GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-083

MAURICE GALLOWAY,
Claimant-Respondent,

v.

WASTE MANAGEMENT,
and GALLAGHER BASSETT SERVICES
Employer/Insurer-Petitioners.

Appeal from a June 5, 2013 Compensation Order By
Administrative Law Judge Amelia G. Govan
AHD No. 10-133A, OWC No. 665373

Richard W. Galiher, Esquire, for the Claimant
Zachary L. Erwin, Esquire for the Employer

Before HEATHER C LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the June 15, 2013, 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 granted the Claimant's request for a modification of a December 13, 2010 Compensation Order, and awarded temporary total disability benefits from March 4, 2010 to the present and continuing with a credit for unemployment benefits and wages received during this time period, and causally related medical expenses. We AFFIRM.

BACKGROUND AND FACTS OF RECORD

The Claimant was employed by the Employer as a helper/driver. On November 12, 2009 the Claimant's garbage truck struck a guard rail causing it to flip over.[1] The Claimant sought

[1] *Galloway v. Waste Management*, AHD No. 10-133, OWC No. 665373 (December 13, 2010).

treatment for his neck and both shoulders the next day at the emergency room at Southern Maryland Hospital.

The Claimant subsequently came under the care of the physicians at Phillips and Green. The Claimant also underwent a Functional Capacity Evaluation (FCE) which found the Claimant was unable to return to his duties as a helper/driver.

A Formal Hearing was convened on March 23, 2010 to adjudicate the Claimant's entitlement to disability benefits. A Compensation Order was issued on December 13, 2010. In that Compensation Order, the ALJ found that the Claimant had proved entitlement to temporary total disability benefits from November 12, 2009 to December 28, 2009. However, the rest of the Claimant's claim for relief was denied as the last reports of Dr. Phillips and Dr. Neil Green released the Claimant back to work. The ALJ also noted the medical reports reveal the Claimant had no complaints of pain to the upper back and neck. The ALJ discounted the deposition of Dr. Green, testimony taken after the FCE but without a physical examination.

Subsequently, the Claimant requested for a modification of the December 13, 2010 Compensation Order, alleging, pursuant to D.C. Code § 32-1524(a), a change of condition had occurred. A *Snipes*[2] hearing was held on April 19, 2012 at which time the ALJ determined that the Claimant had showed that there was a reason to believe a change of conditions had occurred since the last hearing based upon the evidence presented and the testimony of the Claimant at that hearing.

A full evidentiary hearing was held on August 9, 2012. The Claimant sought to modify the December 13, 2010 Compensation Order. The Claimant sought an award of temporary total disability benefits from March 4, 2010 to the present and continuing, subject to a credit for wages paid from the Claimant's current job, causally related medical expenses, wage loss benefits subject to a credit for wages paid, penalties for failure to timely controvert the claim, and interest on past due compensation. The Employer raised the defense of whether there was a medical causal relationship between the Claimant's current cervical condition and the work injury and the nature and extent of the Claimant's disability. A Compensation Order was issued on June 5, 2013 which granted the Claimant's request for disability benefits, with a credit to the Employer for unemployment benefits received and wages earned, due to the cervical disc condition and corresponding radiculopathy. The Compensation Order denied the Claimant's request for penalties to be assessed against the Employer.

The Employer timely appealed. The Employer argues the ALJ erred in finding the Claimant had met his burden of proof in showing a change of condition had occurred pursuant to D.C. Code § 32-1524(a) with regard to the back and neck injury.[3] In the event the modification was found to be in error by this panel, the Employer also asks for a credit in the amount of temporary total disability paid pursuant to the award.

The Claimant opposes the application for review, arguing the CO is supported by the substantial evidence in the record and should be affirmed.

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[2] *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988).

[3] The Employer did not appeal the ALJ's finding that the Claimant's current cervical condition is medically causally related to the work injury or the finding regarding the nature and extent of Claimant's disability. Thus, neither issue will be addressed by this panel.

THE STANDARD OF REVIEW

The scope of review by the Compensation Review Board ("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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code § 32-1501 to 32-1545, ("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).

DISCUSSION AND ANALYSIS

In the instant appeal, the Employer argues that the MRI and EMG studies the ALJ relied upon cannot be the basis for determining a change as they never existed at the prior formal hearing. "Therefore, a comparison cannot be drawn between the tests performed in 2011 and those prior tests which never existed." Employer's argument at 11. The Employer also argues the Claimant testified to the same symptoms in the first hearing as he did in the second hearing, thus no change had occurred and the ALJ erred is finding these symptoms sufficient to carry the Claimant's burden. Finally, the Employer argues there is no evidence of a change in the degree of disability as the Claimant's restrictions have not changed since the first hearing.

We begin by noting that D.C. Code § 32-1524, provides,

> (a) At any time prior to 1 year after the date of the last payment of compensation or at any time prior to 1 year after the rejection of a claim, provided, however, that in the case of a claim filed pursuant to § 32-1508(a)(3)(V) the time period shall be at any time prior to 3 years after the date of the last payment of compensation or at any time prior to 3 years after the rejection of a claim, the Mayor may, upon his own initiative or upon application of a party in interest, order a review of a compensation case pursuant to the procedures provided in § 32-1520 where there is reason to believe that a change of conditions has occurred which raises issues concerning:
>
> (1) The fact or the degree of disability or the amount of compensation payable pursuant thereto; or
>
> (2) The fact of eligibility or the amount of compensation payable pursuant to § 32-1509.
>
> (b) A review ordered pursuant to subsection (a) of this section shall be limited solely to new evidence which directly addresses the alleged change of conditions.

As the District of Columbia Court of Appeals succinctly stated in *Short v. DOES*,

> The Act creates a specific procedure to revisit issues previously decided by a compensation order. Up to one year after the last disability payment, the compensation order may be reviewed and modified "where there is reason to

> believe that a change of conditions has occurred." D.C. Code § 36-324 (a) (1997). This includes a change as to "fact or the degree of disability." *Id*. § 36-324 (a)(1). Thus, when a claimant injures himself, returns to work, but the original injury worsens (*e.g.,* new symptoms manifest themselves), causing him to be unable to work again, the claimant may avail himself of a review procedure to modify the compensation order and seek additional benefits.[4]

Part of our review of the Compensation Order appealed necessitates also a review of the outcome of the *Snipes* hearing before the ALJ. In both the Compensation Order and the *Snipes* Order, the ALJ relied heavily on the MRI and EMG reports. The MRI, in particular, revealed the Claimant suffered from a cervical disc herniation. As the ALJ states Compensation Order,

> [T]he MRI and EMG reported that the Claimant has a disc herniation and radiculopathy, whereas prior to both of these medical procedures, the medical reports opined that the Claimant had a cervical strain as a result of the work-related injury. There would appear to be a clear distinction between a cervical strain and a cervical disc herniation with radiculopathy.

Compensation Order at 8.

As the ALJ stated, the prior Compensation Order only reviewed medical reports that opined the Claimant suffered from a cervical strain. The new evidence presented at the formal hearing reveals the Claimant suffers from a cervical disc herniation as a result of the work injury. The ALJ's conclusion that the evidence supports a change of condition is supported by the substantial evidence in the record.

We reject the Employer's argument that because the MRI and EMG were not in existence at the prior formal hearing, they cannot serve as a basis to show a change in conditions. To limit evidence to that which can be compared to prior evidence submitted is not in line with D.C. Code § 32-1524(b). The only limitation the statute places upon evidence submitted to be considered by the ALJ in a modification hearing is that the evidence shall be new, such as a new MRI and EMG. Thus consideration of the MRI and EMG was not in error.

The Employer points to the Claimant's testimony as showing that the symptoms he described at the formal hearing were the same ones he described at the 2010 formal hearing and as such, no change in his condition occurred warranting a modification. Employer's argument at 11. However, contrary to the Employer's assertion, a review of the testimony at the *Snipes* hearing, shows the Claimant testified his condition became worse after March 4, 2010. *Snipes* hearing transcript at 59.[5]

Thus, there is substantial evidence in the record to support the conclusion that a modification is warranted. While reasonable men and women could disagree with this determination, the CRB's authority on review is to determine whether the ALJ's decision is supported by substantial

[4] 723 A.2d 845, 850 (D.C. 1998).

[5] The hearing transcript from the Snipes hearing was submitted as a joint exhibit at the formal hearing. Hearing transcript at 19-20.

evidence, even if there is contrary evidence in the record and even if we would have reached a contrary conclusion.

The Employer also argues that there was no evidence that the degree of disability had changed from the prior order, positing that the Claimant still operated under the same restrictions from the prior hearing. The Employer points to the FCE and the medical records, specifically Dr. Green's October 5, 2011 report. What the Employer fails to consider, however, is that the statute speaks of a change of condition regarding the fact *or* the degree of disability. While it may be true the restrictions remained the same, the ALJ found that the Claimant had, in fact, proved a change in his condition by new evidence which showed a cervical disc herniation as well as by his testimony that his condition had worsened. We affirm that finding.

Finally, the Employer argues that as the modification of the prior order was not supported by the substantial evidence in the record, the Employer should get a credit for compensation paid pursuant to the June 5, 2013 Compensation Order. As we decline to conclude the modification was in error, Employer's argument is rendered moot and we will not address its merits.

CONCLUSION AND ORDER

The June 5, 2013 Compensation Order is supported by substantial evidence in the record, is in accordance with applicable law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

September 3, 2013
DATE