GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-077

BRIAN K. DUBOIS,
Claimant–Respondent,

v.

SHIRLEY CONTRACTING, COMPANY, and
ZURICH NORTH AMERICA INSURANCE,
Employer/Insurer-Petitioner

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 DEC 2 PM 12 16

Appeal from a May 19, 2014 Compensation Order
by Administrative Law Judge Amelia G. Govan
AHD No. 14-130, OWC No. 708970

Sarah Burton for Claimant
Nadine Osinski for Employer

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

JEFFREY P. RUSSELL, for the Compensation Review Board, MELISSA LIN JONES, *concurring.*

DECISION AND ORDER

BACKGROUND[1]

Claimant Brian Dubois was injured while employed as a skilled laborer by Employer Shirley Contracting Company on September 17, 2013 when he was struck on and about his head and neck by a stream of water that had fallen from several stories above. It is undisputed that since the date of that injury until November 13, 2013, Mr. Dubois was unable to return to work in his pre-injury job. Eventually, Mr. Dubois's treating physician authorized a return to work in a light duty capacity, with certain restrictions.

[1] The scope of review by the CRB 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 and this review panel 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.

In early November 2013, Shirley Contracting offered Mr. Dubois a modified, lighter duty position as a "flagger", in which Mr. Dubois would control traffic at and around the work site using a hand-held sign and flag.

Mr. Dubois attempted to perform this job, but as of November 11, 2013, he declined to perform it due to complaints that the position was beyond his capacity due to continuing problems from the work injury. He returned to his treating physician who authored a note stating that Claimant would be best served by refraining from "flagger" work and using the time to heal. Mr. Dubois did so until December 16, 2013, when he returned to work and resumed "flagger" duties. His treating physician authorized an unrestricted return to full duty in February 2014.

Employer declined to pay Mr. Dubois temporary total disability from November 11, 2013 though December 16, 2013. Mr. Dubois presented his claim for those benefits to an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) at a formal hearing on March 26, 2014. On May 19, 2014, the ALJ issued a Compensation Order awarding the benefits claimed. Employer filed a timely Application for Review of the Compensation Order, to which Mr. Dubois filed a timely opposition.

We affirm the Compensation Order.

ANALYSIS

While acknowledging that the Act contains a presumption of compensability within which is included is the presumption of a medical causal relationship between an alleged disability and a work injury (*see Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995)), Employer suggests that the ALJ ignored or impermissibly rejected it's IME physician's opinion that no such relationship exists, citing *Washington Post v. DOES and Reynolds, Intervenor,* 852 A.2d 909 (D.C. 2004).

However, nowhere has Employer cited, nor has our review of the IME report in the record revealed, any statement by that physician, Dr. Danziger, that Claimant's arm and shoulder complaints are unrelated to the stipulated work injury. No evidence submitted constitutes an unambiguous statement by a physician who has examined Claimant, taken a medical history, and reviewed the pertinent medical records, that his shoulder and arm complaints were not causally related to the work injury.

Employer also argues that the lack of specific arm and shoulder complaints contained in the treating doctor's medical records about the arm immediately following the stipulated work injury militates against a finding of such a causal relationship. While this might be true, and had there been evidence in the record that no such causal relationship exists, it might have been reasonable for the fact finder to include the early omission of a specific complaint to the arm or shoulder as a reason, among others, to conclude that no such relationship exists. However, Employer would have us find that such an omission alone, as a matter of law, not only is sufficient to overcome the presumption, but also commands but a single result, *i.e.*, that there is no such relationship. With this we must respectfully disagree. Employer is essentially requesting that we substitute our judgment for that of the ALJ on this question, something we are not empowered to do.

Employer's second argument is that Claimant failed to adduce a preponderance of the evidence supporting the conclusion that Claimant was unable to perform the light duty work offered by Employer because none of the physical requirements of a "flagger" were specifically prohibited by Claimant's treating physician. Thus, Employer argues, Claimant was not disabled because he refused to perform that job after a brief attempt.

While Employer is correct that there is no presumption regarding the nature and extent of disability, and that it is a claimant's burden to establish entitlement to the benefits sought by a preponderance of the evidence (*see Dunston v. DOES*, 509 A.2d 109 (D.C. 1986) we are nonetheless compelled to uphold a Compensation Order that is supported by "such evidence as a reasonable person might accept to support" a finding of disability.

The ALJ cited Claimant's testimony, which she found credible, that the "flagger" position required extended and repetitive upper body motion, including turning of the head and neck, which caused such discomfort that he was unable to perform the job at the time in question. The failure of a claimant to supply a specific medical report which evaluates that requirements of any alternative modified job offered to a claimant is not, as a matter of law, fatal to a determination that such a modified position is not suitable for a particular claimant. A reasonable person could accept Claimant's testimony that he attempted to perform the job but that he was unable to continue to perform it due to the neck, shoulder and arm pain that the job brought about and/or aggravated. Hence, the finding that Claimant was temporarily totally disabled during the period of the claim is supported by substantial evidence.

CONCLUSION AND ORDER

The findings of fact that Claimant was unable to perform the duties attendant to the "flagger" position during the period claimed are supported by substantial evidence, and the award of temporary total disability is in accordance with the law.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

December 2, 2014
DATE

Melissa Lin Jones, concurring:

I take no exception to the majority's analysis of the issue of causal relationship. I write separately because the majority opinion misses the point when reviewing the issue of the nature and extent of Mr. Dubois' disability.

The majority opinion affirms the Compensation Order because

> the "flagger" position required extended and repetitive upper body motion, including turning of the head and neck, which caused such discomfort that he was unable to perform the job at the time in question. The failure of a claimant to supply a specific medical report which evaluates that requirements of any alternative modified job offered to a claimant is not, as a matter of law, fatal to a determination that such a modified position is not suitable for a particular claimant. A reasonable person could accept Respondent's testimony that he attempted to perform the job but that he was unable to continue to perform it due to the neck, shoulder and arm pain that the job brought about and/or aggravated. Hence, the finding that Respondent was temporarily totally disabled during the period of the claim is supported by substantial evidence.

The ALJ did address the flagger position when analyzing the nature and extent of Mr. Dubois' disability:

> Claimant attempted to return to light duty work and was not able to continue the assigned flagger duties because of upper extremity discomfort related to repetitive turning of his head and upper body. His physical therapist and treating physician provided written restrictions to Employer. Claimant's credible testimony, and the reports of his medical providers, support his inability to perform the flagger duties of his assigned light duty job.
>
> No medical expert has opined that Claimant was fully capable of performing the flagger duties for a full work day during the period at issue. The undersigned is aware of no affirmative duty that Claimant, under the circumstances of this case, either provide a written job description to his medical providers or pursue the possibility of an alternative assignment of light duty work. Employer has not shown the existence of suitable alternative available employment during the period at issue, and it is Employer's burden to do so. *Logan v. D.C. Department of Employment Services, 805 A.2d 237, 242-43 (D.C. 2002).* Claimant was temporarily and totally disabled during the disputed period. *Id*; *Smith v. D.C. Department of Employment Services, 548 A.2d 95 (D.C. 1988).*[2]

However, this analysis is superfluous given the ALJ's findings that Mr. Dubois' treating physician at Kaiser Permanent recommended "time away from work for recovery and treatment from November 11, 2013 through December 16, 2013. CX4, p. 53"[3] and that "Drs. Mininberg and Fechter completed a February 14, 2014 form confirming Claimant's temporary total disability from November 11, 2013 to December 16, 2013, the period of wage loss which is at issue. CX3, p. 50-51."[4] Shirley Contracting Company even concedes Mr. Dubois was taken off work through December 16, 2013:

---

[2] *Dubois v. Shirley Contracting*, AHD No. 14-130, OWC No. 708970 (May 19, 2014), pp. 6-7.

[3] *Id.* at p. 4.

[4] *Id.*

> On November 7, 2013, Claimant obtained a disability slip from Kaiser Permanente restricting the Claimant from light duty work and placing him out of work through December 16, 2013. CE4, p. 53.[5]

Because Mr. Dubois was not released to work during the applicable time period, whether the flagger position is suitable is a red herring, and this argument is the focus of Ms. Dubois' opposition in this appeal:

> The Employer/Insurer contend that the Claimant should not be afforded temporary total disability for this period because he did not ask for an even "lighter" duty assignment. The Employer/Insurer, unfortunately, miss the point that the Claimant's treating doctor was not requesting a lighter duty assignment, but rather completely off work status. It logically flows that the Claimant could not ask for a lighter duty assignment when none was being sought. The Employer/Insurer further contend that Jessica Petty, the employer's light duty assignment coordinator, never received medical documentation adjusting the Claimant's light duty assignment. Again, there was no request to adjust the assignment to something lighter, as the Claimant's medical professionals placed him off work.[6]

During the period of the claim for relief, Mr. Dubois' treating physician took him off work. The ALJ credited this opinion; therefore, whether the flagger position qualifies as suitable, light duty work is irrelevant.

I do not agree with the majority's reasoning on the issue of the nature and extent of Mr. Dubois' disability. Consequently, I write separately in concurrence with the majority's result.

/s/ Melissa Lin Jones
MELISSA LIN JONES
Administrative Appeals Judge

---

[5] Employer and Carrier's Memorandum in Support of Their Application for Review, p. 3. See also Employer and Carrier's Memorandum in Support of Their Application for Review, p. 8. ("Kaiser placed the Claimant in an out of work status through December 16, 2013").

[6] Claimant's Opposition to Employer/Insurer's Application for Review, unnumbered p. 6.