

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-047

ABDUL MOMEN,  
Claimant-Respondent,

v.

AMERICAN PEST MANAGEMENT, INC. and ,  
Employer/Insurer-Petitioners.

Appeal from an March 31, 2014 Compensation Order by  
Administrative Law Judge David L. Boddie  
AHD No. 13-014, OWC No. 688336

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 SEP 3 AM 11 57

Curtis Hane for the Petitioner  
Lloyd Eisenberg for the Respondent

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, and MELISSA LIN JONES, *Administrative Appeals Judges*.

HEATHER C. LESLIE for the Compensation Review Board.

**DECISION AND ORDER**

**OVERVIEW**

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer/Insurer-Petitioners (Employer) of the March 31, 2014, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted Claimant's request for temporary total disability benefits from November 10, 2011 to the present and continuing. We AFFIRM.

**BACKGROUND AND FACTS OF RECORD**

On November 8, 2011, Claimant was employed as a residential technician for the Employer, a position he had held for four and a half years. On that day, Claimant injured his head when descending stairs at a residence. Claimant alleged he also hurt his left ankle on that day. Claimant did have a prior history of left ankle pain for which he received treatment.

After the November 8, 2011 incident, Claimant sought treatment and came under the care of Dr. Alan Nagel, an orthopedist. Dr. Nagel diagnosed Claimant with a ruptured Achilles tendon. After

undergoing conservative care, Claimant underwent surgery on January 20, 2012. A second surgery, on May 3, 2012 was required when an infection developed.

On February 7, 2013 a full evidentiary hearing was held. Claimant sought an award of temporary total disability benefits from November 10, 2011 to the present and continuing, payment of related medical expenses, an interest on accrued benefits. The issues to be presented were whether Claimant's injury arose out of and in the course of Claimant's employment, and whether Claimant's left ankle condition is medically casually related to the work injury.<sup>1</sup> A CO was issued on March 31, 2014 granting Claimant's request of temporary total disability benefits from November 10, 2011 to the present and continuing.

Employer timely appealed on April 23, 2014. Employer argues the ALJ's findings of fact and conclusions of law based solely upon Claimant's testimony are not supported by the substantial evidence in the record and should be reversed, and that the ALJ's findings of fact and conclusions of law regarding a causal relationship between Claimant's work activities and his Achilles tendon condition improperly rejected the testimony of a witness, and thus the CO is not supported by the substantial evidence in the record. Employer further argues the ALJ's findings of fact and conclusions of law based on his review of the medical evidence are not supported by the substantial evidence in the record or in accordance with the law.

A Notice of Application for Review was sent out to the parties on April 24, 2014 wherein the parties were informed that any opposition to the Application for Review shall be filed within fifteen (15) calendar days from the filing date of the Application for Review, listed as April 23, 2014.

On May 2, 2014, Claimant's Opposition to Petitioner's Application for Review was received by the CRB. In that opposition, Claimant argued the findings of the Compensation Order were properly and reasonably based on the evidence submitted and reviewed and urged for dismissal of the application.

On June 11, 2014, a Notice of Assignment to a Compensation Board Review Panel was issued. In that notice, the parties were advised that after the parties were allowed an appropriate period for briefing, the appeal had been perfected and a board assigned.

On June 19, 2014, Claimant filed a Motion for Leave to File Brief. In that Motion, Claimant stated that he had not filed a brief in support of his opposition and had not received a scheduling order indicating when such a brief is due. Claimant requested until July 18, 2014 to file his brief. On

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<sup>1</sup> We note the only issue listed to be addressed in the CO is "whether Claimant's injury arose out of and in the course of the employment." CO at 2. A review of the transcript reveals the ALJ termed the "sole issue" to be resolved as "whether the Claimant's injury of November 8, 2011, arose out of and in the course of the employment, and/or whether the Claimant's left ankle condition is medically casually related to the work injury of November 8, 2011. Hearing transcript at 10. As we have stated on numerous occasions, legal causation and medical causation are not the same. Even though the ALJ equated them in the initial part of his discussion, his further analysis is sufficient so as to render any error in conflating the two issues harmless, particularly since the real issue in this case is medical causation. There is no real dispute that the event arose out of and in the course of employment; the real dispute centers on whether the ankle condition is related to that event.

June 23, 2014, Claimant's Memorandum of Points and Authorities in Response to Application for Review was filed.

On June 24, 2014, Employer filed Petitioner's Opposition to Respondent's Motion for Leave to File Brief. Relying upon D.C. Code § 32-1522(b)(2A)(A), Employer argued Claimant failed to timely apply with the applicable rules, granting the request would prejudice the Employer as such request would delay disposition of the appeal.

On July 3, 2014 Claimant filed a Response to Petitioner's Opposition for Leave to File Brief. Claimant argued again he expected a scheduling order to state when his brief was due. Claimant further argued the Employer would not be prejudiced while Claimant would be prejudiced by the exclusion of the brief.

On July 7, 2014, Employer filed a Motion to Strike Claimant's Memorandum of Points and Authorities in Response to Application for Review as Untimely. In that motion, Employer reiterated earlier arguments against granting the motion.

### **THE STANDARD OF REVIEW**

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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 § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

### **DISCUSSION AND ANALYSIS**

We first address the multiple motions outlined above. Claimant argues the late filing of his brief was due to the belief that a scheduling order would be issued indicating a date certain by which he had to file his brief. Moreover, Claimant argues that Employer would not be prejudiced by the late filing of the brief. Employer opposes Claimant's motion, arguing that the statute and applicable regulations are clear, and that granting the motion would prejudice Employer by delaying further an outcome. We agree with Employer that Claimant's response was untimely.

The April 24, 2014 Notice of Application for Review delineates when an opposition shall be filed, within fifteen (15) of the date of the filing of the Application for Review, pursuant to D.C. Code § 32-1522(b)(2A)(A). Never has the CRB issued a further scheduling order in practice as the Notice serves to inform the parties, not only that an Application for Review has been filed, but also when an opposition is due.. Indeed, Claimant did timely file an opposition on May 2, 2014, in response to the Application for Review, wherein Claimant argued the findings of the Compensation Order were properly and reasonably based on the evidence submitted and reviewed and urged for dismissal of

the application. It is that opposition which we will accept and rely upon. Any further filing is deemed untimely, and Claimant's motion to file a further opposition out of time is denied.

Turning to Employer's argument, Employer's first and second arguments center primarily around selected portions of Claimant's testimony elicited during cross-examination, as well as the deposition testimony of Ms. Dianne Caldwell in support of its argument the ALJ erred in finding Claimant's ankle injury arose out of and in the course of Claimant's employment.<sup>2</sup> Employer points to several statements in the CO and directs our attention to specific testimony during cross examination. The Employer first references the statement: ,

The Claimant inspected several rooms when the customer asked him to check a small room in the basement. He testified that as he followed her down stairs to the basement his head struck a beam above a doorway causing him to stumble and fall backwards in a sitting position. HT p. 41.

CO at 3.

Employer then notes testimony elicited during cross-examination where Claimant testified he only struck his head and that he had not recollection of falling down. Employer also points to the testimony of witness Donna Caldwell who indicated that Claimant did not fall to support its position the ALJ was in error relying on Claimant's testimony. We disagree.

The preceding sentences of the paragraph that the Employer references, quoted above read

When asked to describe how he injured his left ankle on November 8, 2011, the Claimant testified that he was providing service to a home that he had been to several times before. He stated that the customer, Ms. Caldwell, told him to go ahead and do his work as he was familiar with the residence and she was talking to another, contractor who was working there. The Claimant inspected several rooms when the customer asked him to check a small room in the basement. He testified that as he followed her down stairs to the basement his head struck a beam above a doorway causing him to stumble and fall backwards in a sitting position. HT p. 41.

Id.

The ALJ was summarizing Claimant's testimony on direct examination in discussing the incident in question. Moreover, in the paragraph immediately after the above quoted paragraph, the ALJ acknowledges that Claimant testified he blacked out. More importantly, the ALJ summarized much of Claimant's testimony on cross examination, including his interactions with the witness, Ms. Caldwell and John, an accountant with the Employer. Specifically,

In opposition to the Claimant's evidence, the Employer cross examined the Claimant, presented medical reports related to treatment the Claimant has received, and the

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<sup>2</sup> We note that after the ALJ acknowledged the presumption had been invoked, the ALJ did not explicitly state it had then been rebutted by Employer's evidence. It is clear however after reviewing the CO as a whole, the ALJ did find the presumption had been rebutted and weighed the evidence accordingly without benefit of the presumption.

deposition of Donna Caldwell, the customer in whose home the Claimant alleged he was injured.

On cross examination the Claimant testified that he was wearing above the ankle work boots and reiterated that following his being injured he crawled, then eventually stood up and went upstairs. He acknowledged that he told the customer, Ms. Caldwell, when she asked, that he thought he was okay, before he returned to his truck and left. He further testified that before he arrived for the training taking place in his office that he spoke with John on the telephone and that he did not mention the injury occurring to him at that time. He stated that he did tell John of the incident later during the training, although he stated he may not have said he injured his ankle at that time but he was limping, and he did tell John about his ankle later as well. HT PP. — - — .

CO at 6.

Contrary to Employer's argument, the ALJ did acknowledge Claimant's testimony during cross-examination and weighed any inconsistency accordingly. Also, the ALJ did also take into consideration the deposition testimony of the witness, Ms. Caldwell. Specifically,

Ms. Caldwell testified that she knows the Claimant as an exterminator who has come and serviced her home on previous occasions. She stated she recalled the day when the Claimant came to exterminate her home in November 2011 and that when she was leading him to a small room in her basement to perform an inspection that he struck his head on a beam over the door that caused him to be stunned and having to sit down. She stated that she inquired whether he was okay and brought him some ice to put on it. She testified that the Claimant sat for a while to get himself together while she left and went upstairs to deal with another contractor who was in her home. She further testified that after a while the Claimant came upstairs with his tools and said he thought he was okay and got in his truck and left. Ms. Caldwell stated she did not see him limping or doing anything to his left leg or ankle. EE 3, Depo. pp. 12-23; 26-27.

CO at 7.

Thus, the ALJ took into consideration many of the allegedly inconsistent statements elicited on cross examination, as well as testimony on direct examination, and Ms. Caldwell's testimony. After weighing this testimony, the ALJ found that the Claimant had proven that an accidental injury did occur which arose out of and in the course of Claimant's employment. The ALJ found Claimant's testimony more persuasive than that of Ms. Caldwell. What Employer is asking us to do is to re-weigh the testimony of Claimant and Ms. Caldwell and find in favor of Employer. This we cannot do. As stated above, CRB must affirm 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 this panel might have reached a contrary conclusion. *Marriot, supra*.

Employer argues further that the ALJ's finding that Claimant's left ankle condition was medically causally related to the work accident is not supported by the substantial evidence in the record. Employer directs our attention to Claimant's prior left ankle/foot treatment and several medical records in support of its argument.

A review of the CO shows the ALJ did take into consideration Claimant's prior treatment.

In addition, medical reports of the Claimant's primary physician, Dr. Khetan were submitted into evidence by the Employer to show that the Claimant had been previously diagnosed and received treatment related to his left Achilles tendon. EE 1.

Medical reports of Dr. Khetan submitted into evidence by the Employer cover a period of treatment from August 12, 2011 through January 19, 2012. Pre-injury reports of August 12th, and October 11, 2011, reflect in the initial report the Claimant came in for treatment for complaints of severe pain in the area of the left tendo calcaneus tendon and received treatment consisting of lidocaine injection. In a follow up report of October 11, notes indicating the Claimant reported injuring his ankle at work were recorded. Evidence of swelling around the ankle was also recorded.

In post-injury medical reports on November 10, 2011 notes that the Claimant came in still complaining of left ankle pain in the tendo calcaneus area were made and a referral was made by Dr. Khetan to an orthopedist at Potomac Valley Orthopedics for the condition with the comments the patient was unable to walk comfortably. Last, in a January 19, 2012, pre-operative medical report Dr. Khetan provided a fuller description of injury related to him by the Claimant recording he stated he was injured at work following a fall at work in a client house. EE 1.

CO at 6-7.

It is clear that the ALJ considered the prior history of treatment to the same area. The ALJ weighed the evidence accordingly and found,

Upon review and consideration of the evidence in the record, I am not persuaded by the Employer's argument that the cause of the current condition of his left ankle is not medically causally related to the work injury claimed of November 8, 2011. While the Employer is accurate the evidence reflects the Claimant had complaints of left ankle pain and received treatment prior to the date of the work injury, there is no evidence that condition or those complaints caused him to be unable to work.

CO at 8.

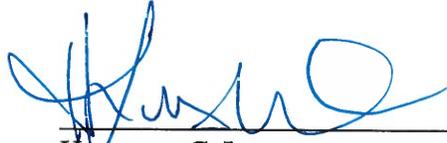
Finally, Employer challenges the ALJ's lack of any finding or mention of Claimant's failure to advise Dr. Khetan of a work related injury in a visit two days after the injury and challenges the veracity of an addendum by Dr. Nagel that was requested by Claimant. However, a review of the CO shows the ALJ thoroughly summarized the medical evidence submitted. The ALJ weighed the evidence accordingly, including the addendum, and ultimately concluded that Claimant had proven that the left ankle condition was medically casually related to the work injury. We cannot reweigh

the evidence, even if there is evidence to the contrary and even if we would have come to a different conclusion.

**CONCLUSION AND ORDER**

The March 31, 2014 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE  
*Administrative Appeals Judge*

September 3, 2014 \_\_\_\_\_  
DATE