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 REPLY BRIEF

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INTRODUCTION

Ms. Brown-Carson was an employee of the District whose total disability results from work duties (typing) that aggravated her preexisting carpal tunnel syndrome, as the ALJ found and the Board did not dispute. She is precisely the type of person – rendered disabled due entirely to her work duties – that workers' compensation laws are intended to benefit, and the ALJ therefore properly granted her workers' compensation claim. Nonetheless, the Compensation Review Board reversed, solely because of Ms. Brown-Carson's alleged failure to timely notify her employer when she was initially diagnosed with a mild case of carpal tunnel syndrome twenty years earlier. That conclusion violates the clear remedial intent of workers' compensation law, and conflicts with the statutory language and with this Court's precedents.

The applicable statute requires an employee to give the employer notice of injury within 30 days. D.C. Code § 1-623.19(a)(1). The only question in this appeal is when that 30-day period began for Ms. Brown-Carson. The ALJ found that the period began on March 28, 2012, when cumulative traumatic stress aggravated Ms. Brown-Carson's preexisting carpal tunnel syndrome to the extent that she became disabled. JA 110-112. This finding is correct (and, at any rate, need only be supported by substantial evidence to be affirmed).

The District argues that only a "'discrete accident'" (rather than cumulative trauma or exposure) can aggravate a preexisting condition. District Br. 33-37 (quoting JA 119-120). But this Court has held to the contrary. *Payne v. DOES*, 99 A.3d 665 (D.C. 2014) (upholding workers' compensation benefits award based on preexisting condition that was aggravated by repeated workplace exposure to dust and heat). The aggravation of a preexisting condition is an "injury" like any other injury cognizable under workers' compensation law, and a discrete event is specifically *not* required to cause such an injury. *Ferreira v. DOES*, 531 A.2d 651, 656 (D.C. 1987) ("[T]he nature of the potential cause of the disability need not be a discrete, particularized event."). Moreover, substantial evidence – notably including the report submitted by the District's own expert – supports the finding that Ms. Brown-Carson's preexisting carpal tunnel syndrome was aggravated by the cumulative effects of her work duties (including typing), causing her disability in 2012.

The District spends most of its brief arguing that, under the "*Franklin* manifestation rule," Ms. Brown-Carson's carpal tunnel syndrome first manifested in 1992 or 1993. This argument is irrelevant, because the aggravation of a preexisting condition is a distinct injury for purposes of workers' compensation law with its own date of injury separate from the onset date of the preexisting condition. Accordingly, the relevant question here is not when Ms. Brown-Carson's

underlying carpal tunnel syndrome initially manifested, but rather when the distinct subsequent aggravation of that condition occurred.

Moreover, the District's argument fails even on its own terms. The 30-day notice period for private employees starts only when an injury is disabling or is known to be likely to become disabling. *Poole v. DOES*, 77 A.3d 460, 467 (D.C. 2013). The District does not justify applying a different start date here, just because Ms. Brown-Carson was a public employee (covered by the Comprehensive Merit Personnel Act or CMPA), rather than a private employee (covered by the Workers' Compensation Act or WCA), *see Ross v. DOES*, 125 A.3d 698, 702 (D.C. 2015) (CMPA and WCA should be interpreted congruently), especially because the notice provisions of the WCA and the CMPA have the same purpose. Finally, even under the manifestation rule proposed by the District and even ignoring the fact that the aggravation of a preexisting condition is an injury distinct from the preexisting condition, Ms. Brown-Carson's carpal tunnel syndrome did not manifest until March 28, 2012.

ARGUMENT

The issue in this appeal is whether Ms. Brown-Carson provided the District with timely notice of her "injury" in accordance with D.C. Code § 1-623.19(a)(1).[1] It is undisputed that Ms. Brown-Carson provided notice on March 28, 2012. Accordingly, the parties agree that the only question this Court need decide is whether "the injury for the purposes of the 30-day notice provision occurred before March 2012." District Br. 11 n.4. Because the ALJ's finding that the

[1] The only other basis for the Board's denial of Ms. Brown-Carson's claim was its conclusion that her claim itself was untimely under D.C. Code § 1-623.22, JA 117, but the District has expressly waived any reliance on this aspect of the Board's decision, District Br. 11 n.4.

injury occurred in March 2012 is supported by substantial evidence, the Board's decision must be reversed and the ALJ's decision must be reinstated.

I. THE RELEVANT INJURY FOR THE PURPOSES OF THE 30-DAY NOTICE PROVISION IS THE AGGRAVATION OF MS. BROWN-CARSON'S PREEXISTING CARPAL TUNNEL SYNDROME.

A. The ALJ's Finding that Ms. Brown-Carson Suffered from an Aggravation of a Preexisting Condition is Dispositive.

The District's brief focuses exclusively on when Ms. Brown-Carson's carpal tunnel syndrome first manifested. *See* District Br. 16-33. But this answers the wrong question. Under § 1-623.19(a)(1), the 30-day notice period starts when Ms. Brown-Carson's *injury* occurred, not when her underlying condition first arose. *See* D.C. Code § 1-623.19(a)(1) ("A notice of injury or death shall . . . [b]e given within 30 days after the injury or death.").

The aggravation of a preexisting condition is a distinct "injury" covered by the workers' compensation statutes. *McCamey v. DOES*, 947 A.2d 1191, 1197 (D.C. 2008) (*en banc*); *accord, e.g.*, *Payne v. DOES*, 99 A.3d 665, 675 (D.C. 2014); *Clark v. DOES*, 772 A.2d 198, 202 (D.C.2001); *Howell v. Einbinder*, 350 F.2d 442, 443 (D.C. Cir. 1965); 1-9 *Larson's Workers' Compensation Law* § 9.02[1]. In this situation, the preexisting condition is immaterial. *See Jackson v. DOES*, 955 A.2d 728, 734 n.7 (D.C. 2008); *WMATA v. DOES*, 992 A.2d 1276, 1282 n.4 (D.C. 2010) (quoting *Jackson*). It necessarily follows that, in cases involving the aggravation of a preexisting condition, the relevant date of injury is the date of aggravation, *not* the date the preexisting condition first manifested.

This Court has approved workers' compensation benefits in a number of cases involving the aggravation of preexisting conditions where there was no indication that the employee gave the employer notice of the preexisting condition within 30 days of manifestation. *See Children's Nat'l Med. Ctr. v. DOES*, 992 A.2d 403, 404-05 (D.C. 2010) (preexisting condition manifested in

the fall of 2006 and was aggravated by a work-related accident in October 2007); *McCamey*, 947 A.2d at 1191 (work accident on September 29, 2000 aggravated preexisting psychological illness dating from the mid-1990s). In one such case, the preexisting condition was congenital. *Capital Hilton Hotel v. DOES*, 565 A.2d 981 (D.C. 1989) (congenital berry aneurysm aggravated by work conditions). Thus, the relevant date with respect to the 30-day notice requirement is the date of the aggravation, not the date of the first manifestation of the underlying preexisting condition.

The ALJ, recognizing that Ms. Brown-Carson's aggravation is *its own* injury with *its own* injury date, correctly set the date of the aggravating injury on March 28, 2012. The District does not assert that this is incorrect as to the aggravation; instead it simply ignores aggravation and suggests that the only relevant date is the date the carpal tunnel syndrome initially manifested in 1992 or 1993. *E.g.*, District Br. 8, 15, 16, 20 n.9, 29.

Because there is no support for the notion that the date of injury for the aggravation of a preexisting condition is the date that the preexisting condition first manifested (or for the corollary notion that an employee who suffers the aggravation of a preexisting condition cannot obtain workers' compensation benefits unless she notified her employer of the preexisting condition within 30 days of its initial manifestation), the District can only prevail here if Ms. Brown-Carson did not, in fact, experience the aggravation of her preexisting carpal tunnel syndrome.

The District argues that no aggravation can be found in the absence of a "discrete" aggravating event and that there is no substantial evidence to support the ALJ's finding that Ms. Brown-Carson's preexisting condition was aggravated by her work. District Br. 33-40. As detailed below, those arguments lack merit.

B. A Discrete Event is not Necessary to Aggravate a Preexisting Condition.

The sole basis upon which the Board (implicitly) rejected the ALJ's finding of an aggravated injury here was its apparent conclusion that an aggravation of a cumulative traumatic injury required a discrete (rather than cumulative) cause. JA 119-120. The District makes this argument the key theme of its brief, which repeats the word "discrete" dozens of times in a variety of different but essentially synonymous phrases. District Br. i, ii, 1, 6, 8, 11, 17, 30-31, 33-36 (using the phrases "discrete aggravating event," "discrete work accident," "discrete accident," "discrete event," "discrete accidental injury," "discrete occurrence," "discrete work-related injury," and "discrete injury"). But there is no statutory basis for requiring a "discrete" aggravating event. Indeed, the word "discrete" does not appear in the relevant statute, and this Court has repeatedly rejected the suggestion that workers' compensation benefits are dependent upon the existence of a discrete event. *E.g.*, *Ferreira v. DOES*, 531 A.2d 651, 656 (D.C. 1997) ("[T]he nature of the potential cause of the disability need not be a discrete, particularized event.") (quoted in *McCamey*, 947 A.2d at 1198); *see id.* at 657 (noting that "repeated trauma" and "cumulative exposure" can cause compensable injuries); *King v. DOES*, 742 A.2d 460, 468 (D.C. 1999) ("cumulative traumatic injuries are compensable," despite the fact that they, by definition, do not involve any "discrete event at a particular date and time that causes (or aggravates) the injury"). Moreover, this Court recently upheld an ALJ determination that an employee was entitled to workers' compensation benefits because his preexisting condition was aggravated by "repeated workplace exposure" to dust and heat – another example of a preexisting condition being aggravated by something other than a discrete event. *Payne*, 99 A.3d at 676, 678 n.7.[2] There is

[2] There is no basis for treating carpal tunnel syndrome differently from all other preexisting conditions that can be aggravated by cumulative trauma. Although this Court has not addressed such a situation, other jurisdictions have uniformly held that such aggravation is both possible and

thus no basis for requiring Ms. Brown-Carson to prove that a "discrete" event aggravated her preexisting carpal tunnel syndrome or for faulting the ALJ for not finding such a "discrete" event.[3]

C. Substantial Evidence Supports the ALJ's Finding that Ms. Brown-Carson Suffered an Aggravation of a Preexisting Condition.

The District's only other basis for challenging the ALJ's aggravation finding is the alleged absence of record evidence supporting that finding. District Br. 37-40. The Board itself never questioned the substantial evidence supporting this finding by the ALJ, and this Court should reject the District's contention that substantial evidence is lacking because there is, in fact, abundant evidence supporting the ALJ's finding, much of which comes from the District's own expert.

The District does not deny that the ALJ's finding that Ms. Brown-Carson suffered from an aggravation of her preexisting carpal tunnel syndrome – like all findings of "injury" under the workers' compensation scheme – is a finding of fact. 1-9 *Larson's Workers' Compensation Law* § 9.02[5]; *see King*, 742 A.2d at 470-74. Accordingly, this finding is reviewed only to determine whether it is supported by substantial evidence in the record. *E.g.*, *Payne*, 99 A.3d at 673; *WMATA v. DOES*, 827 A.2d 35, 46 (D.C. 2003).

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compensable. *See* Brown-Carson Br. 20-21 (collecting cases). It is noteworthy, that, while the District attempts to differentiate these cases on their facts, *see* District Br. 40 & n.14, it does not explain how they are wrong on the law, namely in their conclusion that cumulative events can aggravate preexisting carpal tunnel syndrome.

[3] The District incorrectly asserts that *King* stands for the proposition that a discrete event is required. *See* District Br. 34-37 (citing *King*). It does not. The allegation in *King* was that a discrete event had aggravated a preexisting condition, 742 A.2d at 464 (noting that King claimed that a discrete work-related accident had aggravated a preexisting condition), and the case therefore simply did not address whether cumulative trauma could also aggravate a preexisting condition. Nonetheless, *King* does contain dictum suggesting that cumulative trauma can aggravate a preexisting condition. *Id. at* 468-69 (noting that in a "cumulative trauma case . . . it is not possible to identify a discrete event occurring at a particular date and time that causes *(or aggravates)* the injury") (emphasis added).

The District first asserts that the Board, rather than this Court, must make the substantial evidence determination. District Br. 37-38. But this Court and the Board apply the *same* (substantial evidence) standard on review. *E.g.*, *Payne*, 99 A.3d at 671. And this Court conducts that substantial evidence analysis itself, rather than remanding, regardless of the Board's assessment in reviewing the ALJ's decision itself. *Id.* at 678-79 (reversing Board decision and reinstating ALJ decision, noting that a further proceedings are unnecessary because "substantial evidence supported the ALJ decision"); *Georgetown Univ. v. DOES*, 862 A.2d 387, 391, 393 (D.C. 2004) (reversing agency decision that had, in turn, reversed ALJ's decision because "[t]he ALJ's determination . . . is supported by substantial evidence in the record, and the Director [of DOES] was bound to accept it"); *Marriott Int'l v. DOES*, 834 A.2d 882, 887 (D.C. 2003) (Court determined that ALJ credibility determination was based on substantial evidence and therefore reversed agency decision that rejected or ignored that determination). The cases that the District argues mandate a remand here, *see* District Br. 37-38, are inapposite because they involve remands for further development of inadequate records, not for the application of the substantive evidence test to an already adequate record.

Ms. Brown-Carson's opening brief sets forth some of the abundant evidence that supports the ALJ's finding. Brown-Carson Br. 15-21. The only basis for the District's contrary suggestion is the allegation that the relevant "medical reports" are "equivocal." District Br. 37. This claim, even if true, would not avail the District because equivocal evidence means evidence that supports two or more different conclusions. In that situation, the ALJ's choice between (or among) the supported conclusions must be upheld. *See, e.g.*, *Payne*, 99 A.3d at 671-72 (ALJ's findings must be upheld even if the Board would have reached a contrary result and even if the record contains

substantial evidence to the contrary) (citing *Marriott*, 834 A.2d at 885); *Hensley v. DOES*, 49 A.3d 1195, 1199 (D.C. 2012) (same).

The District's exclusive focus on the "medical reports" to demonstrate the absence of substantial evidence is also misplaced. An employee's testimony can constitute substantial evidence. *See PEPCO v. DOES*, 77 A.3d 351 (D.C. 2013) (employee's testimony that his condition worsened after an incident at work constituted substantial evidence that his injury was caused by that incident, despite the fact that the medical records and opinions did not address the relationship between that incident and the injury); *see also Payne*, 99 A.3d at 673-74 (employee's own testimony, which was supported by medical evidence, constituted substantial evidence that a series of exposures (rather than a discrete event) aggravated employee's asthma). This Court accords "special deference" to an ALJ's decision to credit an employee's testimony. *Id.* at 671; *accord Poole v. DOES*, 77 A.3d 460, 469 n.12 (D.C. 2013).

Here, the ALJ found Ms. Brown-Carson's testimony credible, JA 108, 111, 117, 125, and the District does not challenge that finding. Her credible and, indeed, uncontested testimony along with agreed facts constitute substantial evidence supporting the ALJ's finding. Ms. Brown-Carson was initially diagnosed with carpal tunnel syndrome in 1992. Brown-Carson Br. 3; District Br. 3. She was able to work, despite that diagnosis, from 1992 through March 28, 2012, including as a 911 call taker from 1992 to 1993 and from 2004 through March 2012. Brown-Carson Br. 3-4; District Br. 3-5. On March 28, 2012, while typing at work, Ms. Brown-Carson experienced excruciating pain in her wrist that caused her to have to stop working, and she has been unable to work since then. JA 54-55. And the parties agree that typing in general, and Ms. Brown-Carson's work duties in particular, can cause harm to the wrist, including carpal tunnel syndrome. *See* District Br. 14. These facts, taken together, constitute substantial evidence to support the ALJ's

finding that Ms. Brown-Carson's work duties caused an aggravation of her preexisting carpal tunnel syndrome that rendered her disabled as of March 28, 2012.

The medical reports from both sides in this case independently provide substantial evidence in support of the ALJ's finding. *See* Brown-Carson Br. 17-20. The District suggests that no substantial evidence supports the finding that Ms. Brown-Carson's condition worsened between 1992 and 2012, District Br. 38-39. That suggestion is not only contrary to Ms. Brown-Carson's uncontested testimony, as noted above, it is also directly contrary to the report of the District's own expert, which states that Ms. Brown-Carson's condition "worsened in March [2012]." JA 4. And, while it is undisputed that before March 28, 2012, Ms. Brown-Carson adequately performed her duties as a 911 call taker, which including extensive typing, JA 50, the District concedes that after that date she could no longer perform those duties. District Br. 39 n.13 (noting that District's expert "thought that, as of May 2012, she [Ms. Brown-Carson] might have difficulty performing the unrestricted panoply of her 911 duties"); JA 6 (District's expert report, stating that "I would recommend limited typing."); *see also* JA 12 (treating physician's report, specifically stating that "[t]he patient discussed with me regarding her position as a dispatcher, using her hands. She cannot perform these duties. I shall give her a certificate indicating that this patient is to avoid repetitive movements of the hands . . . .").

Also refuted by its own expert is the District's suggestion that no substantial evidence supports the ALJ's finding that the deterioration in her condition in March 2012 was work related. *See* District Br. 38. The District's expert concluded that Ms. Brown-Carson's work may have been a contributing factor to her disability, albeit perhaps a minor one. JA 5 ("While her work as a telecommunications operator could be a contributing factor, I think it is a relatively minor factor when compared to the non-occupational factor involved in this case."). This conclusion is, by

itself, sufficient to constitute substantial evidence supporting the ALJ's finding that Ms. Brown-Carson's injury related to her work. *See Georgetown Univ. v. DOES*, 971 A.2d 909, 919 (D.C. 2009) (when only one of two causes of injury relates to work, that injury is work related for purposes of workers' compensation law, and "'[t]he law does not weigh the relative importance of the two causes . . . it merely inquires whether the employment was a contributing factor'") (quoting 1 *Larson's Workers' Compensation Law* § 4.04 (rev. ed. 2008)); *Spartin v. DOES*, 584 A.2d 564, 570 n.9 (D.C. 1990).

Accordingly, there is substantial evidence to support the ALJ's conclusion that Ms. Brown-Carson's preexisting carpal tunnel syndrome was aggravated in 2012 and that this aggravation was work related. The ALJ's decision thus must be reinstated.

II. REGARDLESS OF AGGRAVATION, MS. BROWN-CARSON'S CARPAL TUNNEL SYNDROME DID NOT MANIFEST UNTIL MARCH 28, 2012 WHEN IT BECAME DISABLING.

The District's brief explores whether the Board correctly determined that Ms. Brown-Carson's underlying carpal tunnel syndrome first manifested in 1992 (or 1993). As explained above, however, the initial manifestation date for the carpal tunnel syndrome is irrelevant here because the question is the timeliness of Ms. Brown-Carson's notice to her employer of her injury, and that injury was the *aggravation* of a preexisting condition which necessarily occurred *after* the preexisting condition first manifested. There is therefore no reason to inquire as to when Ms. Brown-Carson's carpal tunnel syndrome first manifested. Should the Court nonetheless address this issue, however, it should conclude that the Board erred in determining when the 30-day notice period began, because the Board (1) adopted the wrong legal rule and (2) misapplied even the erroneous rule that it adopted.

A. *Poole* Establishes When the 30-Day Statutory Notice Period Begins.

In *Poole v. DOES*, 77 A.3d 460, 467 (D.C. 2013), this Court held that "the 30-day notice period is triggered when the employee is or should have been aware that an impairment (physical or psychological) may be compensable because it is likely to result in loss of wages." The District asks this Court not to apply *Poole* "because the notice provision in the WCA as construed in *Poole* is not the same as the notice provision in the CMPA." District Br. 31. In other words, the District argues that the 30-day notice period begins at one time under the WCA and a different time under the CMPA based on the fact that the statutory notice provisions are not identical. This argument is invalid on multiple levels.

First, there is a strong presumption that, regardless of minor linguistic differences, the WCA and the CMPA should be interpreted consistently. *See Ross v. DOES*, 125 A.3d 698, 702 (D.C. 2015) (*all* D.C. workers compensation statutes (including the CMPA and the WCA) should be interpreted "to be consistent with each other, even where the statutes' language is not identical, in light of their similar humanitarian purpose"). For example, in *McCamey v. DOES*, 947 A.2d 1191, 1200-01 (D.C. 2008) (*en banc*), this Court held that the "aggravation rule" discussed above (that the aggravation of a preexisting condition constitutes a compensable injury under workers' compensation law) applies in cases arising under both the WCA and the CMPA, despite the fact the WCA "expressly codifies" that rule, while the CMPA does not. The general presumption that the WCA and the CMPA are the same, articulated in *Ross*, is particularly appropriate with respect to the 30-day notice requirement at issue here because the purpose of the notice requirement under the CMPA is the same as the purpose of the requirement under the WCA. *Compare* District Br. 21 (purposes of CMPA notice requirement are "[f]irst, to enable the employer to provide immediate diagnosis and treatment with a view to minimizing the seriousness of the injury; and

second, to facilitate the earliest possible investigation of the facts surrounding the injury"), *with Poole*, 77 A.3d at 468 (describing the purposes of the WCA notice requirement using precisely the same language). The 30-day notice requirements under the CMPA and the WCA should therefore have the same starting point, namely the starting point established in *Poole*.

Moreover, the rule announced in *Poole* is fully consistent with the language of the CMPA. The CMPA states that an employee must give notice within 30 days of an "injury." D.C. Code § 1-623.19(a)(1). The District admits that the notice requirement is not triggered by every harm, no matter how inconsequential; the triggering harm must, instead, be "substantial enough" or "serious enough." District Br. 21, 22. The *Poole* standard simply gives meaning to these vague terms, establishing that harm is substantial enough or serious enough to start the 30-day notice clock if it is disabling or known to be likely to become disabling. 77 A.3d at 467. That explanation of the term "injury" is fully consistent with the language of D.C. Code § 1-623.19(a)(1) – the specific statutory provision at issue here – and the remainder of the CMPA. There is thus no need to deviate from *Ross* and *McCamey* here and have two different triggers for notice, one under the WCA and a different one under the CMPA.

The District correctly notes that the CMPA envisions at least some circumstances in which the 30-day notice requirement begins to run *before* there is a compensable disability. District Br. 31 (quoting D.C. Code § 1-623.22(b), which acknowledges that there are circumstances in which an employee must provide the employer notice of a latent injury although "whether or not there is a compensable disability").[4] This language indicates that some harms that do not rise to the level of causing current compensable disability do, nonetheless, start the 30-day notice period. That

[4] Ms. Carson-Brown's disabling injury was *not* latent; it was caused by an accumulation of events that took place right up to the March 28, 2012 injury date.

concept is fully consistent with *Poole*, which provides for two distinct situations that start the 30-day clock: (1) the employee knows that she has a disabling injury or (2) the employee should be aware that her impairment "*may* be compensable because it is *likely* to result in loss of wages." 77 A.3d at 467, 468 (emphasis added). *Poole* and the CMPA are thus congruous in providing for some circumstances in which the 30-day notice requirement begins to run before there is a compensable disability, specifically when a disability is likely but has yet to occur.

The District also suggests that *Poole* does not apply here because it is incompatible with this Court's older decision in *KOH Sys. v. DOES*, 683 A.2d 446 (D.C. 1996). District Br. 31-32. There is no incompatibility. *KOH* addressed an issue completely different from the issue in *Poole* and here. The issue in *Poole* and here is when a harm is sufficiently serious or severe to count as an "injury" capable of starting the 30-day clock for an employee to give notice to an employer. The issue in *KOH* was when a harm is sufficiently related to work to count as an "injury" capable of starting the one-year statute of limitations for an employee to make a workers' compensation claim. *KOH*, 683 A.2d at 450-51. The requirements of seriousness and work-relatedness are separate. *KOH*'s discussion of the latter are irrelevant to this Court's consideration of the former.[5]

It is also noteworthy that, in asking this Court to reject *Poole*, the District recommends application of the "*Franklin* manifestation rule" instead. District Br. 14, 15, 20 n.9, 21, 22, 32. That rule first appeared in *Franklin v. Blake Realty Corp.*, H&AS No. 84-26, OWC No. 25856 (Aug. 18, 1985). *See* District Br. 16. The District argues that this Court should apply the *Franklin* rule specifically because this case, unlike *Poole*, arises under the CMPA. *See* District Br. 31. But

[5] The only other case the District cites in support of its argument in this regard is wholly irrelevant. It is a penal case addressing whether "the right to a probable cause hearing is a constitutional right." *M.A.P. v. Ryan*, 285 A.2d 310, 313 (D.C. 1971) (cited in District Br. 32).

Franklin (like *Poole*) arose under the WCA, *see* District Br. Addendum 1 (*Franklin*, stating that "[t]his proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act"), so the fact that this case arises under the CMPA is not a valid reason to follow *Franklin* rather than *Poole*. This Court should follow *Poole* (and *not Franklin*) here for at least three reasons. First, *Poole*, like this case, addressed the time at which the 30-day notice period starts, 77 A.3d at 466, while *Franklin* addressed the different question of assigning liability to the appropriate workers' compensation insurer, *see* District Br. Addendum 2. Second, *Poole* is a decision of this Court, while *Franklin* is an administrative decision of the Director of DOES. *See Georgetown Univ. Hosp. v. DOES*, 929 A.2d 865, 869 (D.C. 2007) (noting, in case applying the WCA, that this Court is the final authority on issues of statutory construction). Third, *Poole* was decided more recently than *Franklin*.

B. Ms. Brown-Carson's Notice Was Timely Under *Poole*.

The District incorrectly suggests that the Board's refusal to apply *Poole* here was some kind of harmless error because in 1993 Ms. Brown-Carson knew that her carpal tunnel syndrome was likely to become disabling. *See* District Br. 15, 32-33. The linchpin of this argument is the fact that Ms. Brown-Carson requested a transfer in 1993 to a job that would require less typing. But the fact that Ms. Brown-Carson preferred to do less typing does not meet the *Poole* test, which would require that Ms. Brown Carson should have been aware that her carpal tunnel syndrome was likely to result in a loss of wages. And there is nothing to suggest that Ms. Brown-Carson knew or should have known that her condition was so serious that it was likely to result in disability; to the contrary, the fact that her doctor recommended nothing more than over-the-counter pain medicine and a splint available at any corner drugstore suggests precisely the opposite. *See* District Br. 32 (conceding that Ms. Brown-Carson's doctor "did not recommend

significant interventions"). This record provides no basis for the assertion that Ms. Brown-Carson could or should have suspected that she would become disabled. And the fact that Ms. Brown-Carson in fact suffered no wage loss for 19 years and then did so only because work requirements (typing) aggravated her condition, makes the inference that she knew in 1993 that she would likely lose wages extraordinarily speculative. At any rate, neither the ALJ nor the Board even purported to find that Ms. Brown-Carson knew or should have known in 1993 that she would eventually suffer wage loss as a result of her condition at that time, and this Court cannot supply that missing fact.

C. Ms. Brown-Carson's Notice Was Timely Even Under the Rule Proposed by the District (the *Franklin* Manifestation Rule).

As noted above, the manifestation rule urged by the District here is erroneous because it impermissibly deviates from *Poole*. In addition, the Board misapplied the *Franklin* manifestation rule. According to the Board, the *Franklin* manifestation rule means that, in cases involving a public (as opposed to a private) employee, the 30-day notice period starts running on "the date on which [the] employee first sought medical attention for [her] painful symptoms." District Br. 16. But the ALJ never found that Ms. Brown-Carson sought medical attention for her painful symptoms in 1992, 1993, or at any time prior to March 28, 2012. That fact alone precluded the Board from concluding that Ms. Brown-Carson's 30-day notice period began to run in 1992 under the *Franklin* manifestation rule.

Moreover, the Record does not contain any evidence from which the Board (or this Court) could find that Ms. Brown-Carson sought medical attention for her wrist before 2012. There is very little in the Record regarding her initial diagnosis. It is undisputed, however, that the diagnosis was made at a "routine checkup," not at an appointment that was made to address Ms. Brown-Carson's wrist. JA 53. The District argues that this is irrelevant because the Court should simply

infer from the fact that Ms. Brown-Carson was diagnosed with carpal tunnel syndrome that she must have complained about her wrist. *See* District Br. 28-29 (asserting, without basis, that "Ms. Brown-Carson *would have had to* raise some sort of concern" in order to be diagnosed) (emphasis added). But raising some sort of concern at a "routine checkup" is very different from what the *Franklin* manifestation rule requires, which is that the employee "*sought medical attention* for [her] *painful symptoms*." District Br. 16 (quoting *Franklin*, at 4) (emphasis added).

Moreover, the District is wrong even to suggest that the Record mandates the conclusion that Ms. Brown-Carson raised any concern about her wrist with her doctor. Individuals are frequently diagnosed with conditions for which they never sought medical attention, especially in the context of a routine checkup. The purpose of a routine checkup is to allow a physician to conduct an examination that may reveal an injury or disease about which the patient does not complain and which may cause no symptoms or only mild symptoms. Here, for example, the examining physician might have come to suspect (and then conducted further tests and/or analysis to confirm) carpal tunnel syndrome based on Ms. Brown-Carson's description of her work duties, observations of the exterior of her wrist, and/or her involuntary reactions to standard neurological tests. In short, the mere fact that Ms. Brown-Carson was diagnosed with carpal tunnel syndrome during a routine checkup does not support the notion that she complained about her wrist at all, and certainly does not even suggest that she "sought medical attention for [her] painful symptoms" as would be required under the *Franklin* manifestation rule. The Board's conclusion that Ms. Brown-Carson's notice to her employer was untimely must therefore be reversed.

The District's contrary argument – that being diagnosed with a condition means that one has sought medical treatment for that condition and that therefore the 30-day notice period begins to run regardless of the seriousness of the diagnosed condition, District Br. 28-29 – would lead to

absurd results. For example, suppose an employee has felt slightly dizzy at work but found this to be a minor issue not worthy of seeking medical attention. At her annual physical, her doctor tells her that her blood pressure is slightly elevated, probably due to stress at work, and she should try to eat better and get more exercise but that the condition is minor and requires no other action. The employee goes back to work, eats better, and gets more exercise. A year later, a demanding new boss greatly increases the employee's stress which, combined with her elevated blood pressure, causes a disabling stroke. The employee immediately notifies the employer.

Under this hypothetical, if the employee worked for a private employer, that notice would be timely and the employee would receive workers' compensation benefits under *Poole*, because, at the time of the initial diagnosis, the employee's slightly elevated blood pressure was not disabling and the employee had no reason to think it was likely to ever become disabling. But under the District's proposal, if that employee worked for the District, she would be ineligible to receive benefits because she failed to report the initial diagnosis of slightly elevated blood pressure, even though the diagnosis was of a minor condition highly unlikely to ever result in any compensable injury. That result makes no sense for public employers or employees. It makes no sense for public employers because, if employees knew this was the rule, they would flood employers with irrelevant notices of every slight harm possibly related to work in order to protect their possible future workers' compensation rights. And it makes no sense for employees because it would create a trap to deprive well-meaning employees of benefits to which they are obviously entitled based on a legal technicality that no reasonable employee would ever consider.

This nonsensical result is precisely what has happened (so far) to Ms. Brown-Carson. Her carpal tunnel syndrome was so minor and so easily managed in 1992 that it would never have occurred to her or any reasonable person in her situation to notify her employer. But now that,

two decades later, her minor condition was aggravated and has become major and disabling, her failure to provide that initial notice of inchoate harm is being used as an excuse to deny her workers' compensation benefits for her work related disability. That result is contrary to both law and equity. This Court should correct it.

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 Reply Brief to be delivered by first-class mail, postage prepaid, this 29th day of June, 2016, to:

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