

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 11-098**

**DAVID P. MAJORS,  
Claimant-Respondent,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY and XCHANGING,  
Self-Insured Employer and Third Party Administrator-Carrier-Petitioner.**

Appeal from a Compensation Order by  
The Honorable Anand K. Verma  
AHD No. 10-139, OWC No. 657877

Donna J. Henderson, Esquire for the Petitioner  
Manuel R. Geraldo, Esquire for the Respondent

Before HEATHER C. LESLIE,<sup>1</sup> JEFFREY P. RUSSELL,<sup>2</sup> and LAWRENCE D. TARR, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**OVERVIEW**

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the August 31, 2011, Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section<sup>3</sup> of the District of Columbia Department of Employment Services (DOES). In that COR, the ALJ granted in part the Claimant's request for temporary total disability. We VACATE and REMAND.

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<sup>1</sup> Judge Heather C. Leslie is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

<sup>2</sup> Judge Russell has been appointed by the Director of the DOES as a Interim CRB Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

<sup>3</sup> Formerly known as the Administrative Hearings Division.

## FACTS OF RECORD AND PROCEDURAL HISTORY

On February 17, 2009, the Claimant was repairing an escalator during the course of his employment. At a formal hearing, the Claimant alleged that during this repair work, he sustained plantar fasciitis. The Claimant also alleged that his injury was exacerbated on March 6, 2009 when he attempted to lift an escalator floor plate. The ALJ awarded the Claimant temporary total disability benefits from March 14, 2009 to June 3, 2009, causally related medical expenses, and assessed penalties against the employer for failure to timely controvert the claim.

On July 28, 2011, the CRB issued a Decision and Remand Order<sup>4</sup> (DRO), vacating the CO. The CRB found the ALJ had improperly relied upon medical articles not introduced into evidence by the parties, had not ruled upon the Employer's objection to Claimant's exhibit 6, failed to consider Employer's exhibit 5, erred when assessing the nature and extent of the Claimant's disability from May 26, 2009 to June 2, 2009, and erred when placing the burden on the Employer to show that an accident did not occur.

In response, the ALJ issued a COR<sup>5</sup> on August 31, 2011. The ALJ stated that the CRB raised two principle issues, that of reliance on the medical journal articles and whether the CO's facts and conclusion of law were supported by the substantial evidence in the record. The ALJ again relied upon the medical articles utilized in the appealed CO, found that the Claimant's entitlement to temporary total disability benefits ended on May 26, 2009, and found the Employer failed to rebut the occurrence of an accidental injury.

The Employer appealed. The Employer argues that the ALJ erred by continuing to rely upon the medical journal articles, by not ruling upon the Employer's objections to Claimant's exhibit 6, by failing to rule upon the Employer's post hearing supplemental exhibits, and by failing to hold the Claimant to "his burden to prove by credible evidence" a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability." Employer's Argument at 12.

The Claimant, in opposition, argues the ALJ was correct in finding a medical causal relationship between the Claimant's plantar fasciitis and the work injury and that the ALJ's reliance on the medical journals was not in error.

## THE STANDARD OF REVIEW

The scope of review by the CRB 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 District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

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<sup>4</sup> *Majors v. WMATA*, CRB No. 10-160, AHD No. 10-139 (July 28, 2011).

<sup>5</sup> *Majors v. WMATA*, CRB No. 10-160, AHD No. 10-139 (August 31, 2011).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

## DISCUSSION AND ANALYSIS

In the COR, the ALJ stated:

With respect to the issue of reliance upon the medical journal articles, the CRB alleges that the ALJ having introduced the journal articles into the Compensation Order on his own initiative failed to allow the parties to review the articles and to respond to the official notice taken of their contents. There is nothing in the Act that inhibits the ALJ to rely on the relevant treatises and journals to support the rationale in his decision. In defining the plantar fasciitis, its etiology and the resulting symptoms, the undersigned utilized the *Plantar Fasciitis: Etiology and Treatment* article published in the *Orthopaedic and Sports Physical Therapy*, Volume 29 (December 1999) and a study of *Plantar Fasiitis* published in the *Summit Orthopaedics, Ohio State University College of Medicine and Public Health* (June 9, 2009). The utilization of these journals was analogous to using and citing treatises, such as, Larson's *Workers' Compensation Law* and other pertinent articles contained in the law reviews.

COR at 3.

From this passage it is clear the ALJ either did not understand, or chose to ignore, the nature of "judicial administrative notice," its purposes, limits, and the safeguards established by statute and practice to insure fairness and the rules of litigating contested cases. The ALJ was initially reversed because he failed to afford the parties the opportunity to rebut the medical theories and conclusions stated in the articles and because he improperly took judicial notice and considered the articles' statement regarding the cause of plantar faciitis.

We restate the relevant holding of the July 28, 2011, DRO:

Neither of these articles was offered into evidence by either party. Although an ALJ may take official notice of documents outside the scope of the evidentiary record, both parties must be afforded an opportunity to rebut any fact officially noticed in the documents.<sup>6</sup>

In this case, the ALJ used journal articles to take judicial notice of the cause of plantar fasciitis. Having introduced these articles into the Compensation Order on his own initiative, the ALJ failed to allow the parties to review the articles and to respond to the official notice taken of their contents.

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<sup>6</sup> See *Renard v. DOES*, 673 A.2d 1274 (D.C. 1996) (When notice of evidentiary matters outside the record is taken by the ALJ, due process requires the parties be afforded notice and the opportunity to contest the evidentiary matter.)

Furthermore, "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."<sup>7</sup> A journal article is a source that reasonably can be questioned, especially on the issue of causal relationship in a particular case.

The Compensation Order is based upon information not made part of the record. The ALJ's attempt to rehabilitate his error by stating "even in the absence of these studies, the opinion of the treating physician is preferred"<sup>8</sup> is unavailing inasmuch as it is not clear that given a truly fair review of the evidence without the taint of the journal articles the result reached is one based on an unaffected weighing of the evidence of record.

DRO at 4-5.

The ALJ violated traditional notions of fairness and due process in the CO when he *sua sponte* admitted into evidence facts and relied on those facts in reaching his decision without giving the parties the chance to rebut those facts. This error was repeated in the COR.

In the COR, the ALJ again relied upon the medical journal articles asserting his belief that his use of the articles was analogous to using a legal treatise of law review.

This is a false analogy. The etiology of a medical condition is not "generally known within the territorial jurisdiction of the trial court." And, as stated in the DOR, "a journal article is a source that reasonably can be questioned, especially on the issue of causal relationship in a particular case." We once again cite to the District of Columbia Court of Appeals case of *Renard v. DOES*, 673 A.2d 1274 (D.C. 1996) which describes the requirements of due process whenever an ALJ takes notice of evidence outside the record.

Additionally, we cite D.C. Code § 2-509(c) which states,

Where any decision of the Mayor or agency in a contested case rests on official notice of a material fact not appearing in the evidence in the record, any party to such case shall on timely request be afforded an opportunity to show the contrary.

We again remand the case to the ALJ with the same instructions as before. If the ALJ chooses to rely on the articles in question, he must re-open the record to allow the parties an opportunity to review the articles and to respond.<sup>9</sup>

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<sup>7</sup> *Christopher v. Aguigui*, 841 A.2d 310, 311-312 n.2 (D.C. 2003) quoting Fed. R. Evid. 201(b).

<sup>8</sup> *Majors*, *supra*, at p. 9.

<sup>9</sup> The ALJ does not have to reopen the record if he issues a decision without relying on the contested articles.

The Employer next argues that the ALJ erred by failing to rule upon objections to Claimant's Exhibit 6<sup>10</sup> and by failing to rule upon the Employer's Motion to supplement the exhibits post-hearing. We agree.

As stated in the DRO,

Furthermore, at the hearing, WMATA raised an objection to the admission of Mr. Majors' exhibit number 6;<sup>11</sup> while the ALJ noted WMATA's objection, he did not rule on it at the hearing or in the Compensation Order. Without a ruling on WMATA's objection, there is a risk that the Compensation Order is based on even more information that is not in the record.

DRO at 5.

A review of the COR shows the ALJ failed to rule upon WMATA's objections. On remand, the ALJ should correct this error.

We also note that the ALJ did not address the CRB's holding that he erred by admitting, but not considering, Claimant's exhibit 5. We here repeat the CRB's holding:

Similarly, Mr. Majors raised an objection to WMATA's exhibits number 5;<sup>12</sup> this time, the ALJ admitted the exhibit into evidence over objection but stated on the record that "it will not be relied upon."<sup>13</sup> If an exhibit is in evidence, it must be considered when resolving the contested issues; failure to do so is reversible error.

DRO at 5.

We remand the case for a ruling on the employer's objection to Claimant's exhibits 6 and to consider all evidence admitted into the record.

Moreover, it appears that the Employer's motion to supplement the exhibits after the hearing was submitted to the ALJ before he issued the CO. If so, then the ALJ must rule upon the employer's motion.

Finally, the Employer argues that the ALJ failed to hold the Claimant to his initial burden to prove through credible evidence the existence of a work related event, activity, or requirement which has the potential to cause or contribute to the disability. Employer's Argument at 12. The

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<sup>10</sup> The Employer states in argument that the ALJ failed to rule upon objections to Claimant's exhibits 5 & 6. A review of the transcript only shows an objection to exhibit 6. Moreover, only exhibit 6 was discussed in the DRO. We will assume the reference to Claimant exhibit 5 is in error.

<sup>11</sup> April 27, 2010 Hearing Transcript, pp.13-17.

<sup>12</sup> April 27, 2010 Hearing Transcript, pp. 18-20.

<sup>13</sup> April 27, 2010 Hearing Transcript, p.20.

Claimant argues that the evidence, including medical records as well as the Claimant's testimony, established that the Claimant did suffer an accidental injury on February 17, 2009 and exacerbated by the March 6, 2009 work incident. Claimant's Argument at 5.

On the cause of accidental injury, the ALJ found in the CO's findings of fact (which were adopted in their entirety in the current COR) that the Claimant suffered an injury to his left foot while at work on February 17, 2009. The ALJ stated "in other words, claimant suffered an injury in the course of his employment." CO at 3. No further discussion ensued regarding the accidental injury. The ALJ then proceeded to place the burden on the Employer to prove the accident did not occur.

The CRB found this to be in error:

Finally, at the formal hearing, in addition to raising the issue of causal relationship, WMATA contended Mr. Majors had not sustained an accidental injury arising out of and in the course of employment on February 17, 2009.<sup>14</sup> The requirement of an accidental injury is satisfied when something unexpectedly goes wrong with the human frame.<sup>15</sup> Moreover, the issues of accidental injury and injury arising out of and in the course of employment are inextricably intertwined; the claimant "has the initial burden of introducing persuasive evidence of basic facts tending to establish coverage under the Act before the other facts necessary to establish the claimant's coverage under the Act are presumed."<sup>16</sup> In other words, in order to benefit from the presumption of compensability set forth at §32-1521 of the Act, the claimant initially must show credible evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.<sup>17</sup>

Once the presumption of compensability is invoked, it is the employer's burden to come forth with substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."<sup>18</sup> Only upon a successful showing by the employer does the burden return to the claimant to prove by a preponderance of the evidence, without the benefit of the presumption of compensability, his ongoing injuries arose out of and in the course of employment.<sup>19</sup>

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<sup>14</sup> *Majors, supra*, at 2.

<sup>15</sup> *WMATA v. DOES*, 506 A.2d 1127 (D.C. 1986).

<sup>16</sup> *Booker v. George Hyman Construction Co.*, H&AS No. 85-5, OWC No. 049406 (Director's Decision August 2, 1988).

<sup>17</sup> *Ferreira v. DOES*, 5310 A.2d 651 (D.C. 19987).

<sup>18</sup> *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

<sup>19</sup> *See, Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003).

In the Compensation Order, the ALJ states the legal standard as follows:

Where, as here, the accidental injury is not stipulated, employer bears the burden of establishing that the alleged injury did not occur. ... [The evidence] fails to refute the non-occurrence of the accidental injury, as alleged.

Indeed, there is nothing in the entirety of evidence adduced at the hearing that negates the occurrence of the alleged accidental injury.<sup>20</sup>

This standard is an incorrect recitation of the law, and we cannot affirm a Compensation Order that “reflects a misconception of the relevant law or a faulty application of the law.” *Washington Metro. Area Transit Auth. v. DOES*, 992 A.2d 1276, 1280 (D.C. 2010) (quoting *Georgetown Univ.*, 971 A.2d at 915).<sup>21</sup>

DRO at 5-6.

In the COR, the ALJ utilized the case cited by the CRB in the DRO and stated,

Hence, once claimant, as here, proves something went wrong with his plantar fasciitis, the burden then shifts to employer to offer evidence in rebuttal that it did not occur.

COR at 3.

We are uncertain what evidence the ALJ is relying upon in showing that an injury occurred at work. Other than stating in the CO that the Claimant suffered an injury in the course of his employment on February 17, 2009, we are left to guess what “work related event, activity, or requirement which has the potential to cause or to contribute to the disability.” Upon remand, the ALJ is to clarify what he is relying on when he indicates that an injury occurred on February 17, 2009.

We also take this time to remind the ALJ, evoking the concept of appellate review, that it is up to the District of Columbia Court of Appeals to determine whether or not the CRB is correct or incorrect. This concept is the best way to insure prompt resolution of disputes in an orderly, predictable, and equitable fashion in a manner that maximizes the efficient use of limited administrative and judicial resources.

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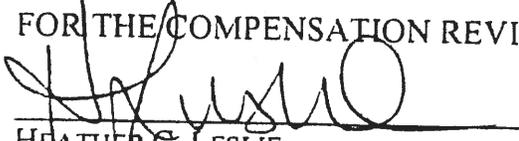
<sup>20</sup> *Majors*, supra, p.4-5.

<sup>21</sup> *D.C. Department of Mental Health v. DOES*, 15 A.3d 692 (D.C. 2011).

**CONCLUSION AND ORDER**

The findings of fact and conclusions of law contained in the August 31, 2011 Compensation Order on Remand are not supported by substantial evidence in the record. It is **VACATED**. This matter is remanded for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE  
Administrative Appeals Judge

January 26, 2012

DATE