

**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. 08-043**

**INGRID HUSBANDS,**

**Claimant - Respondent**

**v.**

**NATIONAL REHABILITATION HOSPITAL AND SEDGWICK CMS,**

**Employer/Carrier - Petitioner**

Appeal from a Compensation Order of  
Administrative Law Judge Anand K. Verma  
AHD No. 06-003B, OWC No. 594979

Matthew J. Peffer, Esquire for the Respondent

William S. Sands, Esquire for the Petitioner

Before LINDA F. JORY, AND FLOYD LEWIS, *Administrative Appeals Judges* and E. Cooper Brown,  
*Chief Administrative Appeals Judge.*

LINDA F. JORY, *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).<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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, 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 D.C. Workers' Compensation Act of 1979, as

## 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 24, 2007, the Administrative Law Judge (ALJ), concluded that Claimant – Respondent’s (Respondent) low back symptoms are “medically causally related” to Respondent’s injury of December 14, 2003 and that Respondent had produced substantial credible evidence to demonstrate her entitlement to continued temporary total disability (TTD) benefits.

Employer-Petitioner’s (Petitioner’s) Petition for Review, filed with the CRB on November 21, 2007, alleges as grounds for its appeal that the ALJ erroneously ruled that Petitioner failed to rebut the presumption that, as of February 2005, Respondent’s low back disease was causally related to the 2003 work injury when she was struck in the back by a door. Petitioner further asserts the ALJ’s rejection of its labor market survey as insufficient to meet its burden in response to the claim for ongoing TTD benefits is contrary to law. Claimant-Respondent has filed a response to Petitioner’s Memorandum of Points and Authorities and therein asserts that assuming *arguendo*, evidence was deemed sufficient to rebut the presumption, the ALJ weighed the evidence as if the presumption was rebutted and the decision that the lumbar spine is causally related to the December 2003 injury should be affirmed as any error is harmless. With regard to the labor market survey, Respondent asserts the ALJ’s finding that employer has not met its burden of proof with regard to job availability and his decision that Respondent is entitled to TTD are supported by substantial evidence and should be affirmed.

## ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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. Official Code §32-1501 *et seq.*, at §32-1522(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 scope of review, the CRB and this panel are bound 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.

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amended, D.C. Official Code §32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.1 *et seq.*, 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.

Turning to the case under review herein, Petitioner asserts that evidence submitted by Petitioner, specifically the opinions of Drs. Hughes and Levitt, constitute specific and comprehensive evidence sufficient to rebut the presumption of compensability which should have led to the ALJ's weighing of the evidence without the benefit of the presumption. In support of its position, Petitioner refers to Dr. Hughes' opinion rendered in his deposition (Employer's Exhibit 2) that the 2003 incident caused a short term muscular injury but was not a cause of Respondent's symptoms, her disability or need for medical care in February 2005. Petitioner further asserts the ALJ's determination that Dr. Levitt's opinion was internally inconsistent reflects a fundamental misunderstanding of Dr. Levitt's opinion and of Petitioner's defense theory.

As Petitioner properly asserts, in the Compensation Order at issue the ALJ failed to mention and address Dr. Hughes' deposition testimony. Describing Petitioner's rebuttal evidence, the ALJ stated:

The evidence proffered on behalf of employer primarily consists of the IME reports from its designated physicians. In the first IME of February 22, 2005, by Dr. Steven S. Hughes, MD., an orthopedic surgeon, [Respondent's] diagnoses of resolved lumbar strain, lumbar spondylosis without myelopathy and lumbago were all noted as 'relative to the injury of 12/14/03'.

CO at 5. As Petitioner correctly point out, the ALJ made no further reference to Dr. Hughes' opinion in his deposition. However, the ALJ's description of Dr. Levitt's opinions and the ALJ's subsequent conclusion this Panel finds equally disturbing. The ALJ stated:

...[Respondent] underwent another IME by Dr. Levitt on May 23, 2006. Upon examination, Dr. Levitt noted, *inter alia* that 'the treatment for her back pain specifically the surgery performed in 2005 was not on the basis of any structural abnormality that occurred when she was struck in the back in 12/03'.(EE 5) Dr. Levitt's IME opinion of May 23, 2006 is however, internally inconsistent with what he noted earlier in his record review on February 28, 2006. Therein, Dr. Levitt had unambiguously recognized that [Respondent] had been simply struck on the back by a steel door at work and temporarily experienced a flare-up of well established spinal pathology.

Although the ALJ added in a footnote that Dr. Levitt "pertinently noted [in the report of May 23, 2006] that the trauma in 12/03 represented a temporary exacerbation of preexisting disease", the ALJ concluded that Dr. Levitt's conclusion that Respondent's back pain in 2005 was not related to the December 14, 2003 injury was rejected.

It is clear to this Panel that Dr. Levitt did not find Respondent's temporary flare-up to be causally related to the more recent surgery and associated disability. Thus this Panel agrees with Petitioner that the ALJ's determination that Dr. Levitt's opinions are internally inconsistent reflect a misunderstanding on the ALJ's part of what Dr. Levitt was proffering and Petitioner's defense.

Upon review of Petitioner's arguments on appeal combined with its argument to the ALJ at the formal hearing, it is clear to this Panel that Petitioner relies on Dr. Hughes' deposition testimony as well as both of Dr. Levitt's opinions to support its position that while Respondent may have back problems they are no longer related to whatever might have been caused by the work accident with the door. That the ALJ did not acknowledge his review of the deposition testimony is in this Panel's view reversible error as Petitioners properly asserts.

Thus, we conclude that the ALJ's statement that the presumption of compensability stands un-rebutted is not supported by substantial evidence.

In keeping with the Court of Appeals guidance in *Washington Post v. District of Columbia Dep't of Employment Services and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004), the Panel finds by proffering a qualified independent medical expert who, having examined Respondent and reviewed her medical records, rendered what the Panel finds to be an unambiguous opinion that the work injury no longer contributes to the disability, Petitioner has met its burden to rebut the presumption. Otherwise said, the Panel concludes that Dr. Hughes' deposition testimony is specific and comprehensive evidence sufficient to rebut the causal relationship between Respondent's alleged carpal tunnel syndrome and the work injury to his neck and shoulder on April 27, 2002. *See, e.g., Safeway Stores Inc. v. District of Columbia Dep't of Employment Servs.*, 806 A.2d 1214, 1219-20 (D.C. 2002).<sup>2</sup> The Panel further concludes that on its own Dr. Levitt's opinion is also specific and comprehensive evidence sufficient to rebut the presumption.

Having found the presumption to have been rebutted, the matter must be remanded to the ALJ to weigh the evidence of record to determine if there is substantial evidence to conclude a causal relationship exists between Respondent's back pain and the back injury she sustained on December 14, 2003. *Washington Post v. D.O.E.S and Raymond Reynolds, Intervenor*, 852 A.2d 909, at 916, *citing Safeway Stores, Inc.*, 806 A.2d at 1220.

In so remanding, the Panel rejects Respondent's assertion that the ALJ weighed the evidence as if the presumption was rebutted and the decision that the lumbar spine is causally related to the December 2003 injury should be affirmed as any error is harmless. While the ALJ subsequently did weigh the evidence of record with regard to the nature and extent of disability, the ALJ did not weigh the evidence of record to determine if Respondent's current back pain, including the surgery of 2005, is causally related to the work related injury of December 14, 2003.

Lastly, we address Petitioner's argument that the ALJ should have answered the question of whether Petitioner demonstrated a reasonable likelihood given Respondent's physical limitations from the work injury and her vocational skills, would she be hired if she diligently sought the jobs listed in the labor market survey. While it is well settled that while there are responsibilities and obligations placed on employees in the rehabilitation process, the initial burden rests with employers and their vocational rehabilitation specialists. *See Bowen v. Marriott*, Dir. Dkt. No. 88-77, H&AS No. 84-59A (January 2, 1994). It is equally well settled that a labor market survey

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<sup>2</sup> The employer's evidence simply needs to be "specific and comprehensive enough," that "a reasonable mind might accept [it] as adequate" to contradict the presumed causal connection between the event at work and the employee's subsequent disability. *Ferreira v. District of Columbia Dep't of Employment Servs.*, 531 A.2d 651 (D.C. 1987).

standing alone, is not substantial evidence of job availability. *See Anderson v. May Department Store*, CRB No. 05-247, OHA No. 01-456B, OWC No. 565431 (September 20, 2005), citing *Whren v. Canteen, Inc.*, Dir. Dkt. No. 01-92, OHA No. 95-189B (April 24, 2002). We conclude the ALJ's determination that the last minute effort of Petitioner to show available work pursuant to *Logan v. District of Columbia Dep't of Employment Servs.*, 805 A.2d 237 (D.C. 2002) cannot be met with a single labor market survey when the Respondent had never been notified that suitable alternative employment existed. Accordingly, if after reviewing and weighing all the evidence, particularly, Dr. Hughes' deposition testimony, the ALJ continues to be of the opinion that the current back problems are causally related to the work injury, the Panel concludes that the ALJ's prior determination that Respondent met her burden of establishing entitlement to TTD benefits is supported by substantial evidence.

#### CONCLUSION

The ALJ's conclusion in the October 24, 2007 Compensation Order that employer failed to rebut the statutory presumption of compensability is not supported by substantial evidence of record and must be REVERSED. The ALJ's finding that employer has not met its burden of proof with regard to job availability is supported by substantial evidence of record and is accordingly AFFIRMED.

**ORDER**

The Compensation Order of October 24, 2007 is hereby **AFFIRMED** in part; and **REVERSED** and **REMANDED** in part for the Administrative Law Judge to weigh the conflicting evidence of causation without relying on the statutory presumption.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY  
Administrative Appeals Judge

January 16, 2008  
DATE