**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**Department of Employment Services**
**Labor Standards Bureau**

**Office of Hearings and Adjudication**
**COMPENSATION REVIEW BOARD**

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**CRB No. 06-065**

**REBECCA JACKSON,**

**Claimant–Petitioner,**

**v.**

**BAPTIST SENIOR ADULT MINISTRIES AND LIBERTY MUTUAL INSURANCE GROUP,**

**Employer/Carrier–Respondent.**

Appeal from a Compensation Order of
Administrative Law Judge Terri Thompson Mallett
AHD No. 05-047, OWC No. 592514

Michael D. Dobbs, Esquire, for the Petitioner.

Thomas E. Dempsey, Esquire[1], for the Respondent.

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

# DECISION AND REMAND ORDER

## JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[2]

[1] Respondent was represented by Chanda Stepney, Esquire, at the time of the formal hearing, but has been represented by Mr. Dempsey in these proceedings.

[2] Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as

## BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on June 5, 2006, the Administrative Law Judge (ALJ) denied Petitioner's claim for temporary total disability benefits and causally related medical care, finding that Petitioner had failed to establish that the claimed disability was causally related to a stipulated work related injury which occurred on November 19, 2003. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ erred (1) by mis-applying the provisions of D.C. Code §32-1508 (6) in denying the claim, (2) by finding that Respondent had produced evidence sufficient to rebut the statutory presumption that the claimed disability alleged to be the result of the injury to her right knee is causally related to the stipulated work injury, (3) in weighing the evidence of causal relationship of the right knee condition to the work injury, by failing to accord the opinion of Petitioner's treating physicians proper evidentiary weight under the treating physician's preference rule in this jurisdiction, and (4) regardless of the finding concerning a lack of causal relationship between Petitioner's right knee injury and the stipulated work injury, by in denying the claimed disability because Petitioner was unable to work in part as a result of the injury to Petitioner's back that was found by the ALJ to have been caused the stipulated work injury.

Respondent opposes this appeal, asserting (1) that the ALJ did not apply the referenced code section to deny the claim, (2) that the ALJ properly determined that Respondent had produced sufficient evidence to overcome the statutory presumption that the right knee condition was causally related to the work injury, and (3) that the ALJ gave the proper deference to the treating physicians' opinions, all resulting in the Compensation Order being supported by substantial evidence and being in accordance with the law.

## ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "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. Disrtict of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of

amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, Petitioner first alleges that the ALJ's decision is erroneous because Petitioner alleges that the ALJ misapplied the provisions of D.C. Code §32-1508 (6) in denying the claim. In response, Respondent asserts that the ALJ did not in fact deny the claim in reliance upon that code section.

We agree with Respondent. Review of the Compensation Order does not support Petitioner's contention that the ALJ interpreted that provision in a manner that resulted in or contributed to the denial of the claim. Rather, the ALJ, in our view, merely cited and quoted from that section in support of the proposition that aggravations of pre-existing injuries or conditions are considered new, compensable injuries under the Act. Indeed, as we read the Compensation Order, the ALJ cited the provision as being supportive of Petitioner's claim, rather than as being hostile to recovery. We detect no factual or legal error in this regard.

Second, Petitioner argues that the ALJ erred by finding that Respondent had produced evidence sufficient to rebut the statutory presumption that the claimed disability alleged to be the result of the injury to Petitioner's right knee is causally related to the stipulated work injury. The basis of this argument is that, in Petitioner's estimation, the independent medical evaluation (IME) report from Dr. Louis Levitt was not sufficient to rebut the presumed causal relationship, because (1) Dr. Levitt was not a treating physician and therefore his opinion should be accorded less weight than the opinion of Petitioner's treating physicians, (2) Dr. Levitt's opinion was reached after but one examination, (3) Dr. Levitt's only examination of Petitioner was performed nine months after the knee replacement surgery, rendering it insufficiently reliable, and (4) Dr. Levitt's conclusion that the only right knee injury sustained in the work injury was a "strain or sprain" should be rejected because (a) Dr. Levitt did not examine Petitioner until after the right knee replacement surgery and (b) no contemporaneous medical records or reports from Petitioner's treating physicians describe the injury as such.

We view all of these arguments as being relevant only to the weight to be accorded to the medical evidence, and as representing arguments why the fact finder might have, in Petitioner's view, rejected the IME opinion ultimately. None of these complaints address whether the IME report was sufficient under the standard established by the Court of Appeals in *Washington Post v. District of Columbia Department of Employment Services and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004) *(Reynolds)*, wherein the Court wrote:

> We hold that an employer has met its burden to rebut the presumption of causation when it has proffered a qualified independent medical expert who, having examined the employee and reviewed the employee's medical records, renders an unambiguous opinion that the work injury did not contribute to the disability.

*Reynolds*, at 909. Petitioner does not cite this case and does not address how in Petitioner's view the IME report is deficient under this standard, and we detect no such deficiency in our review of

EE 4, Dr. Levitt's IME report. The ALJ's determination that Respondent produced sufficient evidence to overcome the presumed relationship between the work injury and Petitioner's right knee condition is accordingly affirmed as being supported by substantial evidence and in accordance with the law as enunciated in *Reynolds*. We add that Petitioner mischaracterizes Dr. Levitt's opinion as to the nature of the injury sustained to Petitioner's right knee. The doctor does not describe it as a "sprain or strain" in his IME report; rather he characterizes it as a temporary exacerbation of the preexisting arthritic condition, and uses the "sprain or strain" language to describe the back injury.

Third, Petitioner asserts that, having found that Respondent's evidence was sufficient to overcome the presumption of causal relationship relating to the right knee condition, in weighing the evidence of such a causal relationship, the ALJ failed to accord the opinion of Petitioner's treating physicians their proper evidentiary weight, under the treating physician's preference rule in this jurisdiction. Related to this argument is Petitioner's assertion that the ALJ erred by not addressing the substance of the opinion of Dr. Straughn, because the ALJ erroneously concluded that the reports of Dr. Straughn were unrelated to the knee injury, because those reports contained a date other than November 19, 2003 as the "Date of Loss", which the ALJ interpreted to mean "Date of Injury". Further, Petitioner asserts that in the process of weighing the evidence related to Dr. Johnson's opinions, the ALJ erred by not accepting his opinion that the work injury was aggravated by the stipulated work injury, in which the ALJ found as follows:

> On November 19, 2003, Claimant, a 65 year old woman, was walking to Employer's nurse's station when she caught her foot on the carpet and fell face down. Both knees hit the ground. She experienced pain in her knees and back.

Compensation Order, page 2, "Findings of Fact".

We agree with Petitioner that the ALJ erroneously failed to discuss the substance of Dr. Straughn's opinion. It appears uncontested that Dr. Straughn was a treating physician. Respondent does not contend otherwise in this appeal, and review of his reports reveal that he did provide treatment for injuries to Petitioner's back and knees. *See*, CE 4 and CE 9. In the initial report dated November 26, 2003, Dr. Straughn relates the history of injury given by Petitioner as follows:

> This is a 65 yr old female who was involved in an accident on her job on the date captioned above. Patient stated she was at work and while she was walking her right foot got caught in the carpet. She denies loss of consciousness and head trauma. No treatment was attained. ... Today, patient presents for an initial evaluation of injuries incurred on the fall on her job on the date captioned above. Since the accident she complains of pain in both knees and lower back pain. She describes pain as sharp and aching and increases with movement.

CE 4, Report of November 26, 2003. That report contained in the "caption" three dates: a Date of Birth (01/08/38), a Date of Loss (01/05/03) and a Date of Service (11/26/03).

The ALJ found that "the evidence presented [from Dr. Straughn] does not relate to treatment for Claimant's November work-related injury; therefore it will not be considered". And, consistent with that finding, the ALJ did not consider the reports in weighing the evidence.

Nothing other than the "Date of Loss" date would suggest that the injuries, treatment and opinions described and discussed in the reports from Dr. Straughn relate to some other incident or occurrence. Respondent's counsel at the formal hearing made no such assertion or argument, did not present any evidence of some other incident or injury to Petitioner's knee that occurred at work following a trip over a carpet, and makes no such assertion in this appeal. Review of Respondent's counsel's cross examination of Petitioner at the formal hearing reveals that Petitioner was never asked about some *other* incident involving a trip over a carpet resulting in a fall to her knees while at work, nor was she confronted with the report containing the January 2003 "Date of Loss". No objection based upon lack of relevance was interposed in connection with these reports when they were offered. On the other hand, the treatment described therein was rendered and the initial report was written within 7 days of the trip and fall over carpet at work which is the subject of this claim; the history given is identical to the facts of the injury as described by Petitioner in her testimony and as found by the ALJ in the Compensation Order; and the body parts said to be involved in the reports are identical to those described by Petitioner in the formal hearing, by Dr. Johnson in his reports, and by Dr. Levitt in his IME report.

On this record, we do not believe that there is substantial evidence to support ALJ's factual finding that the reports and treatment described therein by Dr. Straughn relate to some other incident and injury. Accordingly, under the treating physician preference rule, Dr. Straughn's opinion as to the causal relationship between the work incident and the knee condition must be considered, and if rejected, addressed. *See*, *Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986), *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998), and *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992).

While IME opinion can be accepted over that of treating doctor opinion, unlike other areas relating to acceptance or rejection of evidence, in this area it is incumbent upon the ALJ to describe the reasons for rejection of such opinion. In this case, that was not done. Failing to do so was error, and requires a remand for further consideration of the evidence.

On a related matter, we note that the ALJ discussed the opinion of Dr. Levitt only in connection with the question of whether there was sufficient evidence to overcome the presumption of causality. That is, upon reaching the point in the Compensation Order where the medical evidence is weighed, there is no further discussion of Dr. Levitt's findings, opinions or conclusions, and at no time does the ALJ find or conclude that she accepts Dr. Levitt's opinions in preference to Dr. Johnson's, and she cites nothing in Dr. Levitt's reports as a basis for her ultimate rejection of Dr. Johnson's oft repeated and unequivocally expressed opinion that Petitioner's admittedly preexisting arthritic knee condition was aggravated by the slip, trip and fall at work.

In the absence of a discussion by the ALJ of any *competing* evidence, we are left only with the ALJ's discussion of the reasons why she ultimately rejected the opinion of Dr. Johnson. In essence, the ALJ found that Petitioner had produced substantial, credible evidence that the knee condition was causally related to the work injury, and accorded the Petitioner the benefit of the presumption of such a relationship, but then, in weighing that same evidence, she found it insufficient on its face to support a finding of such a causal relationship. Had the ALJ chosen to accept Dr. Levitt's

opinion in preference to that of Dr. Johnson (and, given our previously expressed ruling, Dr. Straughn), and had she enunciated persuasive reasons consistent with the Act for doing so, the ultimate finding of no such causal relationship would stand. However, it does not appear to us that that is what the ALJ did. Rather, the ALJ appears to have done an about face on her view of the sufficiency of the medical evidence to support a causal relationship finding. This is error. In this case, the ALJ's analysis appears to be based solely upon perceived deficiencies in the medical evidence presented by Petitioner at the formal hearing, and appears to have nothing to do with Respondent's evidence. In other words, it is as if the evidence was uncontradicted, when it came to weighing the evidence as a whole.

While uncontradicted evidence may not necessarily be sufficient to invoke the presumption (i.e., it may lack inherent credibility, it may be missing some requisite elemental part, etc.), where the evidence is sufficient to invoke the presumption, and where it remains *uncontradicted*, the presumption operates to entitle a claimant to an award.

While, in this case, the employer (Respondent) offered competing medical evidence which was considered with respect to the rebuttal of the presumption, when it came to the weighing of the evidence following rebuttal of the presumption, the ALJ did not discuss, consider, evaluate or rely upon that competing medical evidence, or if she did so, it is not apparent from the Compensation Order. In other words, the ALJ appears to have treated Petitioner's medical evidence as uncontradicted in the weighing process, yet denied the claim as being unsupported by substantial evidence.

Given that the issue resolved was one of a medical nature, simply rejecting Dr. Johnson's opinion that the fall and the resultant trauma to the right knee aggravated the preexisting arthritis, without basing that rejection upon competing medical evidence (or upon some other evidentiary deficiency of a non-medical nature, such as lack of a claimant's credibility which may undercut the history related to the physician, or evidence of behavior, physical capacity or conduct inconsistent with the predicate assumptions upon which a medical opinion is based or relies, or any number of other potential, non-medical reasons) amounts to the conclusion that the ALJ impermissibly substituting her own medical judgment for that of the physician, an enterprise which has been prohibited by the Court of Appeals in *Landesburg v. District of Columbia Dep't of Employment Serv's.*, 794 A2d 607 (D.C. 2002). Accordingly, we must remand the case to the ALJ to permit further consideration of the evidence consistent with this discussion.[3]

[3] In light of this remand, we note that in footnote 1, it is set forth that this case was initially heard by an ALJ who is no longer with the Agency, and was reassigned to the authoring ALJ following issuance of a Show Cause Order. In response to that order, the parties apparently consented to the reassignment, "provided that the decision does not hinge on Claimant's credibility". Whether such a precondition amounts to consent to the process poses a difficult problem. There is no way for an ALJ to know, in advance of consideration of the record, whether the decision will or will not hinge upon a witness's credibility, and proceeding to consider the case without regard to credibility issues that might become apparent upon review of the record appears to us to impinge upon the proper discretion and authority of the ALJ. This is a problem not just in theory; rather, the problem is presented in this case. Despite this precondition, the ALJ did comment upon an apparent lack of credibility in Petitioner's testimony, at page 6 – 7 of the Compensation Order, where the ALJ wrote "Claimant also testified that after November 19, 2003 she could not receive anymore [sic] injections, which had previously provided relief, and the pain did not go away. HT at 44. This is not supported by the medical record. CE 2." It is not certain whether this apparent doubt about the accuracy of Petitioner's testimony had any impact upon the outcome of the case. It is undeniable, however, that the statement in the Compensation Order, that Petitioner's testimony that she experienced a worsening of her symptoms following the fall which did not abate, is "not

Finally, Petitioner argues that, regardless of the finding concerning a lack of causal relationship between Petitioner's right knee injury and the stipulated work injury, the ALJ erred in denying the claimed disability, because Petitioner was unable to work in part as a result of the injury to Petitioner's back that was found by the ALJ to have been caused by the stipulated work injury.

Generally speaking, the ALJ based the denial of temporary total disability benefits upon a multiple inter-related findings: that Petitioner's unrelated knee condition precluded her from working because she was unable to perform CPR, which requires her to kneel, something that she can not do due to her knee, and being unrelated to the work injury, this lack of capacity is not compensable; that the release by Dr. Johnson to return to work for a second employer in a similar job, but not to return to work for Respondent, is facially inconsistent and unexplained, and that the failure of Dr. Johnson to explain why Petitioner can return to one job but not to the other renders his opinion a vocational rather than a medical judgment for which he has no special expertise.

Because the first of these reasons is to be reconsidered on remand, we believe that it is best to permit the ALJ to address the issues anew in the context of the reconsideration on remand, and therefore we decline at this time to rule on them, in that resolution may become unnecessary, and in that such new or additional findings of fact and conclusions of law as may be made upon reconsideration might effect the outcome of this issue.

## CONCLUSION

The finding in the Compensation Order of June 5, 2006, that Respondent had produced evidence sufficient to rebut the statutory presumption that the claimed knee condition and resultant disability alleged to be the result of the injury to her right knee is causally related to the stipulated work injury, is supported in part by substantial evidence in the record and is in part in accordance with the law. The finding that the medical reports and opinions expressed by Dr. Straughn are not relevant or related to the injuries sustained and which are the subject of this claim and appeal is not supported by substantial evidence, and the failure to consider the opinions contained in those reports is not in accordance with the law. The rejection of the opinions of Dr. Johnson and Dr. Straughn, in the absence of consideration of competing medical opinion or other non-medical evidence or facts, is not in a accordance with the law.

## ORDER

The Compensation Order of June 5, 2006 is affirmed in part, as it relates to the invocation and rebuttal of the statutory presumption that the disabling condition of Petitioner's right knee is medically causally related to the stipulated work injury. The finding that the medical reports and opinions expressed by Dr. Straughn are not relevant or related to the injuries sustained and which are the subject of this claim and appeal is reversed, and the matter is remanded with instructions to

supported by the medical record", is consistent with the outcome denying compensation on the theory that the work injury did not aggravate the knee condition on a long term basis. On remand, the ALJ may wish to consider whether a rehearing is the best way to resolve this case, in light of the conditional nature of the parties' acquiescence to the reassignment.

consider the opinions contained therein, along with reconsideration of the rejection of the opinions of Dr. Johnson, consistent with the foregoing discussion contained in this DECISION and REMAND Order.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

October 31, 2006___________
DATE