

**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. 08-068**

**DESTA HAREGEWOIN,**

**Claimant-Respondent**

**v.**

**LOEWS WASHINGTON HOTEL AND LIBERTY MUTUAL INSURANCE COMPANY,**

**Employer/Carrier-Petitioner.**

Appeal from a Compensation Order of  
Administrative Law Judge Amelia G. Govan  
AHD No. 07-041A, OWC No. 603483

Christopher R. Costabile, Esquire, for the Petitioner

Stephen A. Bou, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, SHARMAN J. MONROE, *Administrative Appeals Judges*, and E. COOPER BROWN, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

**DECISION AND REMAND 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for

## BACKGROUND

This appeal follows the issuance of a Compensation Order 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 December 7, 2007, the Administrative Law Judge (ALJ) granted Respondent's claim for medical care as recommended by Dr. Steven Macedo, Respondent's treating physician. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the analysis employed by the ALJ was erroneous as a matter of law, because the ALJ improperly applied the treating physician preference in considering the competing opinions of Dr. Macedo on the one hand, and Dr. Vaughn Cohen, a physician who conducted a reasonableness and necessity review of the request for medical care under the provisions of D.C. Code § 32-1507(b)(6), the Utilization Review procedures (UR) contained in the Act and held by the CRB to be mandatory in *Gonzalez v. UNICCO Service Company*, CRB No. 07-005, AHD No. 06-155 (February 21, 2007).

Respondent opposes the appeal, asserting that the ALJ was correct in applying the treating physician preference in weighing competing medical evidence, regardless of the fact that the competing evidence was the result of a UR conducted under the Act.

Because the statute created a mandatory procedure for UR for application in cases where the dispute is whether recommended medical care is reasonable and necessary, and because the District of Columbia Court of Appeals (DCCA) has held that medical opinion which results from such a UR is entitled to the same level of deference as treating physician opinion, the ALJ's granting the opinion of Dr. Macedo an initial preference was erroneous, and we remand the matter for further proceedings. The ALJ shall first make a determination as to whether the mandatory UR provisions of the Act have been exhausted, and if it is found that they have not been exhausted, the formal hearing was premature and the application therefor should be dismissed pending exhaustion of said procedures. If the UR procedures have been exhausted, the ALJ shall reconsider the case without reference to the treating physician's preference.

## 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "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 International v. District of Columbia*

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administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

*Dep't. of Employment Serv's.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard 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.

Turning to the case under review herein, as grounds for this appeal, Petitioner alleges as error that the analysis employed by the ALJ was erroneous as a matter of law, because the ALJ improperly applied the treating physician preference in considering the competing opinions of Dr. Macedo on the one hand, and Dr. Vaughn Cohen, a physician who conducted a reasonableness and necessity review of the request for medical care under the provisions of D.C. Code § 32-1507(b)(6), the Utilization Review procedures contained in the Act and held by the CRB to be mandatory in *Gonzalez v. UNICCO Service Company*, CRB No. 07-005, AHD No. 06-155 (February 21, 2007).

Respondent opposes the appeal, asserting that the ALJ was correct in applying the treating physician preference in weighing competing medical evidence, regardless of the fact that the competing evidence was the result of a UR conducted under the Act.

While the issue presented in this matter has never been squarely addressed, the District of Columbia Court of Appeals (DCCA) has discussed its view of the weight to be attached to medical opinion as contained in UR reports obtained under the Act. In *Sibley Memorial Hospital v. District of Columbia Department of Employment Services and Ann Garrett, Intervenor*, 711 A.2d 105 (D.C. 1998), the Court reversed an agency decision in which the opinion of a treating physician recommending a surgical procedure was accepted despite the contrary opinion in a statutorily obtained UR. Although the Court nowhere suggested that a UR opinion should be given preference to treating physician opinion, the Court did hold as follows:

The hearing examiner [now, ALJ] failed to explain clearly why the utilization review report rendered pursuant to the statute was not decisive in making her determination. [The UR provider] in its report thoroughly reviewed Claimant's six-year medical history. It focused on the inconsistent clinical findings of six different doctors who had examined Claimant in the ten months prior to her third surgery and on the results of the neurodiagnostic tests performed most recently before the surgery. [The UR report] then concluded that the submitted records in its opinion did not support the necessity or timeliness of the third surgical procedure. Even after it had reconsidered its decision at the request of Drs. Goald and Azer [the treating physicians], [the UR provider] concluded the surgery was unnecessary.

*Sibley, supra*, at 107. The Court remanded the matter for further consideration, with the instructions that the fact finder reconsider the matter "within the context of all the other evidence, and explain why the conclusion of the supplemental utilization review report is not dispositive and must be rejected". *Id.*, at 109.

This language mirrors closely the obligations imposed upon an ALJ who rejects a treating physician's opinion to explain the reasons for that rejection. See, e.g., *Short v. District of Columbia Department of Employment Services*, 723 A.2d 849 (D.C. 1998). It appears to us that this

framework set forth by the court in *Sibley* is substantially identical to that espoused by the court in the treating physician cases, and we view it as the appropriate manner to treat UR opinion under the Act. While it can be argued that the Act could be viewed so as to grant an even higher preference to UR opinion over treating physician opinion, we note that the processes envisioned by the statutory UR provisions call for consideration of treating physician opinion and UR opinion, without specifying any preference for one or the other by virtue of its being treating physician opinion on the one hand, and UR opinion on the other. Accordingly, we view the statute as placing an obligation upon the ALJ to weigh the competing opinions based upon the record as a whole, and to explain why the ALJ chose one opinion and not the other, but does not require that either opinion be given an initial preference.

We also note that, as Petitioner points out, the record before us does not contain any indication as to whether the UR report's conclusions or recommendations were subjected to a request for reconsideration, as contemplated by D.C. Code §32-1507(b)(6)(c) and 7 DCMR 232.6. Given the mandatory nature of the UR procedures, if those procedures have not been exhausted, a formal hearing on the reasonableness and necessity of the requested medical care is premature. Thus, on remand, the ALJ must make a finding as to whether those procedures were in fact exhausted. Only upon a determination that the UR procedures have been exhausted can the issue of reasonableness and necessity be considered in a formal hearing. *Gonzalez, supra*.

#### CONCLUSION

The Compensation Order of December 7, 2007 is not in accordance with the law, in that there has been no determination that the UR procedures contained in the Act have been exhausted, and the ALJ improperly accorded the opinion of treating physicians a preference in weighing those opinions against the results and opinions obtained under the UR procedures.

**ORDER**

The Compensation Order of December 7, 2007 is vacated. The matter is remanded to AHD for further proceedings consistent with the foregoing, including a determination as to whether the UR procedures have been exhausted. If not, the ALJ shall dismiss the Application for Formal Hearing pending completion or exhaustion of the UR procedures as required under the Act. If the UR procedures are found to have been exhausted, the ALJ shall reconsider the issue of the reasonableness and necessity of the requested medical care and render a decision without reference to a preference for the opinion of the treating physician or physicians as such, but considering the UR report, the medical opinions of the treating physicians, and the record evidence as a whole, in reaching a conclusion as to the reasonableness and necessity of medical care.

FOR THE COMPENSATION REVIEW BOARD:



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JEFFREY P. RUSSELL  
Administrative Appeals Judge

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February 19, 2008

DATE