

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**CRB No. 15-201**

**JOSE C. ROMERO,**  
**Claimant-Respondent/Cross-Petitioner,**

v.

**V&V CONSTRUCTION, INC. and**  
**OHIO CASUALTY INSURANCE Co.,**  
**Employer-Petitioner/Cross-Respondent.**

Appeal from a November 30, 2015 Compensation Order  
by Administrative Law Judge Nata K. Brown  
AHD No. 10-267, OWC No. 657345

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 MAY 27 AM 11 08

(Issued May 27, 2016)

Christopher R. Costabile for the Employer  
David M. Snyder for the Claimant<sup>1</sup>

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 REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

The procedural history pertinent to the current appeal is described by the Compensation Review Board (CRB) in a prior Decision and Remand Order (DRO):

Mr. Jose Romero injured himself at work on February 13, 2009; he severed part of his left thumb while operating a drill. Mr. Romero underwent surgery by Dr. Kenneth R. Means and received initial follow-up treatment from the orthopedic practice of Phillips and Green who, in turn, referred Mr. Romero back to Dr. Means for continued follow-up treatment.

<sup>1</sup> Michael Kitzman represented Claimant at the Formal Hearing.

While Mr. Romero's chief complaints were pain and stiffness in his left thumb and the sites of his skin grafts, he eventually voiced complaints of left shoulder pain. Mr. Romero filed a claim seeking authorization for medical treatment for his left shoulder complaints, claiming they were medically causally related to his work accident.

In an August 31, 2010 Compensation Order, an administrative law judge ("ALJ") denied Mr. Romero's claim for relief. Mr. Romero appealed arguing he had not been afforded the presumption of compensability.

On appeal, the CRB determined the ALJ had committed error by evaluating the cumulative evidence to conclude that Mr. Romero's left shoulder complaints were not medically causally related to his work injury before according Mr. Romero the presumption of compensability. The CRB further reasoned

the Compensation Order shows that the parties stipulated that on February 13, 2009, the Petitioner sustained an injury which arose out of and in the course of his employment. CO at p. 2. Thus, the presumption of compensability attached in this case. As the court held in *Whittaker v. D.C. Dept. of Employment Services*, 668 A.2d 844 (D.C. 1995), the presumption, once attached to establish a causal connection between the disability and the work-related event, activity, or requirement, also extends to the question of the medical causal relationship between the current disability and the work-related injury. Accordingly, in order to rebut the presumption of medical causal relationship, an employer must present evidence specific and comprehensive enough to sever the potential connection between the disability and work-related injury. See *Whittaker, supra* at 845-846.

With the presumption attached, it became necessary for Respondent to present evidence in rebuttal to sever the potential connection between the left shoulder complaints and the work-related injury. On remand, the ALJ is instructed to apply the traditional presumption of compensability analysis to the facts of this case and determine whether that presumption has been rebutted. If not, the ALJ shall award the relief requested. If the presumption is found to be rebutted, the ALJ shall determine whether on shifting the burden back, Petitioner has proven his case by a preponderance of the evidence and rule accordingly.<sup>[2]</sup>

The August 31, 2010 Compensation Order was vacated and remanded.

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<sup>2</sup> *Romero v. V & V Construction, Inc.*, CRB No. 10-169, AHD No. 10-267, OWC No. 657345 (February 10, 2011), p. 3.

On remand, the ALJ, again, denied the claim for relief. The ALJ reasoned that although the presumption of compensability had attached, it had attached only as to the left thumb injury. As such, the ALJ determined the presumption of compensability had not been invoked as to the left shoulder complaints; therefore, the burden did not shift to the employer to rebut the presumption of compensability. The ALJ then proceeded to argue in the alternative that even assuming the presumption of compensability had been invoked, there was evidence in the record that clearly rebutted that presumption.

Another appeal ensued, and the CRB ruled that Dr. Means' July 29, 2010 letter was not sufficient to rebut the presumption of compensability:

In his July 29, 2010 letter, Dr. Means prefaced his opinion by stating "[I] have not diagnosed Mr. Romero with any specific condition with regard to the left shoulder as he has not been formally evaluated for this as of yet." As to a causal connection he went on to say:

It is possible that he could have developed some left shoulder symptoms from an avulsion traction type injury, but I do not think this is very likely, and Mr. Romero did not note any of these symptoms until 10/22/2009, at least to us. Therefore, I think the possibility that it is related to the 02/13/2009 injury is a very remote possibility.

If we apply the [D.C. Court of Appeals'] standard, we first note that Dr. Means arguably has rendered an opinion without an express examination of the left shoulder and he has stated that he has not diagnosed any specific condition of the left shoulder. We further note that by stating there "is a very remote possibility" of a causal relationship between Petitioner's left shoulder symptoms and the work injury, Dr. Means has rendered an opinion that is anything but unambiguous. We are left to conclude using the test established by the [Court], it was error for the ALJ to find that this evidence was comprehensive enough to rebut the presumption.<sup>3</sup>

In the end, the CRB determined Mr. Romero successfully had invoked the presumption of compensability, and V&V Construction, Inc. ("V&V") had failed to rebut that presumption. As a result, Mr. Romero's shoulder injury is compensable and the matter was remanded for the issuance of a Compensation Order awarding authorization for medical treatment for Mr. Romero's left arm and shoulder.

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<sup>3</sup> *Romero v. V&V Construction, Inc.*, CRB No. 11-025, AHD No. 10-267, OWC No. 657345 (September 9, 2011), pp. 4-5.

On September 29, 2011, a second Compensation Order on Remand issued. This time, the ALJ granted Mr. Romero's claim for relief:

Hence, consistent with the Court's rationale, the statutory presumption, once invoked to the left thumb injury of February 13, 2009, also extends to the subsequently developed left shoulder symptoms. Accordingly, in order to rebut the invoked presumption of compensability to the left shoulder infirmity, employer now must present specific and comprehensive evidence from its IME physician. In the instant case, however, employer did not submit any evidence in rebuttal. Thus, the invoked presumption insofar as the left shoulder symptomatology stands unrebutted.<sup>[4]</sup>

Now, in this appeal, V&V asserts the parties' stipulation to an accidental, thumb injury on February 13, 2009 is not sufficient to invoke the presumption of compensability as to Mr. Romero's left shoulder injury. V&V also asserts that requiring an opinion from an independent medical examination physician to rebut the presumption of compensability was error.

Mr. Romero requests we affirm the September 29, 2011 Compensation Order on Remand. Given the *Whittaker* extension of the presumption of compensability to new symptoms occurring after the initial accident, Mr. Romero contends V&V's evidence was insufficient to rebut the presumption of compensability.

*Romero v. V&V Construction, Inc.*, CRB No. 11-112 (June 11, 2012). (Footnotes in original).

In a Decision and Remand Order dated June 11, 2012, the CRB affirmed the September 29, 2011 Compensation Order which found Claimant's left thumb and left shoulder to be medically causally related to the work injury. This decision was subsequently affirmed by the District of Columbia Court of Appeals. *V&V Construction, Inc. v. DOES*, No. 12-AA-0960, Mem. Op. & J. (D.C. September 5, 2013).

On January 13, 2015, an evidentiary hearing was held. Claimant's claims for relief were for an award of temporary total disability benefits from April 30, 2014 to the present and continuing, authorization of medical treatment and payment of medical bills. Compensation Order (CO) at 2. The issues listed to be adjudicated were:

1. Is Claimant's current left shoulder condition medically casually related to the work-related injury that occurred on June 4, 2012?
2. What is the nature and extent of disability, if any?
3. Are the medical treatments and expenses that Claimant is requesting reasonable and necessary?

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<sup>4</sup> *Romero v. V&V Construction, Inc.*, AHD No. 10-267, OWC No. 657345 (September 29, 2011), p. 4.

CO at 2.

A Compensation Order (CO) was issued on November 30, 2015 which concluded:

I hereby find and conclude, based upon review of the record evidence as a whole, that there is a medical causal relationship between the accident Claimant suffered on February 13, 2009 that occurred in the course of his employment and the injury to his left shoulder; that Claimant is temporarily totally disabled, and Claimant is entitled to have the diagnostic testing recommended by Dr. Magee.

CO at 7.

The CO:

...**ORDERED** that Claimant's claim for the diagnostic testing recommended by Dr. Magee, and the payment of casually medical expenses, are hereby **GRANTED**.

*Id.*

Employer appealed. Employer argues first that there is not substantial evidence in the record to support a finding that Claimant was temporarily and totally disabled and second, there is no substantial evidence in the record to support a finding that Claimant is entitled to a cervical MRI which is causally related to the work injury.

Claimant opposes Employer's appeal, arguing that the CO is supported by the substantial evidence in the record and in accordance with the law "insofar as it grants his claim for diagnostic testing in the form of a cervical MRI and insofar as it presumptively grants his claim for temporary total disability benefits." Claimant's argument at 1. Claimant also concurrently filed a Cross Application for Review, requesting the CRB to modify the CO's order section to reflect an award of temporary total disability benefits from April 30, 2014 to the present and continuing, as the present order section does not explicitly order these benefits despite the conclusion section where the ALJ concluded Claimant is temporarily and totally disabled.

#### ANALYSIS<sup>5</sup>

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<sup>5</sup>The scope of review by the CRB is generally 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. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

Preliminarily, we must address what seems to be confusion over the issues presented by the ALJ and the parties.

A review of the hearing transcript and the Joint Pre-Hearing Statement and Stipulation form (JPHS) does not bear out the issues presented, as reiterated above, and has resulted in confusion over what was to be addressed by the CO.

The Employer section of the Pre-Hearing Statement lists the following as the contested issues of fact and law:

1. Whether shoulder surgery sought by claimant is reasonable and necessary medical treatment;
2. Whether the shoulder surgery, if it is reasonable and necessary, is casually related to his accident of 2/13/09;
3. Nature and extent of claimant's disability;
4. Causal relationship of alleged disability to accident.

The Pre-Hearing Statement, while signed by the parties, is not signed by the ALJ.

The Stipulation Form lists as contested issues:

- Arising out of an in the Course/Causal Relationship;
- Nature and Extent of Disability; and
- Reasonableness and necessity of medical expense.

The Claim for Relief is listed as authorization of medical treatment, payment of causally related medical expenses, and temporary total disability from April 30, 2014 to the present and continuing. Handwritten next to the issues is a note which states "MRI to cervical spine."

A review of the hearing transcript indicates that the parties agree that the DCCA opinion affirmed the finding that Claimant's left shoulder and left thumb injuries were medically causally related to the work injury. In opening and closing statements, both parties allude to one issue to be adjudicated as whether the need for the cervical MRI is causally related to the work injury. Claimant's counsel stated:

Dr. Magee, based on the findings in that MRI, said that surgery might be a possibility for the shoulder, but before the surgery was done he also wanted an MRI of the cervical spine done to rule out that the complaints that Mr. Romero was having were, in fact, related to that shoulder and not related to something else, specifically to some sort of impingement in her cervical spine. That's the issue that we have before you here today, Your Honor, is the issue of whether or

not that MRI that was recommended by the doctor, really to determine whether the course of the treatment going forward is or is not related to the work injury, should be performed.

Hearing transcript at 18-19.

Employer's counsel stated:

Well, what's not going to be in evidence here is that there is any connection between a possible neck problem and the thumb injury from 2009. That's the question ultimately that the Court will have to decide and that's the evidence that the Claimant should ultimately have to produce if they want to show that it is a medical necessity, as a result of the thumb injury in 2009, because Dr. Magee isn't quite sure, as you'll see in the medical records, what the real source of Mr. Romero's current complaints are.

Hearing transcript at 21.

We point out all of the above because ultimately we are unsure of what issues and body parts the parties actually intended to have adjudicated. The JPHS and stipulations, as well as the parties' opening statements raise many different issues. For instance although the need for shoulder surgery is listed by the Employer as an issue, it doesn't appear to have been argued at the hearing. Claimant's need for a cervical MRI is what was raised and presented by the parties. We are also unclear whether the parties intended to argue whether the need for a cervical MRI (the neck) is legally (arising out of and in the course) or medically causally related (causal relationship) to the work accident, as on the stipulation form these two distinct issues seem to be listed on the same line. Considering the parties' arguments at the Formal Hearing and the JPHS and stipulation forms, we simply cannot say with certainty what the parties intended to present as issues for the ALJ to consider or even what body part the parties were alleging to be contested (the left shoulder or neck).

Adding to this confusion is the CO, which analyzes

Causal Relationship/Injury Arising Out of and in the Course of Employment/  
Medical Casual Relationship

CO at 3.

This analysis is limited to Claimant's left shoulder only. As the ALJ notes, it has been determined in prior orders that the left shoulder injury is causally related to his work injury, a finding affirmed by the DCCA. CO at 5. As we also note above, the parties did not *seem* to contest this fact at the Formal Hearing. Indeed, Employer states in argument,

...the law of the case is that claimant's injury has been defined by previous order as a left thumb and left shoulder injury. No modification of that prior order was sought by

claimant and no evidence establishing a causal relationship between claimant's work injury and a possible structural problem with the neck was submitted.

Employer's argument, unnumbered at 7.

We cannot perform our statutory function, that of determining whether the factual findings of the CO are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law when we cannot ascertain what the issues were to be adjudicated. As shown above, there is significant confusion over what was to be presented as issues by the parties and what the CO ultimately addresses.

Because of this confusion, including what body part was in dispute, we decline to address Employer's other arguments.

We would be remiss if we did not also point out that if reasonableness and necessity of the requested medical care is still an issue after further consideration by the ALJ, then the utilization review process is mandatory. See *Gonzalez v. UNICCO Service Company*, CRB No. 07-005, (February 21, 2007). Once a utilization review report has been submitted into evidence, that report is not dispositive but is entitled to equal footing with an opinion rendered by a treating physician. See *Children's National Medical Center v. DOES*, 992 A.2d 403 (D.C. 2010). See also *Green v. Washington Hospital Center*, CRB No. 08-208, (June 17, 2009).<sup>6</sup>

Employer did not submit a utilization review. This omission raises the question as to whether reasonableness and necessity was actually at issue, or whether the actual issue was the causal relationship of the neck.

Turning briefly to Claimant's Cross-Application, the Claimant points out that the CO is silent as to whether the ALJ intended to award disability benefits. Claimant argues that taking into consideration the CO as a whole, the CRB should amend the CO to reflect an award of temporary total disability benefits for the time period claimed. As we are remanding the case with instructions to correctly identify and adjudicate the issues presented, the ALJ may then also correct any errors or omissions in the order part of the CO.

In sum, until the ALJ identifies what the correct issues are for adjudication we cannot perform any type of meaningful review.<sup>7</sup>

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<sup>6</sup> An ALJ is "free to consider the medical evidence as a whole on the question, and is not bound by the outcome of the UR report. The issued should be decided based upon the ALJ's weighing of the competing medical evidence and [the ALJ] is free to accept either the opinion of [the] treating physician who recommends treatment or the opinion of the UR report, without the need to apply a treating physician report.

<sup>7</sup> The ALJ may do this in any fashion deemed fit to properly ascertain the parties intention, including re-opening the record.

## **CONCLUSION AND ORDER**

The November 30, 2015 Compensation Order is VACATED and REMANDED for further consideration consistent the above discussion.

*So Ordered.*