

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-071**

**DARRELL BANKS,  
Claimant–Petitioner/Cross-Respondent,**

v.

**CLARK CONSTRUCTION GROUP LLC and  
ZURICH NORTH AMERICA,  
Employer-Respondent/Cross-Petitioner.**

Appeal from a March 31, 2015 Compensation Order by  
Administrative Law Judge Amelia G. Govan  
AHD No. 14-507, OWC No. 702171

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 SEP 30 PM 12 18

(Decided September 30, 2015)

Matthew J. Peffer for Claimant  
Zachary I. Shapiro for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Except as noted otherwise, the following facts are taken from the Findings of Fact portion of the Compensation Order (CO) under review, issued March 31, 2015 and are not contested by either party in this appeal.

Darrell Banks (Claimant) worked for Clark Construction Group LLC (Employer) as a pile driver, in which position he was required to walk, lift heavy weights, and engage in other strenuous activities involving stooping and bending. Pile driving is a specialized skill, there being only approximately 200 such workers in the metropolitan area.

Claimant, age 61 at the time, was injured while working for Employer on March 7, 2013. At a date that is not clear, Claimant underwent a bilateral ureteral stent implant to treat kidney stones.<sup>1</sup>

The work injury occurred when Claimant slipped on wet clay while carrying a chainsaw. He fell backwards, hitting a mound of hard dirt and striking his upper back between the shoulder blades. The injury caused Claimant to require assistance walking, and he was taken to MedCor,<sup>2</sup> a medical facility used by Employer for work related injuries.

Although Claimant's upper and lower back were both sore, he did not complain to MedCor about his upper back because his lower back was the more significantly painful injury at that time.<sup>3</sup>

Employer advised Claimant that if he declined to file a workers' compensation claim and continued to report to the jobsite, Employer would continue to pay Claimant his regular wages.

Claimant accepted this arrangement, and returned to work within a few days of the injury. He was assigned duties that required no physical exertion upon his return. His duties consisted of watching a wall to see if water was coming through, and if it was he would contact co-workers by radio to come and repair the leak.

Claimant returned to MedCor on March 11, 2013, and was referred to a clinic in Sterling, Virginia<sup>4</sup> for further treatment, where he received medical attention for approximately six weeks, until approximately April 15, 2013.<sup>5</sup>

After a period of time performing this wall-watching work, Claimant returned to some of his previous duties and was assisted by co-workers who performed any necessary heavy lifting and carrying.

Claimant was laid off in May 2013.<sup>6</sup> Employer advised Claimant that the layoff was due to lack of work. However, the project was not complete, and other pile drivers continued to work on the project.

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<sup>1</sup> The CO does not specify when this procedure was performed. Reference is made to the procedure having been performed in 2012 in CX 2, p. 11. However, in his independent medical examination report dated September 11, 2014, Dr. Hinkes states that the stents were implanted "recently" and "a few months ago". See, RX 1, p. 2.

<sup>2</sup> The CO refers to MedCor as "Employer's Clinic", but does not explain what is meant by this phrase.

<sup>3</sup> Employer does not concede this point. The ALJ found this as a finding of fact based upon Claimant's testimony, which she found "credible in every respect." CO, p. 2.

<sup>4</sup> The CO refers to the Vienna clinic as "Employer's clinic facility", but does not explain what is meant by this phrase.

<sup>5</sup> The CO does not specify the number of visits or type of medical treatment provided at MedCor or the Vienna facility.

<sup>6</sup> The CO does not specify the date of the layoff.

Claimant received unemployment benefits following the layoff, but stopped seeking medical care because he had no medical insurance.

In September 2013 Claimant obtained a position at another construction company, Berkel. Although in his application for this job he stated that he was unrestricted in his physical capacities, the job that he obtained was supervisory and required no physical exertion. He worked at this job intermittently until December 2013, when he was again laid off.<sup>7</sup>

In late December 2013, Claimant received a letter from Employer advising him that “there had been an error” and that he “should have been receiving health care benefits, which would end on December 31, 2013.”<sup>8</sup>

Upon receipt of this letter, Claimant immediately sought treatment from Dr. Joshua Anderson. He advised Dr. Anderson that he continued to have pain in his upper back and also complained of pain in his lower back with radiculopathy on the right. Dr. Anderson ordered a lumbar MRI which revealed a left paracentral disc protrusion at L5-S1 abutting the left nerve root.

In February 2014, Claimant applied for Social Security disability benefits,<sup>9</sup> relinquished his union card because he felt physically unable to perform his duties as a pile driver, and began receiving medical care from Dr. Godwin Darko, an internist at MedStar Washington Hospital Center Support Services (MedStar), that was provided through Medicaid. Dr. Darko’s reports contain no mention of cervical pain.

Claimant was seen by a neurologist, Dr. Michael Batipps, on June 17, 2014. Dr. Batipps’s report of that date is the first medical record containing reference to cervical pain, and in that report Dr. Batipps states that Claimant has been suffering from that pain since the work injury. The cervical complaints reported were of daily neck pain radiating bilaterally into the trapezes and daily lumbosacral pain with parathesia and tingling radiating down his right leg to his toes.

Dr. Batipps reviewed the earlier MRI and diagnosed a disc herniation and nerve root impingement. He advised that Claimant undergo an EMG and NVC study, and a cervical MRI. He also prescribed physical therapy and medication.

On September 11, 2014, Claimant was evaluated by Dr. Clifford Hinkes at Employer’s request for the purpose of an independent medical evaluation (IME). In his IME report, Dr. Hinkes characterized Claimant’s low back injury as a lumbar sprain and a bulging disc. Dr. Hinkes commented that ureteral stents often cause “flank pain”, back pain and muscle spasms. He also opined that Claimant was not in need of a cervical MRI, the EMG/NVS studies or further physical therapy unless he views the actual MRI pictures, which he did not have at that time.

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<sup>7</sup> The CO does not give the dates that Claimant worked at Berkel, nor does it contain any findings as to what wages he was paid when he worked.

<sup>8</sup> The CO does not say from whom this letter was received.

<sup>9</sup> The CO does not specify upon what conditions Claimant based his Social Security disability claim.

Dr. Hinkes was later provided with the MRI pictures and on November 13, 2014 he authored an addendum in which he opined that the findings were “Probably a normal variant at [Claimant’s] age” and “probably unrelated” to the work injury.

Employer sought utilization review (UR) and on November 14, 2014, performed by Dr. Jason Gerber, a neurosurgeon, who rejected all of Dr. Batipps’s recommendations.

On January 15, 2015, a formal hearing was conducted before an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES). At that hearing, Claimant sought an award of temporary total disability benefits from February 4, 2014 through the date of the hearing and ongoing, authorization for the medical care recommended by Dr. Batipps, and payment of such medical bills that had been incurred for treatment of his neck and back complaints.

On March 31, 2015, the ALJ issued the CO, in which it was found that (1) Claimant’s cervical complaints are not causally related to the work injury, (2) Claimant’s lumbar complaints are causally related to the work injury, (3) Claimant’s wage loss after his layoff by Employer was not causally related to the work injury but rather was “for economic reasons”, and (4) the recommended medical care for the low back is reasonable and necessary as a result of the work injury. Based on these findings, the ALJ granted the claim for low back medical care, denied the claim for medical care the cervical spine, and denied the claim for temporary total disability.

Claimant filed an Application for Review and memorandum of points and authorities in support thereof (Claimant’s Brief) with the Compensation Review Board (CRB), appealing the denial of temporary total disability benefits and cervical medical care, arguing that the finding of a lack of causal relationship between the claimed cervical injury, and the denial of the temporary total disability claim, are not supported by substantial evidence and should be reversed.

Employer filed an Opposition to Claimant’s Application for Review and memorandum of points and authorities in support thereof (Employer’s Opposition Brief) and a Cross Application for Review and memorandum of points and authorities in support thereof (Employer’s Supporting Brief). In Employer’s Opposition Brief, Employer argues that the denial of temporary total disability benefits and cervical medical care are supported by substantial evidence and should be affirmed. In Employer’s Supporting Brief, Employer argues that the finding that Claimant’s lumbar condition is causally related to the work injury is unsupported by substantial evidence and should be reversed. Employer did not appeal the finding that the medical care awarded is medically reasonable and necessary.

Claimant has filed nothing in opposition to Employer’s Cross Application for Review.

For the reasons discussed below, the CO is affirmed in part, reversed in part, vacated in part, and remanded for further consideration.

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 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. Code § 32-1521.01(d)(1)(A). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order 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 different conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

Claimant’s first argument correctly notes that the ALJ found that Claimant had adduced sufficient evidence to invoke the presumption that his cervical condition is causally related the work injury. Employer does not contest this assertion in Employer’s Opposition Brief.

Claimant proceeds to argue that Employer’s IME report is inadequate to overcome the presumption, because elsewhere in the CO, when considering the causal relationship issue regarding the lumbar condition, the ALJ found the report “conclusory” and that it “does not take into account Claimant’s credible description of significant pain emanating from his lumbar injury”. Claimant’s Brief, p. 8, quoting CO, p. 7.

Here is what Dr. Hinkes’s report has to say on the question:

PHYSICAL EXAMINATION:

\* \* \*

Cervical range of motion is normal. Lhermitte’s and Spurling signs are negative.

\* \* \*

DIAGNOSIS:

1. Lumbar strain and sprain with bulging lumbar disc.

\* \* \*

OPINION:

\* \* \*

I respectfully disagree with the recommendations of Dr. Batipps. A cervical spine MRI is not necessary. This is not related to the work injury.

RX 1, p. 1 – 4.

The District of Columbia Court of Appeals (DCCA) has written, in an oft-cited passage, as follows:

We hold that an employer has met its burden to rebut the presumption of causation when it has proffered a qualified independent medical expert who, having examined the employee and reviewed the employee’s medical records renders an unambiguous opinion that the work injury did not contribute to the disability.

*Washington Post v. DOES and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004).

This passage established the following criteria for determining whether an employer has produced sufficient medical evidence to overcome the causation presumption: (1) an opinion from (2) a qualified medical expert which (3) follows an examination of the claimant by that expert and (4) a review of the relevant medical records, which opinion is (5) unambiguous, and which asserts both (6) a lack of causation of and (7) a lack of “contribution”, or, in a phrase used more frequently in workers’ compensation law, “aggravation” of the disabling condition.

However, the DCCA has also held that the mere statement of a physician’s opinion in opposition to the presumption is not sufficient to overcome the presumption. Where such an opinion is unaccompanied by a discussion of the reasoning upon which it is based, and where such a contrary opinion has been reached in the absence of a review of at least most, if not all, of the relevant medical records, it does not constitute “substantial evidence”. *See Washington Metropolitan Area Transit Authority v. DOES and Harold Spencer, Intervenor*, 827 A.2d 35 (D.C. 2003).

Dr. Hinkes’s opinion fails not only to address aggravation, it is so spare a discussion as to fairly be characterized as being “unaccompanied by a discussion of the reasoning upon which it is based”. Further, the opinion expressed is ambiguous. It is not clear whether Dr. Hinkes feels the cervical MRI is not necessary medically, or that it is not related to the accident. Thus, we agree with Claimant that it fails to overcome the presumption. Accordingly, we reverse the ALJ’s determination that the cervical condition and any required medical care for that condition is not causally related to the work injury.

Regarding the claim for temporary total disability, Claimant argues that he has demonstrated that he is unable to return to his pre-injury job as a pile driver, and in the CO, the ALJ found that although he earned wages following the injury, she also found that in both jobs to which he returned, his employment was either “sheltered”, in the case of the wall watching position, or specially accommodated as in the case of Berkel.

The only evidence in the record that suggests Claimant can return to his pre-injury job is the IME report of Dr. Hinkes, which the ALJ rejected, and which rejection was well within the ALJ’s discretion. The ALJ found specifically that she accepted Claimant’s credible testimony that he is unable to perform his pre-injury duties. CO, pp. 7 – 8. Although the CO properly cites *Logan v. DOES*, 805 A.2d 237 (D.C. 2002) as the applicable case governing this issue, the ALJ never actually applied the *Logan* analysis in determining the nature and extent of Claimant’s disability.

The ALJ’s finding that Claimant cannot return to his pre-injury job is supported by substantial evidence, and is affirmed. The finding that he is not entitled to wage loss benefits because of the supposed layoffs does not flow rationally or legally from that finding. There has been no showing that Employer has offered Claimant employment within his physical capacity since it laid Claimant off. There is no finding that Claimant had returned to suitable alternative employment when he worked for short time, intermittently, at Berkel.

There is but one conclusion that can flow from these facts: except for the “intermittent” periods of light duty work at Berkel, Claimant has been and remains temporarily totally disabled from the date of the layoff from Employer to the present and continuing.

## CONCLUSION AND ORDER

Because the rejection of Dr. Hinkes's opinions and the UR report's conclusions are supported by substantial evidence, the conclusion that Claimant's lumbar condition is medically causally related to the work injury and the award of causally related medical care to the lumbar spine as provided and recommended by Dr. Batipps is **AFFIRMED**.

Because there is no dispute that Claimant adduced evidence sufficient to invoke the presumption that his cervical condition is causally related to the work injury, and because the evidence relied upon by the ALJ to find the presumption to have been rebutted is insufficient for that purpose, the conclusion that Claimant's cervical condition is not causally related to the work injury is **REVERSED** and the denial of causally related medical care is **VACATED**.

Because the CO did not properly assess the nature and extent of Claimant's disability, the finding that Claimant is not entitled to temporary total disability is **REVERSED** and the denial of the claim temporary total disability is **VACATED**.

The matter is **REMANDED** to AHD for further findings of fact, through either stipulation, resort to the existing record, or the conduct of further proceedings, concerning the dates of the intermittent employment with Berkel and the wages paid during that employment, and entry of an award of temporary total disability for any period since the date of the layoff from Employer that Claimant was not working, and any temporary partial disability to which Claimant may be entitled due to any diminution of wages sustained if there was a wage differential between Claimant's average weekly wage and the wages earned from Berkel, subject to a credit for any unemployment benefits received during the period of disability.

*So ordered.*