

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. 09-072

DELMIS T. TORRES

Claimant-Respondent,

v.

WESTIN HOTELS WASHINGTON, D.C. and GALLAGHER BASSETT SERVICES,

Employer/Third Party Administrator-Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 05-088B, OWC No. 590860

Benjamin T. Boscolo, Esquire, for the Claimant-Respondent

Kevin J. O'Connell, Esquire, for the Employer/Third Party Administrator-Petitioner

Before MELISSA LIN KLEMENS, LAWRENCE D. TARR, and HENRY W. MCCOY, *Administrative Appeals Judges*.

MELISSA LIN KLEMENS, *Administrative Appeals Judge*, for the Compensation Review Panel

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to D.C. Code §§32-1521.01 and 32-1522 (2004), 7 DCMR §250, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

OVERVIEW

Respondent worked for Petitioner as a housekeeper. At work, on September 8, 2003, she slipped and fell into a wall sustaining a right wrist fracture.

Thereafter, Respondent began experiencing symptoms in her right shoulder. Following a formal hearing on July 12, 2005, her right shoulder injury was deemed compensable. *Torres v. The Westin Grand Hotel*, AHD No. 05-088, OWC No. 590860 (August 17, 2006).

Respondent underwent right shoulder rotator cuff repair in 2007, but she continued to experience symptoms. While still undergoing treatment for her right shoulder, Respondent had cervical complaints.

Petitioner believed Respondent's cervical complaints were not related to her work-related accident. Following a second formal hearing, Respondent's neck injury was deemed compensable in a March 26, 2009 Compensation Order.

Petitioner raises several grounds on appeal:

1. The administrative law judge ("ALJ") erred as a matter of law because the causal relationship between Respondent's work-related accident and any cervical injury was barred by *res judicata* and collateral estoppel;
2. The ALJ erred in accepting Dr. Rafael Lopez Steuart's opinions regarding Respondent's work capacity because Dr. Lopez rendered a legal opinion rather than a medical opinion;
3. The ALJ was restricted by the 2006 Compensation Order when making a determination regarding Dr. Lopez's credibility; and
4. The ALJ failed to address the issue of a credit for overpayment of indemnity benefits.

On the other hand, Respondent asserts the March 26, 2009 Compensation Order on appeal should be affirmed because Respondent is temporarily totally disabled and her claim for relief is not barred by preclusion doctrines. In addition, Respondent asserts the March 26, 2009 Compensation Order is supported by substantial evidence in the record.

STANDARD OF REVIEW

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.¹ §32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* ("Act"). 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 contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

CREDIT FOR OVERPAYMENT

Even though at the time of the formal hearing, the following dialog took place:

JUDGE ANAND [*sic*]: Counsel, prior to opening the record, I understand that the issues that need to be resolved at this hearing are medical causal relationship;

¹ "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott, supra*.

nature and extent of Claimant's disability, if any; and the voluntary limitation of income, as well as the authorization for any additional medical treatment arising out of Claimant's September 8, 2003 injury.

* * *

Are they the proper recitation of the issues? Both counsels.

MS. BHAGAN: Yes, Your Honor.

MR. O'CONNELL: Yes, Your Honor.

(HT pp.7-8),

Petitioner includes a request for a credit for an alleged overpayment in the Joint Pre-Hearing Statement. In addition, evidence in the form of fifty-four pages of "medical and indemnity payment history" was submitted (EE12), and Petitioner's proposed findings of fact and conclusions of law also includes its request for a credit.

The Joint Pre-Hearing Statement serves the purpose of advising the parties of the contested issues to be addressed at the formal hearing; together with the Stipulation Form, the Joint Pre-Hearing Statement puts the parties on notice of the need to prepare and present evidence and argument regarding those issues to be addressed by way of a Compensation Order (*See*, 7 DCMR §222; *Turner v. Restaurant Associates*, CRB No. 09-009, AHD No. 08-244, OWC No. 623657 (March 6, 2008)), and ordinarily, it is not sufficient to raise an issue in a written closing argument or a proposed findings of fact and conclusions of law. In this case, however, the issue of an overpayment of indemnity benefits is raised in the Joint Pre-Hearing Statement, the evidence, and the proposed findings of fact and conclusions of law; therefore, counsel's failure to identify the overpayment request during the opening moments of the formal hearing is not fatal. Moreover, it is inextricably intertwined with the issue of the nature and extent of Respondent's disability because Petitioner's request rests on Respondent's work capacity, Petitioner's offer of light duty, and Respondent's resignation. As such, the failure to address this issue in the Compensation Order requires this matter be remanded in light of our holding regarding the law of the case which follows.²

² In a contested case, in order to conform to the requirements of the D.C. Administrative Procedures Act, D.C. Code §2-501 *et seq.* (2006), (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. DOES*, 482 A.2d 401, 402 (D.C. 1984). Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate court is not permitted to make its own findings on the issues; it must remand the case for the proper factual findings. *King v. DOES*, 742 A.2d. 460, 465 (D.C. 1999) (Basic findings of fact on all material issues are required; only then can the appellate 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.")

The CRB is no less constrained in its review of Compensation Orders. *See, Washington Metropolitan Area Transit Authority v. DOES*, 926 A.2d 140 (D.C. 2007). 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; the case must be remanded to permit the ALJ to make the necessary findings. *King, supra*.

LAW OF THE CASE

The law of the case doctrine recognizes that “once the court has decided a point in a case, that point becomes and remains settled unless it is reversed or modified by a higher court.” *Kritsidimas v. Sheskin*, 411 A.2d 370, 371 (D.C. 1980). Petitioner argues that the 2009 Compensation Order does not follow the law of the case in that it ignores previous findings regarding the nature and extent of Respondent’s disability and regarding Dr. Lopez’s credibility.

As for the nature and extent of Respondent’s disability, Respondent’s current request for benefits is for temporary total disability benefits from August 28, 2007 to the date of the formal hearing and continuing. The 2006 Compensation Order did not address this period of alleged disability and could not set the law of the case in this regard.

As for Dr. Lopez’s credibility, in the 2006 Compensation Order, Dr. Lopez’s opinion regarding Respondent’s work capacity was rejected:

Dr. [Lopez-]Steuart fails to place Claimant under any physical limitations or restrictions; . . . rather, he simply certifies her as “not fit for duty.” (CE 1) This time, Dr. Steuart’s opinion lacks specificity [because he was not aware of the physical requirements of Respondent’s job among other things,] Dr. Steuart’s blanket assertion that Claimant is “not fit for duty” posits a legal conclusion rather than a medical opinion. *Torres, supra*, at *16.

An ALJ is not required to accept or reject the entire range of opinions offered by one physician in order to remain sufficiently consistent to withstand review under a substantial evidence test. *Mwabira-Simera v. Sodexo Marriott Management*, CRB No. 08-186, AHD No. 08-126, OWC No. 629496 (January 28, 2009). The ALJ presiding over the July 2005 formal hearing made his credibility determinations in the context of the issues and the claim for relief under consideration at that time. The ALJ presiding over the December 2008 formal hearing made his credibility determinations in the context of the issues and the claim for relief under consideration at that time. There is nothing inconsistent in the 2008 Compensation Order nor is it impermissible for the ALJ to make his own findings regarding credibility.

A review of the record below reveals Dr. Lopez continued to assert essentially the same opinion regarding Respondent’s work capacity; however, as of his deposition on May 23, 2005, he was aware of the physical demands of Respondent’s pre-injury position as set forth in the work hardening reports. *Torres, supra*. As such, there is substantial evidence to support a finding that Dr. Lopez rendered a medical opinion, and the ALJ’s preference for Dr. Lopez’s opinion regarding Respondent’s work capacity is affirmed.

PRECLUSION

Petitioner argues that because Respondent did not raise the issue of a cervical spine injury at the July 12, 2005 formal hearing, she was precluded from asserting a claim for that injury at the December 2, 2008 formal hearing. Petitioner argues Respondent was precluded from raising the

issue of the causal relationship between the work-related accident and a cervical spine injury because of the doctrines of *res judicata* and collateral estoppel.

Res judicata operates to preclude relitigation of the same claim by the same parties when a final judgment on the merits has been reached previously; similarly, collateral estoppel operates to preclude relitigation of the same set of facts or law which were inherent in reaching a prior final judgment. *Short v. DOES*, 723 A.2d 845 (D.C. 1998). Although judicial in origin, these principles are applicable to administrative hearings. *Washington Metropolitan Area Transit Authority v. DOES*, 770 A.2d 965 (D.C. 2001). The humanitarian purpose of the Act, however, creates exceptions to these principles and provides an opportunity for injured workers to revisit workers' compensation awards. D.C. Code §32-1524; *Washington Metropolitan Area Transit Authority v. DOES*, 981 A.2d 1216 (D.C. 2009) ("*Millhouse*").

Neither *res judicata* nor collateral estoppel applies to a request for modification. *Id.* Equally, neither *res judicata* nor collateral estoppel applies to a request for additional benefits when a claimant's original injury worsens thereby manifesting new symptoms which cause her to be unable to work. *Id.* Thus far, the D.C. Court of Appeals, however, has declined to address whether *res judicata* or collateral estoppel would bar an injured worker from filing a new claim but has noted "[s]uch an argument would be successful only if claimant was aware or on notice of her subsequent injury at the time she filed her original claim for compensation benefits." *Id.* at 1223.

Other than the nature and extent of Respondent's disability, the issue at the July 12, 2005 formal hearing specifically was limited to "whether Claimant's right shoulder injury arises out of and in the course of employment." *Torres, supra*. The issue of a causal relationship between the work-related accident and a neck injury was not litigated at that time, but the question remains, should Respondent's neck injury have been litigated at that formal hearing?

Although Respondent reported neck pain as long ago as September 2004 and after a July 2007 motor vehicle accident, the Compensation Order is silent as to when Respondent "was aware" or "was on notice" of her neck injury. The Compensation Order also is silent as to whether or not Respondent's neck complaints constitute a worsening of her original injury "manifesting in new symptoms" or a "subsequent injury." This matter, therefore, must be remanded for these determinations.³

CONCLUSION

We remand this case to the Office of Hearings and Adjudication, Administrative Hearings Division ("AHD") to address the issue of an overpayment of indemnity benefits in light of our ruling that Respondent's request for temporary total disability benefits was not determined in the 2006 Compensation Order and our ruling that Dr. Lopez rendered a medical opinion entitled to the treating physician preference. We also remand this case for consideration of the preclusion doctrines.

³ See, footnote 2, *supra*.

ORDER

The March 26, 2009 Compensation Order is AFFIRMED IN PART and VACATED IN PART, and this matter is REMANDED to AHD for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN KLEMENS
Administrative Appeals Judge

May 3, 2010

DATE