

**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. 06-37**

**CYNTHIA THOMPSON,**  
**Claimant – Petitioner**

**v.**

**AVAYA COMMUNICATIONS AND GATES MCDONALD.,**  
**Employer/Carrier – Respondent.**

Appeal from a Compensation Order on Remand of  
Administrative Law Judge Anand K. Verma  
OHA No. 02-180, OWC No. 561690

Cynthia Thompson, *pro se* Petitioner

Michael S. Levin, Esquire, for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS AND SHARMAN P. MONROE, *Administrative Appeals Judges*.

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the 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).<sup>1</sup>

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<sup>1</sup> 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. 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

## BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand 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 February 28, 2006, the Administrative Law Judge (ALJ) denied the request for relief requested by Claimant-Petitioner (Petitioner), concluding that Petitioner failed to prove that the physical injury suffered by Petitioner and its after effects could have produced a similar emotional injury in a person of normal sensibilities not predisposed to such injury. Petitioner now appeals that Compensation Order.

## 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. D.C. Official Code §32-1522(d)(2). “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. App. 2003). Consistent with this scope 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.

On May 20, 2004, the ALJ issued a Compensation Order on Remand which denied Petitioner’s request for disability benefits on the grounds that Petitioner’s psychological injuries were not casually related to her fall on the floor of September 29, 2000. On appeal, the CRB issued a Remand Order on December 23, 2005, instructing the ALJ to reconsider whether the physical injury that Petitioner sustained would have resulted in the same or similar psychological injury to an individual of normal sensibilities not predisposed to the depression suffered by Petitioner, in light of the rule established by the CRB in the case of *West v. Washington Hospital Center*, CRB (Dir. Dkt.) No. 99-97 (August 5, 2005). The CRB noted that the ALJ’s Compensation Order on Remand of May 20, 2004 was issued prior to the CRB’s decision in *West*.

In this instant Compensation Order on Remand, the ALJ discussed in great detail the reasons for concluding that Petitioner’s fall on Respondent’s freshly mopped floor was not the cause of Petitioner’s depression. The ALJ specifically relied on the opinion of Dr. Bruce Ammerman and detailed the reasons for rejecting the opinion of Dr. Kenneth Smothers, who opined that Petitioner’s depression seemed to be related to her fall at work. The ALJ specifically noted that the evaluation

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appeals filed prior to October 1, 2004, the effective date of the D.C. Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

by Dr. Smothers did not reference any diagnostic evaluation and the ALJ emphasized that no other physician who treated Petitioner ever found any objective evidence of her psychological problems being related to her physical injury. The ALJ went through an analysis of the tests enunciated in *West* and determined that it could not be concluded that Petitioner had established that her emotional problems were the direct and natural consequences of her physical injury, nor that the physical injury sustained by Petitioner could have caused the same or similar emotional injury in a person of normal sensibilities not predisposed to such injury.

The ALJ stated:

. . . no physician ever noted that the psychological injury actually suffered by claimant alleged to be the consequence or medical sequelae of work-related physical injury was typical to that of the average, emotionally non-predisposed individual.

Claimant's complained of continued depression is not causally related to her work injury which resulted in no objective evidence of continued disability; rather it is related, solely to her subjective perception of hopelessness . . .

Compensation Order on Remand at 6.

In her appeal, Petitioner expresses her overall dissatisfaction with the ALJ specifically and she generally disputes the ALJ's overall findings and evaluation of the medical evidence in rejecting her request for benefits. Petitioner also protests that the ALJ did not specifically mention each of the physicians who treated her.

Initially, this Panel would like to clarify how the objective test established in *Dailey v. 3M Company*, H&AS No. 85-259, OWC No. 066512 (Final Compensation Order, May 19, 1988), for determining whether the presumption is invoked, should be used when analyzing a case under the *West* standard. The CRB in *Patterson v. Kaiser Permanente of the Mid-Atlantic States*, CRB No. 06-041, AHD No. 05-388 (May 23, 2006) stated:

As we have recently pointed out . . . in *Thompson v. Avaya Communications and Gates McDonald*, CRB No. 04-055 (Decision and Order, December 14, 2005), the objective test in *Dailey* is part of the "potentiality" prong of the quantum of evidence needed to be produced by a claimant to invoke the presumption of compensability. . . .

We wish to be clear: the proper place to conduct *Dailey* analysis is when deciding whether sufficient evidence has been produced to invoke the presumption that the claimed stressors caused the claimed psychological injury. If not, the claim is denied. If however the complained of stressors have the requisite *Dailey* potential, they by definition have the potential to have caused the injury in the case at hand, making what appears to have been a "first step" undertaken by the ALJ in this case superfluous. Where the actual conditions as found by the ALJ have the requisite potential to cause the

complained of condition in a person of average sensibilities, the presumption that the complained of condition was in fact caused by those stressors is invoked. The ALJ is then to proceed and analyze the evidence of employer to determine if it is sufficient to overcome the presumption that the complained of stressors did, in fact, cause the complained of condition in the specific claimant in the case at hand. If not (that is, if employer's evidence is insufficient to overcome the now-presumed causal relationship), the claim is granted. If so, the presumption falls from the case, and the evidence is again to be weighed to determine whether, in this specific case, the actual work conditions did cause the claimed injury, without reference to any presumptions, and with the claimant having the burden of proof, under *Dunston v. District of Columbia Dep't. of Employment Serv's.*, 509 A.2d 109 (D.C. 1986).

In the instant matter, it appears that while the ALJ initially did not clearly articulate whether the presumption had been properly invoked, the ALJ did determine that a person not otherwise susceptible to the emotional problems that Petitioner had, would not have suffered the same or similar emotional trauma after the physical injury. Thus, in essence, without clearly stating so, the ALJ determined that the physical injury sustained by Petitioner did not have the requisite *Dailey* potential, and thus that Petitioner failed to invoke the presumption.

As such, although the ALJ did not first clearly specify the *Dailey* analysis regarding the presumption, the ALJ detailed the reasons, supported by evidence in the record, for concluding that a person not susceptible to Petitioner's emotional problems would not have suffered this emotional trauma after the fall. This Panel notes that the ALJ specifically emphasized that no physician of record ever indicated that the emotional injury suffered by Petitioner, which she alleged was the consequence of her work-related physical, was typical of a normal, non-predisposed individual. After reviewing the record as a whole, this Panel concludes that the ALJ's ultimate conclusion that Petitioner failed to show that the physical injury she suffered would have produced a similar emotional injury in a person of normal sensibilities not predisposed to such injury, is supported by substantial evidence.

As to Petitioner's argument that the ALJ did not specifically refer to all of her physicians in the Compensation Order on Remand, this Panel notes that the ALJ "is not required to inventory the evidence and explain in detail why a particular part of it is accepted or rejected." *Landesberg v. Dist. of Columbia Dep't. of Employment Servs.*, 794 A.2d 607, 616, n.7 (D.C. 2002) quoting *Sturgis v. Dist. of Columbia Dep't. of Employment Servs.*, 629 A.2d 547, 555 (D.C. 1993).

Accordingly, this Panel can find no reason to disturb the ALJ's conclusions in this matter.

#### CONCLUSION

The Compensation Order of February 28, 2006 is supported by substantial evidence in the record and is in accordance with the law.

**ORDER**

The Compensation Order of February 28, 2006 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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FLOYD LEWIS  
Administrative Appeals Judge

February 22, 2007  
DATE