GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 09-133

ANDRE HARTGROVE,
Claimant–Petitioner,

v.

ARAMARK CORPORATION and SPECIALTY RISK SERVICES, INC.,
Employer/Carrier–Respondent.

Appeal from a Compensation Order on Remand by
The Honorable Leslie A. Meek
AHD No. 04-476A, OWC No. 590360

Benjamin Boscolo, Esquire for the Petitioner
Curtis B. Hane, Esquire, for the Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and HENRY W. MCCOY, A*dministrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to §§32-1521.01 and 32-1522 (2004) of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. ("Act"), 7 DCMR §250, *et seq*., and the Department of Employment Services Director's Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

In 1987, Mr. Andre Hartgrove underwent brain surgery. As a result of that surgery, a shunt was placed in Mr. Hartgrove's brain. In August 2003, Mr. Hartgrove struck his head at work and aggravated his pre-existing brain condition resulting in headaches, nausea, and some difficulty focusing.[1]

[1] *Hartgrove v. Aramark Corp.*, OHA No. 04-476, OWC No. 590360 (June 27, 2005), *aff'd* CRB No. 05-248, OHA No. 04-476, OWC No. 590360 (September 29, 2005).

Almost four years later, Mr. Hartgrove began experiencing abdominal pain he attributed to his on-the-job accident. Aramark Corporation ("Aramark") refused to pay for medical expenses related to Mr. Hartgrove's stomach complaints, and the parties proceeded to a formal hearing.

On October 20, 2008, an administrative law judge ("ALJ") issued a Compensation Order denying Mr. Hartgrove's request for authorization for medical treatment related to abdominal complaints.[2] This Compensation Order was reversed and remanded with instructions to the ALJ to apply the presumption of compensability ("Presumption") to the issue of causal relationship.[3] In response, the ALJ issued the July 31, 2009 Compensation Order on Remand. Mr. Hartgrove's request for laparoscopic repositioning of his abdominal catheter, again, was denied.[4]

On appeal, Mr. Hartgrove contends the ALJ erred in concluding Aramark had submitted evidence sufficient to rebut the Presumption. Mr. Hartgrove also contends the law of the case is that his shunt-related condition is causally related to his on-the-job accident; therefore, any inconsistent finding is erroneous as a matter of law. He also argues the ALJ's credibility determination finding Mr. Hartgrove's testimony lacks credibility is in error as is the dicta regarding utilization review.

Aramark had until October 5, 2009 to file a response to Mr. Hartgrove's Application for Review. Aramark filed no opposition to the appeal.

ISSUES ON APPEAL

1. Did the ALJ err in determining that the Presumption had been rebutted?

2. Does the law of the case require a finding that Mr. Hartgrove's current condition is causally related to his on-the-job accident?

3. Are the ALJ's determinations on credibility and utilization review in error?

4. Are the findings of fact and conclusions of law in the July 31, 2009 Compensation Order on Remand supported by substantial evidence in the record?

PRELIMINARY MATTER

On August 31, 2009, simultaneous with the filing of Claimant's Application for Review, Mr. Hartgrove filed a Motion to Extend Time Within Which to File Claimant's Opposition to the Employer/Insurer's Application for Review [*sic*]. That request was granted on September 9, 2009; Mr. Hartgrove was given until September 21, 2009 to file his Memorandum of Points and

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[2] *Hartgrove v. Aramark Corp.*, AHD No. 04-476A, OWC No. 590360 (October 20, 2008).

[3] *Hartgrove v. Aramark Corp.*, CRB No. 09-015, AHD No. No. 04-476, OWC No. 590360 (January 26, 2009).

[4] *Hartgrove v. Aramark Corp.*, AHD No. No. 04-476A, OWC No. 590360 (July 31, 2009).

Authorities in Support of Application for Review, and Aramark was given fifteen calendar days from the date of receipt of the Memorandum in Support of Application for Review or until October 5, 2009 (whichever was earlier) to file its opposition.

Mr. Hartgrove filed his Memorandum of Points and Authorities in Support of Application for Review on September 18, 2009. Aramark did not file any opposition to this appeal before October 5, 2009, but on October 2, 2009, Aramark filed Employer/Third-Party Administrator's Motion to Dismiss Claimant's Application for Review ("Motion"); in the Motion, Aramark argues that Mr. Hartgrove's appeal should be dismissed because an unidentified clerk had stated that as of September 29, 2009 no memorandum had been filed in support of Mr. Hartgrove's Application for Review.

In administrative appellate practice, an Application for Review is analogous to a Notice of Appeal, and a Memorandum of Points and Authorities is analogous to a brief.[5] Thus, failure to file a Memorandum of Points and Authorities with an Application for Review does not automatically require dismissal of an appeal.[6]

Pursuant to 7 DCMR §258.1,

> [a]ny party adversely affected or aggrieved by a compensation order or final decision issued by the Administrative Hearings Division or the Office of Workers' Compensation may appeal the compensation order or final decision to the Board by filing an Application for Review pursuant to this section.

Despite some references, there is a distinction between an Application for Review and a Memorandum of Points and Authorities, and a Memorandum of Points and Authorities is not the benchmark by which the sufficiency of an Application for Review is measured. Thus, although the time limitation established for filing an Application for Review is strictly enforced, a Memorandum of Points and Authorities is susceptible to a filing extension when reasonably submitted to support a timely Application for Review.[7]

Although the accepted practice is that a petitioner will file a Memorandum of Points and Authorities when an Application for Review is filed, a brief extension of time within which to file a Memorandum of Points and Authorities may be granted provided the petitioner requests such an extension at the time the Application for Review is filed. Thus, although Mr. Hartgrove did not perfect his appeal on August 31, 2009, the appeal was timely when the Application for

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[5] The CRB has authority to utilize the Rules of the District of Columbia Court of Appeals to resolve procedural issues, 7 DCMR §261.4, and pursuant to Rule 3(a)(2) of Rules of the District of Columbia Court of Appeals, "failure to take any step other than the timely filing of a notice of appeal does not effect the validity of the appeal."

[6] *Adjei v. Colonial Dodge, Inc.,* Dir. Dkt. No. 00-38, H&AS No. 99-106, OWC No. 525699 (November 30, 2001) ("It is not required that a memorandum of points and authorities be filed in order for an Application for Review to be perfected."), *aff'd. on other grounds,* 817 A.2d 179 (D.C. 2003).

[7] *See Onofre v. George and Irene Lorinczi,* Dir. Dkt. No. 95-48, H&AS No. 92-302A, OWC No. 209231 (June 30, 1997).

Review was filed together with the request for an extension to file the Memorandum of Points and Authorities, and Aramark's Motion is denied.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand are based upon substantial evidence[8] in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.[9] Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion.[10]

Pursuant to §32-1521(1) of the Act, a claimant is entitled to a presumption of compensability.[11] In order to benefit from the Presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.[12] "[O]nce an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act."[13] After the claimant successfully establishes a causal relationship between a disability and a work-related accident, the Presumption continues to apply when he files for additional benefits due to new symptoms allegedly stemming from the work-related injury.[14] There is no dispute the ALJ appropriately ruled that the Presumption properly had been invoked.

Once the Presumption was invoked, it was Aramark's burden to come forth with substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."[15] Only upon a successful showing by Aramark would

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[8] "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott*, infra.

[9] Section 32-1521.01(d)(2)(A) of the Act.

[10] *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[11] Section 32-1521(1) of the Act states, "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter."

[12] *Ferreira v. DOES,* 531 A.2d 651 (D.C. 1987).

[13] *Washington Hospital Center v. DOES,* 744 A.2d 992, 996 (D.C. 2000).

[14] *Short v. DOES,* 723 A.2d 845, 850 (D.C. 1998), citing *Whittaker v. DOES,* 668 A.2d 844, 846-847 (D.C. 1995).

[15] *Waugh v. DOES,* 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

the burden return to Mr. Hartgrove to prove by a preponderance of the evidence, without the benefit of the Presumption, his ongoing injuries arose out of and in the course of employment.[16]

The ALJ found Aramark had submitted sufficient evidence to rebut the Presumption:

> In support of its position Employer offers the July 2, 2008 neurological independent medical evaluation of neurologist, Dr. Ignacio Rodriguez. Dr. Rodriguez opines that, "none of Claimant's shunt-related problems were related to the closed head injury that occurred at work on August 2, 2003. (EE 3). In support of its position Employer also offered the February 20, 2008 and February 5, 2008 correspondences of Dr. Parag Bhanot and Dr. Kevin McGrail respectively.
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> Claimant was referred to Dr. Bhanot by Dr. McGrail for a consultation regarding a possible incisional hernia. In his correspondence, Dr. Bhanot opined Claimant's pain was due to incisional pain stating, "A percentage of patients will have chronic pain associated with their incision and he may be one of those individuals." Dr. McGrail, in his correspondence states the following regarding Claimant's condition; "He has some occasional headaches. These have been ongoing for a long time. I do not think that they in any way represent failure of the shunt."[17]

The Presumption is rebutted when the record demonstrates a physician has performed a personal examination of a claimant, has reviewed the relevant medical records, and has stated an unambiguous opinion contrary to the causal relationship presumption.[18] There can be no reasonable dispute that the medical opinions of Dr. Rodriguez, Dr. Bhanot, and Dr. McGrail, whether considered alone or in conjunction with each other, are supported by substantial evidence in the record or that they are sufficient to satisfy the standard to rebut the Presumption.

Turning to Mr. Hartgrove's argument that his shunt-related condition must be causally related to his on-the-job accident, the law of the case doctrine recognizes that "once the court has decided a point in a case, that point becomes and remains settled unless it is reversed or modified by a higher court."[19] Mr. Hartgrove's argument that the issue that his "shunt related problems are causally connected to the accidental injury that occurred at work on August 2, 2003 has already been resolved and my [*sic*] not be reconsidered by another judge"[20] is not persuasive.

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[16] *See Washington Hospital Center v. DOES,* 821 A.2d 898 (D.C. 2003).

[17] *Hartgrove v. Aramark Corporation*, AHD No. 04-476A, OWC No.590360 (July 31, 2009), 5.

[18] *Washington Post v. DOES,* 852 A.2d 909 (D.C. 2004).

[19] *Kritsidimas v. Sheskin,* 411 A.2d 370, 371 (D.C. 1980).

[20] Memorandum of Points and Authorities in Support of Application for Review, 7.

The law regarding pre-existing conditions that are temporarily exacerbated by a workplace event is that an employer is liable only for the exacerbation unless the workplace incident permanently effects the underlying condition.[21] Although in a previous Compensation Order an ALJ determined that on August 2, 2003 Mr. Hartgrove sustained an accidental brain injury arising out of and in the course of his employment that rendered him temporary totally disabled, that ruling alone does not prove that Mr. Hartgrove's abdominal complaints more than three years later are causally related to his work-related accident.

Mr. Hartgrove's argument is that there is evidence in the record that if weighed in his favor should be sufficient to support a finding that he is entitled to the benefits he has requested. The role of this tribunal, however, is not a *de novo* review of the evidence; so long as the Compensation Order on Remand is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion, the CRB is constrained to affirm the Compensation Order on Remand.[22]

Next, Mr. Hartgrove disagrees with the ALJ's credibility ruling. This argument was addressed in our January 26, 2009 Decision and Remand Order:

> In this jurisdiction, it is well-settled that the credibility findings of an ALJ are entitled to great weight. *See Murray v. D.C. Dept. of Employment Services,* 765 A.2d 980, 984-985 (D.C. 2001) citing *Dell v. D.C. Dept. of Employment Services,* 499 A.2d 102, 106 (D.C. 1985). The credibility findings must be predicated upon an ALJ's first hand observation of the witness's demeanor during the formal hearing, *see Santos v. D.C. Department of Employment Services,* 536 A.2d 1085, 1089 (D.C. 1988), as well as an evaluation of the witness's testimony in view of its rationality, internal consistency and the way it hangs together with other evidence of the record. *See Cohen v. A & A Hardware,* Dir. Dkt. No. 88-93, H&AS No. 86-272A, OWC No. 0075694 (July 2, 1990). In addition, the credibility finding, as with any other finding in a compensation order, must be supported by substantial evidence in the record and likewise must be set aside if not so supported. *See McDonnell v. Washington Gas Light Co.,* CRB No. 06-78, OHA No. 01-186B, OWC No. 283130 (December 11, 2006); *Washington Vista Hotel v. D.C. Dept. of Employment Services,* 721 A.2d 574, 578 (D.C. 1998).
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> In the Compensation Order, the ALJ found that the Petitioner was not credible because of his demeanor, his inability to recall important facts, and inconsistencies in his testimony. The ALJ delineated the bases for this determination by stating her reasons and citing specific supporting examples in

[21] See *The Washington Post v. Berthault*, 853 A.2d 704, 708 fn.3 (D.C. 2004).

[22] *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

> the record for her decision to accord his testimony "very little weight." CO 2 at 5. After reviewing the record as a whole, the Panel determines that there is no error with this finding and the finding is based on substantial evidence. The ALJ's credibility finding was based not only on Petitioner's testimony but her observation and evaluation of his demeanor during the hearing. Under such circumstances, a fact-finder's determinations are entitled to special weight. *See Georgetown University v. D.C. Dept. of Employment Services,* 862 A.2d 387 (D.C. 2004). This Panel is constrained to uphold such a finding 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.[23]

The ALJ's credibility finding previously was affirmed and is not subject to review at this time.

Finally, the issue on remand was the causal relationship between Mr. Hartgrove's on-the-job accident and his current abdominal condition, not the reasonableness and necessity of medical treatment for that condition. As such, we agree with Aramark that the dicta regarding utilization review in the Compensation Order on remand is irrelevant; however, given that it was not relied upon to reach the conclusion that Mr. Hartgrove's current medical condition is not causally related to his August 2, 2003 work-related accident, the inclusion of this dicta is harmless.

CONCLUSION AND ORDER

The presumption of compensability was properly rebutted; the issue of the causal relationship of Mr. Hartgrove's current abdominal condition was not determined previously, and is not subject to the law of the case. The administrative law judge's determinations regarding credibility and utilization review are not error, and the findings of fact and conclusions of law contained in the July 31, 2009 Compensation Order on Remand are supported by substantial evidence in the record and cannot be disturbed on appeal. The July 31, 2009 Compensation Order on Remand is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

August 16, 2011
DATE

[23] *Hartgrove v. Aramark Corp.*, CRB No. 09-015, AHD No. 04-476A, OWC No. 590360 (January 26, 2009), 11-13.