

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-048

**ISAAC EBENEZER,
Claimant- Petitioner,**

v.

U.S. SECURITY ASSOCIATES,

AND

ZURICH AMERICAN INSURANCE CO.

Employer/Carrier - Respondents.

Appeal from a Compensation Order of
Administrative Law Gerald Roberson
OHA No. 10-485, OWC No. 666531

(Decided September 8, 2011)

Benjamin T. Boscolo, Esquire, for the Claimant
Charles J. O'Hara, Esquire, for the Employer

Before HEATHER C. LESLIE¹, MELISSA LIN JONES, and LAWRENCE TARR, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Review Panel:

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the April 14, 2011, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for temporary total disability benefits from November 2, 2009 through the present and continuing, authorization for medical care, causally related medical bills and interest.

¹ 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).

The ALJ denied the requested benefits, finding the Claimant's back condition was not medically causally related to the November 2, 2009 injury.² We AFFIRM.

BACKGROUND AND FACTS OF RECORD

The Claimant worked as a Security Officer for the Employer. Before November 2, 2009, the Claimant sought treatment for back pain related to pre-existing tuberculosis. On November 2, 2009, the Claimant slipped and fell while at work. The Claimant sought medical treatment for a cut on his head. Subsequently, the Claimant followed up with Dr. David Perim on November 14, 2009 for treatment to his back. The Claimant underwent surgery to his back to address possible tumor and fracture at T6 and T7. The Claimant was disabled from his regular job as a result of his back condition and surgery. The Employer denied that the back condition was causally related to the November 2, 2009 slip and fall.

A full evidentiary hearing was held on April 4, 2011. The medical reports of Dr. Perim as well as his deposition were presented by both parties in their cases in chief. In a Compensation Order dated April 14, 2011, the ALJ denied the requested benefits, finding that the Claimant's back condition was not medically causally related to the work injury.

The Claimant timely appealed. The Claimant puts forth two arguments. First, the Claimant argues the ALJ erred in finding the Employer had presented evidence specific and comprehensive enough to rebut the presumption of compensability. Specifically, the Claimant argues the Employer did not produce any medical evidence to establish that the fall did not aggravate the pre-existing condition or that the pre-existing condition would have required surgery absent the accidental injury. Claimant's Argument at 8. Second, the Claimant argues that the Compensation Order failed to address whether the accidental injury aggravated the Claimant's back condition, thus requiring reversal.

The Employer did not participate in the appeal.

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).

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

² The ALJ referred to an injury date of November 2, 2002 when listing the issues to be decided. This is clearly a typographical error as the parties stipulated to a November 2, 2009 injury and will be treated as such.

Pursuant to §32-1521(1) of the Act, a claimant is entitled to a presumption of compensability.³ In order to benefit from the presumption, the claimant initially must show some 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. *Ferreira v. D.C. Department of Employment Services*, 531 A.2d 651, 655 (D.C. 1987). The presumption then operates to establish a causal connection between the disability and the accidental work-related event, such that the disability is compensable. *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1217 (D.C. 1997), citing *Ferreira*; *Washington Hospital Center v. D.C. Department of Employment Services*, 744 A.2d 992, 996-97 (D.C. 2000). However, the Act's presumption of compensability operates only "in the absence of evidence to the contrary." In *Ferreira*, the Court of Appeals held, that "[o]nce the presumption is triggered, the burden is upon the employer to bring forth 'substantial evidence' showing that a disability did not arise out of and in the course of employment." *Ferreira, supra* at 655; *Parodi v D.C. Department of Employment Services*, 560 A.2d 524 at 526 (D.C. 1989); *Waugh v. D.C. Department of Employment Services*, 786 A.2d 595, 600 (D.C. 2001).

After having found the Claimant had invoked the presumption of compensability, the ALJ turned his analysis to whether the Employer had presented substantial evidence to rebut this presumption. The ALJ relied upon the medical records presented by the Employer which included records from Holy Cross Hospital, a form letter filled out by Dr. Perim, and Dr. Perim's deposition. Specifically,

Employer relied on the medical evidence from Dr. Perim to question the medical causality of Claimant's thoracic compression fracture to the work incident of November 2, 2009. During his deposition, Dr. Perim acknowledged his report noted Claimant did not have a significant fall, and Claimant had increasing pain for the past month which preexisted the fall at work. CE 6, Deposition at 11-12. According to Dr. Perim, the infiltrative process was already occurring prior to the fall. CE 6, Deposition at 12. Dr. Perim testified he performed the surgery thinking Claimant had a tumor or infection, and the infection and tumor would not have been caused by the fall. CE 6, Deposition at 15-16.

With respect to Dr. Perim's statement of March 24, 2010, Dr. Perim reiterated during his deposition Claimant's condition was not really caused by the work incident, and he testified he offered the explanation Claimant had tuberculosis in the T6 and T7 vertebral bodies. CE 6, Deposition at 17. Dr. Perim further testified the tuberculosis was not caused by the fall. CE 6, Deposition at 18. With medical evidence and testimony from Dr. Perim, Employer has rebutted the presumption of compensability.

Ebenezer v. U.S. Security, AHD No. 10-485, OWC No. 666531 (April 14, 2011) at 5.

The Claimant incorrectly argues that the Employer "failed to produce a shred of evidence to establish either that the fall did not aggravate the pre-existing condition or that the pre-existing

³ Section 32-1521(1) of the Act states, "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter."

condition would have required surgery absent the accidental injury.” As the ALJ noted, the Employer presented Dr. Perim’s statement of March 24, 2010, elicited at the request of Counsel for the Claimant, where he answered in the negative when asked whether or not the “condition you have diagnosed caused, contributed to or aggravated, even in part, by the above referenced incident.” *Ebenezer, supra* at 6.

We find the ALJ properly relied upon the Employer’s exhibits, the medical records and the deposition transcript of Dr. Perim when finding the Employer rebutted the presumption of compensability. What the Claimant is requesting is that we re-weigh the evidence in the Claimant’s favor. This we simply cannot do.

Next, the Claimant argues the Compensation Order fails to address the Claimant’s theory that the work accident aggravated his pre-existing condition.⁴ Notably, the Claimant argues “the Administrative Law Judge failed to address the Claimant’s contention that but for the accidental injury the thoracic surgeries performed to treat and remove the tuberculosis riddled vertebrae would not have been required.” Claimant’s Argument at 9. As discussed briefly above, the ALJ did rely, in part, on the March 24, 2010 letter which answered in the negative whether the Claimant’s condition had been aggravated by the work incident. Furthermore, a review of the Compensation Order reveals that when analyzing whether or not the Claimant had presented evidence to invoke the presumption, the ALJ did in fact rely upon Dr. Perim’s testimony that the fall injured an already weakened area. *Ebenezer, supra* at 5. Quoting the well settled aggravation theory, the ALJ found the Claimant had invoked the presumption of compensability. The ALJ then went on, after review of all of Dr. Perim’s opinions, to reject the Claimant’s case theory. The ALJ found,

Even a favorable reading of Dr. Perim’s deposition testimony, would lead the trier of fact to conclude his opinion is merely equivocal without supporting medical rationale to support Claimant’s contention that the fall at work caused the compression fracture or aggravated an underlying condition leading to a compression fracture. Dr. Perim’s statement of March 24, 2010 clearly resolves the matter, and therefore Claimant has not met his burden under the Act to establish his compression fracture resulted directly or indirectly from the workplace incident of November 2, 2009. As such, the evidence does not medically causally relate Claimant’s compression fracture of the thoracic spine to the incident at work on November 2, 2009.

Ebenezer, supra at 6.

⁴ It is well settled in this jurisdiction that an aggravation of a pre-existing condition by work related conditions constitutes a compensable injury under the Act. Like the presumption rule, the aggravation rule is intended as an aid to a claimant who might otherwise not be entitled to benefits. See generally, *King v. District of Columbia Department of Employment Services*, 742 A.2d 460 (D.C. App. 1999), and *Harris v. District of Columbia Department of Employment Services*, 660 A.2d 404 (D.C. App. 1995). In *King*, the aggravation rule was used to award benefits where the claimant had a pre-existing, non-occupational condition which was aggravated by his job; in *Harris* it was held that aggravation of a pre-existing work related injury for which claimant was still entitled to receive ongoing wage and medical benefits (under the predecessor compensation statute, the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (LHWCA) constitutes a new injury, thereby permitting the claimant in that case to obtain benefits at a higher compensation rate.

The crux of the Claimant's argument is that there is substantial evidence in the record to support a finding that the back condition is medically causally related to the November 2, 2009 injury. As stated above, 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 International, supra*. Here the ALJ's decision is supported by the substantial evidence in the record.

CONCLUSION AND ORDER

The April 14, 2011 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. The Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

September 8, 2011

DATE