

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 14-080**

**JUANA BENAVIDES,**  
**Claimant-Petitioner,**

v.

**RENAISSANCE-WASHINGTON, D.C. and**  
**MARRIOTT CLAIMS SERVICES,**  
**Employer/Insurer-Respondent.**

Appeal from a May 22, 2014 Compensation Order by  
Administrative Law Judge Gerald D. Roberson  
AHD No. 14-171, OWC No. 706009

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 NOV 25 PM 1 40

David J. Kapson for the Petitioner  
Joel E. Ogden for the Respondent

Before MELISSA LIN JONES, and HEATHER C. LESLIE, *Administrative Appeals Judges* and  
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Ms. Juana Benavides worked for Renaissance-Washington, D.C. ("Renaissance") as a housekeeper. On June 10, 2013, she fell and hit her head against the wall. She injured the right side of her body and has not worked since her accident.

Ms. Benavides began treating with Dr. Lawrence Zumo, a neurologist. On July 22, 2013, Dr. Zumo certified Ms. Benavides as unable to work and referred her for an orthopedic evaluation. On October 4, 2013, Dr. Zumo released Ms. Benavides to her pre-injury employment with a work site evaluation by her supervisor. Thereafter, on December 16, 2013, Dr. Zumo authorized Ms. Benavides to gradually return to work with worksite evaluation.

On August 6, 2013 at Dr. Zumo's recommendation, Ms. Benavides began treating with Dr. Phillip Omohundro, an orthopedic surgeon. Following diagnostic testing, injections, and aquatic physical therapy, Dr. Omohundro conditionally released Ms. Benavides to return to work if an EMG/Nerve Conduction Study was negative or referred for work reconditioning; if the EMG was positive, Dr. Omohundro suggested pain management. An EMG revealed no documentable neurologic damage, and Dr. Omohundro released Ms. Benavides to full duty as of December 30, 2013.

Dr. Louis Levitt examined Ms. Benavides on September 17, 2013 at Renaissance's request. Dr. Kenneth Eckmann, a neurologist, also examined Ms. Benavides at Renaissance's request.

Based upon Dr. Levitt's opinion that Ms. Benavides could return to her pre-injury work, Renaissance stopped voluntarily paying wage loss benefits on October 14, 2013. The parties, therefore, proceeded to a formal hearing to resolve the following issues:

1. What is the nature and extent of Claimant's disability?
2. Did Claimant fail to cooperate with vocational rehabilitation?
3. Did Claimant voluntarily limit her income?<sup>[1]</sup>

In a Compensation Order dated May 22, 2014, an administrative law judge ("ALJ") granted Ms. Benavides temporary total disability benefits for the closed period of October 15, 2013 through December 30, 2013. The ALJ determined Dr. Omohundro's opinion that Ms. Benavides is able to return to full duty work as of December 30, 2013 is entitled to decisive weight on the issue of the nature and extent of Ms. Benavides' work-related disability.<sup>2</sup> Ms. Benavides appeals the May 22, 2014 Compensation Order.

On appeal, Ms. Benavides disputes the award of temporary total disability benefits for the closed period of October 15, 2013 through December 30, 2013 as well as any denial of ongoing medical benefits. Ms. Benavides contends she met her burden to prove "that the symptoms she continues to experience in her head, neck, right shoulder, and low back since the June 10, 2013 work accident have precluded her from returning to her regular employment as a housekeeper."<sup>3</sup> Specifically, Ms. Benavides argues

[t]he ALJ does not explain why, in light of the differing opinions of all the physicians to examine Ms. Benavides regarding her work status, the ALJ chose to accept only this period and reject the others.<sup>[4]</sup>

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<sup>1</sup> *Benavides v. Renaissance-Washington, D.C.*, AHD No. 14-171, OWC No. 706009 (May 22, 2014), p. 2.

<sup>2</sup> *Benavides, supra*.

<sup>3</sup> Claimant's Application for Review, p. 6.

<sup>4</sup> Claimant's Application for Review, p. 7.

Ms. Benavides also argues the denial of additional treatment for her right shoulder “does not flow rationally from the facts and represents an arbitrary and capricious abuse of discretion.”<sup>5</sup> Ms. Benavides asserts that the parties stipulated to the causal relationship between Ms. Benavides’ right shoulder injury and her work-related accident and that entitlement to ongoing medical benefits was not raised by the parties. For these reasons, Ms. Benavides requests the Compensation Review Board (“CRB”) reverse the Compensation Order in part.

In response, Renaissance maintains the ALJ offered detailed reasons for accepting Dr. Omohundro’s opinion regarding Ms. Benavides’ work capacity. In addition, Renaissance concedes “the denial of medical benefits should be construed as only pertaining to those which were recommended by Dr. Zumo as of the formal hearing date [including a] MRI of the right shoulder, orthopedic evaluation/possible second opinion, and work hardening.”<sup>6</sup> Renaissance requests the CRB affirm the Compensation Order.

Neither party appeals the ALJ’s ruling that Ms. Benavides did not fail to cooperate with vocational rehabilitation or the ALJ’s ruling that Ms. Benavides did not voluntarily limit her income.

#### ISSUES ON APPEAL

1. Is the ALJ’s ruling that Ms. Benavides is entitled to temporary total disability benefits from October 15, 2013 through December 30, 2013 supported by substantial evidence and in accordance with the law?
2. Is Ms. Benavides entitled to ongoing medical benefits for reasonable and necessary treatment for her work-related injuries?

#### PRELIMINARY MATTER

Renaissance filed a Motion to Dismiss on July 7, 2014; Renaissance asserts Ms. Benavides’ Application for Review was not filed timely. Ms. Benavides contends her Application for Review was filed timely.

As a matter of law, if an Application for Review is not filed timely, the CRB does not have authority to consider the merits of the appeal.

Section 32-1522(2A)(A) of the Act, in pertinent part, provides

[a] party aggrieved by a compensation order may file an application for review with the [CRB] within 30 days of the issuance of the compensation order. A party

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<sup>5</sup> Claimant’s Application for Review, p. 6.

<sup>6</sup> Self-Insured Employer’s Response to Claimant’s Application for Review, p. 5.

adverse to the review may file an opposition answer within 15 days of the filing of an application for review.

Also, 7 DCMR §258.2 provides

[a]n Application for Review must be filed within thirty (30) calendar days from the date shown on the certificate of service of the compensation order or final decision from which appeal is taken.

7 DCMR §257.1 states

[f]ilings with the Board of any permitted pleading, including the Application for Review, shall be deemed effective upon actual receipt by the Office of the Clerk.

Finally, 7 DCMR §299 defines the word “day” as a “calendar day, unless otherwise specified in the Act or this chapter;” however, pursuant to 7 DCMR §256.3,

[t]he Office of the Clerk of the Board shall be open from 8:30 a.m. to 5:00 p.m. on all days except Saturdays, Sundays, and legal holidays, for the purpose of receiving Applications for Review and such other pleadings, motions and papers as are pertinent to any matter before the Board.

Thus, when the thirtieth (30th) calendar day falls on a Saturday, Sunday, or legal holiday, the deadline is extended to the next business day.<sup>7</sup>

The Compensation Order on appeal issued on May 22, 2014. The thirty (30) calendar day period beginning on that date ended on June 21, 2014, a Saturday. Thus, in order to meet the statutory timeframe and to be a timely filing, Ms. Benavides's Application for Review must have been filed by the close of business on June 23, 2014. As evidenced by the date stamp on the Application for Review, it was filed on June 23, 2014 and is timely.

#### ANALYSIS<sup>8</sup>

As the ALJ noted, there is no presumption regarding the nature and extent of a claimant's disability.<sup>9</sup> The claimant must prove the nature and extent of her disability by a preponderance of the evidence without the benefit of any presumption.<sup>10</sup>

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<sup>7</sup> See, *Jackson v. ECAB*, 537 A.2d 576, 578 (D.C. 1988).

<sup>8</sup> 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. 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).

To assess the weight of the evidence, the ALJ focused on the medical evidence:

Claimant has relied essentially on the opinion of her treating neurologist, Dr. Zumo, to support her claim for temporary total disability. On October 4, 2013, Dr. Zumo stated Claimant could return to work on as a housekeeper with work site evaluation by her supervisor. CE 1, p. 12. Dr. Zumo provided follow-up treatment on November 18, 2013. He acknowledged concerns regarding Claimant's ability to return to work, given the rooms she has to clean and the repetitive use of her extremities, and Claimant fears she may worsen her symptoms and prolong her recovery. CE 1, p. 9. Dr. Zumo reported Claimant continued to have right shoulder range of motion limitations due to adhesive capsulitis, and recommended repeating the right shoulder MRI and physical therapy. Dr. Zumo placed Claimant off of work to avoid worsening of the right shoulder arthralgia. CE 1, p. 9. On December 16, 2013, Dr. Zumo noted Claimant continued to have focal right shoulder restrictive pain. Despite these complaints, Dr. Zumo allowed Claimant to return to work, recommending a gradual return to work with worksite evaluation. CE 1, p. 5. Dr. Zumo, however, completed disability certificates on January 16, 2014 excusing Claimant from work. CE 1, pp. 3-4. On March 17, 2014, Dr. Zumo noted Claimant continued to have limited mobility of the right shoulder, and recommended treatment for the right shoulder again, which included a MRI of the right shoulder. Dr. Zumo also recommended a work hardening program and work evaluation after the pain subsides. CE 1, p. 1.<sup>[11]</sup>

As this passage demonstrates, contrary to Ms. Benavides argument that the ALJ failed to give any weight to her testimony regarding her current symptoms and how those symptoms affect her ability to perform her job duties, the ALJ did consider that testimony through its consistency with the medical records.

Furthermore, in recognition of the treating physician preference,<sup>12</sup> the ALJ gave deference to Ms. Benavides' treating physician who had released her to return to work after an EMG was unremarkable:

Dr. Omohundro recommended completion of EMG/NCS indicating Claimant could return to work or refer for work re-conditioning if the testing was negative. He suggested pain management if the EMG/NCS was positive. CE 2, p. 26. On December 24, 2013, Dr. Omohundro reported the EMG/NCS found no

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<sup>9</sup> *Dunston v. DOES*, 509 A.2d 109, 111 (D.C. 1986).

<sup>10</sup> *Golding-Alleyne v. DOES*, 980 A.2d 1209, 1215 (D.C. 2009).

<sup>11</sup> *Benavides, supra*, at p. 6.

<sup>12</sup> *Stewart v. DOES*, 606 A.2d 1350, 1353 (D.C. 1992).

documentable neurologic damage. He injected the right shoulder, and released Claimant to return to work full duty as of December 30, 2013. CE 2, p. 22.

In this case, Claimant has provided medical evidence from two treating physicians who offered conflicting opinions regarding her return to work status. At this point, Dr. Zumo has placed Claimant out of work due to her right shoulder condition. . . . When presented with questions concerning Claimant's right shoulder, Dr. Eckmann, a neurologist, deferred to the orthopedic specialist. In this case, Dr. Omohundro, the treating orthopedic surgeon, released Claimant to full duty on December 30, 2013. The record reveals Dr. Omohundro provided extensive treatment for the right shoulder condition and thoroughly documented his findings after a number of examinations. Notwithstanding the positive findings of the MRI of the right shoulder, Dr. Omohundro concluded Claimant was not a surgical candidate, and released Claimant to full duty. . . .

In terms of the disparity between the return to work opinions of Dr. Omohundro and Dr. Levitt, it is generally recognized under the District of Columbia's Workers' Compensation Act that there is a preference for the testimony of treating physicians over doctors retained for litigation purposes, *Canlas v. DOES*, 723 A.2d 1210 (D.C. 1999), and that in assessing the weight of competing medical testimony in worker compensation cases, attending physicians are ordinarily preferred as witnesses to those doctors who have been retained to examine the claimant solely for purposes of litigation. *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992). However, it is equally recognized that "the hearing examiner nonetheless 'may choose to credit the testimony of a non-treating physician over a treating physician,'" *Short v. DOES*, 723 A.2d 845 (D.C. 1998), particularly if the contradicting medical evidence from the employer was from a doctor who examined the claimant, and the ALJ explains his decision to credit the one opinion over the other. *Canlas, supra*, at 1212. The record establishes Dr. Omohundro served as the treating physician.

On September 17, 2013, Dr. Levitt concluded Claimant was grossly exaggerating her pain responses and grossly exaggerating her level of disability. Dr. Levitt stated her fall was a low energy injury from a musculoskeletal perspective. He reported Claimant sustained a strain to the neck, back, right upper extremity and right lower extremity. He opined treatment should have been adequate after three months with medicine and physical therapy. EE2, p.7. Dr. Levitt remarked he did not see evidence of an active impingement syndrome or shoulder pathology. Dr. Levitt placed Claimant at maximum medical improvement, and stated Claimant had the capacity to return to work immediately without modification of her work activities. EE 2, p. 8.

In contrast, Dr. Omohundro did not release Claimant to return to work until December 30, 2013. Dr. Omohundro documented Claimant's pain complaints, and offered sufficient findings to continue Claimant's medical

treatment. On December 3, 2013, Dr. Omohundro recommended EMG/NCV testing to rule out neurological damage. Dr. Omohundro offered sufficient medical rationale to support continued treatment, and he provided a right shoulder injection on December 24, 2013. The medical evidence from the treating physician, Dr. Omohundro, establishes Claimant had medical restrictions precluding a return to her pre-injury employment. Therefore, Claimant has established entitlement to temporary total disability benefits from October 15, 2013 to December 30, 2013.<sup>[13]</sup>

We find no error in the weight the ALJ afforded the medical evidence when assessing the nature and extent of Ms. Benavides' disability or work capacity.

Regarding the ALJ's comment that "additional treatment is not warranted for the right shoulder,"<sup>14</sup> at the formal hearing the parties stipulated that Ms. Benavides' right shoulder injury arises out of and in the course of her employment. Moreover, neither party raised any issues regarding Ms. Benavides' entitlement to ongoing medical treatment. Thus, although the ALJ did not formally include any denial of ongoing medical treatment in his Order, to avoid any due process issues stemming from a lack of notice,<sup>15</sup> the CRB amends the May 22, 2014 Compensation Order by striking the sentence "Therefore, additional treatment is not warranted for the right shoulder."<sup>16</sup>

#### CONCLUSION AND ORDER

The ALJ's ruling that Ms. Benavides is entitled to temporary total disability benefits from October 15, 2013 through December 30, 2013 is supported by substantial evidence and is in accordance with the law. Because neither party raised any issue before the ALJ regarding Ms. Benavides' entitlement to ongoing medical benefits for reasonable and necessary treatment for her work-related injuries, due process requires the May 22, 2014 Compensation Order be amended to strike the sentence "Therefore, additional treatment is not warranted for the right shoulder." With this amendment, the May 22, 2014 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Melissa Lin Jones

MELISSA LIN JONES

*Administrative Appeals Judge*

November 25, 2014

DATE

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<sup>13</sup> *Benavides, supra*, pp. 7-8.

<sup>14</sup> *Id.* at p. 7.

<sup>15</sup> See *Transportation Leasing v. DOES*, 690 A.2d 487 (D.C. 1997).

<sup>16</sup> *Benavides, supra*, at p. 7.