

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. 08-115

CHARLES K. GRAY,

Claimant – Petitioner,

v.

PERFORMANCE CONTRACTING GROUP AND AMERICAN CASUALTY COMPANY OF READING,

PA.,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Gerald D. Roberson
AHD No. 08-011, OWC No. 613861

Roger C. Johnson, Esq., for the Petitioner

Joseph C. Veith, III, Esq., for the Respondent

Before FLOYD LEWIS, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel; JEFFREY P. RUSSELL, *Administrative Appeals Judge*, dissenting.

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

OVERVIEW

On February 15, 2008, the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES) issued a Compensation Order in this case. In the Compensation Order, the Administrative Law Judge (ALJ) denied the Claimant-Petitioner's (Petitioner) request for

temporary total disability benefits continuing from June 25, 2007, interest and causally related medical expenses. The Petitioner injured his neck on February 3, 2005 while standing on a ladder and pushing insulation through a hole in a wall. The ALJ denied benefits after finding the Petitioner's current disability did not arise out of and in the course of his employment with the Respondent.

On March 7, 2005, the Petitioner filed an Application for Review appealing the Compensation Order. On appeal, the Petitioner essentially argues the Compensation Order is not supported by substantial evidence and is contrary to the law. The Petitioner maintains the Respondent did not present any medical evidence which supports the ALJ's findings. The Petitioner asserts the ALJ's conclusion ignores the fact he "undisputedly suffered a [work-related] herniated disc for which he had neck surgery (including a fusion) as a result of his injury" with Respondent on February 3, 2005 and the fact Dr. Robert Squillante, the treating physician, returned to him to light duty work only with restrictions on overhead work. Additionally, the Petitioner argues the only work available to him after his injury entailed overhead work, which he could not tolerate as evidenced in Dr. Squillante's medical reports. The Petitioner argues his inability to do overhead work is a direct consequence of his herniated disc and surgery and, per the law in this jurisdiction, the Respondent is liable for all natural and unavoidable results of a work injury. Moreover, the Petitioner asserts it would be inconsistent with the presumption of compensability as defined in *Whittaker v. D.C. Department of Employment Services*, 531 A.2d 844 (1995) to deny him benefits.

On April 1, 2008, the Employer/Carrier-Respondent (Respondent) filed an Opposition. Therein, the Respondent asserts the ALJ afforded the Petitioner the presumption of compensability, but found its medical evidence severed the presumed causal relationship between his current disability and the February 3, 2005 work injury. Accordingly, the Respondent asserts the Compensation Order should be affirmed.

Because the statutory presumption of compensability was misapplied in this case, the Panel vacates the Compensation Order and remands this matter for re-consideration.

ISSUE

The issue on appeal is whether the Compensation Order is supported by substantial evidence and is in accordance with the law.

STANDARD OF REVIEW AND APPLICABLE PRINCIPLES OF LAW

As an initial matter, the standard 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. D.C. Official Code § 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. 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, supra* at 885.

It is well settled in this jurisdiction that, in order to conform to the requirements of the D.C. Administrative Procedures Act (DCAPA), D.C. Official Code § 2-501 *et seq.* (2006), for each administrative decision in a contested case, (1) the agency's decision must state findings of fact on each material, contested factual issue, (2) those findings must be based on substantial evidence, and (3) the conclusions of law must follow rationally from the findings. *Perkins v. D.C. Department of Employment Services*, 482 A.2d 401, 402 (D.C. 1984); D.C. Official Code § 2-509. Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate body is not permitted to make its own finding on the issue; it must remand for the proper factual finding. *See Jimenez v. D.C. Department of Employment Services*, 701 A.2d 837, 838-840 (D.C. 1997). As the Court of Appeals explained in *King v. D.C. Department of Employment Services*, 742 A.2d 460, 465 (D.C. 1999), basic findings of fact on all material issues are required, for “[o]nly then can this court determine upon review whether the agency's findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law.” *See also Sturgis v. D.C. Department of Employment Services*, 629 A. 2d 547 (D.C. 1993). The CRB is no less constrained in its review of compensation orders issued by AHD. *See WMATA v. D.C. Department of Employment Services (Juni Browne, Intervenor)*, 926 A.2d 140 (D.C. 2007). *Accord, Hines v. Washington Metropolitan Area Transit Authority*, CRB No. 07-004, AHD No. 98-263D (December 22, 2006). Thus, where an ALJ fails to make express findings on all contested issues of material fact, the CRB can no more “fill the gap” by making its own findings from the record than can the Court of Appeals upon review of a final agency decision, but must remand the case to permit the ALJ to make the necessary findings. *See Mack v. D.C. Department of Employment Services*, 651 A.2d 804, 806 (D.C. 1994).

Under the Act, an injured employee is entitled to a presumption an injury is work-related once the employee provides some evidence of the existence of two basic facts: (1) an injury or disability and (2) a work-related event, activity, or requirement which has the *potential* of resulting in or contributing to the injury or disability. *See Parodi v. D.C. Department of Employment Services*, 560 A.2d 524, 526 (D.C. 1989); *Short v. D.C. Department of Employment Services*, 723 A.2d 845, 851 (D.C. 1998); D.C. Official Code § 32-1521(a). If the employee provides such evidence, thereby invoking the presumption, the burden shifts to the employer to rebut the presumption by providing “substantial evidence” showing the disability is not work-related. *Parodi*, at 526. “Absent employer evidence ‘specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event,’ the compensation claim will be deemed to fall within the purview of the statute.” *Id.* [emphasis added].

The question of causal relation between a present disability and a job-related injury must also be viewed “through the lens” of the statutory presumption, unless the employer has rebutted the presumption. *See Whittaker v. D.C. Department of Employment Services*, 668 A.2d 844 (D.C. 1995).

ANALYSIS

The Panel reviewed the entire record in this matter and finds the record lacks the specificity required to address the merits of the appeal. A remand is necessary for the following reasons.

The starting point for any legal analysis is a clear statement of the issue presented for resolution. Without a clear statement of the issue(s), the ensuing legal analysis is not reliable. At the outset, it appears to the Panel that the ALJ, and the parties, were not clear on the issues in this case. At the formal hearing, the ALJ identified the issues as, *inter alia*, causal relationship arising out of and in the course of employment. See Hearing Transcript (HT) at p. 6. From a review of the opening statements, neither party disputed the Petitioner's neck injury of February 3, 2005 occurred in the course of his employment with the Respondent.¹ See HT at pp. 14, 20. It appears both parties focused on the Petitioner's current back condition. See HT at 18, 20, 76. At the beginning of Compensation Order, the ALJ identified the issues for resolution as, *inter alia*, arising out of and in the course of employment. See Compensation Order at p. 2. Later, after setting out the law on the statutory presumption, the ALJ stated:

Essentially the parties agree Claimant had an accidental injury on February 3, 2005 which caused an injury to his neck and the need for subsequent surgery. The parties, however, dispute whether Claimant's current disability is causally related to the February 3, 2005 work incident and his employment.

Compensation Order at p. 5.

Thus, it is not clear to this Panel if the issue raised for resolution was whether the Petitioner's neck injury of February 3, 2005 arose out of and in the course of his employment, or whether the Petitioner's current disability is medically causally to his February 3, 2005. These are two different types of issues; they are not the same.

The next problem with specificity directly flows from the failure to clearly define the issue for resolution. The ALJ found:

Claimant had additional lumbar surgery on August 13, 2007. His lumbar surgery of July 10, 2006 and August 13, 2007 are not causally related to the employment incident of February 3, 2005.

Compensation Order at p. 4.

In the Discussion, the ALJ discussed the medical evidence as it related to the Petitioner's current cervical problems and the amount of overhead work he had to perform before and after his February 3, 2005 injury. The ALJ did not discuss the medical evidence as it related to the Petitioner's lumbar surgery. After setting out the law on the statutory presumption and analyzing the evidence, the ALJ stated:

¹ The Panel realizes information in opening statements is not evidence. However, information in an opening statement provides an understanding of each party's perspective on a case and on its issues.

As such, the Employer has offered sufficient medical rationale to sever the causal connection between Claimant's current disability and his February 3, 2005 work injury. Therefore, the Claimant loses the benefit of the statutory presumption, and the record evidence must be weighed without further reference thereto. [citations omitted]

The medical evidence in its entirety does not provide medical rationale to establish the current disability is causally related to the February 3, 2005 incident or employment factors with Employer. The medical reports from the treating physician, Dr. Squillante, would suggest otherwise. Dr. Squillante extensively focused on Claimant's employment activities, such as overhead duties, when he returned to work in November 2005 with TB&N following his cervical surgery. According to his records, these activities caused marked increase in Claimant's *cervical pain*. [emphasis added].

Compensation Order at p. 6.

Given the parties' assertions about the Petitioner's lumbar surgeries in their opening statements, the ALJ's finding on the lumbar surgeries, the ALJ's focus on the Petitioner's cervical condition and the ALJ's lack of discussion of the Petitioner's lumbar problems, it is not clear to this Panel which "current condition", *i.e.*, cervical or lumbar, the ALJ determined was not causally related to the February 3, 2005 incident. Moreover, although the ALJ found the Petitioner's lumbar surgery was not causally related to the February 3, 2005 injury, the ALJ did not explain the basis for this finding. As indicated above, the ALJ did not address the Petitioner's lumbar surgery in his analysis.

On remand, the ALJ must state, with specificity, the issue presented for resolution. If the issue is whether the Petitioner's injury of February 3, 2005 arose out of and in the course of his employment, then the ALJ, using the statutory analysis as set forth in *Parodi, supra*, must make findings of fact relating to the events that occurred on February 3, 2005. In other words, the ALJ must make specific findings of fact and conclusions of law on the Petitioner's injury or disability, on a work-related event, activity, or requirement occurring on February 3, 2005, if any, which had the potential of resulting in or contributing to the Petitioner's injury or disability, and on the Respondent's evidence, if any, specific and comprehensive enough to sever the potential connection between the Petitioner's injury of February 3, 2005 and a work-related event occurring on February 3, 2005. *See Parodi, supra; Perkins, supra*. If the parties stipulated or agreed the injury arose out of and in the course of employment, the presumption was essentially invoked and not rebutted and no discussion of this portion of the presumption is necessary. *See Whitley v. Howard University*, CRB No. 06-71, OHA No. 03-500, OWC No. 578967 (February 16, 2007).

If the issue is whether the Petitioner's current disability is medically causally related to his February 3, 2005 injury, then the ALJ must identify the current disability, *i.e.*, cervical or lumbar, being addressed. The ALJ must analyze the current disability as set forth in *Whittaker, supra*. In other words, the ALJ must analyze the current disability "through the lens" of the

statutory presumption and make findings of fact and conclusions of law on whether the Respondent presented evidence specific and comprehensive enough to sever the potential connection between the Petitioner's injury of February 3, 2005 and the identified current disability.

The Panel notes the ALJ emphasized the difference in the amount of overhead work the Petitioner performed before his February 3, 2005 injury against the amount of overhead work he performed after his injury. In denying benefits, the ALJ determined since the Petitioner was employed as a foreman and not required to perform overhead work before his injury, but performed more overhead work after his injury, then his current disability was not related to his employment with Respondent, but was related to his employment with TB&N and Faimé & Padgett, the companies he worked for after his injury.

On remand, the ALJ should be mindful that whether the Petitioner performed overhead work prior to his injury on a regular basis or only once on the day he was injured is irrelevant in determining the compensability of his claim. Under the Act, a compensable claim embodies three elements: the injury must (1) be an "accidental injury" (2) that "arises out of" employment and also (3) arises "in the course of" employment. For an injury to "arise out" of the employment, this agency requires evidence that "the obligations or conditions of employment . . . exposed the employee to the risk or dangers connected with the injury." *Capital Hilton Hotel v. D.C. Department of Employment Services*, 565 A.2d 981, 985 (D.C. 1989) [citation omitted]. Also, the ALJ must recognize that in order to rebut the presumption of compensability, the Respondent must produce evidence of an intervening event which breaks the causal relationship link. See *Whittaker, supra*. Finally, the ALJ should be mindful of the application of the presumption within the context of the aggravation rule. See *Whittaker, supra* at 846-847.

CONCLUSION

The February 15, 2008 Compensation Order is not supported by substantial evidence and is not in accordance with the law.

ORDER

The February 15, 2008 Compensation Order is hereby VACATED AND REMAND for further review of the issues presented for resolution consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:



SHARMAN J. MONROE
Administrative Appeals Judge

September 17, 2008
DATE

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, dissenting:

I believe that the ALJ improperly ruled that the evidence was sufficient to overcome the statutory presumption that neck injury which prevents Mr. Gray from working is not medically causally related to the work injury to Mr. Gray's neck that was the subject of the stipulation of his having sustained a work related injury. The evidence cited by the ALJ does not support a finding that the neck condition is unrelated to the previous neck injury, and thus I would reverse the Compensation Order and remand the matter with instructions to award the claimed benefits.