

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-013

WENYING JOHNSON,
Claimant-Respondent,

v.

HOTEL MONACO, A KIMPTON HOTEL and
GALLAGHER BASSETT SERVICES,
Employer/Insurer-Petitioner.

Appeal from a January 9, 2014¹ Compensation Order By
Administrative Law Judge Gerald D. Roberson
AHD No. 13-373, OWC No. 703611

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 APR 14 PM 12 01

John P. Rufe for Petitioner
Douglas K. Allston, Jr. for Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE, and HENRY W. MCCOY, *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On April 21, 2013, Ms. Wenying Johnson worked for Hotel Monaco, A Kimpton Hotel (Hotel Monaco) as a banquet manager. On that day, Ms. Johnson slipped on water in the kitchen and fell forward onto her left knee.

Initially, Ms. Johnson sought medical treatment at George Washington University Hospital for left knee pain. Although Ms. Johnson had a pre-existing left knee condition, she was not planning to have that knee replaced until some time in the future; falling at work caused Ms. Johnson to expedite that procedure.

¹ The Compensation Order is dated January 9, 2013 (as is the Certificate of Service attached to that Compensation Order); however, given that the formal hearing took place on November 26, 2013, it is clear that the correct date of issuance is January 9, 2014. Throughout this Decision and Order, the underlying Compensation Order shall be referred to as the January 9, 2014 Compensation Order.

Ms. Johnson also twisted her back when she fell at work. Almost four months later, in August 2013, she began treating with Dr. Corey Wallach for low back pain.

Following a formal hearing, an administrative law judge (“ALJ”) issued a Compensation Order dated January 9, 2014. The ALJ granted Ms. Johnson temporary total disability benefits from March 27, 2013 to the date of the formal hearing and continuing as well as medical expenses for her left knee injury, the only injury the ALJ found is causally related to the on-the-job accident.²

On February 10, 2014, Barry D. Bernstein, Esquire³ filed Employer/Insurer’s Application for Review and Accompanying Memorandum of Points and Authorities in Support of Application for Review. There was no Memorandum of Points and Authorities included with that filing.

Mr. Allston filed Claimant/Respondent’s Opposition to Petitioner’s Application for Review on February 27, 2014. Mr. Allston argues the ALJ correctly finds Ms. Johnson’s left knee replacement is causally related to a compensable injury because the work-related accident worsened Ms. Johnson’s pre-existing left knee condition. Mr. Allston also argues that if the ALJ is in error, the error is finding that Ms. Johnson’s low back condition is not causally related to her on-the-job accident because Dr. Louis Levitt’s report includes inaccurate factual information regarding when Ms. Johnson first reported back pain. For these reasons, Mr. Allston requests the Compensation Review Board (“CRB”) affirm the ruling that Ms. Johnson’s left knee injury is causally related to the April 21, 2013 accident and reverse the ruling that her low back injury is not compensable.

On March 12, 2014, John P. Rufe, Esquire entered his appearance on behalf of Hotel Monaco. No Memorandum of Points and Authorities was ever filed on Hotel Monaco’s behalf.

PRELIMINARY MATTERS

Mr. Rufe filed a Motion to Strike Portion of Claimant/Respondent’s Opposition to Petitioner’s Application for Review. Specifically, Mr. Rule asserts Mr. Allston’s request that the CRB reverse the portion of the Compensation Order ruling that Ms. Johnson’s low back injury is not compensable is not a timely cross-appeal.

Without a Memorandum of Points and Authorities, the only pleading explaining Hotel Monaco’s position on appeal is Employer/Insurer’s Application for Review and Accompanying Memorandum of Points and Authorities in Support of Application for Review which states in pertinent part, “The Employer and Insurer contend that the Order is not in accordance with the evidence presented and applicable law.”⁴ So long as an Application for Review is filed timely, is in writing, and states that an appeal is being taken, it qualifies as an effective appeal, and even without a Memorandum of Points and Authorities to support a legal argument, the underlying

² *Johnson v. Hotel Monaco, a Kimpton Hotel*, AHD No. 13-373, OWC No. 703611 (January 9, 2014).

³ Mr. Bernstein represented Hotel Monaco at the formal hearing.

⁴ Employer/Insurer’s Application for Review and Accompanying Memorandum of Points and Authorities in Support of Application for Review, unnumbered p. 1.

Compensation Order must be reviewed by the Compensation Review Board to ascertain if it is supported by substantial evidence;⁵ however, with nothing more to frame the specific issues for resolution, the CRB finds that it was not necessary for Mr. Allston to file a cross-appeal in order for this panel to consider whether the ruling that Ms. Johnson's low back injury is not causally related to her April 21, 2013 accident is supported by substantial evidence and is in accordance with the law. Consequently, Mr. Rufe's Motion to Strike Portion of Claimant/Respondent's Opposition to Petitioner's Application for Review is DENIED.

ISSUE ON APPEAL

Is the January 9, 2014 Compensation Order supported by substantial evidence in the record and in accordance with the law?

ANALYSIS⁶ KNEE INJURY

When assessing the causal relationship between current symptoms and a compensable accident, a claimant may be entitled to a presumption of compensability ("Presumption").⁷ In order to benefit from this Presumption, a 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.⁸

Following a detailed recitation of some of Ms. Johnson's testimony and some of the medical records, the ALJ determined Ms. Johnson had invoked the Presumption:

At the hearing, Claimant testified she had returned to work after the right knee replacement, and she fell at work one month later, while working full duty with some restrictions, which included no bending and no heavy lifting. HT p. 26. Claimant acknowledged her doctor originally wanted to replace the left knee first, but she advised him her right knee bothered her twice as much than the left knee. Claimant admitted she received cortisone shots for the left knee, prior to the work incident. HT p. 27. Claimant testified her left knee bothered her before the accident, but did not interfere with her ability to do her job. HT p. 28. Claimant

⁵ See *Tinsley v. D.C. Office of the Superintendent of Education*, CRB No. 13-109, AHD No. PBL09-036B, DCP No. 30080214753-0001 (October 15, 2013).

⁶ The scope of review by the 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. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁷ 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."

⁸ *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

remarked she was not contemplating having left [total knee arthroplasty (“TKA”)] in April 2013. HT pp. 28-29. Claimant testified she slipped on water in the kitchen on April 21, 2013 and fell forward directly onto her left knee. HT p. 29. Claimant reported she went to George Washington University Hospital via ambulance where she focused on her left knee, but she was also having back problems. HT pp. 30-31. Claimant explained she had to move the surgery up because she had no choice due to the left knee pain. HT p. 33. Claimant testified Dr. Wallach treated her back, and she had to wait two months before she could see him. HT pp. 33-35. Claimant testified Dr. Yu recommended six weeks of physical therapy for her back. HT p. 36.

During cross-examination, Claimant stated she has a history of knee problems, and her doctor recommended a left total knee replacement in October 2012. Claimant acknowledged she saw the physical therapist on April 12, 2013, ten days before the accident, with right knee pain complaints of 8/10 and left knee pain complaints of 10/10. HT pp. 41-42. Claimant testified she had limited gait and trouble riding the recumbent bike secondary to increased pain in her left knee, four days before the accident. HT p. 43. Claimant explained she was taken to George Washington University Hospital with complaints of left knee problems, and she had an x-ray of the left knee, but no x-ray for the back. HT pp. 43-44. Claimant recalled her left knee got worse after the accident. HT pp. 44-45.

Claimant relied on medical evidence from her treating physicians to causally relate her left knee and back conditions to the work incident of April 21, 2013. On May 16, 2013, Dr. Goyal indicated Claimant had left knee arthritis and pain prior to falling directly on the left knee. He stated “this has exacerbated after a fall when she was working at her kitchen and fell directly onto her left knee. She was planning on having the left knee replaced next year; however, at this point she has some limiting left knee pain.” CE 2. Dr. Goyal remarked the fall exacerbated her left knee arthritis, and he released Claimant from work until further notice.^[9]

We find no error with the ALJ’s analysis of this evidence as the basis for invoking the Presumption.

Once the Presumption was invoked, it was Hotel Monaco’s burden to come forth with substantial evidence “specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event.”¹⁰ Only upon a successful showing by Hotel Monaco would the burden return to Ms. Johnson to prove by a preponderance of the evidence, without the benefit of the Presumption, her current symptoms arose out of and in the course of employment.¹¹

⁹ *Johnson* at pp. 6-7.

¹⁰ *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001). (Citations omitted.)

¹¹ See *Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003).

Based upon Dr. Levitt's opinion that Ms. Johnson's work-related accident did not advance or enhance Ms. Johnson's arthritis, the ALJ ruled that the presumption had been rebutted:

To challenge causal relationship and rebut the presumption, Employer relied on the IME report of Dr. Levitt dated October 8, 2013. Dr. Levitt stated Claimant had well established chronic pain in both knees established to be advancing degenerative arthritis as a preexisting pathology before the injury of April 21, 2013 with discussion prior to 4/13 that Claimant had end stage arthritis and both knees needed to be replaced. Dr. Levitt reported there was discussion to do the left knee TKA that was changed at the last minute to do the right TKA. He stated Claimant had preexisting severe arthrosis to both knee joints and she was a candidate for knee replacement surgery. Dr. Levitt remarked "I see no evidence that the fall at work on 4/21/13 advanced her arthritis or did anything to enhance her disease." [SCE] 1, p. 2. Dr. Levitt further added the recommendation for joint replacement was appropriate, but there was no causal relationship between Claimant's 4/21/2013 fall at work and the decision to replace the joint.^[12]

The Presumption is rebutted when the record demonstrates a physician has performed a personal examination of the claimant, has reviewed the relevant medical records, and has stated an unambiguous opinion contrary to the Presumption.¹³ Given that Dr. Levitt's opinion qualifies pursuant to this standard, again, we find no basis to disturb this ruling.

Finally, when weighing the evidence in the record as a whole and when applying the preference for the opinions of a treating physician, the ALJ determined that Ms. Johnson's left knee condition is causally related to her on-the-job accident:

In deciding between competing medical opinions, one must start from the perspective that, under the law of the District of Columbia, the opinion of Claimant's treating physician is entitled to significant weight in light of the preference accorded the treating physician's opinion over the conflicting opinion of a non-treating physician who is connected to the case for litigation purposes. See *Short v. D.C. Dept. of Employment Services*, 723 A.2d 845 (D.C. 1998); *Stewart v. D.C. Dept. of Employment Services*, 606 A.2d 1350, 1353 n.5 (D.C. 1992).

However, this general rule is not absolute. Where there are persuasive reasons to do so, a treating physician's opinions may be rejected and credit given to a non-treating physician over a treating physician. *Short, supra*. Where that opinion is disregarded and a conflicting medical opinion is given controlling weight, the finder of fact must specifically elaborate the bases for doing so.

¹² *Johnson* at p. 8.

¹³ *Washington Post v. DOES*, 852 A.2d 909 (D.C. 2004).

Whittaker v. Washington Metropolitan Area Transit Authority, OWC No. 0001036, H&AS No. 90-803, Dir. Dkt. No. 91-12 (March 23, 1993).

In this jurisdiction, the law of workers' compensation has a very basic principle that an employer is liable for all natural and unavoidable consequences of a work-related injury. A subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. *Forrest D. Pulliam v. Potomac Personnel Services*, H&AS No. 86-558, OWC No. 88281 (12/18/87); *Joseph B. Ryan v. Dodd Electric Company*, H&AS No. 87-815, OWC No. 87786 (June 7, 1998); *Vaughn v. Hadley Memorial Hospital*, H&AS No. 86-204, OWC No. 48011 (July 28, 1986).

With regard to Claimant's left knee condition, Claimant's testimony and the evidence from the treating physician causally relates her condition to the April 21, 2013 work incident. While the record reveals Claimant had a preexisting left knee condition and her physician had proposed total knee replacement, the evidence of record reveals the work incident hastened the need for the surgery. Claimant testified the left knee bothered her prior to the accident, but she worked full duty with restrictions of no bending and no heavy lifting. HT pp. 26 and 28. Claimant stated she was not contemplating having left TKA in April 2013. HT pp. 28-29. Claimant indicated it takes 1 year to recover from total knee surgery, and she fell about four months after her right total knee replacement. HT p. 32. She testified she had to move the surgery up because she had no choice due to the left knee pain. HT p. 33. While Employer maintains Claimant returned to her baseline prior to the left total knee replacement, Claimant testified her left knee got worse after the accident. HT pp. 44-45.

The medical evidence corroborates Claimant's testimony. On April 25, 2013, Dr. Goyal noted Claimant fell directly on the left knee while at work which caused anterior knee pain. Dr. Goyal offered the assessment of acute exacerbation of chronic arthritis of the left knee, and provided a corticosteroid injection for the acute exacerbation of osteoarthritis. CE 2. On May 16, 2013, Dr. Goyal indicated Claimant had left knee arthritis and pain prior to falling directly on the left knee. He stated "this has exacerbated after a fall when she was working at her kitchen and fell directly onto her left knee. She was planning on having the left knee replaced next year; however, at this point she has some limiting left knee pain." CE 2. Conversely, Dr. Levitt stated "I see no evidence that the fall at work on 4/21/13 advanced her arthritis or did anything to enhance her disease." [SCE] 1, p. 2. Dr. Levitt further remarked the decision to perform the left knee surgery was not about a fall due to increasing symptoms, but a decision that had already been made to replace her joint. Dr. Levitt's opinion appears to conflict with the factual evidence of the case. The record reveals Claimant was able to work full duty despite her underlying left knee condition, and the fall at work on April 21, 2013 rendered her symptomatic to the point where she could no longer work. Dr. Goyal has stated the limiting left knee pain caused Claimant to alter her plans and have

the left knee total replacement earlier than planned. Given the testimony of Claimant and the findings of Dr. Goyal, the record establishes Claimant's left knee condition and surgery are causally related to the work incident of April 21, 2013.^[14]

As this tribunal is prohibited from reweighing the evidence,¹⁵ the ruling that Ms. Johnson's left knee condition and surgery arose out of and in the course of her employment is affirmed.

BACK INJURY

The same Presumption that applies to Ms. Johnson's knee injury applies to her back injury. The ALJ found that the Presumption was invoked and was rebutted:

Additionally, Dr. Wallach examined Claimant on August 16, 2013 for low back pain. SCE 2, p. 10. Dr. Wallach indicated Claimant had the back pain since falling on April 21, 2013 at work. He stated "She states she fell forward on her left knee and twisted her lower back." SCE 2, p. 11. Dr. Wallach noted Claimant's chief concern was the pain radiating across her low back and paresthesias in her left hand. SCE 2, pp. 11-12. Given the mechanism of the injury which included Claimant falling directly on the left knee and twisting her back during her fall at work on April 21, 2013, the medical evidence from Dr. Goyal and Dr. Wallach supports Claimant's contentions that the work incident caused her left knee and lower back conditions. As such, Claimant has provided some evidence to show an injury and work incident having the potential of resulting in or contributing to the need for medical treatment in order to invoke the presumption of compensability. *See Ferreira, supra*, 531 A.2d at 654-655; *Hensley v. Washington Metro Area Transit Auth.*, 210 U.S.App.D.C. 151, 155, 655 F.2d 264, 268 (1981).

* * *

With regard to the lumbar spine, Dr. Levitt stated Claimant did not complain of low back pain related to the original injury during treatment for her knee arthroplasties. He remarked Claimant had the opportunity to complain to several doctors, and did not complain of low back symptoms during her admission for left knee surgery. Dr. Levitt noted Claimant did not report back pain until August 2013, and the MRI of August 2013 revealed advanced spondylosis to the lumbar spine at L4-5 and L5-S1 intervertebral segment with no evidence of acute pathology. [SCE] 1, p. 1. Dr. Levitt stated the medical records do not contain any consistency that the lumbar spine injury has been a source of continued distress, and the medical records do not lend support to causation of back pain that was reported in August 2013. Dr. Levitt attributed the back pain to the altered gait and the effort required to recover from a knee replacement that was electively decided

¹⁴ *Johnson* at pp. 8-9.

¹⁵ *Marriott*.

upon in May 2013 with complications due to the TKA performed in December 2012. With the medical evidence from Dr. Levitt, Employer has rebutted the presumption of compensability regarding causal relationship. Therefore, Claimant loses the benefit of the statutory presumption, and the record medical evidence must be weighed without further reference thereto.^[16]

Mr. Allston argues Dr. Levitt's opinion must be rejected because Ms. Johnson complained of back pain five days after her fall. The ALJ acknowledged Ms. Johnson's testimony to this effect,¹⁷ but upon review of the medical records noting that pain, those records are dated in August 2013, just as Dr. Levitt states; therefore, we reject Ms. Johnson's argument and accept the ALJ's weighing of the evidence to conclude Ms. Johnson's back injury is not causally related to her on-the-job fall:

Regarding the causal relationship of Claimant's back, Dr. Wallach initially reported on August 16, 2013 that Claimant had back pain since falling on April 21, 2013 at work. He noted Claimant stated she fell forward on her left knee and twisted her lower back, and her chief concern was the pain radiating across her low back. SCE 2, p. 12. On August 26, 2013, Dr. Wallach noted the MRI of the lumbar spine showed mild to moderate stenosis at L4-5. Dr. Wallach recommended an epidural injection for the lumbar spine. SCE 2, p. 15. On September 23, 2013, Dr. Wallach provided a right L4 transforaminal epidural steroid injection under fluoroscopic guidance. SCE 2, p. 17. Dr. Wallach reported Claimant did not receive any relief from the injection and she continued to have sharp pain emanating from her right knee that radiates up her thigh and into her calf with numbness in a similar distribution. [SCE] 2, p. 20. Dr. Wallach appears to offer a different assessment after the epidural injection failed to improve Claimant's symptoms. Given Claimant did not receive any relief from the injection, Dr. Wallach stated he believed her pain was emanating from her right knee replacement. Dr. Wallach released Claimant from treatment stating she could return as needed for her cervical or lumbar complaints. Dr. Levitt offered a similar conclusion on October 8, 2013 stating the medical records do not contain any consistency that the lumbar spine injury has been a source of continued distress, and do not lend support to causation of back pain that was reported in August 2013. Dr. Levitt largely attributed Claimant's back condition to her altered mobility and altered gait requiring her to use upper extremity and proximal back musculature to assist in activities of daily living and assist in gait. He stated "Any minor muscular discomfort she experienced when she fell in 4/13 has more than resolved." [SCE] 1, p. 3. While Dr. Wu acknowledged Claimant attributed her back condition to the work incident, Dr. Wu did not offer medical rationale to support this conclusion. Dr. Wu offered the assessment of spondylolisthesis at L4-5, and Dr. Wu recommended physical therapy without offering an opinion regarding causal relationship or attributing the diagnosis to any employment

¹⁶ *Johnson* at pp. 7, 8.

¹⁷ *Id.* at p. 2.

factors. As such, the evidence does not causally relate Claimant's current back condition to the work incident of April 21, 2013.^[18]

The conclusion that that Ms. Johnson's back condition did not arise out of and in the course of her employment is affirmed.

ENTITLEMENT TO BENEFITS

Finally, in awarding ongoing temporary total disability benefits from March 27, 2013, the ALJ considered only Ms. Johnson's compensable left knee injury. The ALJ rejected Dr. Levitt's opinion in favor of Dr. Goyal's opinion because Dr. Levitt was convinced Ms. Johnson's left knee injury was not related to her April 21, 2013 fall:

On May 16, 2013, Dr. Goyal stated the work incident exacerbated Claimant's left knee condition, and he released Claimant from work until further notice. CE 2. On May 24, 2013, Claimant underwent left total knee arthroplasty. CE 3. On September 19, 2013, left knee examination revealed no knee effusion with healed incision and flexion of 5-110 degrees. X-rays of the bilateral knees showed well fixed and positioned bilateral TKA with no evidence of wear, osteolysis or loosening in the appropriate alignment. The assessment included four months status post left total knee arthroplasty doing well and nine months status post right total knee arthroplasty with continued pain. SCE 1, p. 3. Dr. Goyal recommended physical therapy, and stated Claimant was unable to return to work in a full capacity for six months. SEC 1, p. 4. The medical evidence from the treating physician supports the period of disability. While Employer challenged entitlement to benefits based on the IME of Dr. Levitt, the opinion of Dr. Levitt lacks medical rationale because he stated the left knee condition was not causally related to the work incident of April 21, 2013. Therefore, the record contains sufficient evidence to support the period of disability, and Claimant has established entitlement to temporary total disability benefits for the period in question.^[19]

We find no legal reason to compel the ALJ to reject of the opinion of the physician who performed Ms. Johnson's surgery in favor of an opinion offered by an independent medical examiner. Consequently, the grant of temporary total disability benefits from March 27, 2013 to the present and continuing is affirmed.

¹⁸ *Id.* at pp. 9-10.

¹⁹ *Id.* at p. 11.

CONCLUSION AND ORDER

The January 9, 2014 Compensation Order is supported by substantial evidence in the record, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES

Administrative Appeals Judge

April 14, 2014

DATE