. Carson-Brown's "assertion that repetitive motions of typing over a period of many years have aggravated her left carpal tunnel syndrome." JA 113. The ALJ also commented upon Dr. Azer's "understanding of Claimant's work responsibilities as a 911 call-taker," JA 114, implying that Dr. Friedman lacked such an understanding and that his conclusions regarding the cause of her carpal tunnel syndrome should be discounted accordingly.

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[4] Although the District represented during the administrative process that Dr. Friedman was a treating physician, *see* Record Document DOES0096 (District administrative memorandum asserting that "Claimant was *treated* by [Dr.] Friedman") (emphasis added), this assertion was inaccurate. Dr. Friedman's own report expressly states that his examination of Ms. Brown-Carson "is intended to provide information, *not* to deliver medical care." JA 4 (emphasis added).

Finally, the ALJ concluded, based on Dr. Azer's assessment, that Ms. Brown-Carson remained disabled. JA 114. Both physicians concluded that Ms. Brown-Carson's wrist condition required treatment and limitations on her work activities, including typing, but only Dr. Azer understood that those restrictions were incompatible with Ms. Brown-Carson's work responsibilities as a 911 call-taker. JA 114. The ALJ held that Ms. Brown-Carson had proven that her carpal tunnel condition is causally related to her employment and that she is entitled to temporary total disability benefits and medical treatment. JA 114.

2. Initial Appeal to the Compensation Review Board. The District appealed to the Compensation Review Board, which vacated the ALJ's decision and remanded the matter to the ALJ. JA 115-121. Finding that Ms. Brown-Carson did not timely notify her employer of her original carpal tunnel diagnosis back in 1992 or file a workers' compensation claim based on that initial diagnosis, the Board reversed without addressing the merits of her claim.

The Board began its analysis by implicitly treating Ms. Brown-Carson's injuries as a single injury of carpal tunnel syndrome beginning in 1992 and continuing through the date of the hearing. JA 117, 119. The Board thus disregarded

the ALJ's factual finding that Ms. Brown-Carson's original carpal tunnel syndrome was a preexisting condition that was aggravated in 2012.[5]

Based on this analytical framework, the Board then set out to determine when Ms. Brown-Carson's injury manifested, thereby starting her time limit for notifying her employer and making her workers' compensation claim. To make this determination, the Board invoked what it called the "manifestation rule." JA 117, 120. The Board stated that it had established this rule in its previous decision in *Vanhoose v. Respicare Home Respiratory Care*, CRB No. 07-022, AHD No. 06-342, OWC No. 626066 (July 23, 2007), which had held that "'[t]he rule for fixing the time of injury in cumulative trauma cases . . . [is] the date the employee first

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[5] The Board provided no clear rationale for disregarding the ALJ's factual finding. The Board did state that "[i]t is possible for a discrete accident to aggravate a preexisting condition that was caused by repeated on-the-job trauma, but the ALJ in this case has not made that distinction." JA 119-120. It is possible (although by no means necessary) to infer from this statement the suggestion that it is *only* possible for a discrete accident to aggravate a preexisting condition that was caused by repeated on-the-job trauma and thus that it is *not* possible for further repeated on-the-job trauma to aggravate a preexisting condition that was caused by earlier repeated on-the-job trauma. If so, the Board provided no support for this proposition, and it is wrong. *See Smith v. DOES*, 934 A.2d 428, 432 (D.C. 2007) (noting that "cumulative traumatic injuries (which include carpal tunnel syndrome) . . . present a special challenge in the workers' compensation area, since 'it is not possible to identify a discrete event occurring at a particular date and time that causes *(or aggravates)* the injury . . .'") (quoting *King v. DOES*, 742 A.2d 460, 469 (D.C. 1999)) (emphasis added).

seeks medical treatment for his/her symptoms or the date the employee stops working due to his/her symptoms, whichever first occurs.'" JA 118 (quoting *Vanhoose*). The Board specifically criticized the ALJ for looking to the date upon which Ms. Brown-Carson's condition became disabling, stating that "[i]n determining the date of injury as the date when Claimant's 'left wrist condition became disabling', the ALJ misapplied the manifestation rule." JA 120; a*ccord id.* ("[T]he ALJ placed her focus, incorrectly, on when Claimant's condition became disabling."). Instead, the Board viewed the manifestation date as "the 1992 diagnosis of carpal tunnel and Claimant's contemporaneous realization that it was work related." JA 121. Based on that manifestation date, Ms. Brown-Carson had not given timely notice or filed a timely claim, and the Board accordingly vacated the ALJ's decision and remanded "to the ALJ to issue a CO [compensation order] denying the claim for benefits due to the failure to provide timely notice of injury within 30 days." JA 121.

3. Remand to the ALJ and Subsequent Board Appeal. On remand, the ALJ issued the required decision denying Ms. Brown-Carson's claim on December 23, 2014. JA 122-126. Ms. Brown-Carson appealed again to the Board and provided the Board with a copy of this Court's decision in *Poole v. DOES*, 77 A.3d 460, 467 (D.C. 2013), which held that the time for providing notice to an employer and for making a workers' compensation claim runs, not from the time that an injured

worker first seeks medical care, but rather from the time that the worker knows that the injury will likely result in disability, meaning a loss in wages. The Board denied this administrative appeal on May 19, 2015. JA 127-129. The Board's decision did not address *Poole*. Instead, the Board expressly refused to "address the arguments presented in this appeal, as they all go to the merits of the case, which have already been decided in the prior [Board Decision of January 23, 2014]." JA 128.

4. Petition for Review by this Court. On June 22, 2015, Ms. Brown filed a timely petition for review of the May 19, 2015 order. Although this Court is reviewing the Board's second decision in this matter (the decision dated May 19, 2015), that decision is little more than a restatement of the Board's first order (dated January 23, 2014). The Board's first order was not subject to immediate review by this Court because the Board remanded for further proceedings. Thus, as a practical matter, the instant petition for review asks this Court to reverse the Board's final decision below (the May 19, 2015 decision) because its first decision below (the January 23, 2014 decision) was erroneous. *See Bentt v. DOES*, 979 A.2d 1226 (D.C. 2009) (review of a similar series of two ALJ decisions and two Board decisions).

SUMMARY OF THE ARGUMENT

Despite being diagnosed with carpal tunnel syndrome in 1992, Ms. Brown-Carson's income was unaffected and she was able to continue working for the next twenty years. In 2012, however, her job requirements, specifically extensive typing

as a 911 call-taker, aggravated her preexisting carpal tunnel syndrome to the extent that she could no longer perform her job duties and she lost the ability to earn wages. She timely notified her employer of this new disability and filed an appropriate claim. She is accordingly entitled to workers' compensation benefits, as the Administrative Law Judge found.

The Compensation Review Board erred in concluding that Ms. Brown-Carson's notification and claim were untimely. First, the Board erred in ignoring the ALJ's factual findings regarding aggravation. Those findings cannot be disturbed by either the Board or this Court because they were supported by substantial evidence, including not only the report of Ms. Brown-Carson's treating physician but also the report of the District's hired consulting physician. *See Payne v. DOES*, 99 A.3d 665, 671 (D.C. 2014).

The Board further erred in determining that, regardless of aggravation, the time for Ms. Brown-Carson to notify her employer and make a workers' compensation claim began to run two decades before she suffered any disability. As this Court has made clear, a disabling injury (including the impairment of the ability to perform work and/or earn wages) is necessary to trigger an employee's obligations to notify the employer and to file a workers' compensation claim. This makes sense, as there can be no workers' compensation without such a disability. *See Poole v. DOES*, 77 A.3d 460 (D.C. 2013).

ARGUMENT

I. MS. BROWN-CARSON'S NOTIFICATION AND CLAIM WERE TIMELY BASED ON THE 2012 AGGRAVATION OF HER PREEXISTING CARPAL TUNNEL SYNDROME.

A. The Board Erred in Failing to Consider the ALJ's Determination that, in 2012, Ms. Brown-Carson Suffered an Aggravation of Her Preexisting Carpal Tunnel Syndrome.

It is a long-established and fundamental principle of workers' compensation law that "'an aggravation of a preexisting condition may constitute a compensable accidental injury.'" *Ferreira v. DOES*, 531 A.2d 651, 660 (D.C. 1987) (quoting *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 183, 407 F.2d 307, 313 (1968) (*en banc*)); *accord, e.g.*, *Payne*, 99 A.3d at 675; *Jackson v. DOES*, 979 A.2d 43, 49 (D.C. 2009); *McCamey v. DOES*, 947 A.2d 1191, 1197 (D.C. 2008) (*en banc*); *Clark v. DOES*, 772 A.2d 198, 202 (D.C. 2001); *King v. DOES*, 742 A.2d 460, 468 (D.C. 1999); 1-9 *Larson's Workers' Compensation Law* § 9.02[1]. In her initial decision below, the ALJ applied this principle and concluded that in 2012 Ms. Brown-Carson suffered an aggravation of her previously existing carpal tunnel syndrome, which rendered her disabled (at least temporarily) and mandated that she receive benefits. JA 109, 111, 114.

The Board verified that the ALJ made this finding, specifically stating that "[t]he ALJ hearing the case determined that Claimant suffered an aggravation of a cumulative work injury that manifested itself on March 28, 2012." JA 116. But the

Board went on to err as a matter of law by ignoring this aggravation and treating Ms. Brown-Carson's injury as carpal tunnel syndrome with onset in 1992 that was never aggravated. This failure to even address Ms. Brown-Carson's claim (and the ALJ's finding) that she aggravated a preexisting condition in 2012 is legal error. *See Payne*, 99 A.3d at 675-76 (noting, in reversing Board decision, that "the Board simply ignored" the ALJ's conclusion "that multiple workplace exposures aggravated or worsened [the claimant]'s respiratory conditions"); *see also Spartin v. DOES*, 584 A.2d 564, 570 (D.C. 1990) (Hearing Examiner erred in failing to consider whether claimant's job aggravated any preexisting condition).

B. The ALJ's Determination of an Aggravation of a Preexisting Condition is a Finding of Fact Supported by Substantial Evidence.

Had the Board considered the ALJ's finding of an aggravated preexisting condition, it would have been constrained to affirm that finding as a finding of fact supported by substantial evidence. As an initial matter, because the aggravation of a preexisting injury is itself a cognizable injury for workers' compensation purposes, such an aggravation is a question of fact, just like the existence of any other cognizable injury. 1-9 *Larson's Workers' Compensation Law* § 9.02[5] (section entitled "Aggravation as Question of Fact" and stating that "[w]hether the employment aggravated, accelerated, or combined with the internal weakness or disease to produce the disability is a question of fact, not law, and a finding of fact on this point . . . will not be disturbed on appeal"); *see King*, 742 A.2d at 470-74

(whether claimant suffered from an aggravating injury is a question of fact for the factfinder); *see also Gardner v. Dir. OWCP*, 640 F.2d 1385, 1387 (1st Cir. 1981) (under federal Longshoremen's and Harbor Workers' Compensation Act – upon which the District's workers' compensation laws are based, *see Poole v. DOES*, 77 A.3d 460, 466 (D.C. 2013) – the finding that a "job situation aggravated [a] preexisting condition" is a "factual finding[]").

Importantly here, the factfinder is the ALJ (not the Board) and the Board could only disturb the ALJ's finding of an aggravation of a preexisting condition on the same basis that this Court could disturb that finding, namely, if it were not supported by substantial evidence. *See Payne*, 99 A.3d at 671 ("Neither the Court of Appeals, when reviewing an Order of the Board, nor the Board, when reviewing an ALJ's Compensation Order, may 'consider the evidence de novo or . . . make factual findings different than those of the ALJ.'") (quoting *Marriott Int'l v. DOES*, 834 A.2d 882, 885 (D.C. 2003)); D.C. Code § 32-1521.01(d)(2)(A) (Board "shall not disturb factual findings contained in the [ALJ's] compensation order that are supported by substantial evidence"). Accordingly, this Court must reverse the Board's decision and effectively reinstate the ALJ's original decision granting Ms. Brown-Carson relief if there is any substantial evidence supporting the ALJ's original finding of an aggravation of a preexisting injury. *See e.g.*, *WMATA v. DOES*, 827 A.2d 35, 46 (D.C. 2003) (affirming a finding of "work related injury that

aggravated the [preexisting] condition" because "there is substantial evidence in the record" supporting that finding). There is an abundance of such substantial evidence here.

Ms. Brown-Carson's physician submitted reports supporting her "assertion that repetitive motions of typing over a period of many years have aggravated her left carpal tunnel syndrome." JA 113. Indeed, one of his reports specifically states that it is a "report for conditions caused by work injury of 03/28/12." JA 12. Those reports included noting that Ms. Brown-Carson was, at the time, "performing computer work in a position she shows me which is flexion and pronation with no evidence of her having an ergonomic station." JA 10, 113. Those reports are supported by the District's own witness's concession that Ms. Brown-Carson's position required her to take about 100 calls per day, JA 97, and that she processed approximately 3,300 calls in the less than three months preceding her disability, JA 101-102.

Moreover, the District's hired expert did not contest that Ms. Brown-Carson suffered an aggravation of a preexisting injury in 2012 (and focused, instead, on the question of whether that aggravation was caused by her employment). Even in his capacity as the District's expert, Dr. Friedman conceded that Ms. Brown-Carson's carpal tunnel syndrome had advanced in late 2012 to the point where even he would have imposed significant limitations on her employment, including that she do, at

most, "limited typing" with "frequent rest breaks from typing." JA 6. This statement is, in effect, a concession that Ms. Brown-Carson's carpal tunnel syndrome was aggravated at some point in 2012 because it is uncontested that: (1) Ms. Brown-Carson was diagnosed with carpal tunnel syndrome in 1992; (2) from at least 2004 through March 28, 2012, Ms. Brown-Carson's carpal tunnel syndrome did not prevent her from performing her job duties as a 911 call-taker, which included extensive typing in connection with taking about 100 calls per day; and (3) when Dr. Friedman examined Ms. Brown-Carson in May 2012, her carpal tunnel syndrome had worsened (*i.e.*, had been aggravated) to the extent that she could no longer engage in those same activities that she had been performing for the eight previous years. In short, Dr. Friedman's report supports Dr. Azer's conclusion that Ms. Brown-Carson's carpal tunnel syndrome was aggravated over a period of time culminating in her disability manifesting on March 28, 2012.

In addition to implicitly conceding the existence of an aggravation in 2012, Dr. Friedman also expressly agreed with Dr. Azer that Ms. Brown-Carson's employment was a cause of this aggravation. *See* JA 5 (Dr. Friedman's assessment that Ms. Brown-Carson's "work as a telecommunications operator," was a factor in her condition); *see also* JA 77 (testimony of District's witness that Dr. Friedman's report stated that Ms. Brown-Carson's condition "could have been related to . . . her work").

Thus the only real point of contention between the experts here was the *extent* to which Ms. Brown-Carson's work duties aggravated her preexisting carpal tunnel syndrome in 2012. *Compare* JA 113 (quoting Dr. Friedman's report stating that Ms. Brown-Carson's work was only "a relatively minor factor"), *with id.* (noting that Dr. Azer's report concluded that Ms. Brown-Carson's condition was caused by work). It may well be that Dr. Friedman's statement, by itself, is sufficient as a matter of law to require affirmance of the ALJ's factual finding of a work-related aggravation here. Dr. Friedman concedes that a work-related factor caused the aggravation here at least in part, and, once even partial causation is established, "[t]he fact that other, nonemployment related factors may also have contributed to, or additionally aggravated [petitioner's] malady, does not affect [the] right to compensation under the aggravation rule." *McCamey v. DOES*, 947 A.2d 1191, 1197 (D.C. 2008) (quoting *Ferreira v. DOES*, 531 A.2d 651, 660 (D.C. 1987)) (internal quotation marks omitted). But even if the ALJ's finding of a work-related aggravation here is premised on accepting Dr. Azer's opinion over Dr. Friedman's, the ALJ made the finding necessary to do so, *see* JA 113 ("Upon review of both medical opinions, Dr. Azer's assessment is found more reliable and persuasive."), and was entitled to do so, given the substantial evidence supporting Dr. Azer's opinion. *See, e.g.*, *Washington Vista Hotel v. DOES*, 721 A.2d 574, 578 (D.C. 1998) (a hearing examiner's decision to credit one physician's opinion over another's may be reversed

only if it is unsupported by substantial evidence). The ALJ's preference for Dr. Azer's opinion was particularly appropriate here, not just because he was her treating physician but because, as the ALJ noted "Dr. Azer has an understanding of Claimant's work responsibilities as a 911 call-taker," and, in particular, understood that her job required extensive typing, while Dr. Friedman lacked this basic understanding. JA 114.

Finally, it is noteworthy that numerous and diverse courts have awarded workers' compensation benefits under the very same type of fact pattern that the ALJ found present in this case, namely preexisting carpal tunnel syndrome that was aggravated as a result of typing or other work duties. For example, in *City of Philadelphia v. Workers' Compensation Appeal Board*, 851 A.2d 838, 847 (Pa. 2004), the Pennsylvania Supreme Court affirmed workers' compensation benefits awarded because "[t]he credited medical evidence showed, and the WCJ [Workers' Compensation Judge – Pennsylvania's equivalent to the District's Administrative Law Judge] found, that appellee indeed suffered from a daily aggravation of her existing carpal tunnel syndrome injury each day she worked as a clerk typist and word processor." And in *Frontier Refining, Inc. v. Payne*, 23 P.3d 38, 41 (Wyo. 2001), the Supreme Court of Wyoming affirmed the award of workers' compensation benefits based on a finding that the claimant's carpal tunnel syndrome "was a preexisting condition materially aggravated by work." In that case, as in *City*

of Philadelphia, the aggravation was not caused by any specific event, but rather "occurred over a substantial period of time." *Id.*; s*ee also Tice v. Albertson's & Specialty Risk Servs.*, 940 So. 2d 1253, 1254 (Fla. Dist. Ct. App. 2006) (finding work-related "aggravation of . . . preexisting carpal tunnel syndrome" from using a meat slicer); *Ashley v. Buster Brown Apparel*, 590 S.E.2d 23 (N.C. Ct. App. 2003) (although claimant was originally diagnosed with work-related carpal tunnel syndrome in 1992, she was entitled to separate benefits based on findings that her mill work "materially aggravated her preexisting carpal tunnel syndrome," twice – once in 1995 and again in 2000); *Health-Tex, Inc. v. Humphrey*, 747 So.2d 901, 904-05 (Ala. Civ. App. 1999) (agreeing that claimant's "second onset of carpal tunnel syndrome" was "an aggravation of her first onset").

C. The ALJ Correctly Determined that the Manifestation Date for the Aggravation of the Preexisting Condition was March 28, 2012.

Because the Board did not acknowledge the existence of an aggravation of a preexisting condition, it never determined the date on which that aggravation manifested itself sufficiently to trigger Ms. Brown-Carson's time in which to give notice to her employer and to file a workers' compensation claim. The ALJ correctly determined that date was March 28, 2012.

As an initial matter, the manifestation date for the aggravation of a preexisting condition is the date on which the aggravation or the aggravated injury manifests and has nothing to do with the date on which the underlying condition first occurred

(or was diagnosed or manifested). Instead, in cases involving a second injury that aggravates a preexisting condition, "the liability of the employer shall be as if the subsequent injury alone caused the subsequent amount of disability." *Georgetown Univ. v. DOES*, 830 A.2d 865, 873 (D.C. 2003) (citing *WMATA v. DOES*, 704 A.2d 295, 297-99 (D.C. 1997)); *accord McCamey v. DOES*, 947 A.2d 1191, 1197 (D.C. 2008); D.C. Code § 32-1508(6). It necessarily follows that only the subsequent injury – that is, the aggravation – matters for determining whether the claimant provided timely notice and made a timely claim. *See, e.g., Payne v. DOES*, 99 A.3d 665, 667 (D.C. 2014) (awarding benefits for aggravation of preexisting medical condition based on claim filed after the date of the aggravation).

As long as Ms. Brown-Carson's injury is treated as an aggravation of her preexisting carpal tunnel syndrome (which it must, for the reasons discussed in the preceding subsection), the ALJ's determination that her notice to her employer and her workers' compensation claim were timely must be upheld. It is undisputed that this aggravation did not meaningfully manifest itself until Ms. Brown-Carson experienced sudden and painful symptoms on March 28, 2012. It is further undisputed that Ms. Brown-Carson reported the aggravation to her employer that same day and filed her claim long before two years had passed from that date. *See* D.C. Code §§ 1-623.19(a)(1) & 1-623.22(a) (employee must give employer notice of injury within 30 days and file workers' compensation claim within two years).

Accordingly, the Board's conclusion that Ms. Brown-Carson untimely notified her employer and submitted her claim must be reversed.

II. MS. BROWN-CARSON'S NOTICE TO HER EMPLOYER AND CLAIM WERE TIMELY BECAUSE HER NOTICE AND CLAIM PERIODS BEGAN TO RUN ONLY WHEN HER INJURY IMPAIRED HER ABILITY TO WORK.

Ms. Brown-Carson's notice and claim were timely (and the Board's decision was therefore erroneous) for a second reason independent of the fact that her injury was the 2012 aggravation of a preexisting condition. For any injury, notice must be provided within 30 days after the "date of injury" and a workers' compensation claim must be submitted within two years of that same date. *See* D.C. Code §§ 1-623.19(a)(1) & 1-623.22(a). Here, as discussed in greater detail below, the date of injury for workers' compensation purposes was March 28, 2012.

In many workers' compensation cases, the date of injury is obvious: A single traumatic accident at work causes an immediate and substantial injury. But determining the date of injury for the purposes of workers' compensation can be more difficult, especially for cumulative traumatic injuries like carpal tunnel syndrome. In some cases, a serious injury manifests itself but it is not immediately apparent that the injury is work-related. In other cases a work-related injury appears minor at first and only later does it become apparent that the injury is significant enough for there to be a workers' compensation issue. Ms. Brown-Carson's carpal tunnel syndrome falls within the latter category.

This Court addressed this particular situation – when a seemingly minor work-related injury later turns out to be more significant – in *Poole v. DOES*, 77 A.3d 460 (D.C. 2013). In *Poole*, the petitioner Donald Poole lost his balance and nearly fell at work, injuring his shoulder and experiencing immediate pain. But his pain soon subsided and he continued to work. *Id.* at 463. Over the following two months, Mr. Poole's pain increased to the point where he saw several doctors, one of whom imposed work restrictions. At that point – more than 30 days after the injury occurred but less than 30 days after Mr. Poole realized that the injury would likely impair his earning capacity – Mr. Poole reported the injury to his employer. *Id.* at 463-64.

The Compensation Review Board denied workers' compensation benefits for Mr. Poole's disability on the same basis that it denied Ms. Brown-Carson's claim, namely, the alleged failure to give the employer notice within 30 days of the date of injury. Specifically, the Board held that Mr. Poole's 30 days in which to give his employer notice began to run as soon as he knew that he had suffered some harm and that the harm was work-related. *Id.* at 464. That is essentially the standard that the Board applied to Ms. Brown-Carson's claim as well. *See* JA 121 (holding that Ms. Brown-Carson's time to give notice began when she "was first diagnosed with carpal tunnel," given her "contemporaneous realization that it was work related").

This Court reversed, holding that the severity of the injury matters and that only when it is apparent that an injury is (or is likely to be) compensable (meaning disabling or impairing the ability to perform work) does the time for providing notice start to run:

> [T]he 30-day notice period is triggered when the employee is or should have been aware than an impairment (physical or psychological) may be compensable because it is likely to result in loss of wages . . . . This awareness will usually come about because of an actual inability or impaired ability to perform usual work duties, from the nature of the trauma sustained, or on advice from a physician . . . . The presence of momentary pain or discomfort, however, does not necessarily indicate the presence of an underlying disabling impairment and will not always trigger the requirement to give notice of injury that is compensable, particularly where the employee is able to continue to work as before . . . . This is not to say that an employee may defer notice until the full nature and extent of the injury is known, but that the fact of injury potentially compensable must be reasonably appreciable.

Id. at 467-69; *see also* 3-126 *Larson's Workers' Compensation Law* § 126.06 [1] (when injury is the trigger for requiring notice, "there is now almost complete judicial agreement that the claim period runs from the time *compensable* injury becomes apparent") (citing *Poole*, emphasis added). For workers' compensation, compensable injury is synonymous with "'disability,' which we have often said is primarily an economic – not medical – concept that encompasses 'any incapacity arising from a work-related injury that results in lost wages.'" *Poole*, 77 A.3d at 467 (quoting *WMATA v. DOES*, 926 A.2d 140, 149 n.12 (D.C. 2007)).

This holding is entirely logical for a number of reasons. First, workers' compensation payments are "predicated upon the loss of wage earning capacity, or economic impairment." *Smith v. DOES*, 548 A.2d 95, 100 (D.C. 1988); *accord Georgetown Univ. Hosp. v. DOES*, 929 A.2d 865, 871 (D.C. 2007) (no workers' compensation claim can be brought before there is a "wage loss") (quoting *Washington Post v. DOES*, 853 A.2d 704, 706 (D.C. 2004)). It would make no sense to interpret the workers' compensation laws as requiring that an employee file a workers' compensation claim before there is a loss of earning capacity and, thus, before there is any cognizable workers' compensation injury or claim to be made. Second, as a practical matter, the Board's contrary view would require reporting of every paper cut, toothache, bruised forehead, or stomach ailment that was work-related – a requirement which serves the interests of neither employees nor employers. *See Poole*, 77 A.3d at 469 ("As a matter of policy, in imposing notice and filing obligations on claimants, threshold recognition of the seriousness of an injury is 'a salutary requirement, since any other rule would force employees to rush in with claims for every minor ache, pain, or symptom.'") (quoting 3-126 *Larson's Workers' Compensation Law* § 126.05 [5]). Finally, the rule announced in *Poole* implements the "remedial purposes" of the workers' compensation statutes, *Poole*, 77 A.3d at 468, by declining to punish workers who do their best to work in spite of minor injuries, even if it ultimately turns out to be impossible to do so. Specifically,

and perfectly describing Ms. Brown-Carson's situation here, "'[a]n employee who discovers the onset of symptoms and their relationship to the employment, but continues to work faithfully for a number of years without significant medical complications or lost working time, may well be prejudiced if the actual breakdown of the physical structure occurs beyond the period of limitation set by statute.'" *King v. DOES*, 742 A.2d 460, 473 (D.C. 1999) (quoting *Oscar Mayer & Co. v. Indus. Comm'n*, 531 N.E.2d 174, 176 (Ill. 1988)).

Applying this standard in *Poole* itself, this Court held that Mr. Poole's notice to his employer of his injury was timely because he gave notice "within thirty days of when he reasonably became aware of its severity, its consequent capacity to affect his work performance, and its link to the workplace accident." *Poole*, 77 A.3d at 469. Under *Poole*, the ALJ's determination that Ms. Brown-Carson's time to notify her employer did not begin to run until she first became aware that her carpal tunnel syndrome might affect her work, which was on March 28, 2012, must stand, and the Board's contrary conclusion must be reversed as legal error. It is undisputed that in 1992 Ms. Brown-Carson did not know that her carpal tunnel syndrome was likely to impair her ability to work. To the contrary, the evidence demonstrates that she did not view the condition as serious (she did not seek medical attention for the condition, which was simply noticed by a doctor conducting a routine checkup) and she neither missed work nor sought medical attention for the next twenty years. In

other words, in 1992 (and for twenty years thereafter) Ms. Brown-Carson's carpal tunnel syndrome caused no "disability," no "actual inability or impaired ability to perform usual work duties," and no "incapacity arising from a work-related injury that result[ed] in lost wages." *Id.* at 467. Nor was there any indication in 1992 (or for twenty years thereafter) that her condition was "likely to result in loss of wages." *Id.* Thus, under *Poole*, Ms. Brown-Carson's 30-day time period to notify her employer of her carpal tunnel syndrome started only on March 28, 2012, when she experienced a "disabling impairment." *See* JA 109.[6] Ms. Brown-Carson unquestionably notified her employer within 30 days after she experienced a "disabling impairment" and submitted a workers' compensation claim within two years thereafter. She therefore gave notice timely and submitted a timely claim.

The Board ignored *Poole* below, despite the fact that *Poole* was decided by this Court on October 10, 2013 and the Board's first decision below was not issued until January 24, 2014. This omission is particularly striking because Ms. Brown-

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[6] Ms. Brown-Carson's carpal tunnel syndrome was not completely asymptomatic during the twenty years from 1992 to 2012, but the fact that she "had intermittent flare ups of left wrist pain and tingling from 1993 to 2004, and in 2010 she continued to self-medicate," JA 109, does not mean that her time to give notice to her employer began to run. *See Poole*, 77 A.3d at 468 (noting that isolated incidents of pain or discomfort are not sufficient to trigger the notice provision, "particularly where the employee is able to continue to work as before"). Here, "[t]here is no evidence [Ms. Brown-Carson] sought medical treatment for her condition or that she was unable to perform her assigned duties during this time period." JA 109.

Carson cited *Poole* and even provided a copy of this Court's opinion in *Poole* to the Board. Instead of applying (or even citing) *Poole*, the Board applied its own much older "manifestation rule" that had been introduced in 1985 by *Franklin v. Blake Realty Corporation*, H&AS No. 84-26, OWC No. 25856 (Aug. 18, 1985), and adopted by the Board in 2007 in *Vanhoose v. Respicare Home Respiratory Care*, CRB No. 07-022, AHD No. 06-342, OWC No. 626066 (July 23, 2007).[7] That rule stated that the "date of injury" could be "the date on which the employee first sought medical attention for his painful symptoms," even if that occurred before "the date of disability." JA 120. In applying this rule to Ms. Brown-Carson, the Board

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[7] This Court affirmed a specific application of the Board's "manifestation rule" in *Smith v. DOES*, 934 A.2d 428 (D.C. 2007), another case addressing the "date of injury" for work-induced carpal tunnel syndrome. Unlike in *Poole* and here, however, where the question is whether the "date of injury" can come before the date of any actual or likely disability, *Smith* addressed the very different question of whether the claimant could assert as a "date of injury" a date not only before any actual or potential disability, but even before the claimant himself believed that his injury was serious. (The claimant asserted this very early "date of injury" in *Smith* for the obvious purpose of placing the injury date within the small window of time that the claimant worked in the District). *Id.* at 430. This Court held in *Smith* that the applicable date of injury was *not* the date of onset of some symptoms which the claimant did not view as serious and which had no impact on employment. *Id.* at 437-38 (concluding that the Board's rejection of claimant's preferred "date of injury" was neither arbitrary nor capricious). The *Poole* opinion does not refer to *Smith* but reiterates *Smith*'s holding that the first date of non-serious symptoms of carpal tunnel syndrome is *not* the "date of injury" for this type of cumulative traumatic injury. *Poole* goes on to specify that the necessary degree of seriousness for a "date of injury" to be established is sufficient seriousness to constitute actual or likely disability.

specifically criticized the ALJ for doing precisely what this Court did in *Poole* – "placing her focus . . . on when Claimant's condition became disabling." JA 120.[8] The Board was not free to disregard this Court's ruling in *Poole* and committed legal error in doing so. Its resulting conclusion regarding the date on which Ms. Brown-Carson's time limits for notifying her employer and for making a claim began to run must be reversed and the ALJ's correct determination of that date reinstated.

[8] In addition to applying a legal standard for "date of injury" that is incompatible with *Poole*, the Board incorrectly applied its erroneous legal standard to the facts here. The Board's legal standard for date of injury does not place the date of injury at the date of diagnosis, but rather places it "at the date medical attention is first sought for the painful condition." JA 120. Ms. Brown-Carson was diagnosed with carpal tunnel syndrome back in 1992, not as a result of seeking treatment for her wrist pain, but rather simply as a result of a "routine checkup." JA 53. The Record indicates that the first time she ever sought medical attention for her wrist pain was on March 28, 2012. Thus even under the erroneous legal standard articulated by the Board, Ms. Brown-Carson's "date of injury" was in 2012, not 1992.

CONCLUSION

For the foregoing reasons, the decision of the Compensation Review Board should be reversed and the matter remanded to the Board with instructions to affirm the Administrative Law Judge's original Compensation Order and to grant Ms. Brown-Carson's claim for workers' compensation relief in the form of temporary total disability benefits, medical treatment, and other just and proper relief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Petitioner's Brief to be delivered by first-class mail, postage prepaid, this 28th day of December, 2015, to:

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