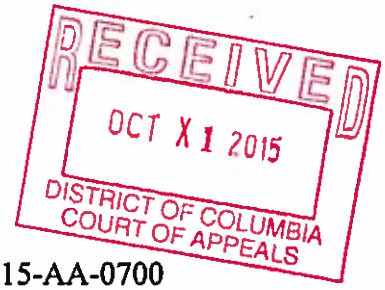
IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

SYLVIA BROWN-CARSON, Petitioner, v. D.C. DEPARTMENT OF EMPLOYMENT SERVICES (WORKERS' COMPENSATION), Respondent.	)	Case No. 15-AA-0700



PETITION FOR REHEARING BY THE DIVISION

Pursuant to this Court's Rule 40, Petitioner Sylvia Brown-Carson hereby respectfully requests that the Court rehear the judgment of dismissal entered in the above-captioned matter on September 18, 2015 and reinstate the dismissed petition for review. Rehearing should be granted because Ms. Brown-Carson is indigent and, while proceeding *pro se*, failed to respond timely to this Court's order regarding the completion of her motion to proceed *in forma pauperis* because she had been notified by her "experienced workers compensation advocate," that he would pay this Court's filing fee. Reinstating Ms. Brown-Carson's appeal and allowing her to proceed *in forma pauperis* would be an appropriate exercise of discretion that would avoid an unduly harsh result against a (then) *pro se* litigant, allow an adjudication of Ms. Brown-Carson's case on the merits, rather than on procedural technicality, further the purposes of the District's remedial workers' compensation statute, and cause no prejudice to the opposing party, which is the District of Columbia.

BACKGROUND

For at least 20 years prior to 2012, Ms. Brown-Carson worked for the D.C. Office of Unified Communications. According to the Compensation Review Board, Ms. Brown-Carson was diagnosed with carpal tunnel syndrome in 1992 but did not make a workers' compensation claim at that time. She continued to work with intermittent but non-disabling flare-ups which required no medical treatment. *Sylvia Brown-Carson v. D.C. Office of Unified Communications*, CRB No. 13-132 (Jan. 24, 2014) (Addendum I), at 2. In 2012, based on work duties that involved significant typing, Ms. Brown-Carson's carpal tunnel syndrome was significantly aggravated to the extent that she became disabled. Addendum I, at 2-4. Ms. Brown-Carson retained the services of Richard Daniels, a non-attorney representative affiliated with Federal Disability Experts LLC, to pursue her workers' compensation claim. *See* Brown-Carson Declaration (Addendum II), at ¶ 39. After an evidentiary hearing, an ALJ determined that Ms. Brown-Carson had suffered an aggravation of a prior work injury and was therefore entitled to workers' compensation benefits. *See* Addendum I, at 2, 5. The District sought review by the Compensation Review Board, which reversed. Addendum I. The Board held that because Ms. Brown-Carson's carpal tunnel syndrome was first diagnosed in 1992 and was not the subject of a timely workers' compensation claim upon that diagnosis, her claim was legally barred and had to be denied. *See* Addendum I, at 3-7.

After remand to implement the Board's order and a subsequent final decision by the Board, on June 22, 2015, Ms. Brown-Carson filed a timely petition for review with this Court, along with a motion to proceed *in forma pauperis*. Both of these documents were prepared by Mr. Daniels. *See* Addendum II, at ¶ 50. Ms. Brown-Carson's signature appears on the petition

but not on the motion, and she does not recall seeing the motion before it was filed. *See* Addendum II, at ¶ 51.

The motion contains several problems, including inconsistent/incorrect answers to at least one question and the absence of Ms. Brown-Carson's signature. Presumably for this reason, on August 21, 2015, this Court issued an order denying the motion without prejudice to its renewal within 20 days by filing a fully completed motion and financial information statement or by tendering the $100 fee. The order stated that failure to comply would result in the dismissal of the petition. Ms. Brown-Carson contacted Mr. Daniels' office when she received this order. She was told that Mr. Daniels had not received the order and that she should fax it to him, which she did. *See* Addendum II, at ¶ 54. She assumed that Mr. Daniels would either take care of the problem or let her know what she should do. Addendum II, at ¶ 54. Several weeks later, on September 14, 2015, Mr. Daniels left Ms. Brown-Carson a voicemail indicating that he understood that there was a problem with the petition for review and that he would pay the $100 filing fee on her behalf in order to solve that problem. Addendum II, at ¶ 57. This Court's records do not, however, reflect any payment by Mr. Daniels for the filing fee for this petition.

On September 18, 2015, this Court noted that Ms. Brown-Carson had not responded to the August 21, 2015 order and therefore dismissed the petition. Ms. Brown-Carson received a copy of that order by mail on September 25, 2015 and promptly consulted with counsel regarding how to proceed. Through this petition for rehearing, Ms. Brown-Carson now promptly seeks the reinstatement of her petition and simultaneously submits to the Court a completed and signed motion to proceed *in forma pauperis* along with a financial information statement. Addendum III.

DISCUSSION

This Court has – and should exercise – discretion to reinstate Ms. Brown-Carson's petition and grant her *in forma pauperis* status. *See, e.g., Kibunja v. Alturas, L.L.C.*, 856 A.2d 1120, 1124 n.4 (D.C. 2004) (reinstating appeal previously dismissed for failure to file the docketing fee and failure to comply with certain appellate rules).

1. Ms. Brown-Carson acted in good faith and did not intentionally fail to respond to this Court. Ms. Brown-Carson's failure to complete the financial documentation required to receive *in forma pauperis* status was inadvertent, not willful. Throughout the administrative proceedings in the matter, Ms. Brown-Carson had been working with Mr. Daniels, who advertises himself as an "experienced workers compensation advocate," who will "represent your interest." *See* D.C. Employees | Federal Disability Experts | Spring Hill FL, http://federalexperts.com/d-c-employees/ (last visited Sept. 30, 2015). Mr. Daniels drafted the incomplete *in forma pauperis* motion that Ms. Brown-Carson originally submitted, and Ms. Brown-Carson reasonably turned to him when this Court rejected that motion. Ms. Brown-Carson also reasonably relied on Mr. Daniels' representations that he would take care of this problem, including by paying the $100 filing fee.

2. As a (then) *pro se* litigant invoking a remedial statute, Ms. Brown-Carson should be given leeway (in the form of a little extra time) to provide this Court with the necessary information regarding her indigent status. This Court has made clear that "courts may grant leeway to *pro se* litigants" with regard to technical, rather than substantive, rules of procedure. *Macleod v. Georgetown Univ. Med. Ctr.*, 736 A.2d 977, 980 (D.C. 1999); *see also Reade v. Saradji*, 994 A.2d 368, 372 (D.C. 2010) (noting that "courts are procedurally more lenient" with *pro se* litigants "who cannot afford counsel"); *Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210,

1219 n.15 (D.C. 2008) (*pro se* litigation warrants lenience); *Hinton v. Sealander Brokerage Co.*, 917 A.2d 95, 109 n.29 (D.C. 2007) (*pro se* litigants should be given leeway "in situations involving technical pleadings, especially in cases that are remedial in nature"). Here, Ms. Brown-Carson's tardiness in responding to the court-set deadline regarding her *in forma pauperis* application falls into the category of a technical procedural issue wholly unrelated to the merits of her workers' compensation case. This Court should therefore give her some leeway and reinstate her petition.

Additionally, "courts may grant leeway to *pro se* litigants" in cases "in which litigants bring suit under remedial statutes." *Macleod*, 736 A.2d at 980. This is an independent basis for granting Ms. Brown-Carson's request for reinstatement. She is seeking workers' compensation benefits under the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Code §§ 1-623.01 *et seq.* (2015). There is no question that the CMPA is a remedial statute that should be construed broadly for the benefit of employees and to serve its humanitarian purpose. *See, e.g.*, *McCamey v. D.C. Dep't of Employment Servs.*, 947 A.2d 1191, 1197-98 (D.C. 2008) (en banc) (CMPA, like other workers' compensation laws, "'should be liberally construed to achieve their humanitarian purpose'") (quoting *Vieira v. D.C. Dep't of Employment Servs.*, 721 A.2d 579, 584 (D.C. 1998)); *Newell-Brinkley v. Walton*, 84 A.3d 53, 60 n.4 (D.C. 2014) (referring to the "remedial purpose of workers' compensation laws"); *D.C. v. AFGE, Local 1403*, 19 A.3d 764, 771 (D.C. 2011) (noting that the District considers the CMPA to be a "remedial statutory scheme"). It is therefore appropriate for this Court to grant Ms. Brown-Carson a little leeway by accepting her revised motion to proceed *in forma pauperis* and reinstating her appeal.

3. This Court should hear Ms. Brown-Carson's meritorious workers' compensation claim. Dismissal of a judicial action is generally too harsh a sanction for an inadvertent error, especially one by a litigant proceeding *pro se*, and especially in light of "the strong judicial policy favoring adjudication on the merits of a case." *Walker v. Smith*, 499 A.2d 446, 448-49 (D.C. 1985); *see also Iannucci v. Pearlstein*, 629 A.2d 555, 559 (D.C. 1993) (noting that, at the trial court level, default judgment is an "extreme sanction" that "should only be imposed upon a showing of severe circumstances," such as "deliberate or willful noncompliance with court rules and orders" and "resulting prejudice" to the opposing party's ability to successfully pursue the litigation) (internal quotation marks omitted)); *D.C. v. Serafin*, 617 A.2d 516, 519 (D.C. 1992) (at trial court level, "[d]ismissal should not be imposed where the failure of a party to comply with an order is inadvertent or excusable"). Ms. Brown-Carson unquestionably acted in good faith and did the best that could be expected under the circumstances, and her petition for review should therefore be reinstated.

Moreover, the petition here invokes a remedial statute (as noted above) and has merit. The Compensation Review Board's conclusion that "a preexisting condition that was caused by repeated on-the-job trauma" can only be aggravated by "a discrete accident," rather than by further repeated on-the-job trauma, *see* Addendum I, at 5-6, has no basis in law or logic. In fact, repeated on-the-job trauma can aggravate a preexisting injury, *see Payne v. D.C. Dep't of Employment Servs.*, 99 A.2d 665 (D.C. 2014) (ongoing workplace exposure to dust aggravated preexisting asthma); *Hensley v. WMATA*, 655 F.2d 264 (D.C. Cir. 1981) (ongoing rough driving conditions aggravated preexisting psoriatic condition), and other courts have specifically held that preexisting carpal tunnel syndrome can be aggravated in this manner, *see City of Philadelphia v. Workers' Compensation Appeals Bd.*, 851 A.2d 838 (Pa. 2004); *Noakes v.*

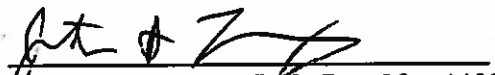
AMTRAK, 845 N.E.2d 14, 22 (Ill. App. 2006) (allowing expert testimony regarding aggravation of carpal tunnel syndrome and noting that in cases involving that claim, the cause of the preexisting carpal tunnel syndrome was irrelevant). Indeed, *City of Philadelphia* is almost directly on point. There, an employee was awarded workers' compensation for carpal tunnel syndrome that she reported to her employer when it became disabling. The employer asserted that she had failed to report the carpal tunnel syndrome over a year earlier when it had first been diagnosed, and instead reported it "only after the condition became disabling on her last day of work." 851 A.2d at 839. The court rejected that contention, noting that the aggravation of the preexisting carpal tunnel syndrome was taking place daily and was timely reported within 120 days of the last aggravation, which was typically the last day of work. *Id.* Reinstating Ms. Brown-Carson's petition is therefore necessary to avoid an injustice to her and to correct a legal error by the Compensation Review Board that could affect additional employees in the future.

Finally, any short delay that results here will cause no prejudice to this Court or any other party. The opposing party here is the District of Columbia, which has engaged in no activity in this appeal to date and is not prejudiced by any short delay. *See, e.g., Long v. United States*, 79 A.3d 310, 319 (D.C. 2013) (government failed to identify prejudice from untimely filing); *Butler v. United States*, 836 A.2d 570, 575 (D.C. 2003) (defendant may withdraw guilty plea "[w]here the delay causes little prejudice to the government"); *Daley v. United States*, 739 A.2d 814, 818 (D.C. 1999) (denial of continuance – even during criminal trial – was abuse of discretion where resulting delay "would have caused little, if any, prejudice to the government").

CONCLUSION

For the foregoing reasons, Ms. Brown-Carson respectfully requests that this Court reinstate her petition for review and grant her attached completed motion to proceed *in forma pauperis*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Petition for Rehearing by the Division to be delivered by first-class mail, postage prepaid, this 1st day of October, 2015, to:

Todd S. Kim
Solicitor General
441 4th Street, NW Suite 600s
Washington, DC 20001

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Addendum I

In re Brown-Carson, CRB No. 13-132

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-132

SYLVIA BROWN-CARSON,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA OFFICE OF UNIFIED COMMUNICATIONS,
Self-Insured Employer-Petitioner

Appeal from a September 27, 2013 Compensation Order by
Administrative Law Judge Joan E. Knight
AHD No. PBL 13-002, DCP No. 30120433947-0001

Lindsay M. Neinast, for the Petitioner
Richard Daniels, for the Respondent[1]

Before: HENRY W. MCCOY, HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND AND FACTS OF RECORD

This appeal follows the issuance on September 27, 2013 of a Compensation Order (CO) from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). In that CO, the Administrative Law Judge (ALJ) granted Claimant's request for an award of temporary total disability benefits from April 6, 2012 to the

[1] Richard Daniels, a non-attorney representative, appeared on Claimant's behalf at the formal hearing. There is no record of him or Claimant, acting *pro se*, filing a response to the instant appeal.

present and continuing, authorization for medical treatment, and payment of causally related medical expenses.[2]

Claimant has worked for Employer since 1987 as a telecommunications operator/911 call-taker, working four (4) ten-hour shifts per week. Her duties entailed answering emergency calls for police, fire, and emergency medical services and typing information into a computer aided dispatch system.

Claimant has a history of left carpal tunnel syndrome and was initially diagnosed in 1992. Claimant also has a history of left wrist pain. In 1993, Claimant requested and received reassignment to a payroll clerk position that required less typing. In 2004, Claimant resumed her position as a 911 operator. Claimant has experienced intermittent flare-ups of left wrist pain and tingling from 1993 to 2004 and in 2010. From the time of her initial diagnosis, Claimant has always self-medicated and worn a wrist splint. There is no record of Claimant seeking medical treatment for her condition and she has always been able to perform her assigned duties, until the instant claim was filed.

On March 28, 2012, Claimant complained of increased left wrist pain and numbness when typing and notified her supervisor that the left wrist pain and swelling prevented her from performing her job duties. It was determined that from January 2012 through March 2012, Claimant processed approximately three thousand three hundred (3,300) 911 calls.

On April 3, 2012, Claimant filed a disability claim with the District of Columbia Office of Risk Management/Public Sector Workers' Compensation Program (DCORM/PSWCP). Claimant was sent for a medical evaluation where a diagnosis of pre-existing left tenosynovitis, left carpal tunnel syndrome, and ganglion cyst was rendered.

On September 21, 2012, the PSWCP issued a Notice of Determination to Claimant denying her claim stating her condition was not related to her employment. This determination was based on Claimant's medical history and an independent medical evaluation (IME) performed by Dr. Steven Friedman on July 2, 2012. Claimant filed an application for a formal hearing to contest that denial.

The ALJ hearing the case determined that Claimant suffered an aggravation of a cumulative work injury that manifested itself on March 28, 2012, and that Claimant timely notified her supervisor of her disabling left wrist pain. In addition, the ALJ determined that Claimant filed a timely claim and has been unable to perform her work duties since March 28, 2012 due to her work injury and granted the claim for relief. While Employer has filed a timely appeal, there is no record of Claimant filing in opposition.

On appeal, Employer argues the ALJ erred in determining that Claimant provided timely notice of her injury and timely filed her claim due to a faulty application of the law, that the ALJ applied an incorrect standard of proof in determining whether Claimant made a proper showing

[2] *Sylvia Brown-Carson v. D.C. Office of Unified Communications,* AHD No. PBL 13-002, DCP No. 30120433947-0001 (September 27, 2013)(CO).

that her carpal tunnel was causally related to her employment, and that the ALJ's determination of causal relationship is not supported by substantial evidence or in accordance with the law.

ANALYSIS

The scope of review by the Compensation Review Board (CRB) is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law.[3] Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq.* ("Act"). Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

The initial issue below was whether Claimant provided timely notice of her injury to Employer. Under the Act, Claimant had thirty (30) days to notify her supervisor of her injury[4] and required an original claim[5] to be filed within two (2) years. Insofar as the ALJ found Claimant's injury initially occurred in 1992 but did not notify her supervisor of her injury and file her claim until 2012, Employer argues the ALJ's conclusion that Claimant provided timely notice and filed a timely claim constitute a faulty application of the law. We agree.

There is no dispute that Claimant has had a history of left carpal tunnel dating from 1992 when it was initially diagnosed. In addition, the ALJ found that Claimant credibly testified as to this diagnosis and to experiencing left wrist pain in 1992 while working as a 911 operator. The ALJ determined that "Claimant has presented a work scenario of what could be classified as a cumulative traumatic injury"[6] and further determined that "in a cumulative injury case, such as here, the manifestation rule applies to affix the date of injury."[7]

The ALJ and Employer cite the D.C. Court of Appeals decision in *King v. DOES*[8] for establishing the manifestation rule that has been adopted for application in this jurisdiction. This is incorrect. The Court acknowledged that this agency had used a manifestation rule, stating:

> The Department of Employment Services utilized a manifestation rule in at least one cumulative trauma injury case prior to the 1991 amendment of

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[3] "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

[4] D.C. Code § 1-623.19 (a)(1).

[5] D.C. Code § 1-623.22 (a). The time to file an original claim was changed from within three (3) years of the work injury to within two (2) years in an amendment that became effective September 24, 2010. The ALJ used the outdated timeframe in conducting her analysis.

[6] CO, p. 5.

[7] *Id.*

[8] 742 A.2d 460 (1999).

> D.C. Code § 36-303. In *Franklin v. Blake Realty Co.*, H&AS No. 84-26, OWC No. 25856 (August 18, 1985), the claimant had sustained a cumulative trauma injury to her shoulder and arm during June 1983, but that injury did not manifest itself in debilitating pain and discomfort until some time [sic] in July 1983. The employer had changed insurance carriers at the end of June, and so one of the issues in the case was which carrier was liable on the claim. That dispute turned on whether the date of injury was considered to be before or after the employer switched carriers. For this purpose the Director "concluded that the date of injury for a cumulative traumatic injury is the date on which the *injury* manifests itself. The date on which the injury manifests itself is (1) the date on which employee first sought medical attention for his painful symptoms, whether or not he ceased work or (2) the date of disability, whichever first occurred." 742 A.2d, 471.

The Court went on to discuss other alternative rules that could be used to fix the time of injury in cumulative trauma cases and concluded:

> We make no judgment about the wisdom of adopting any particular time of injury rule with respect to the issue in this case. The choice of rule implicates many considerations bearing on the implementation of the WCA. The agency charged with administering the Act should make a choice in the first instance, after carefully analyzing the precedents discussed above – which, in this jurisdiction, plainly support, if they do not compel, adoption of some version of a manifestation rule – and the language, structure and purpose of the statute. *Id.* at 473-474. (Citation omitted.)

The choice left open by the Court in *King* was made by the CRB in matter of *Vanhoose v. Respicare Home Respiratory Care*[9], where it was stated:

> The rule for fixing the time of injury in cumulative trauma cases had not as of the time of the Court of Appeals' decision in *King* been firmly established by DOES. Consequently, after an examination of the possible rules that might apply, *see King*. 472 A.2d at 471-473, the Court remanded *King* to the agency to articulate the applicable rule of law. Because the parties settled the *King* case upon remand, there was no final resolution of this matter, at least within the context of the *King* case. Nevertheless, the Director has in several other decisions embraced the manifestation rule first articulated in *Franklin v. Blake Realty Company*, H&AS No. 84-26, OWC No. 25856 (Director's Decision, August 18, 1985), *i.e.* the date the employee first seeks medical treatment for his/her symptoms or the date the employee stops working due to his/her symptoms, whichever first occurs. *See, e.g., Walton v. Woodward & Lothrop*, Dir. Dkt. No. 88-152, H&AS No. 88-533 (May 16, 1989); and *Washington v. Pro-Football, Inc.*,

[9] CRB No. 07-022, AHD No. 06-342, OWC No. 626066 (July 23, 2007).

> Dir. Dkt. No. 98-37, H&AS No. 97-186 (July 16, 1999). The Compensation Review Board has similarly embraced the *Franklin* rule in fixing the "time of injury" under D.C. Code § 32-1503(a) for cumulative traumatic injury claims. *See Bagbonon v. Africare*, CRB No. 03-121, OHA No. 03-340 (November 1, 2005); and *Hall v. Daughters of Charity*, CRB No. 05-245, OHA No. 01-094A (January 6, 2006). Based upon the pleadings filed in the instant matter, the supplemental briefing specifically addressing this issue, and the oral arguments presented by legal counsel for the parties at hearing, this Panel finds no persuasive reason for departing from this case authority. Thus, upon remand the ALJ is to apply the manifestation rule adopted by the Director in *Franklin, supra*, and the CRB for determining "time of injury" under D.C. Official Code § 32-1503(a) in cumulative trauma cases, assuming the ALJ first finds, as a factual matter, that the Petitioner sustained a cumulative traumatic injury.[10]

In the instant matter, the ALJ found that Claimant has a history of carpal tunnel syndrome and was first diagnosed in 1992, that in 1993 she requested and was reassigned to a position that required less typing, that she resumed her position as a 911 operator in 2004, that she had intermittent flare ups of left wrist pain and tingling from 1993 to 2004 and in 2010, that she self medicated and wore a wrist splint but did not seek medical treatment for her condition, and that she never stopped working until experiencing a significant flare up on March 28, 2012. Based on these findings, the ALJ made the ultimate findings that:

> Claimant suffered an aggravation of a cumulative trauma work injury. Claimant's condition manifested on March, 2012 and she timely notified her supervisor of her debilitating left wrist pain on March 28, 2012. Claimant filed a timely claim for benefits after notifying her employer of her condition. Claimant has been unable to perform her work duties since March 28, 2012 due to her work injury.[11]

In making her ultimate findings, the ALJ has conflated the legal concepts of a discrete accident causing an injury and a cumulative trauma. The difference between the typical case of a discrete accident causing an injury (including an aggravating injury) and a cumulative trauma case is that in the latter case, it is not possible to identify a discrete event occurring at a particular date and time that causes or aggravated the injury. Instead, the cumulative traumatic injury becomes manifest only after the body's repeated exposure to individually minor traumas, insults, or harmful employment-related conditions.[12] It is possible for a discrete accident to aggravate a

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[10] *Vanhoose, supra*, at 6.

[11] CO, p. 3-4.

[12] *King, supra*, at 468-469.

preexisting condition that was caused by repeated on-the-job trauma, but the ALJ in this case has not made that distinction.[13]

Rather than make that distinction, the ALJ went on to conclude:

> Under the *King* approach, the date of the manifestation of Claimant's cumulative injury is March 28, 2012, when her left wrist condition became disabling. The record reflects Claimant immediately notified her supervisor on March 28, 2012, was relieved of her duties and sent to urgent care for evaluation. Therefore the statutory notice requirement has been satisfied since Claimant reported her disabling condition to her supervisor within 30 days of its manifestation. The record also reflects Claimant filed a claim for benefits with DCORM on or about April 3, 2012. Therefore, Claimant has filed a timely claim within the three year statutory timeframe.[14]

In determining the date of injury as the date when Claimant's "left wrist condition became disabling", the ALJ misapplied the manifestation rule as first set forth in *Franklin* and adopted by the CRB for his jurisdiction in *Vanhoose*. As the Director stated in *Franklin* with regard to a cumulative injury case, the date on which injury manifests itself is (1) the date on which the employee first sought medical attention for his painful symptoms, *whether or not he ceased work*, or (2) the date of disability, *whichever first occurred.* (Emphasis added.) As made clear by footnote 6 of the CO, the ALJ placed her focus, incorrectly, on when Claimant's condition became disabling.[15]

In assessing the date in a cumulative injury case, the comparison is between the date medical attention is first sought for the pain and the date of disability, whichever occurred first. Further, when looking at the date medical attention is first sought for the painful condition, whether the condition causes the employee to cease work or not is not a factor. As the Director explained in *Franklin*:

> The fact that the employee continued working after medical attention does not negate the fact of the employee's injury, whatever the degree of impairment . . . . In many instances an employee will seek medical attention for a diagnosable injury long before he ceases working. I see no

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[13] *Cf. Currie v. Washington Hosp. Ctr.*, H&AS No. 93-441, OWC No. 246754 (June 12, 1995). In *Currie*, the claimant suffered a work-related injury to her back, recovered, but continued to voice complaints of low back pain as a result of her work duties. As the severity of pain increased, claimant sought treatment and was diagnosed with degenerative arthritic changes to her low. After those symptoms abated, claimant had another work incident that caused significant back pain, and a hearing examiner found that claimant sustained an aggravation of her pre-existing degenerative disc disease that disabled her from performing her usual employment. The hearing examiner concluded that the subsequent work incident was an aggravation compensable under the Act.

[14] CO, p. 6.

[15] In fn. 6, the ALJ stated: "There is no evidence that Claimant's left carpal tunnel syndrome was a disabling condition between 1993 and February 2012."

> rationale for setting the date of the injury coincidentally with the date of disability when it is apparent to the employee and doctor that the employee has suffered an injury requiring medical attention.[16]

Evidence in the record clearly established that Claimant was first diagnosed with carpal tunnel in 1992 and the following year, 1993, asked to be detailed to a position that required less typing. The ALJ acknowledged that Claimant was aware in 1993 that certain of her work duties aggravated her left wrist condition and requested reassignment. The ALJ found that Claimant experienced intermittent flare ups from 1993 until March 2012 when her left wrist pain became too intensive for her to continue working.

While Claimant's condition became disabling on March 28, 2012, when applying the *Franklin* manifestation rule and determining which came first, it was the 1992 diagnosis of carpal tunnel and Claimant's contemporaneous realization that it was work related, that occurred first. Therefore, the ALJ's determination of March 28, 2012 as the date of injury is not in accordance with the law and cannot stand.

As no other conclusion can attain based on the record evidence and timely notice and timely claim are dispositive, the CO order is vacated and this matter is remanded to the ALJ to issue a CO denying the claim for benefits due to the failure to provide timely notice of injury within 30 days pursuant to D.C. Code § 1-623.19 (a)(1).[17]

CONCLUSION AND ORDER

The ALJ's determination that Claimant filed timely notice of injury and filed a timely claim is VACATED. This matter is remanded for the issuance of an order denying the claim for benefits.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

January 24, 2014
DATE

[16] *Franklin, supra*, at 4.

[17] As this matter is being returned for the issuance of an order to deny the claim for disability benefits, consideration of Employer's other assignments of error is rendered moot.

APPEAL RIGHTS

To appeal a final Order or Decision of the Compensation Review Board, you must file a Petition for Review with the District of Columbia Court of Appeals within 30 calendar days of the mailing date shown on the Certificate of Service attached to that Order or Decision.

The D.C. Court of Appeals is located at 430 E Street NW, Washington DC 20001 and is open from 8:30 a.m. to 5:30 p.m., Monday through Friday, except for legal holidays. For information about the D.C. Court of Appeals procedure please call the Court at 202-879-2700.

In addition to filing a Petition for Review with the D. C. Court of Appeals, to appeal this decision you also must send copies of the Petition for Review to:

(1) The counsel for the opposing party at the address shown on the Certificate of Service attached to the Order or Decision.

(2) Todd S. Kim, Esq., Solicitor General
Office of the Attorney General
441 4th Street NW Suite 600S
Washington DC 20001

(3) Compensation Review Board
Department of Employment Services
4058 Minnesota Avenue NE Suite 4005
Washington DC 20019

Note: A request for reconsideration filed with the Compensation Review Board does not extend or eliminate the 30 calendar day deadline for filing an appeal with the District of Columbia Court of Appeals.

BROWN-CARSON v. D.C. OFFICE OF UNIFIED COMMUNICATIONS
CRB No. 13-132

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2014 the attached Decision and Remand Order was sent by U.S. mail, First Class postage pre-paid, or hand-delivered, as noted, addressed as indicated below:

Lindsay M Neinast
Office of the Attorney General
441 4th Street NW Suite 1180 N
Washington DC 20001

CERTIFIED MAIL NUMBER
91 7199 9991 7033 0455 1208

Richard Daniels
Federal Disability Experts
4142 Mariner Blvd #522
Spring Hill FL 34609

CERTIFIED MAIL NUMBER
91 7199 9991 7033 0455 1192

Sylvia Brown-Carson
5037 Hanna Place SE
Washington DC 20019

FIRST CLASS MAIL

Phillip Lattimore III
Chief Risk Officer/Director of Risk Management
D.C. Office of Risk Management
441 4th Street NW Suite 800 S
Washington DC 20001

FIRST CLASS MAIL

Mohammad R Sheikh
Associate Director
Labor Standards Bureau
DC Department of Employment Services
Washington DC

HAND DELIVERY

Chief Administrative Law Judge
Hearings and Adjudication
DC Department of Employment Services
Washington DC

HAND DELIVERY

Malcolm J Luis-Harper
Associate Director
Office of Workers' Compensation
DC Department of Employment Services
Washington DC

HAND DELIVERY

Emma Yarbrough-Smith
Clerk, Compensation Review Board

Addendum II

Brown-Carson Declaration

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

SYLVIA BROWN-CARSON, Petitioner, v. D.C. DEPARTMENT OF EMPLOYMENT SERVICES (WORKERS' COMPENSATION), Respondent.	)	Case No. 15-AA-0700

DECLARATION OF SYLVIA BROWN-CARSON

I, Sylvia Brown-Carson, declare under penalty of perjury and based on my personal knowledge as follows:

1. I was born on October 11, 1960.

2. I currently reside at 3400 25th Street SE, Apartment 2 in the District of Columbia, where I have lived since July 8, 2015.

3. Before living at my current address, I lived with my mother at 2201 Savannah Street SE, Apartment 212, in the District of Columbia. I moved to the Savannah Street address in October 2013.

4. My son, Jaleel Carson, currently lives with me. He is 15 years old.

5. I am legally married, but I have been separated from my husband since September 2011. The last time I spoke with him was February 2015. He is currently incarcerated in the District of Columbia.

6. I am not currently employed.

7. I worked for the D.C. government since 1987, but I recently retired. I submitted my retirement paperwork in November 2014.

8. My last full day of work was March 28, 2012.

9. My last official day of work was April 6, 2012.

10. My only source of income is from a civil service retirement annuity.

11. From March 2015 through June 2015, I was placed on interim status by the Office of Personnel Management while my retirement application was pending and received $400 per month in annuity payments.

12. Beginning in July 2015, I have received net monthly annuity payments of $1,986.47. The gross amount of the payments is $2,704. $599.58 is deducted for health benefits. $39.68 is deducted for post-retirement basic life insurance. $32.05 is deducted for federal income tax. $20.15 is deducted for basic life insurance. $3.03 is deducted for "Option A – Standard." $16.92 is deducted for "Option B – Additional." $6.12 is deducted for "Option C – Family."

13. My son tutors elementary school students through the Reach program. He receives a monthly stipend of $100.

14. I have one bank account. On September 30, 2015, the account had approximately $8 in it.

15. My monthly annuity payments are directly deposited in my bank account at the beginning of each month.

16. I do not have any cash.

17. I own a 2014 Ford Fusion. I do not own any other vehicles. I had to get a loan to pay for my car that requires me to pay $362 per month for 72 months.

18. I do not own any stocks.

19. I do not own any real estate.

20. I pay $1,025 per month in rent.

21. I pay approximately $50 per month for my electric bill.

22. I pay approximately $50 per month for my gas bill.

23. I pay approximately $100 per month for my cell phone bill.

24. I pay approximately $123 per month for internet, cable, and phone service.

25. I pay approximately $155 per month for car and rental insurance.

26. I spend approximately $250 per month on food for myself and my son.

27. I have medical insurance that is deducted from my annuity payment. I also have a $25 copay for every regular doctor visit and a $40 copay for every specialist visit. I go to the doctor approximately once every three months. I am a diabetic, and I pay approximately $7 per month for my prescription medicine. I do not have a copay for my son.

28. I spend approximately $100 per month on gas.

29. I spend approximately $20 per month for a haircut for my son.

30. I spend approximately $80 per month on clothes for myself and my son.

31. I spend approximately $200 per year, or $16.67 per month, on a uniform for my son to wear to school. This is separate from the $80 per month on clothes noted above.

32. I spend approximately $100 per year, or $8.33 per month, on school supplies for my son.

33. I do not spend a significant amount of money on any other items.

34. My first contact with Richard Daniels was in September or October 2012.

35. To the best of my knowledge, Mr. Daniels works for Federal Disability Experts in Spring Hill, Florida.

36. I was referred to Federal Disability Experts by someone in the office of Robert A. Ades.

37. I called Federal Disability Experts in the fall of 2012 because I was trying to find someone to represent me in my workers' compensation claim. After going through a teleprompter for a free initial consultation, I spoke with Joann Jerrell. She connected me with Mr. Daniels.

38. On that day, Mr. Daniels and I spoke for at least an hour.

39. Following that conversation, Mr. Daniels emailed me with a representation agreement. I signed the agreement and mailed it back to him. The agreement says that Mr. Daniels is not a licensed attorney but it also refers to him providing me with "legal services" and says that he agrees to "pursue all reasonable and appropriate appeals" on my behalf.

40. Mr. Daniels represented me throughout the administrative process in which I sought workers' compensation benefits from the D.C. Government for my work-related aggravated carpal tunnel syndrome.

41. On September 27, 2013, an Administrative Law Judge at the Department of Employment Services issued an order in my favor that granted my claim for workers' compensation benefits.

42. My employer subsequently filed an appeal.

43. On January 24, 2014, the Compensation Review Board issued a decision that remanded my claim to the Department of Employment Services with instructions to issue a decision denying workers' compensation benefits.

44. On December 23, 2014, an Administrative Law Judge at the Department of Employment Services issued a compensation order on remand that denied my claim.

45. On May 19, 2015, the Compensation Review Board upheld the Department of Employment Services' compensation order on remand.

46. On May 20, 2015, Mr. Daniels sent me an email. Attached to the email was a copy of the May 19, 2015 order and a petition for review (Form 5) before the District of Columbia Court of Appeals. He asked me to sign the petition and return it to him, so that he "may submit the Notice of Appeal within 30 days."

47. I promptly, within a couple of days, signed the petition and returned it to him.

48. I was aware at that time that Mr. Daniels would not be able to represent me in the Court of Appeals because he is not a lawyer but I also understood that he was going to file the petition for review for me.

49. Around this time, Mr. Daniels advised me to find an attorney to represent me on appeal.

50. On June 22, 2015, Mr. Daniels submitted the petition to the District of Columbia Court of Appeals on my behalf. Along with the petition, he attached a motion to proceed in forma pauperis. To the best of my knowledge, Mr. Daniels or someone from Federal Disability Experts prepared both documents.

51. I was aware that Mr. Daniels intended to file the petition and motion to proceed in forma pauperis with the Court of Appeals on my behalf, although I don't recall seeing the motion before it was filed.

52. The only contact I had with Mr. Daniels or Federal Disability Experts between the time I returned the signed petition to him and August 21, 2015 was a couple phone calls seeking status updates.

53. On August 21, 2015, the Court of Appeals issued an order denying without prejudice the motion to proceed in forma pauperis. The order noted that the motion was incomplete.

54. Shortly thereafter, I called Federal Disability Experts to ask Mr. Daniels about the order. I spoke with Joann Jerrell, who transferred me to Mr. Daniels. He informed me that, because he is not an attorney, the order is not something that he would have received. He or Ms. Jerrell asked me to fax a copy to him, which I did. I assumed, based on this conversation, what Mr. Daniels had done so far, and what our agreement said, that Mr. Daniels would take care of the problem or discuss the issue with me further.

55. The only contact I had with Mr. Daniels or Federal Disability Experts between the date of that phone call and September 14, 2015 was a couple phone calls seeking status updates.

56. On September 14, 2015, Mr. Daniels left me a voicemail message at 4:44 pm. I still have the voicemail message saved on my phone.

57. In the voicemail message, Mr. Daniels stated that the Court of Appeals rejected the initial filing because they wanted more information about my income. He stated that he was going to resubmit the petition and pay the $100 filing fee. Specifically, he stated the following: "Hi Sylvia, this is Rick Daniels. I wanted to let you know what was going on with your case. We are refiling. They had rejected the initial filing because they wanted more information about your income and all that --- and all it is is delaying the case, so what I'm going to do is I'm just going to resubmit it and we'll pay the $100 for the fee and we'll worry about getting that back later. It's just easier and more expeditious this way. So if you have any other questions, feel free to call. I won't know any more information than that. When the court gets the appeal they'll docket it and we'll go from there. So if you have any questions give me a call. I'll talk to you soon. Bye."

58. After receiving the voicemail message, I called Mr. Daniels back and left a message.

59. Although I knew that Mr. Daniels would not be able to represent me in the Court of Appeals, I assumed, based on the voicemail message he left and the fact that he filed a petition on my behalf on June 22, 2015, and what our agreement said, that he would take care of the problem noted in the August 21, 2015 order.

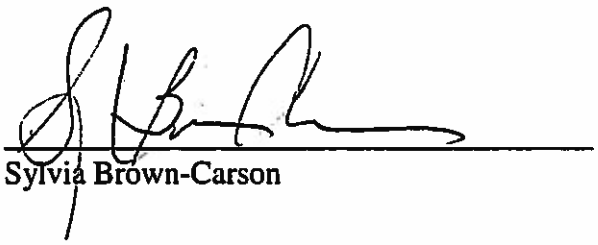
60. On or around September 14, 2015, I visited Bread for the City's legal clinic. They referred me to the Legal Aid Society of DC.

61. On September 17, 2015, I visited the Legal Aid Society of DC's office in Anacostia.

62. On September 25, 2015, I received in the mail a copy of this Court's September 18, 2015 order dismissing my appeal. Learning about this September 18, 2015 order was how I discovered that Mr. Daniels had not paid the $100 filing fee and had not taken care of the issues raised in this Court's August 21, 2015 order.

63. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 1st day of October 2015.



Sylvia Brown-Carson

Addendum III

Motion to Proceed *in Forma Pauperis* with Financial Information Statement

DISTRICT OF COLUMBIA COURT OF APPEALS

Sylvia Brown-Carson, Appellant

Appeal No. 15-AA-0700

v.

D.C. Department of Employment Services, Appellee.

MOTION FOR WAIVER OF PREPAYMENT OF COURT FEES AND COSTS (IN FORMA PAUPERIS)

1. ☑ I am not able to pay any of the court fees and costs

   ☐ I am able to pay only the following court fees and costs (specify):

2. My current street or mailing address is:

   3400 25th Street SE, Apt. 2
   Washington, DC 20020

3. My occupation, employer, and employer's address are (specify):

   Retired

4. My spouse's occupation, employer, and employer's address are (specify):

   N/A

5. ☑ No, I am not receiving financial assistance.

☐ Yes, I am receiving financial assistance under one or more of the following programs:

☐ SSI (Social Security Supplemental Income)
☐ General Assistance for Children
☐ AFDC (Aide to Families with Dependent Children)
☐ Medical Assistance

If you checked Yes on box 5, you must attach documents to verify receipt of the benefits; you may then skip item 6 and sign at the bottom of this form.

6. ☑ My income and available assets are not enough to pay for the common necessaries of life for me and the people in my family whom I support, and also to pay court fees and costs. **[If you check this box, you must complete the attached Financial Statement, Form 7b.]**
Warning: You must immediately tell the court if you become able to pay court fees or costs during this action.
I declare under penalty of perjury that the information on this form and all attachments is true and correct:

Date: 10/1/15

Sylvia Brown-Carson
(Type or print name)

(Signature)

CERTIFICATE OF SERVICE

I hereby certify that I have ☐ hand-served or, ☑ mailed, postage prepaid, a copy of this motion to D.C. Solicitor General, this 1 day of October, 2015.

Becket Marum
Name

Form 7b. Financial Information Statement.

DISTRICT OF COLUMBIA COURT OF APPEALS

Financial Information Statement
(In Forma Pauperis)

Applicant's Name Sylvia Brown-Carson Case No. 15-AA-0700

1. **MY MONTHLY INCOME**

(If your pay changes considerably from month to month, each of the amounts reported in item 1 should be your average for the past 12 months.)

a. My gross monthly pay is:..... $ 2704

b. My payroll deductions are (specify purpose and amount):

(1) Health benefits $ 599.58
(2) Federal income tax $ 32.05
(3) Post-retirement and basic life insurance $ 59.83
(4) Other deductions $ 26.07

My TOTAL payroll deduction amount is: ..... $ 717.53

c. My monthly take-home pay is (a. minus b.):..... $ 1986.47

d. Other money I get each month is: (specify source and amount, include spousal support, child support, scholarships, retirement or pensions, social security, disability, unemployment, veterans payments, dividends, and net rental income)

(1) _____ $ 0
(2) _____ $ 0
(3) _____ $ 0

The total amount of other money is: ..... $ 0

e. MY TOTAL MONTHLY INCOME IS (c. plus d.): ..... $ 1986.47

2. **PERSONS LIVING IN MY HOME.**

Number of persons living in my home: 2

Below list all persons living in your home, including your spouse, who depend in whole or in part on you for support or on whom you depend in whole or in part for support:

	Name	Age	Relationship	Gross Monthly Income
1.	Jaleel Carson	15	Son	$ 100
2.				$
3.				$
4.				$
5.				$

The TOTAL amount of income from others living in my home is..... $ 100

3. **PROPERTY.** I own or have an interest in the following property:

a. Cash: $ 0
b. Bank accounts: $ 1994
c. Cars: $ 1000
d. Stocks $ 0
e. Real estate (identify each property and note the fair market value and any loan balance):
_____ $ 0
_____ $ 0
_____ $ 0
f. Other personal property (describe below): $ 5000
Furniture for a 2-bedroom apartment, clothes, three TVs

4. **MY MONTHLY EXPENSES.** My monthly expenses are the following:

a. Rent/house payment & maintenance..... $ 1025
b. Food & household supplies..... $ 250
c. Utilities and telephone..... $ 323
d. Clothing..... $ 96.67
e. Laundry and cleaning..... $ 0
f. Medical/dental payments..... $ 17
g. Insurance (life, health, accident)..... $ 155
h. School and child care required for employment..... $ 0
i. Court-ordered child or spousal support..... $ 0
j Transportation and auto expenses (insurance, gas, repair)..... $ 100
k. Installment payments (specify purpose and amount)
(1) Car payment $ 362
(2) _____ $ 0
(3) _____ $ 0
l. Amounts deducted due to wage assignments and earnings withholding orders:..... $ 0
m. Other expenses (specify):
(1) Haircut for son $ 20
(2) _____ $ _____
(3) _____ $ _____
n. My Total monthly expenses are (add a. through m.) $ 2348.67

5. Other facts that support this application are (describe unusual medical needs, expenses for recent family emergencies, or other unusual circumstances or expenses to help the court understand your budget; if more space is needed, attach a page labeled Attachment 5):