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. 07-13

ETHEL MURPHY,

Claimant – Respondent

v.

BROOKS BROTHERS CLOTHING AND LIBERTY MUTUAL INSURANCE,

Employer/Carrier – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Terri Thompson Mallett
AHD No. 06-255, OWC No. 616890

Christopher Costabile, Esq., for the Petitioner

David Schloss, Esq., for the Respondent

Before E. COOPER BROWN, Chief Administrative Appeals Judge, LINDA F. JORY and SHARMAN J. MONROE, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the 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).[1]

[1] 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

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 October 13, 2006, the Administrative Law Judge (ALJ) granted the requested relief for various periods of temporary total disability benefits, interest thereon and causally related medical expenses. The Employer/Carrier-Petitioner (Petitioner) now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the Compensation Order is not in accordance with the law and should be reversed.

ANALYSIS

As an initial matter, the standard 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. D.C. Official Code § 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 Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 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, the Petitioner alleges that the ALJ's determination that it had failed to rebut the presumption was erroneous as a matter of law. The Petitioner argues that, to rebut the presumption, it must simply provide evidence "specific and comprehensive enough" such that "a reasonable mind might accept [it] as adequate" to contradict the presumed causal connection between the work event and the injured employee's disability.[2] Citing *Washington Hospital Center v. D.C. Department of Employment Services*, 744 A.2d 992

Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

[2] The Petitioner cites *Ferreira v. D.C. Department of Employment Services*, 531A.2d 651 (D.C. 1987) and *Safeway Stores, Inc., v. D.C. Department of Employment Services*, 806 A.2d 1214 (D.C. 2002) to support her position.

(D.C. 2000), the Petitioner further argues that its evidence need not be so strong as to prove that causation is impossible in order to rebut the presumption. Wherefore, the Petitioner maintains that Dr. Robert Draper's opinion that the Respondent's temporary disability was not related to her work accident, but caused by other factors is sufficient to rebut the presumption, thereby reverting the burden to the Respondent to prove by a preponderance of the evidence, without aid of the presumption, a causal relationship between her current disability and the work injury. After reviewing the record, the Panel agrees with the Petitioner.

The ALJ premised the decision to grant benefits on the grounds that the Petitioner "failed to disprove Claimant's assertion that Claimant's on-the-job injury caused the condition that resulted in her loss wages." Compensation Order at p. 5. However, to rebut the presumption of compensability, "an employer [need] only to offer 'substantial evidence' to rebut the statutory presumption of compensability, not to disprove causality with absolute certainty." *Washington Hospital Center*, 744 A.2d at 1000. Substantial evidence is relevant evidence that a reasonable person would consider adequate to support a conclusion. *Dell v. D.C. Department of Employment Services*, 499 A.2d 102, 108 (D.C. 1985). As the CRB noted in *Perez v. Morgans, Inc*., CRB (Dir.Dkt.) No. 02-107, OHA No. 02-119, OWC No. 5712 (June 21, 2006), beyond stating that "substantial evidence" means "more than a mere scintilla," *Children's Defense Fund v. D.C. Department of Employment Services*, 726 A.2d 1242, 1247 (D.C. 1999), the Court of Appeals has declined to establish a precise quantum of proof needed to meet the substantial evidence threshold. At the same time, the Court has indicated that the statutory presumption "is not so strong as to require the employer to prove causation is *impossible* in order to rebut it." *Id.* Thus, "it is sufficient for the employer to present substantial medical evidence - as opposed to unequivocal medical evidence - to rebut the statutory presumption." *Id.* at 1221.

Herein, the Petitioner submitted the July 24, 2006 report of Dr. Robert Draper. In his report, Dr. Draper opined, as noted by the ALJ, that the Respondent's preexisting osteoarthritis and degenerative cervical disc disease "can cause" shoulder pain. Employer Exhibit No. 4. However, Dr. Draper also opined "[t]he temporary total disability dates of September 8, 2005 to September 12, 2005, November 28, 2005 to December 13, 2005 and January 13, 2006 to March 8, 2006 are not reasonably related to the injury dated September 18, 2002." There is nothing equivocal in his opinion that no causal relationship exists between the Respondent's claimed disability and her work injury. Effectively, the evidence offered by Petitioner provided both a medical opinion that the period of claimed temporary disability was not related to Respondent's work-related accident and provided a plausible alternative explanation with respect to the issue of causation. *See Washington Post v. D.C. Department of Employment Services*, 852 A.2d 909 (D.C. 2004)(*Reynolds*).

Having presented relevant evidence that a reasonable person would consider adequate to support its position of no causal relationship, the Petitioner carried its burden. Thus, the statutory presumption drops out of this case entirely and the burden reverts to the Respondent to prove by a preponderance of the evidence, without the aid of the presumption, that a work-related injury caused or contributed to her disability. *See Reynolds*, 852 A.2d at 911. This matter must be remanded for the ALJ to weigh the evidence on causation.

CONCLUSION

The Compensation Order of October 13, 2006 is not supported by substantial evidence in the record and is not in accordance with the law.

ORDER

The Compensation Order of October 13, 2006 is REMANDED.

On remand, the ALJ shall render further findings of fact and conclusions of law on the issue of whether the Respondent's current impairment is medically related to her September 18, 2002 injury consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

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SHARMAN J. MONROE
Administrative Appeals Judge

_____February 6, 2007_____
DATE