

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

Office of Hearings and Adjudication
Administrative Hearings Division



(202) 671-2233-Voice
(202) 673-6938-Fax

In the Matter of,)
)
JACOB G. KLEIN,)
)
Claimant,)
)
v.)
)
UNITED STEEL METAL,)
)
and)
)
LIBERTY MUTUAL INSURANCE COMPANY,)
)
Employer/Carrier.)

OHA No. 04-464
OWC No. 603001

Appearances:

DAVID M. SCHLOSS, ESQUIRE
For the Claimant

CHRISTOPHER R. COSTABILE, ESQUIRE
For the Employer/Carrier

Before:

ANAND K. VERMA
ADMINISTRATIVE LAW JUDGE

COMPENSATION ORDER ON REMAND

STATEMENT OF THE CASE

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §§32-1501 *et seq.*, (hereinafter, the Act).

After timely notice, a full evidentiary hearing was held on November 15, 2004, before Anand K. Verma, Administrative Law Judge. Jacob G. Klein, appeared in person and through counsel (hereinafter, claimant). United Sheet Metal/Liberty Mutual Insurance Company, (hereinafter, employer) appeared by counsel. Claimant testified on his own behalf. No testimony was offered on behalf of employer.

Claimant Exhibit (hereinafter, CE) Nos. 1-7 and Employer Exhibit (hereinafter, EE) Nos. 1-5, described in the Hearing Transcript (hereinafter, HT) were admitted into evidence. The record closed on December 14, 2004.

BACKGROUND

Claimant, while employed as a sheet metal worker on April 26, 2004, injured his lower back, left elbow, right hip, knee and elbow when a 2000-pound air conditioning unit came down on top of an instrument, namely, Johnson bar which in turn struck him. After initially treating in the emergency room at the Washington Hospital Center, claimant sought treatment with Fredric L. Salter, M.D., an orthopaedic surgeon. Although claimant returned to work briefly, he discontinued working because of persistent pain in his low back. Later, upon referral from Dr. Salter, claimant sought neurological consultation with Bruce A. Ammerman, M.D., a neurosurgeon.

PROCEDURAL HISTORY

Following issuance of a Compensation Order on January 25, 2005, claimant filed an Application for Review by the Compensation Review Board (CRB) which remanded the case on July 27, 2006¹ to accord claimant the presumption of compensability and consider the claim for the requested disability benefits.

CLAIM FOR RELIEF

Claimant seeks an award under the Act of temporary total disability benefits from July 26,

¹This is the date an Errata Order was received by the AHD. The date when the CRB's Remand Order dated August 9, 2005 was received by the AHD cannot be determined.

2004 to August 12, 2004 and September 6, 2004 to the present and continuing, as well as causally related medical expenses and interest on accrued benefits.

ISSUES

1. Whether claimant's complained of physical impairments are causally related to the April 26, 2004 work injury.
2. The nature and extent of claimant's disability, if any.

FINDINGS OF FACT

The parties have stipulated, and I accordingly so find, an employer/employee relationship is present under the Act; jurisdiction is vested in the District of Columbia; claimant sustained an accidental injury on April 26, 2004, and his resulting impairments as of July 26, 2004 are causally related; claimant provided timely notice of the injury; the claim was timely filed; claimant's average weekly wage is \$1,128.22; and employer voluntarily paid claimant temporary total disability benefits from April 29, 2004 to July 13, 2004 and from September 14, 2004 to October 11, 2004.

Based on the review of the record as a whole, I make the following findings:

I find claimant worked for employer on or about April 26, 2004 as a sheet metal worker, fabricating and installing the metal which required him to carry and lift equipment, weighing up to 140 pounds, climbed stair wells, short ladders and scaffolds. I find on April 26, 2004 while working at a site in Washington, D.C., claimant sustained dorsal strain, right ribs and left elbow contusions and a large hematoma in the right flank overlying the iliac crest region

when an air conditioning equipment weighing approximately 2000 pounds struck the Johnson bar he was holding. I find claimant was initially admitted in the Emergency Department at the Washington Hospital Center where he was diagnosed with multiple contusions and a cut in the left hand. I find claimant was discharged with the prescription for Tylenol #3 and instruction to follow up with his own physician.

I find on April 29, 2004 claimant sought treatment from Dr. Salter who diagnosed him with acute dorsal strain, right ribs and left elbow contusions, multiple resolving abrasions and large hematoma² in the right flank overlying the iliac crest region.³ I find Dr. Salter noted claimant's diagnosed condition was secondary to the April 26, 2004 work injury. I find Dr. Salter noted restricted lumbar motions and recommended physical therapy, which he received from April 30, 2004 through July 9, 2004.

I find, noting an overall improvement in claimant's condition in a follow up on July 9, 2004, Dr. Salter recommended cessation of physical therapy and dispensed an Ortho-Gel tube to alleviate his residual discomfort in the right rib and right iliac crest. I find following Dr. Salter's release to return to his usual employment from July 15, 2004, claimant returned to work accordingly, however, because of continued pain in his head, he discontinued it after two weeks. I find claimant returned to Dr.

Salter on July 27, 2004 with complaint of "electrical type" shooting pain to his head, as well as pain in the right iliac region precipitated by extreme activities.

I find, although claimant suffered from a mild residual right iliac contusion, Dr. Salter anticipated his other symptoms would gradually resolve. Accordingly, from an orthopaedic point of view, Dr. Salter released claimant to his usual full duty employment and recommended a neurological evaluation. I find disfavoring any further orthopaedic treatment on July 27, 2004, Dr. Salter discontinued claimant's prescriptions issued by his office and closed his chart.

I find upon his reevaluation of claimant on September 14, 2004, Dr. Salter noted tenderness about the right iliac crest and straight leg raising was uncomfortable for lower back pain and radiating right leg. Predicated on his examination, Dr. Salter felt claimant had developed an acute lumbosacral strain with right sided radicular symptoms related to the April 26, 2004 injury and ordered him off work until October 1, 2004.

I find claimant's September 21, 2004 lumbar spine MRI sac disclosed mild disc bulge and end plate spurs abutting right L5 nerve root both in the neural foramen and laterally. Claimant also had right L5 radicular symptoms which combined with other symptoms contributed to her complained of symptoms. The L3-4 showed a mild bulge and mild narrowing of neural foramen bilaterally due to loss of disc height but without any foraminal stenosis. At L4-5 there was a broad mild bulge and bilateral mild osteoarthritis without any stenosis or neural impingement. I find L5-S1 revealed a mild broad bulge greater on the right lateral without any definite canal or foraminal stenosis. David A. May, M.D., radiologist, interpreting the MRI

²A localized collection of blood, usually clotted, in an organ, space, or tissue, due to a break in the wall of a blood vessel. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 29th Edition (2000), p797.

³The thickened, expanded upper border of the ilium; called also *crest of ilium*. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 29th Edition (2000), p 421.

scan opined claimant had a multilevel mild degenerative disc and facet disease along with mild disc bulge.

I find with no new findings in the follow up of October 1, 2004, Dr. Salter referred claimant for an neurological evaluation by Dr. Ammerman and extended his disability to return to work. In his last follow up of record dated November 3, 2004, Dr. Salter noted claimant's continued lower back pain and intermittent pain in the right leg, especially with long driving and prolonged sitting. On examination, Dr. Salter opined claimant's lumbar forward flexion was about 50% restricted with tenderness and mild lower lumbar paraspinal spasm increasing with increased forward lumbar flexion. Keeping claimant under observation until his reevaluation in five weeks, Dr. Salter continued his disability and prescribed Motrin 800 mg.

I find claimant underwent an independent medical evaluation (IME) by employer's physician, Robert A. Smith, M.D. on October 21, 2004, who noted resolution of the lumbar strain and contusion and opined he was fully capable of resuming his pre-injury work without any restrictions I find, however, Dr. Smith did not review claimant's diagnostic test reports, i.e., the September 21, 2004 lumbar spine MRI scan before rendering a medical opinion relative to his continued symptomatology.

I find on October 28, 2004, claimant underwent a neurological evaluation by Dr. Ammerman who noted lumbar tenderness with moderate restriction of motion, mainly on the right side as well as positive straight leg raising at 90E on the right.

DISCUSSION

I have reviewed the arguments of counsel with

respect to the issue presented herein. To the extent an argument is consistent with the findings and conclusions, it is accepted; to the extent an argument is inconsistent therewith, it is rejected.

On remand, the AHD is required to accord claimant the statutory presumption of compensability and thereafter consider the claim for the requested disability benefits.

Whether claimant's impairment subsequent to July 26, 2004 is causally related to the April 26, 2004 work injury.

District of Columbia Workers' Compensation Act provides, in pertinent part, that "in any proceeding for the enforcement of a claim for compensation it shall be presumed, in the absence of evidence to the contrary that the claim comes within the provisions of this chapter" D.C. Code §32-1521(1) (2001). This statutory presumption is "designed to effectuate the humanitarian purposes of the statute and reflects a strong legislative policy favoring awards in arguable cases." *Ferreira v. District of Columbia Department of Employment Services*, 531 A.2d 651, 655 (D.C. 1987). To invoke the presumption, an employee seeking compensation merely has to present "some evidence" of "a work-related event, activity, or requirement which has the potential of resulting in or contributing to" the employee's disability. *Id.* Upon that minimal showing, the statutory presumption "operates to establish a causal connection between the disability and the work-related event, activity, or requirement," such that the disability is compensable. *Id.*

This presumption operates, though, only "in the absence of evidence to the contrary." D.C. Code §32-1521. "Once the presumption is triggered, the burden is upon the employer to bring forth 'substantial evidence' showing that death or

disability did not arise out of and in the course of employment” *Ferreira, supra* at 655. The employer’s evidence simply needs to be “specific and comprehensive enough,” to contradict the presumed causal connection between the event at work and the employee’s subsequent disability. *Id.* See, e.g., *Safeway Stores, Inc. v. District of Columbia Department of Employment Services*, 806 A.2d 1214, 1219-20 (D.C. 2002).

In this instance claimant’s evidence offered to support his claim for temporary total disability benefits from July 26, 2004 to August 12, 2004, September 6, 2004 to September 27, 2004 and from October 5, 2004 to the present and continuing will be discussed specifically addressing whether his impairments during the aforesaid periods arose out of and in the course of his employment on April 26, 2004.

Claimant’s initial emergency treatment at the Washington Hospital Center on April 26, 2004 disclosed his diagnoses as multiple contusions and a cut in left hand and the x-rays of claimant’s right rib, right elbow, left hand and right hip were normal. Claimant was discharged the same day with the prescription for Tylenol #3 and instruction to follow up with his own physician. Claimant’s subsequent follow up treatment with Dr. Salter on April 29, 2004 disclosed he incurred an “acute” dorsal strain, contusions of left elbow and right ribs, multiple resolving abrasions and large hematoma in the right flank in the iliac crest region, secondary to the injuries sustained on April 26, 2004. Recommending physical therapy to the left elbow, dorsal region and right ribs, Dr. Salter prescribed Motrin for pain and ordered him off work. This evidence primarily meets the requisite threshold under the Act of showing “some evidence” of a work-related event with a potential of resulting in his disability. Now the

burden of production shifts to employer to present specific and comprehensive evidence in rebuttal that claimant’s injury did not arise out of and in the course of his employment.

Employer had claimant undergo an IME on October 21, 2004 by Robert A. Smith, M.D., an orthopaedic surgeon, who noted in his diagnosis that his contusion and back sprain resulted from “a work incident on April 26, 2004.” In the course of his IME, Dr. Smith further remarked that with respect to the April 26, 2004 work incident, he had reached maximum medical improvement and the medical treatment received through July 27, 2004 were reasonably related to the work injury. (EE 4). Hence, essentially concurring opinion of Dr. Smith on the issue of causality fails to rebut the presumed nexus between claimant’s April 26, 2004 work injury and his employment.

The nature and extent of claimant’s disability, if any.

Under the Act, claimant maintains the burden to show by a preponderance of the evidence that his disability, in the economic sense, was caused by the work injury. *Upchurch v. District of Columbia Department of Employment Services*, 783 A. 2d 623 (D.C. 2001).

Claimant presented evidence of his emergency room treatment on April 26, 2004 at the Washington Hospital Center where he was diagnosed with multiple contusions and cut in the left hand and with prescription of Tylenol #3, he was discharged to follow up with his physician. The evidence further reflects claimant’s initial orthopaedic consultation with Dr. Salter on April 29, 2004 with principal complaints of mid to lower back pain, right rib cage pain, left elbow pain, right hip and right knee pains.

Upon examination of the right rib, Dr. Salter observed tenderness to palpation about the mid to clavicular to anterior axillary line of the right mid to lower rib with discomfort at the extremes of inspiration. The examination of dorsal spine disclosed tenderness along the medial border of the right scapula with moderate spasm and tight dorsal paraspinal tenderness with moderate spasm. Claimant's lumbar motions were restricted because of dorsal pain and a large ecchymotic area overlying the right flank extending to the right iliac region was also appreciated. Starting claimant on a course of physical therapy to the left elbow, dorsal region and right ribs, Dr. Salter opined he was unable to return to his usual employment.

In claimant's re-evaluation on May 18, 2004, Dr. Salter felt claimant was improving, albeit still symptomatic and continued the physical therapy to the involved regions, as well as his incapacity to work. The follow up of June 9, 2004 remained essentially unchanged. On July 9, 2004, claimant returned to Dr. Salter, who noted an overall improvement although with slight right iliac crest tenderness to palpation. Prescribing a tube of Ortho-Gel for the symptomatic right iliac crest area and with cessation of physical therapy, Dr. Salter released claimant to his regular work from July 15, 2004. In his final follow up note dated July 27, 2004 pertinent to the work injury, Dr. Salter felt his residual right iliac tenderness would resolve gradually, and finding no further specific orthopaedic intervention with respect to the April 26, 2004, he closed his chart and advised claimant to discontinue any medication prescribed by him. (CE 2).

Thereafter, claimant was re-evaluated by Dr. Salter on September 14, 2004 with the complaint of increasing pain in the right iliac region radiating in the right lower back as well

as the right leg. In Dr. Salter's impression, claimant developed an acute lumbosacral strain with right-sided radicular symptoms related to the April 26, 2004 injury. Ordering an MRI scan of the lumbar spine, Dr. Salter placed him in off-work status. Claimant's lumbar spine MRI scan of September 21, 2004 revealed disc bulge at L2-3, L3-4, L4-5 and L5-S1 with disc and end plate spurs abutting the right L5 nerve root lateral to the neural foramen. And since claimant continued to be symptomatic on October 1, 2004, Dr. Salter extended his disability to return to work and referred him for a neurological evaluation by Dr. Ammerman. Accordingly, claimant underwent a neurological evaluation by Dr. Ammerman on October 28, 2004 who noted lumbar tenderness with moderate restriction of motion, primarily on the right side along with evidence of post traumatic lumbar radiculopathy as a result of the April 26, 2004 work accident.

Later, noting significant findings at L4-5 and L5-S1 in his progress note of November 3, 2004, Dr. Salter opined claimant was intermittently symptomatic and pending further work-up, prescribed Motrin 800 mg and continued his inability to return to work. (CE 3).

Conversely, as opined by Dr. Smith in his October 21, 2004 IME, claimant's symptoms, caused by the April 2004 work injury, had resolved and "based on his benign examination" he was fully capable of returning to his usual employment. However, upon a careful scrutiny of Dr. Smith's IME, it does not appear he reviewed claimant's diagnostic tests, i.e., September 21, 2004 lumbar spine MRI scan which revealed the sources of claimant's ongoing lumbar malady. Moreover, the undersigned is mindful that Claimant's initial orthopaedic evaluation of April 29, 2004 as well as his last follow up of November 3, 2004 by Dr. Salter consistently noted lower back pain as well

as restricted lumbar motion with tenderness⁴ and mild lumbar paraspinal spasm. However, those persistent symptoms in Dr. Smith's October 21, 2004 IME had, somehow, remitted. Therefore, the inherent deficiency in Dr. Smith's opinion is irreconcilable.

As compared to a doctor retained solely for litigation purposes, court has said that opinion of a treating physician is entitled to a preferential treatment because he was (1) less apt to be consciously or subconsciously biased by the litigation, and (2) more likely to be familiar with the patient's condition because he or she has typically spent a greater amount of time with the patient. See *Canlas v. District of Columbia Department of Employment Services*, 723 A. 2d 1210, 1212 (D.C. 1999). In light of the foregoing precedent and reasons otherwise explained in the preceding paragraph, the opinion of Dr. Smith is rejected in favor of claimant's treating orthopaedic surgeon, Dr. Salter.

In order to be found disabled, claimant must establish an inability to return to his usual employment. Once claimant has made this demonstration, the burden then shifts to employer to establish suitable alternate employment opportunities available to claimant considering his age, education and work experience. See *Logan v. District of Columbia*

Department of Employment Services, 805 A. 2d 237 (D.C. 2002).

Review of the entirety of evidence clearly establishes in light of the preference afforded the treating physician in this jurisdiction, *Canlas, supra*, claimant has established by a preponderance of the evidence an entitlement to total disability benefits from July 26, 2004 to August 12, 2004 and from September 12, 2004 to the present and continuing and, therefore, the burden shifts to employer to identify suitable alternate employment claimant could perform. Predicated on the available evidence, employer's requisite burden has not been met.

CONCLUSIONS OF LAW

Based upon a reconsideration of the record evidence as a whole, I find and conclude claimant's injury is medically causally related to his employment on April 26, 2004. I further find and conclude claimant has established an entitlement to the temporary total disability benefits from July 26, 2004 to August 12, 2004 and from September 12, 2004 to the present and continuing.

⁴Dr. Salter's findings were further corroborated by the October 28, 2004 neurological evaluation by Dr. Ammerman. (CE 5).

ORDER

It is **ORDERED** claimant's claim for relief be, and hereby is **GRANTED**.



ANAND K. VERMA
Administrative Law Judge

June 27, 2008

Date

RE: **JACOB G. KLEIN V. UNITED STEEL METAL AND LIBERTY MUTUAL INSURANCE COMPANY, AHD 04-464, OWC 603001.**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this 27th day of June 2008 to the following:

Mohammad R. Sheikh, Assistant Director
Labor Standards
Department of Employment Services
64 New York Ave., N.E., Suite 3923
Washington, D.C. 20002

Hand Delivery

Charles L. Green, Associate Director
Department of Employment Services
64 New York Ave., N.E., Second Floor
Washington, D.C. 20002

Hand Delivery

David M. Schloss, Esquire
Suite 450
2001 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Certified

Christopher R. Costabile, Esquire
Suite 400
10555 Main Street
Fairfax, VA 22030

Certified

Jacob G. Klein
2008 Richmond Avenue
Petersburg, VA 23803

Certified


LINDA F. JORY, CHIEF ALJ
ADMINISTRATIVE HEARINGS DIVISION

RE: **JACOB G. KLEIN V. UNITED STEEL METAL AND LIBERTY MUTUAL INSURANCE COMPANY, AHD 04-464, OWC 603001.**

APPEAL RIGHTS

This order is effective upon filing with the Mayor pursuant to Section 21 of the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code § 32-1520. See D.C. Official Code § 32-1522(a). Any party aggrieved by this Order may file an Application for Review with the Chief Administrative Appeals Judge, Compensation Review Board, Labor Standards Bureau, Department of Employment Services.

Send Application for Review to:

**Compensation Review Board
Attn: Chief Administrative Appeals Judge
Department of Employment Services
64 New York Avenue, N.E., Third Floor
Washington, D.C. 20002**

The Application for Review must be filed with the Compensation Review Board (CRB) within 30 calendar days of the date of the filing of this Order with the Mayor as provided in §23a(a) of the Act, D.C. Official Code § 32-1522(b)(2A)(A). Pursuant to 7 DCMR §§ 258.2, 258.3, 258.4 and 258.6, an Application for Review is perfected by filing with the CRB the following:

1. An original and three (3) copies of an Application for Review;
2. An original and three (3) copies of a Memorandum of Points and Authorities in support of the Application for Review;
3. An original and three (3) copies of the Compensation Order or final decision appealed; and
4. Certification that copies of the Application and Memorandum have been served by mail or delivery upon the opposing party(ies) and the Administrative Hearings Division (AHD).

For a copy of the CRB Rules of Practice and Procedure, go to the DOES website at www.does.dc.gov/does,

Once at the website, click on the link "Worker Protection", then link "Compensation Review Board", then link "Notice of Final Rulemaking".