

**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. 08-063**

**JAMIL F. MUHAMMAD,**

**Claimant – Petitioner**

**v.**

**EASTERN ELECTRIC AND ZURICH AMERICAN INSURANCE COMPANY,**

**Employer/Carrier – Respondent.**

Appeal from a Compensation Order of  
Administrative Law Judge Anand K. Verma  
AHD No. 03-035C, OWC No. 576531

Heather C. Leslie Esq., for the Petitioner

Jaime L. Desisto, Esq., for the Respondent

Before FLOYD LEWIS, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.<sup>1</sup>

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).

OVERVIEW

On November 30, 2007, the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES) issued a Compensation Order in this case. In the Compensation Order, the Administrative Law Judge (ALJ) denied the Claimant-Petitioner's (Petitioner) claim for

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<sup>1</sup> The initial CRB Review Panel for this case consisted of AAJ's Linda F. Jory, Sharman J. Monroe and Jeffrey P. Russell.

permanent total disability benefits continuing from March 1, 2006 with interest accrued thereon and causally related medical expenses. The ALJ found the Employer/Carrier-Respondent (Respondent) rebutted the presumption of compensability and the Petitioner failed to prove with substantial evidence his psychological injury was causally related to his March 1, 2002 work related physical injury.

On December 27, 2007, the Petitioner filed an Application for Review with the Compensation Review Board (CRB) appealing the Compensation Order. The Petitioner asserts the ALJ misapplied the holding of *Logan v. D.C. Department of Employment Services*, 805 A.2d 237 (D.C. 1996) and “summarily” ignored a substantial portion of the record evidence. Specifically, the Petitioner asserts the ALJ ignored the testimony of the Petitioner, as well as the testimony and documents of the vocational counselors, Trudy Koslow and David Schneider. The Petitioner maintains, relying on the medical opinions of Drs. Hampton Jackson and Kenneth Smothers, the total evidence shows his psychiatric condition is causally related to his physical injury of March 1, 2003. The Petitioner further maintains the total evidence shows he is permanently totally disabled as the Respondent failed to establish suitable job availability. Assuming arguendo the Respondent established suitable job availability, the Petitioner asserts Ms. Koslow’s testimony refuted the Respondent’s evidence. Finally, the Petitioner asserts the total evidence shows he cooperated with vocational rehabilitation and did not voluntarily limit his income.

On January 23, 2008, the Respondent filed an Opposition. The Respondent asserts the ALJ properly applied the Act’s presumption of compensability, properly applied the law for psychological injuries as set forth in *Dailey v. 3M Company*, H&AS No. 85-259, OWC No. 066512 (May 19, 1988) and properly applied the law in *Logan, supra*.

#### ISSUE

The issue on appeal is whether Compensation Order is supported by substantial evidence and is in accordance with the law.

#### STANDARD OF REVIEW AND APPLICABLE PRINCIPLES OF LAW

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. 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.

While this matter was pending appeal, the D.C. Court of Appeals issued *McCamey v. D.C. Department of Employment Services*, No. 04-AA-211 (May 15, 2008). In *McCamey*, a District of Columbia employee filed a claim under the D.C. Government Comprehensive Merit Personnel Act, D.C. Official Code § 1-623.01 *et seq.* (CMPA), alleging she developed a psychological injury after she sustained a work-related physical injury. The DCCA conducted a lengthy and detailed review of the law on work-related psychological injuries under both the CMPA and the D.C. Workers' Compensation Act of 1979, D.C. Official Code § 32-1501 *et seq.* (WCA), the Act applicable to this matter. The Court reviewed the language and legislative history of the CMPA and the WCA, the treatise LARSON ON WORKMEN'S COMPENSATION LAW and *Dailey v. 3M Company*, H&AS No. 85-259, OWC No. 066512 (May 19, 1988) and its progeny. The DCCA concluded the *Dailey* test was not applicable to cases where an injured worker alleges a psychological injury resulting from a work-related physical injury (physical-mental case). Accordingly, the DCCA held where an injured worker in a physical-mental case presents competent medical evidence connecting a work-related physical injury with an alleged psychological injury, the injured worker establishes a *prima facie* case of either a new injury or an aggravation of a pre-existing condition.

In remanding this matter, the Court did not limit its ruling or rationale to the CMPA, but explicitly indicated the ruling applies to the CMPA and the WCA.<sup>2</sup> In cases filed under the WCA, the DCCA stated "where the statutory presumption is applicable, the claimant must show that the physical accident had the potential of resulting in or contributing to the psychological injury." *McCamey, supra*, at 46 [citations omitted]. The Court further stated "[w]here the presumption . . . has been rebutted, the burden falls on the claimant to prove by a preponderance of the evidence that the physical accident caused or contributed to the psychological injury". *McCamey, supra*, at 46, citing *Washington Post v. District of Columbia Department of Employment Services*, 852 A.2d 909, 911 (D.C. 2004). Finally, the DCCA stated "[i]n determining whether a claimant has met his or her burden, a[n] [ALJ] must weigh and consider the evidence as well as make credibility determinations [and may] of course consider the reasonableness of the testimony and whether or not particular testimony has been contradicted or corroborated by other evidence." *McCamey, supra*, at 46.

Thus, the *Dailey* test is no longer to be applied under the WCA for a claim of a psychological injury resulting from a physical injury (physical-mental). Rather, to invoke the statutory presumption of compensability an injured worker must produce: 1) evidence of a physical injury and a work-related event which has the potential of resulting in or causing the physical injury and 2) competent medical evidence showing the work-related physical injury has the potential of resulting in or causing the psychological injury. Of course, once the injured worker invokes the presumption, the burden shifts to the employer to provide "substantial evidence" showing that the psychological injury is not work-related. See *Parodi v. D.C. Department of Employment Services*, 560 A.2d 524, 526 (D.C. 1989). If the employer fails to present evidence specific and comprehensive enough to sever the potential connection between the work-related physical

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<sup>2</sup> Consistent with the DCCA's remand, *McCamey* was further remanded to AHD to apply the new standard for physical-mental claims under the CMPA to the facts of the case. See *McCamey v. D.C. Public Schools*, CRB (Dir.Dkt) No. 10-03R, AHD No. PBL 02-031, DCP No. LT2-DDT002160 (June 17, 2008).

injury and the alleged psychological injury, the psychological injury is deemed to arise out of and in the course of employment. However, if the employer produces the requisite substantial evidence, the statutory presumption drops out of the case entirely and the burden falls upon to the injured employee to prove, by a preponderance of the evidence, without the aid of the presumption, the work-related physical injury resulted in or caused the alleged psychological injury. *See Washington Hospital Center v. D.C. Department of Employment Services*, 744 A.2d at 992, 998 (January 20, 2000).

#### ANALYSIS

In the matter now before the Panel, the Petitioner alleged a psychological injury resulting from a work-related physical injury. The ALJ addressed the issue of whether the Petitioner's psychological condition was medically causally related to his March 1, 2002 physical injury. *See* Compensation Order at p. 2. In deciding against the Petitioner, the ALJ applied the *Dailey* test. Because the *Dailey* test is no longer to be applied in physical-mental cases under the WCA, this matter must be remanded for the ALJ to apply the new standard enunciated in *McCamey* and discussed above.

The Panel notes the ALJ also addressed the issues of nature and extent of disability, failure to cooperate in vocational rehabilitation and voluntarily limitation of income. However, as the ALJ found the Petitioner's psychological injury was not causally related to his physical injury, the ALJ addressed the above issues vis-à-vis the Petitioner's physical injury alone. The Panel recognizes the ALJ's findings on the above issues may change depending on the conclusion reached on the question of causal relationship. Therefore, at this time, the Panel will neither address the ALJ's findings on nature and extent of disability, failure to cooperate in vocational rehabilitation and voluntarily limitation of income nor the merits of the Petitioner's appeal.

#### CONCLUSION

The November 30, 2007 Compensation Order is not supported by substantial evidence and is not in accordance with the law.

#### ORDER

The November 30, 2007 Compensation Order is hereby VACATED AND REMANDED.

On remand, the ALJ shall revisit the issues presented for resolution applying the new standard enunciated in *McCamey* and discussed above. As the parties' burdens of production, *i.e.*, the type of evidence each must present, have changed, the ALJ shall conduct such further proceedings as may be necessary to properly address the issues presented for resolution.

FOR THE COMPENSATION REVIEW BOARD:

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SHARMAN J. MONROE  
Administrative Appeals Judge

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July 7, 2008  
DATE