

Exhibit (hereinafter, EE) Nos. 1-3, described in the Hearing Transcript (hereinafter, TR), were admitted into evidence. The record closed on August 28, 2008 upon receipt of the TR.

Claimant worked for Employer in August, 2003 when he sustained an injury that arose out of and in the course of his employment. Claimant filed an application for formal hearing and a hearing was convened on December 7, 2004. A Compensation Order was issued on June 27, 2005 in *Andre P. Hartgrove v. Aramark Corporation/Specialty Risk Services, Inc.*, OHA No. 04-476, OWC No. 590360. In that Order, Administrative Law Judge Anand K. Verma (hereinafter ALJ), found and concluded Claimant sustained a work related injury that arose out of and in the course of his employment and as a result thereof, sustained a temporary total disability. The ALJ granted Claimant's claim for temporary total disability benefits from May 12, 2004 to the present and continuing as well as causally related medical expenses.

Subsequent to the issuance of the Final Order in *Hartgrove, Id.*, and almost four years after his work injury, Claimant began to experience pain in his abdomen. Claimant sought to have Employer pay additional medicals relative to his stomach ailment, asserting his current medical condition is a result of his August 2, 2003 work injury. Employer has refused to pay.

CLAIM FOR RELIEF

Claimant seeks an award under the Act for authorization for a medical procedure.

ISSUES

1. Is there reason to believe that Claimant has

experienced a change of condition regarding the fact or degree of Claimant's disability or amount of compensation payable to Claimant?

2. What is the nature and extent of Claimant's injury?
3. Is there a causal relationship between Claimant's current condition and his work related injury?

FINDINGS OF FACT

The findings of fact and stipulations of the parties contained in the June 27, 2005 Compensation Order are hereby incorporated by reference, except to the extent abrogated by the specific findings of fact as set forth herein. In said Compensation Order the ALJ, determined inter alia, that Claimant's work injury was a "brain injury" that resulted when Claimant hit his head on a metal door while at work. It was further found that Claimant sought medical care and as a result of his work injury, underwent surgery to elevate the pressure of a pre-existing shunt. In the prior Compensation Order, the ALJ found Claimant to be temporary totally disabled and Claimant's surgery was deemed to be reasonable, necessary and a result of his work injury. *See Hartgrove.*

I further find Claimant's testimony lacks credibility based upon, his demeanor at hearing; the fact that his testimony was, at times, inconsistent with other credible evidence of record; and his inability to recall significant occurrences relative to his medical treatment.

DISCUSSION

The undersigned has reviewed and considered the

totality of the evidence, as well as the argument, presented by the parties on the issues presented for resolution. To the extent an argument is consistent with the findings of fact, analysis, and conclusions of law contained herein, it is accepted; to the extent an argument is inconsistent therewith, it is specifically rejected.

D.C. Code, as amended, §32-1524 provides in pertinent part;

(a) At any time prior to 1 year after the date of the last payment of compensation or at any time prior to 1 year after the rejection of a claim...the Mayor may... upon application of a party in interest, order a review of a compensation case pursuant to the procedures provided in §32-1520 where there is reason to believe that a change of conditions has occurred which raises issues concerning:

(1) The fact or the degree of disability or amount of compensation payable pursuant thereto...

Where the modification of an extant Compensation Order is sought¹, the initial focus of any discussion

¹Claimant's counsel at hearing asserts Claimant is not seeking a modification however, it is apparent from the existent Compensation Order, the arguments made, and the evidence presented at hearing, that a salient issue to be addressed in the instant case is whether Claimant's condition has changed to warrant additional compensation, namely surgical treatment for his abdomen. Claimant is seeking benefits for a new medical condition

must begin with the threshold questions presented by the statute provision: (1) the timeliness of the request for review; and, (2) whether the party making the request has presented a "reason to believe that a change of condition has occurred" to support further investigation on the merits. See, *Sylvia Snipes v. District of Columbia Department of Employment Services*, 542 A. 2d 832 (D.C. 1988).

The second of the aforementioned thresholds to be cleared in seeking to modify an outstanding Compensation Order requires the sufficient proffer of credible evidence to support a "reason to believe" that since the date of the previous Order, a "change of condition has occurred" which raises issues concerning the fact, degree or extent of claimant's disability.² And, it is only with this

and asserts said condition was caused by the August 2, 2003 work injury. Claimant's request for payment of medicals concerning his abdominal pain in this case constitutes a request for modification of the existent Compensation Order. As neither party requested a preliminary hearing pursuant to *Snipes*, both parties presented their respective cases in chief at the time of the Formal Hearing. A preliminary determination regarding the "reason to believe" standard was made upon analysis of the evidentiary record generated.

²The "reason to believe" evidentiary burden, while requiring "affirmative evidence", remains a minimal one. See *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 703 A.2d at 1230. The Court has reasoned that the Act's presumption of compensability specifically applies in a review proceeding under Section 32-1524; "where a [party] files for a review of benefits due to an alleged changed degree of disability, it is presumed under the Act that the changes stem from the initial work-related injury and are covered by the Act". See, *Stephen Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998). "To benefit from this presumed relationship, a [party] need only offer some evidence of (1) a change in the fact or the degree of disability, and (2) some initial work-related

affirmative showing that the inquiry into the modification of the outstanding Order may proceed.³ See *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 703 A.2d 1225 (D.C. 1997), citing *Snipes v. D.C. Department of Employment Services*, supra. “While something short of full proof is required to meet the ‘reason to believe’ standard, a preliminary examination of evidence is contemplated.” *Id.* at 1230.

Upon a successful preliminary showing, the focus turns to the evidentiary submissions necessary to consider the issue or issues to be raised. The burdens of production and proof are upon the party seeking the modification, and said party must establish by a preponderance of the evidence that the purported “change of condition” actually exists. Where established a “new compensation order” will issue “which may terminate, continue, reinstate, increase, or decrease such compensation.” See D. C. Code as amended §32-1524(c).

In the instant matter, the award to claimant pursuant to the previous Compensation Order is ongoing therefore the timeliness of the filing for review thereof is unchallengeable. Employer, therefore has cleared the first threshold for the “reason to

injury that caused the previous disability.” *Short*, supra 723 at 851.

³It should be noted that the “review” of a previous Compensation Order is “limited solely to new evidence which directly addresses the alleged change of conditions”. See D.C. Code, as amended, Section 32-1524(b). However, the evidence submitted to clear the initial threshold of “a reason to believe” is not so limited, See *Snipes*, supra, 832 A.2d at 835 (1988), and may subsume evidence previously submitted in order to determine whether the “reason to believe” standard has been met.

believe” standard.

Snipes supra, provides that the evidence submitted to clear the initial threshold of “a reason to believe” standard may subsume evidence previously submitted in order to determine whether the standard has been met. In consideration of whether there is a reason to believe that Claimant experienced a change in condition, the undersigned also reviewed and considered the evidence submitted in the Claimant’s previous case.

Claimant’s evidence shows, on August 2, 2003, he suffered a work injury to his head and said injury aggravated his pre-existing brain condition.⁴ Subsequent to the head trauma that Claimant suffered on August 2, 2003, he began to experience “headaches, nausea and difficulty focusing”. On December 1, 2003, claimant underwent surgery to replace the VP shunt. Claimant’s symptoms and need for surgery were deemed to be caused by his August 2, 2003 work injury. *Hartgrove, Supra.* .

Claimant continued to experience headaches after the December, 2003 shunt revision and repeatedly visited his doctors with complaint’s of headaches and nausea. Claimant’s physicians deemed his symptoms to be consistent with “low pressure shunt headaches”, and readjusted Claimant’s shunt valve on April 18, 2006. (CE 2, p. 28).

The evidence of record shows that on May 15, 2007, July 19, 2008 and February 5, 2008,

⁴In 1987, claimant underwent surgery to remove a brain cyst. As a result of that surgery, Claimant was required to undergo the placement of a “VP shunt” for hydrocephalus. (CE 3 p. 44, 47).

Claimant sought treatment for a new ailment concerning pain in his abdomen. Claimant's treating physician surmised said pain was related to Claimant's abdominal wall and possibly the "peritoneal portion of the VP shunt." (CE 3, p. 44).

Claimant has presented evidence that demonstrates a reason to believe a change of his medical condition has occurred. The instant case can now proceed to a determination on the merits.

Claimant's evidence is comprised of, inter alia, his testimony; the medical reports of his treating physician, Dr. Kevin McGrail, Professor and Chairman of the Georgetown University Hospital Department of Neurosurgery; Dr. Parag Bhanot, a physician with the Georgetown University Hospital Department of Surgery; and reports concerning diagnostic tests performed on Claimant.

At hearing Claimant appeared to be unsure of himself as he presented his testimony. This lack of confidence was punctuated by his inability to recall important, significant aspects of his medical treatment and inconsistencies that permeated his testimony.

Claimant was unable to recall if he had seen any other physicians for his shunt other than Dr. Carson between 1996 and 2003. (TR p. 47). Claimant testified he could not recall if the 1996 shunt revision involved the abdominal drain. (TR pp. 48-49). However earlier in his testimony when asked, "and is part of the shunt an abdominal drain?", Claimant answered, "yes." (TR p. 35). Claimant could not recall when he had last seen his treating physician, when he had seen Dr. McGrail two weeks before the formal hearing. (TR p. 49). Claimant also testified he first reported his abdominal pain to Dr. McGrail in 2003, however

this assertion is not supported by the remaining record evidence. In fact, the evidentiary reports of Dr. McGrail date back to July 12, 2005 and make no mention of Claimant's abdominal pain until May 15, 2007. For these reasons Claimant's testimony was accorded very little weight.

Claimant's documentary evidence shows that although his complaints of headaches continued after the December 1, 2003 shunt surgery and even after the April, 2006 shunt revision, Claimant's first complaint regarding his abdominal pain didn't occur until May 15, 2007. (CE 2, p.17). Thereafter Dr. McGrail ordered a CT scan of Claimant's abdomen to determine if Claimant's "peritoneal catheter" was the cause of Claimant's abdominal pain. (CE 2, p. 17). Dr. McGrail's July 19, 2007 review of the CT scan showed "distal shunt tubing terminating near the liver." (CE 2, p. 14). The doctor opined, "this may be responsible for some of his pain and discomfort". On October 1, 2007, Dr. McGrail referred Claimant to pain management. (CE 2, p. 13).

On February 5, 2008, Claimant made his second complaint of abdominal pain. (CE 2, p. 6). Dr. McGrail expressed concern with whether "the catheter" was irritating claimant's diaphragm and stated a laparoscopic repositioning of said catheter would be attempted if his pain persisted.

Included in Claimant's evidence are medical forms entitled, "New Patient Visit" and "Follow up Visit". (CE 4 pp. 53-58). The medical forms are documents completed with hand-written information, and most of said information is illegible. For this reason I have accorded little weight to these documents.

Claimant's evidence also includes reports regarding diagnostic tests that were performed on

Claimant. The first diagnostic report detailed an esophagogastroduodenoscopy⁵ procedure performed on September 6, 2006 before Claimant's first complaint of abdominal pain.⁶ Claimant's esophagus was deemed to be normal. Mild gastritis was found in the antrum portion of Claimant's stomach and his duodenum was deemed normal. (CE 4 p. 51).

The second diagnostic test concerned a CT of Claimant's head and abdomen taken on July 17, 2007. The CT of Claimant's stomach identified two different shunts in the soft tissue of Claimant's right abdomen. The report indicates, "The smaller shunt is seen entering the mid right abdomen and terminates just beyond the peritoneum. The larger shunt enters the abdomen more inferiorly than the first and terminates in the right upper quadrant posterior to the liver."⁷

Claimant's request for compensation benefits from Employer concerns authorization, pursuant to the Act, for a laparoscopic repositioning of an abdominal catheter. The Employer has declined to pay, contending the requested medical treatment is not work related.

The record is void of any medical description

⁵This is a procedure in which an endoscope was passed through Claimant's mouth under direct visualization; it was extended to the second portion of the duodenum. When the scope was withdrawn, the mucosa was examined.

⁶There is no evidence in the record to indicate this test was performed as a result of Claimant's complaint of abdominal pain.

⁷Dr. McGrail's reports and diagnoses fail to mention the fact that Claimant has two shunts in his abdomen and he fails to specifically identify the shunt that requires repositioning.

regarding the character, purpose or function of the apparatuses frequently referred to in the evidentiary medical reports.⁸ Nor does the record provide any information of how, or whether the apparatuses are related. At hearing, the undersigned suggested the use of the utilization review process⁹.

⁸The medical reports submitted by Claimant and Employer make reference to Claimant's shunt, VP shunt, catheter, peritoneal catheter, valve, shunt valve, ventricular shunt, and ventriculo peritoneal shunt. All reports fail to explain the function of said apparatuses.

⁹The undersigned's suggested use of utilization review in the instant case was misstated. At hearing the undersigned suggested the use of utilization review to determine the reasonableness and necessity of the medical treatment requested by Claimant. The Compensation Review Board (CRB) in *Chaupis v. George Washington University* CRB No. 08-075, AHD No. 07-112A, has ruled, utilization review is the "exclusive and mandatory" procedure for all disputes arising under the Act relative to the "necessity, character or sufficiency" of any medical care furnished or scheduled to be furnished. The CRB in *Chaupis* ruled utilization review is not the exclusive and mandatory procedure for resolution of disputes that relate to causal relationship of a medical condition to a work injury. In this case however, the utilization review process was not suggested as a process to resolve the issue of causal relationship. The utilization review process was suggested for the purpose of providing clarity regarding the requested medical procedures.

The Act provides utilization review as a means for medical procedures to be explained/clarified. After invoking utilization review for this purpose, an ALJ may consider the information provided to determine the existence or non-existence of a causal relationship between Claimant's medical condition and the work injury.

It was the undersigned's intent to invoke the utilization review process to clarify the medical procedure Claimant seeks and its relationship to the procedures Claimant has previously undergone, not to determine the reasonableness and necessity of the medical care

Section 32-1507 (b) (3)(B) of the Act states;

When it appears that the necessity, character, or sufficiency of medical care or service to an employee is improper or that medical care or service scheduled to be furnished must be clarified, the Mayor, employee, or employer may initiate review by a utilization review organization or individual. (Emphasis added).

At hearing the undersigned made reference to utilization review in the context of "reasonableness and necessity", Claimant's counsel was vehemently opposed to the utilization review process being invoked in this case. However it was the intent of the undersigned to use said process to clarify the character and function of the various devices mentioned in the submitted medical reports.

As the record evidence failed to describe or define the structure, composition or purpose of a VP shunt, it became necessary to obtain information regarding a VP shunt from sources outside of the record evidence.

The Attorney's Dictionary of Medicine, v-80 (2004), defines "ventriculo peritoneal shunt";

The surgical creation of a communication between a cerebral (brain) ventricle (normal space) and the peritoneal cavity (which see) by means of a plastic tube, to provide drainage of cerebrospinal fluid (from ventricle to the peritoneal cavity), for the relief of hydrocephalus (which see).

Even with the enlightenment provided by the medical dictionary, the undersigned was unable to determine whether the shunt installed in Claimant's head, was physically attached to the shunt/catheter suspected of causing Claimant's abdominal pain or whether the two devices were related at all. Further research provided additional understanding of the structure of the ventriculo peritoneal shunt.

The Ventriculo-Peritoneal (VP) shunt is small tubing that is placed inside the brain's ventricle and tunneled underneath the skin to the peritoneum. The peritoneum is a membrane that lines and protects the abdominal cavity and its contents. The purpose of the VP shunt is to reduce the amount of cerebral spinal fluid (CSF) in the brain by draining it into the abdominal (peritoneal) space. The shunt tubing does not come into direct contact with the stomach or other organs. The peritoneum is the usual, safe site to place the end of the ventricular shunt.

Janet Freeman, Jennifer Diabato, Hydrocephalus Information Sheet, October 1, 2008, <http://www.divideclassic.org/Documents/ShuntInfo.htm>.

Claimant's evidence includes, CE 1, a correspondence written by his treating physician that is missing text. In this correspondence Dr. McGrail makes several assertions regarding Claimant's abdominal pain, however it appears the omitted text may be important and relevant. It reads;

Dear Benjamin T. Boscolo: I have seen Mr. Hartgrove on several occasions over the past year. He continues to complain of abdominal pain. It is my opinion that because of his continued abdominal pain, which may represent some irritation from the abdominal catheter is a laparoscopic repositioning. Although I would not do this surgery myself, it would be done by Dr. Bhanot in the Department of General Surgery. The need for the abdominal catheter relates to his hydrocephalus. I think that the need for the repositioning again dates back to issue regarding the aforementioned injuries, including the accident where he struck his head on a door jam and the work related injuries which are well documented in his medical record.

If there is any further information I can provide to you, please do not hesitate to contact me.

Sincerely, Devin M. McGrail, MD.¹⁰

Claimant posits Dr. McGrail's correspondence even with its omissions, contains enough information to prove Claimant's current medical

¹⁰When given the opportunity to address the correspondence and its obvious omissions, Claimant's Counsel stated, "Well, the second sentence is not well written but it reads what - it reads - I think it does say what - - it addresses the issues that I asked Dr. McGrail to issue. The second sentence is a little awkward. He does address the issue of causal connection as found by Judge Verma." (TR p. 19).

condition is causally connected to the work accident of August 2, 2003. I disagree.

Upon reading the text contained in the correspondence, it appears Dr. McGrail is unsure of the cause of Claimant's abdominal pain and it also appears Dr. McGrail is not convinced the repositioning is related to Claimant's work injury. Dr. McGrail is quite tentative in his assertions. "...His abdominal pain...*may* represent some irritation from the abdominal catheter..." "*I think* the need for repositioning dates back to...aforementioned injuries." (Emphasis added). Dr. McGrail's assertions are speculative.

It is also apparent Dr. McGrail's assertions lack substantiation. His assertions regarding the need for repositioning are not supported by any objective medical evidence or diagnostic tests. In all of the evidence presented, there is no comprehensive explanation of how Dr. McGrail came to the conclusion that the need for repositioning is related to Claimant's work injury.

Dr. McGrail's correspondence is incomplete, imprecise and fails to substantiate the assertion that the requested surgery is related to Claimant's work injury, for this reason, I accord CE 1 no weight.

Claimant has not met its burden of proof. Claimant's evidence fails to show a causal relation between Claimant's current medical condition and his work injury and therefore Claimant has failed to prove a change of condition that would warrant the modification of the extant Compensation Order in *Hartgrove*.

CONCLUSION OF LAW

Based upon a review of the record evidence as a whole, I find and conclude Claimant has failed to show a change in his condition that would warrant

a modification of the extant compensation order in *Hartgrove*.

ORDER

It is **ORDERED** Claimant's claim for relief be, and hereby is **Denied**.



LESLIE A. MEEK
ADMINISTRATIVE LAW JUDGE

October 20, 2008

Date

RE: *Andre Hartgrove v. Aramark Corporation and Specialty Risk Services Inc., AHD No. 04-476A, OWC No. 590360.*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this 20 day of October, 2008 to the following:

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

Hand Delivery

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

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Benjamin Boscolo, Esquire
7852 Walker Drive, Suite 300
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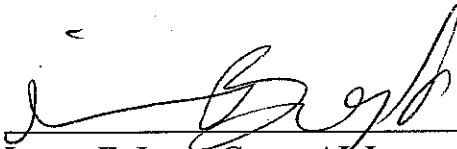
Certified

Curtis B. Hane, Esquire
25 Wood Lane
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Certified

Andre Hartgrove
3700 Stonesboro Road
Ft. Washington, MD 20744

Certified


LINDA F. JORY, CHIEF ALJ
ADMINISTRATIVE HEARING DIVISION

October 20, 2008
DATE

RE: *Andre Hartgrove v. Aramark Corporation and Specialty Risk Services Inc., AHD No. 04-476A, OWC No. 590360.*

APPEAL RIGHTS

This order is effective upon filing with the Mayor pursuant to §21 of the Act, D.C. Code, as amended, §32-1520. 7 DCMR §230.12; §23a of the Act, D.C. Code, as amended, 2001, §32-1522a. Any party aggrieved by this Order may file an application for review with the Chief Judge Compensation Order Review Board¹¹, Labor Standards Bureau, Department of Employment Services.

Send Application for Review to:

**Compensation Review Board/Chief Judge
Department of Employment Services
Labor Standards Bureau
64 New York Ave., N.E.
Third Floor
Washington, D.C. 20002**

The Application for Review must be filed within 30 days of the date of the filing of this Order with the Mayor as provided in §23a(a) of the Act, D.C. Code, as amended, §32-1522a(a). An Application for Review is perfected by filing with the Chief Judge, Compensation Review Board, Labor Standards Bureau,

1. one (1) original and three (3) copies of an Application for Review,
2. one (1) original and three (3) copies of a Memorandum of Points and Authorities in support of the Application, and
3. certification that copies of the Application and Memorandum have been served by mail or delivery

7 DCMR §§230.1, 230.2; §23a of the Act, D.C. Code, 2001, §32-1522a.

A complete copy of the fore going documents should be filed with the Office of Hearings and Adjudication Administrative Hearings Division at 64 New York Avenue, N.E., Second Floor, Washington, D.C. 20002.

¹¹D.C. Code Ann. § 32-1521.01 (2001) and Title 7 of the District of Columbia Municipal Regulations, Chapter 1, section 118, and Chapter 2, sections 250 *et seq.*, established a Compensation Order Review Board and set forth the authority and responsibilities thereof. The letterhead used for decisions and orders refer to the entity as the "Compensation Review Board", which is the shorter-form designation the Director of the Department of Employment Services used in Administrative Policy Issuance No. 05-01 (February 5, 2005).