

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. 08-208

ADELLE GREEN,

Claimant–Petitioner,

v.

WASHINGTON HOSPITAL CENTER,

Self-Insured Employer-Respondent.

Appeal from a Compensation Order of  
Administrative Law Judge Karen R. Calmeise  
AHD No. 07-130B, OWC No. 628552

Benjamin T. Boscolo, Esquire, for the Petitioner

William S. Hopkins, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, DAVID L. BODDIE,<sup>1</sup> *Administrative Appeals Judges*, and E COOPER BROWN, *Chief Administrative Appeals Judge*.

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 § 250, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

### OVERVIEW

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<sup>1</sup> Administrative Law Judge Boddie is appointed by the Director of the Department Of Employment Services (DOES) as an Interim Board Member pursuant to DOES Administrative Issuance No. 09-05 (April 28, 2009) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

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 30, 2008, the Administrative Law Judge (ALJ) denied Petitioner's claims for temporary total disability benefits and for authorization for medical care. Petitioner filed an Application for Review (AFR) on July 29, 2008, seeking review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the denial of temporary total disability benefits and requested medical care are not supported by substantial evidence and are not in accordance with the law.

Respondent opposed the appeal, asserting that the denial of the claims are supported by substantial evidence and are in accordance with the law.

Because the ALJ's determination that Petitioner had voluntarily limited her income by not accepting a modified position offered by Respondent that was within her physical capacity, and that Petitioner's wage loss was due to the voluntary limitation resulting from that refusal (including the termination for job abandonment), are supported by substantial evidence, the denial of the wage loss claim is in accordance with the law and is affirmed.

Because the denial of medical care was based upon the ALJ's belief that she was foreclosed from considering the medical evidence in opposition to the opinion expressed in a Utilization Review (UR) report for which no request for reconsideration had been made is not in accordance with the law, the denial of the requested medical care is vacated and the matter is remanded for further consideration of the claim for authorization for medical care.

#### 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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of 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.

Regarding the nature and extent of disability rulings by the ALJ, we have determined that the ALJ's analysis of the claim for wage loss benefits comports with the Act and the case law there under, particularly *Logan v. District of Columbia Dep't. of Employment Services*, 805 A.2d 237 (D.C. App. 2002).

Specifically, the ALJ found that Respondent offered Petitioner modified duty work within Petitioner's physical capacity, and Petitioner's own testimony confirms that she was aware of its availability. HT page 92. The ALJ concluded that said position was within Petitioner's capacity based upon it being authorized by the health center office at Petitioner's place of employment, which the ALJ determined had been elected by Petitioner to be her "attending" health care provider. Compensation Order, page 7. That determination is supported by substantial evidence.

The ALJ gave cogent reasons for rejecting Petitioner's argument that she was justified in not returning to work in the modified position, to wit, the "disability slip" from Petitioner's chiropractor was deemed inadequate to overcome Respondent's showing of suitable alternative employment having been offered, due to the lack of specificity in the document concerning what about the alternative position was beyond Petitioner's capacities. Compensation Order, page 7. She further explained her reasons for rejecting Petitioner's argument that Dr. Klimkiewicz's October 10, 2007 "off work" slip should have re-instituted Petitioner's entitlement to temporary total disability benefits as of that date. In characterizing Petitioner's wage loss as being the result of her own voluntary limitation of income, the ALJ noted that at the time of the October 10, 2007 note, Petitioner had already been terminated for reasons unrelated to the limitations imposed by her work injury, i.e., intentionally failing to report for the proffered light duty position. The ALJ also noted that Petitioner had not attempted to return to any other work prior to seeking to change attending physicians from the Respondent's health center to Dr. Klimkiewicz.<sup>2</sup> And, the ALJ also rejected as incredible Petitioner's testimony that Respondent had somehow forced her to refuse to return to work by not authorizing Dr. Klimkiewicz to replace Respondent's health center as Petitioner's attending medical providers. See, Compensation Order, pages 7 – 8. These reasons, while not compelling to Petitioner, are adequate to support the ALJ's conclusion that Petitioner voluntarily refused to return to suitable alternative employment proffered by Respondent and approved by her attending medical provider, Petitioner's health center, leading to her termination and rendering the wage loss the result of that voluntary limitation of income.

Regarding the issues relating to the request for additional medical care and the Utilization Review procedures employed and discussed in the Compensation Order, we do not agree with Petitioner's assertions regarding *Chaupis v. George Washington University*, CRB No. 08-075, AHD No. 07-112A (March 4, 2008), and we continue to maintain that *Chaupis*, as clarified and modified by the majority in *McCormick v. Children's National Medical Center*, CRB No. 09-016, AHD No. 08-353 (January 2, 2009)<sup>3</sup> controls cases involving reasonableness and necessity of medical care. We also

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<sup>2</sup> We do not understand precisely why the ALJ cited D.C. Code § 32-1511 in a footnote to her discussion, given that that section has no relevance to this issue.

<sup>3</sup> The *Chaupis* decision was modified or clarified in *McCormick* as follows:

In *Chaupis*, the following statement is found: "[I]f the parties had undertaken the entire procedure envisioned by the UR statute, and at its conclusion (i.e. following a reconsideration of the UR determination) either party was unwilling to accept the results of the reconsideration, a formal hearing as provided in subsection (D) would be available."

While we continue to maintain that the statutory process of UR must be completed insofar as the parties (that is, the claimant and the employer) are concerned, before the matter may be heard at a

note that the UR report in this case is sufficient to constitute a report to the effect that the requested medical care is not reasonable or necessary. Although the specific sentence quoted by the ALJ from that report addresses causal relationship and does not address reasonableness and necessity, the final sentence of the discussion portion of the UR report states that “At the time of my review I *opined that there was no need for any form of treatment as it relates to the left knee, lumbar spine, or cervical spine*” (emphasis added). While it is arguable that the central thrust of the report is that it asserts that the requested medical procedures are not required “as a result of the June 19, 2006 work injury”, it is also susceptible to the broader interpretation as well.

We therefore must address the ALJ’s use of the term “dispositive”, and whether the perceived “constraints” on the ALJ’s discretion to weigh evidence in conflict with the UR report’s conclusion requires a remand for further consideration, and we believe that it does. Since issuing *Chaupis*, we have clarified, and one could say modified, the initial meaning of that case, having ruled in *Haregewoin* that the UR process is complete for the purposes of permitting a formal hearing upon receipt of the UR report.<sup>4</sup>

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formal hearing, we should and do hereby clarify that the final step outlined in the statutory process insofar as the parties are concerned is the UR report.

This view is, we recognize, is at odds with the above quotation from *Chaupis*. Where it appears to us that language in a previous decision is overbroad, and where that decision has not become so entrenched in our system of workers’ compensation law and adjudication as to have become widely accepted as part of the process, we are willing to clarify the matter. We therefore take this opportunity to clarify *Chaupis*, and to hold that the UR process is complete, for the purposes of obtaining a formal hearing by the claimant or employer, upon obtaining the initial UR report.

*McCormick, supra*, at 5 – 6.

<sup>4</sup> And, as was held in *Haregewoin v. Loews Washington Hotel*, CRB No. 08-068, AHD No. 07-041A, OWC No. 603483 (February 19, 2008), the District of Columbia Court of Appeals has provided an analysis of what is required in evaluating the contents of a UR report which closely mirrors the obligations imposed upon an ALJ in evaluating a treating physician’s opinion, requiring an explanation with persuasive reasons for rejecting such opinion. The CRB noted in *Haregewoin* that:

[The] framework set forth by the court in *Sibley [Memorial Hospital v. District of Columbia Department of Employment Services and Ann Garrett, Intervenor]*, 711 A.2d 105 (D.C. 1998) is substantially identical to that espoused by the court in the treating physician cases, and we view it as the appropriate manner to treat UR opinion under the Act. While it can be argued that the Act could be viewed so as to grant an even higher preference to UR opinion over treating physician opinion, we note that the processes envisioned by the statutory UR provisions call for consideration of treating physician opinion and UR opinion, without specifying any preference for one or the other by virtue of its being treating physician opinion on the one hand, and UR opinion on the other. Accordingly, we view the statute as placing an obligation upon the ALJ to weigh the competing opinions based upon the record as a whole, and to explain why the ALJ chose one opinion and not the other, but does not require that either opinion be given an initial preference.

*Haregewoin, supra*, at 4. Thus, it is established that (1) a formal hearing is available to resolve a dispute that remains following the UR process, (2) the UR process must be concluded (i.e., the UR report must be received, per *Chaupis*) prior to the matter being presented to the agency for resolution in such a hearing, (3) the outcome of that process is to be accorded equal initial weight to the opinion of a treating physician, and (4) the process is not a process of “independent

On the question of reasonableness and necessity, the UR is not “dispositive”, but rather, under the DCCA opinion in *Sibley Memorial Hospital, supra*, and our subsequent decision in *Haregewoin, supra*, it stands on equal “preferential” footing with an opinion of a treating physician. The question of reasonableness and necessity is properly before the ALJ for consideration; she is free to consider the medical evidence as a whole on this question, and is not bound by the outcome of the UR report. The issue should be decided based upon the ALJ’s weighing of the competing evidence and she is free to accept either the opinion of the treating physician who recommends the treatment, or the opinion of the UR report, without the need to apply a treating physician preference.

Because there is other evidence which the ALJ may have chosen to consider and upon which the she may have chosen to rely which does address the question of reasonableness and necessity, but which she did not consider because of the erroneous belief that the UR report compelled denial of the claimed care, we remand for further consideration of this issue based upon the medical evidence in the record that is relevant to reasonableness and necessity of the claimed care, as discussed above.<sup>5</sup>

#### CONCLUSION

The denial of wage loss benefits contained in the Compensation Order is supported by substantial evidence and is in accordance with the law. The denial of the requested medical care based upon the belief that the UR report was dispositive of the issue of reasonableness and necessity is not in accordance with the law.

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medical evaluation” as that term is used to ordinarily describe a litigant’s obtaining a second medical opinion from a non-treating physician for litigation purposes.

<sup>5</sup> The ALJ having found, based upon substantial evidence, that the complained of conditions are causally related to the work injury in question, and causal relationship not being an issue to which utilization review has any relevance, the UR report’s discussion of that subject amounts to nothing more than IME opinion. Given that the UR report was authored without an actual examination of the patient, and given that causal relationship is an issue beyond the scope of the UR statute and is an issue upon which claimants enjoy a statutory presumption, the ALJ’s decision on that issue, finding a causal relationship between the claimed condition and the employment, is affirmed and is not subject to being revisited on remand.

**ORDER**

The denial of temporary total disability benefits contained in the Compensation Order is affirmed. The denial of authorization for medical care contained in the Compensation Order is vacated, and the matter is remanded for further consideration of the requested medical care in a manner consistent with the preceding Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



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JEFFREY P. RUSSELL  
Administrative Appeals Judge

June 17, 2009  
DATE