GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
(202) 673-6402-Fax

CRB No. 05-045

BRIDGETT BROWN,

Claimant–Petitioner,

v.

BLOOMBERG, L.P., AND CHUBB INSURANCE GROUP,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Karen R. Calmeise
OHA/AHD No. 02-392, OWC No. 568405

Matthew Peffer[1], for the Petitioner

Robert C. Baker, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and LINDA F. JORY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND 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 § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[2]

[1] Petitioner was represented by Benjamin T. Boscolo, Esquire, at the formal hearing, but this appeal was filed by Mr. Peffer.

[2] Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as

BACKGROUND

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 September 30, 2003, the Administrative Law Judge (ALJ) denied Petitioner's claim for compensation in connection with a claimed psychological or psychiatric injury. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ erred in failing to accord her the presumption that her claimed psychiatric condition was compensable under the Act.

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 Int'l. v. Dist. of Columbia Dep't. of Employment Servs.*, 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.

Turning to the case under review herein, Petitioner alleges that the ALJ's decision, based as it is upon a determination that Petitioner had failed to present sufficient evidence to invoke the presumption of compensability, is not in accordance with law. Specifically, Petitioner asserts that she presented sufficient evidence that her claimed condition, disabling depression and anxiety, was the result of work-place stressors or conditions which, if experienced by an average worker of normal sensibilities and with no predisposition to psychiatric injury, would have the potential to cause the same or similar condition as Petitioner claims to have suffered in this case. The alleged error, in other words, is that the ALJ misapplied the special test for compensability of psychiatric or psychological injuries enunciated in *Spartin v. District of Columbia Dep't. of Employment Services*, 584 A.2d 564 (D.C. 1990) and in *Dailey v. 3M Co.*, H & AS No. 85-259, OWC No. 066512 (May 19, 1988), (hereafter the Dailey standard).

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amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

As part of her complaint, Petitioner asserts that, while the ALJ based her decision in part upon her assessment that there was nothing unusual, in the context of a normal workplace, about the types of stresses that Petitioner alleged to have been part of her work environment, the Dailey test has no requirement that the "mental stimulus which causes the emotional injury must be unusual or uncommon", and the ALJ's requiring that there be something unusual about the stressors was contrary to law. Memorandum of Points and Authorities in Support of Application for Review (Petitioner's Memorandum), page 2. This complaint is in apparent response to the following language in the Compensation Order:

> The analytical framework [of the *Dailey* test] pre-supposes that all employment carries with it some degree of stress. In order to form the basis of a compensable injury claim, the stressors at work must be so far in excess of the normal or expected workplace stress, due to their intensity or frequency (as in *Spartin, supra*, where claimant's travel days per month tripled in frequency) that the same has become objectively and unbearably excessive. The work occurrences must be unlike that which occur in the normal workplace, such as where an employee becomes the target of threats to his or her person, or is subjected to humiliations beyond normal embarrassment attendant to normal workplace criticism such as might be experienced by the victim of repeated embarrassing "practical jokes" or invasions of personal privacy, or ethnic or gender based insult, or witnessing an especially traumatic event such as a violent assault or murder.

Compensation Order, page 8.

With the possible exception of the reference to "ethnic or gender based insult"[3], we see no error in the ALJ's assessment of the "analytical framework" of the *Dailey* test. That is, while the *Dailey* test does not by its terms have an explicit requirement of "unusualness", it does by implication assume that there is something out of the ordinary, either intrinsically, or in the frequency, persistence, severity, or intensity, about the claimed stressors, at least in connection with their capacity to produce incapacitating anxiety or emotional harm. There would be no point to such a test in the first instance if normal, common stressors inherent in any or most employment were sufficient for compensability purposes. All that would be required in the absence of such characteristics would be straightforward cause and effect, the rejection of which as the standard in this special class of cases is the basis of the *Dailey* test.[4]

[3] We include this possible caveat in light of the principles concerning compensability claims of disability resultant from alleged race or gender based discrimination, as discussed in *McMillian v. District of Columbia Fire and Emergency Medical Services*, CRB (Dir. Dkt.) No. 20A-01, AHD/OHA No. 01-041A, OBA No. 012316 (July 28, 2005), *Wright v. Potomac Electric Power Company*, CRB No. 05-25, AHD/OHA No. 02-424, OWC No. 576756 (July 20, 2005) and *Estae of Underwood v. Nat'l. Credit Union Assoc.*, 665 A.2d 621 (D.C. 1995).

[4] We do note, however, that we are not faced with, and do not decide, the question, unresolved by *Spartin, supra*, or by *Dailey, supra*, of whether such "unusualness" in the everyday sense would be relevant for employments in which it is not "unusual" to be faced routinely with stressors that an "average" worker of "normal sensitivities" might find sufficient to lead to incapacitating emotional or psychological injury, such as might be encountered in some hospital emergency rooms or other employments where workers are exposed to "especially traumatic" events.

Beyond this, Petitioner asserts the presence of sufficient specific medical evidence to invoke the presumption, writing that "Dr. Marnell [Petitioner's treating psychiatrist] further opined that an ordinary person with no predisposition to emotional injury could have developed the same condition as Ms. Brown when exposed to the same and similar stimuli. This evidence is adequate to invoke the presumption of compensability." Petitioner's Memorandum, page 3. This is in apparent (but unreferenced) response to that portion of the Compensation Order in which the ALJ wrote "Claimant presented no medical evidence that the alleged work place incidents would have caused a person non-predisposed to stress related psychological condition [sic] to have the same reaction." Compensation Order, page 7.

Petitioner does not, in her Memorandum, point to where, in the record, any such expression of opinion can be found. The only place where we have found something matching Petitioner's description of the evidence is in CE 1, identified on the exhibit list cover sheet as "Medical Records" from Dr. Marnell. Among those documents are a narrative report apparently authored in the ordinary course of Dr. Marnell's medical treatment of Petitioner, on his office letterhead, being dated September 5, 2001, and including the following substantive contents:

> Ms. Bridgett Brown had a psychiatric diagnostic interview with me on 05-02-01. I also conducted follow-up interviews on 05-22-01, 05-29-01 and 07-10-01.
>
> Ms. Brown states that she has been seeing a therapist, Valerie Fortune, since April 2001. She started psychotherapy in the aftermath of "stress leave" from work. She was told that she was going to get a 2-month severance package following reports of intense conflict at work. *She claims that a manager hit and assaulted her at work. She states that "my manager would lie about everything." She felt that she was receiving no credit for her work. She reported that she was being denied leave and that ultimately "security removed me" from her job site. This all occurred within seven months of starting her job.*
>
> She acknowledges that she has had conflicts in the past on her job, but not to this extent. She feels "humiliated" by these recent developments in her life.
>
> She reports depressed and anxious mood with insomnia, agitation, and crying spells. She denies being suicidal. "I am too old for this kind of drama".
>
> The patient lives by herself and recently bought a house. She has never married and has no children. Her father lives nearby and she has other family in Boston.
>
> She denies being suicidal at any time, either now or in the past. She denies any history of substance abuse.
>
> The patient's family doctor had recently started her on Serzone which I have continued. This is a non-addictive anti-depressant. I have also added Wellbutrin to her current medication regimen.

> Diagnostically the patient then presents as a major depression. She is obviously stressed by her current life situation.
>
> She continues to see Valerie Fortune for psychotherapy. She continues to see me for medication monitoring.
>
> It is obvious that her current distress is a direct and immediate consequence of her current work conflicts and situation.

CE 1, Medical Report, September 5, 2001 (emphasis added). In addition, CE 1 contains a document which is clearly not a medical record, but rather is a fill-in-the-blank form, drafted by Petitioner's counsel on counsel's letterhead, bearing a letterhead date of February 6, 2002, and Dr. Marnell's signature, dated March 20, 2002. The document consists of 4 numbered questions, followed by either a written response or a check mark. Those questions and responses are as follows:

1. What is your diagnosis of my client's condition [Response] *Depression*
2. Is the condition you diagnosed caused or aggravated by the actual conditions of my client's employment? [Response] Yes __X__ No _____
3. If yes, please give the conditions of my client's employment which have caused or aggravated the condition you diagnosed [Response] *Conflicts [with] supervisor Allegations of assault*
4. Could an ordinary person with no predisposition to emotional injury have developed the same condition as my client when exposed to a [sic] the same or similar stimuli [Response] Yes __X__ No _____

CE 1, Counsel's letterhead form, signed March 20, 2002.

From these two documents, what emerges is the following: based upon a history including (a) being assaulted by a supervisor, (b) being removed by security officers from the place of employment (c) after working for seven months (d) under a supervisor perceived to be dishonest about Petitioner's work qualities and performance, the doctor is of the opinion that (1) Petitioner suffered from depression as a result of a *real* assault and *perceived* mistreatment by a supervisor, and (2) an average or ordinary worker suffering from these conditions could have also become depressed.

What is *not* clear from these documents is, in including the *perceived* mistreatment as one of the two contributing causes of the diagnosed depression, whether the doctor (1) assumed the *perception* of mistreatment to be to be an *actual* contributing cause which had the potential to cause a similar reaction in a non-predisposed individual, (2) was asserting that there was *actual* mistreatment and actual assault, either or both of which could cause a similar reaction in a non-predisposed individual, (3) was asserting that either there was an actual assault which by itself could have caused a similar reaction in a non-predisposed individual, or there was actual mistreatment, or there was perceived mistreatment, any of which could have caused a similar reaction in a non-predisposed individual.

Resolution of this appeal is made difficult by the fact that the ALJ, although recognizing explicitly that the first step in a *Dailey* analysis is the identification of the *actual*, as opposed to perceived

workplace stresses (see, Compensation Order, page 6), no such findings are apparent in the Compensation Order. While her decision is couched in terms that could be interpreted to have assumed, for the purposes of *Dailey* analysis, that the "claimed" or "alleged" stressors were also the actual conditions to which she was exposed, and still there was "no medical evidence" that they had the potential to cause similar reaction in a non-predisposed individual, such a decision would appear to fail to recognize that, under *some* reasonable interpretations of Dr. Marnell's report (combined with the fill-in-the-blank form), there is medical evidence that actual conditions under which Petitioner was employed had the requisite potential under *Dailey* analysis, and in that case, the assertion that there was *no such evidence* would be unwarranted.

We recognize that the ALJ made quite clear her concerns for the lack of veracity exhibited by Petitioner in her testimony, and we do not find implausible her inference that Petitioner may have been equally unreliable in her dealings with Dr. Marnell, thereby giving reason to perhaps reject his opinion. This is not to say, however, that the opinion does not exist on this record.[5] Further, we do not preclude the possibility that upon ascertaining the "actual" conditions to which Petitioner was exposed, the ALJ may still determine that, despite the evidence presented by Petitioner and discussed above, Petitioner still has not met her burden under *Dailey*; we do not mean to hold that for the purpose of the *Dailey* analysis, the ALJ is bound by the evidence presented to find that the actual conditions do indeed have the requisite potential. The ALJ is free to consider all the evidence of record to ascertain not only what the actual conditions to which she was subjected were, but also to determine whether those actual conditions had the potential to cause the same or similar injury as that claimed by Petitioner, in an average worker of normal sensibilities, not pre-disposed to psychological or emotional injury.

Lastly, we point out that, as we recently noted in *West v. Washington Hospital Center*, CRB (Dir. Dkt.) No. 99-97, OHA/AHD No. 99-276A, OWC No. 281076 (August 5, 2005), the *Dailey* test is part of "presumption" analysis. That is, it must be satisfied in order to invoke the presumption of compensability. It is, as has been noted, a special test which is appropriate in a special class of cases, and which is resolved as the first step in the presumption part of the overall causal relationship issue. As such, it *replaces* the normal "*some* evidence of potential causation" as the trigger for the presumption, with a test that requires the ALJ to make a factual conclusion as to the issue of potential causation. While we are not aware of any existing case authority addressing the specific quantum of evidence required at this stage, we must posit the existence of the test to be a *limiting* factor, the application of which will reduce the number of claims that would otherwise, in the absence of the test, be compensable, rather than an expansive one whose purpose would be to include cases that might otherwise be excluded from compensability. Because of this, we conclude that this initial stage of the analysis places a burden, by the preponderance of the evidence, upon claimants to establish both the nature of the actual conditions or stressors to which a claimant has

[5] Perhaps more appropriately, it might be stated that it is *possible* that the record contains such medical opinion, if the ALJ considers and accepts the "fill-in-the-blank" form as containing, in conjunction with the narrative report, such a cognizable medical opinion, despite its being un-sworn, it's lack of business/medical record status, it's lack of explanatory rationale for it's conclusions, it's lack of factual description of the bases for it's conclusions, it's apparent genesis as a record created in significant part by counsel for litigation purposes, and the multiplicity of potential meanings that one could read into it, particularly where it purports to assess the potential of the "stressors" to cause the same or similar condition in a non-predisposed individual, without distinguishing "objective" conditions from perceived conditions or events. Nonetheless, without more discussion from the ALJ, the blanket assertion that there is "no medical evidence" of such potential appears to be erroneous.

been subjected, and whether those stressors have the requisite potential to cause the same or similar condition in an average worker of normal sensitivities, not otherwise predisposed to emotional or psychiatric injury.

Accordingly, the legal conclusion that that Petitioner had not presented sufficient evidence to invoke the presumption of compensability must be vacated, and the matter must be remanded to AHD for further consideration of the issue, under *Dailey, supra* and *West, supra*, and such further additional consideration of such other issues as the resolution of that question may require.

CONCLUSION

The Compensation Order of September 30, 2003 is not supported by substantial evidence in the record and is not in accordance with the law.

ORDER

The Compensation Order September 30, 2003 is hereby VACATED, and the matter is REMANDED to AHD for further consideration consistent with the foregoing Decision and Order, and such further additional consideration of such other issues as the resolution of that question may require.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

January 10, 2006
DATE