

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
DIRECTOR

**CRB No. 14-049**

**DEIDRE BERRY,  
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS,  
Employer-Petitioner.**

Appeal from a March 31, 2014 Compensation Order by  
Administrative Law Judge Fred D. Carney, Jr.  
AHD No. PBL13-012, DCP No. 3012048291-0001

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 DEC 12 AM 10 14

Lindsay Neinast for Petitioner  
Harold L. Levi for Respondent

Before MELISSA LIN JONES, JEFFREY P. RUSSELL, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

In 1988, Ms. Deidre Berry began working for the District of Columbia Department of Public Works ("Employer") as a parking enforcement officer; Ms. Berry issued tickets and license citations using a hand-held computer. On April 23, 2014, Ms. Berry filed a claim for workers' compensation disability benefits for right hand and wrist injuries.

Ms. Berry's treating physician diagnosed her with repetitive use syndrome, bilateral carpal tunnel syndrome, and a ganglion cyst as a result of her employment duties. In December 2012, Ms. Berry underwent right wrist surgery with carpal tunnel release and removal of a mass lesion from her right hand.

Based upon the opinions of Dr. Louis E. Levitt, the Public Sector Workers' Compensation Program denied Ms. Berry's claim, and the parties proceeded to a formal hearing to determine if Ms. Berry's right hand and wrist injuries are causally related to her employment. On March 31,

2014, an administrative law judge (“ALJ”) ruled Ms. Berry’s right hand carpal tunnel syndrome and large palm mass are the result of cumulative trauma and repetitive use at work.<sup>1</sup>

Employer filed an appeal. Employer contends the ALJ erred in ruling Ms. Berry met her burden to prove her injuries are caused by her employment. Employer argues the ALJ took Dr. Levitt’s April 30, 2012 report out of context and that the ALJ mischaracterized Dr. Nigel Azer’s opinion. Employer also asserts that the Compensation Order does not address the purported inconsistency between Ms. Deborah Daise’s testimony<sup>2</sup> and Ms. Berry’s testimony.<sup>3</sup> For these reasons, Employer requests the Compensation Review Board (“CRB”) reverse the March 31, 2014 Compensation Order.<sup>4</sup>

In opposition, Ms. Berry disagrees with Employer’s arguments on the grounds that the ALJ’s findings of fact are supported by substantial evidence in the record and the ALJ’s conclusions of law flow rationally from those findings of fact. As such, Ms. Berry asserts the CRB is without authority to reweigh the evidence and must affirm the March 31, 2014 Compensation Order.

#### ISSUE ON APPEAL

Is the March 31, 2014 Compensation Order supported by substantial evidence and in accordance with the law?

#### ANALYSIS<sup>5</sup>

---

<sup>1</sup> *Berry v. D.C. Department of Public Works*, AHD No. PBL13-012, DCP No. 3012048291-0001 (March 31, 2014).

<sup>2</sup> When Ms. Daise worked as a parking enforcement officer, she held the computer in her left hand.

<sup>3</sup> When Ms. Berry worked as a parking enforcement officer, she held the computer in her right hand.

<sup>4</sup> Employer has not appealed the ALJ’s ruling that the ALJ had jurisdiction to hold a formal hearing because the June 20, 2012 Notice of Determination (which did not recite appeal rights) was not sent to Ms. Berry’s correct address, and consequently, Ms. Berry’s untimely request for reconsideration did not bar the ALJ from considering the merits raised in the Final Decision on Reconsideration. In fact, Employer concedes that “[i]n the Compensation Order, the ALJ correctly concluded that the Program issued the Final Decision on Reconsideration denying the claim for procedural and substantive reasons, and thus that he could consider the merits of the denial.” Memorandum of Points and Authorities Supporting Petitioner’s Application for Review, p. 3.

Similarly, Employer has not appealed the ALJ’s reliance upon “specific record based attributes of a treating physician’s relationship to the case under consideration, such as the length of time and number of visits or examinations that the physician performed, the extent of treatment rendered, the timing of the commencement of the physician’s relationship with this case as compared with the timing of the relationship of a physician holding a conflicting opinion relationship to the case, or other record based factors that an ALJ may deem relevant to assessing whether a specific treating physician is in a better position to more accurately assess the true nature of the injury and its effect upon the patient” (*Berry, supra*, p 6.) when weighing the medical evidence in the record.

<sup>5</sup> 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. Comprehensive Merit Personnel Act of 1978, as amended. D.C. Code §1-623.01 *et seq.*, at §1-623.28(a). Consistent with this standard of review, the CRB

When assessing Ms. Berry's entitlement to workers' compensation disability benefits, the ALJ properly placed the burden on her to prove her case by a preponderance of the evidence. In reaching the conclusion that Ms. Berry's right hand injuries are work-related, the ALJ relied upon

- the opinion of Dr. Rida N. Azer that Ms. Berry's right hand condition (including her carpal tunnel syndrome) and treatment were necessitated by her repetitive movement of her hand at work,
- the medical opinion of Dr. Nigel Azer that Ms. Berry's right hand mass is work-related, and
- Ms. Berry's testimony.

Employer disagrees with the ALJ's characterization of Dr. Nigel Azer's opinion that "the mass on [Claimant's] right hand was caused by her employment,"<sup>6</sup> but the medical evidence supports the ALJ's assertion. On March 28, 2012, Dr. Nigel Azer asserted Ms. Berry's "carpal tunnel is clearly related to her accident[, but] the mass is [not],"<sup>7</sup> meaning the carpal tunnel syndrome is related to Ms. Berry's June 13, 2011 car accident and the mass is not related to that car accident; the mass is related to her employment. On March 15, 2013, Dr. Rida Azer asserted Ms. Berry's carpal tunnel syndrome "is caused by the repetitive movement of the right hand."<sup>8</sup> Ms. Berry's burden was to prove compensability by a preponderance of the evidence, not all of the evidence, and there is sufficient evidence in the record to support the ALJ's ruling that Ms. Berry's "carpal tunnel syndrome, right hand mass and medical treatment including surgery were caused by her employment."<sup>9</sup>

In addition, to assess the preponderance of the evidence, the ALJ considered the medical reports of Dr. Levitt. Employer complains the ALJ mischaracterized Dr. Levitt's April 30, 2012 report because it was taken out of context unless considered in conjunction with his June 18, 2012 addendum.

In his April 30, 2012 medical report, Dr. Levitt states

---

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 contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

<sup>6</sup> Memorandum of Points and Authorities Supporting Petitioner's Application for Review, p. 6.

<sup>7</sup> Claimant's Exhibit 5.

<sup>8</sup> *Id.*

<sup>9</sup> *Berry, supra*, at p. 6.

[s]he has a soft tissue mass that probably represents a ganglion cyst or a cyst coming off the tendon sheath. . . . I do think it appears to be clearly related to the use of the handheld device and pressure on the hand as an irritant.<sup>[10]</sup>

In the addendum that Employer highlights, Dr. Levitt's opinion is summed up in one sentence, "We had a lengthy discussion about this being work related or non-work related and she insists it is because she uses a handheld computer and I am not sure I subscribe to that theory."<sup>11</sup> Contrary to Employer's argument that the ALJ only considered Dr. Levitt's April 30, 2012 medical report, the ALJ gave appropriate consideration to Dr. Levitt's opinions as expressed in both of his two medical reports:

Claimant's testimony is further bolstered by the medical report of Dr. Louis E. Levitt, orthopedic surgeon. Dr. Levitt examined Claimant's right hand and wrist on April 30, 2012. He noted on examination that the 52 year old Claimant holds a hand held device in her right hand and over time she has developed a lot of swelling to the base of her index finger. He noted further that Claimant had a large mass lesion to her right hand. (CE 6) He opined the mass on Claimant's right hand was caused by her using the hand held devices in her work over the years.

"She has a soft tissue mass that probably represents a ganglion cyst or a cyst coming off the tendon sheath. Given the size of this mass, we first have to prove it is benign and an MRI scan is indicated. I think there will be a role for surgical excision of the mass due to its volume. We won't be able to reduce it with an injection or aspiration. We will order the MRI scan and I do think it appears to be clearly related to the use of the handheld device and pressure on the hand as an irritant. She will be seen again once the results of the MRI are available. She will continue working on a full time basis until I see her back."

Claimant's testimony was internally consistent, consistent with the reports of Dr. Azer and Dr. Levitt and therefore I accorded the testimony of Claimant much weight.

Employer posits that Claimant's right hand/wrist conditions are not work related. Employer relies on the April 13, 2012 report of Dr. Azer which diagnoses Claimant with arthritis, carpal tunnel syndrome and a mass on Claimant's right palm. Dr. Levitt opined Claimant carpal tunnel and right palm mass were work related and ordered an MRI. The results of the MRI indicate the mass or growth was present since March 2010. The MRI was performed on June

---

<sup>10</sup> Claimant's Exhibit 7, Employer's Exhibit 4.

<sup>11</sup> Employer's Exhibit 6.

5, 2012 and was interpreted as showing “a solid nodular mass lesion at the palmar aspect of the second MCP joint abutting the flexor tendon; prime diagnostic considerations include giant cell tumor or fibroma of the tendon sheath.” After review of the MRI and discussion with Claimant on June 18, 2012, Dr. Levitt reported that he was “not sure” that the lesion was caused by Claimant’s Employment. (EE 6)<sup>[12]</sup>

There is no error in the consideration the ALJ afforded Dr. Levitt’s opinions.

Finally, Employer argues Ms. Daise’s testimony contradicts Ms. Berry’s theory of recovery:

Claimant’s supervisor, Ms. Daise, testified that she worked as a parking enforcement officer prior to becoming a supervisor for years and that she is also right handed. Transcript, p. 81. Ms. Daise testified that she would hold the small handheld computer device in her left hand so that she could input details about the ticket with her right hand. Transcript, p. 86. The Compensation Order, however, does not address this inconsistency in the testimony and Claimant’s “theory” of how her employment allegedly caused her injury. *See generally*, Compensation Order.<sup>[13]</sup>

Ms. Daise’s testimony is not contradictory to Ms. Berry’s theory; Ms. Daise did not testify that Ms. Berry did not hold the computer in her right hand despite Ms. Berry’s testimony that she did so, and how Ms. Daise performed her job duties is irrelevant to how Ms. Berry performed her job duties.

#### CONCLUSION AND ORDER

The March 31, 2014 Compensation Order is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

  
\_\_\_\_\_  
MELISSA LIN JONES  
*Administrative Appeals Judge*

December 12, 2014

\_\_\_\_\_  
DATE

---

<sup>12</sup> *Berry, supra*, pp. 5-6.

<sup>13</sup> Memorandum of Points and Authorities Supporting Petitioner’s Application for Review, p. 6.