COMPENSATION REVIEW BOARD

CRB No. 12-179

KEVIN BURKE,
Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer-Respondent

Appeal from an October 5, 2012 Compensation Order on Remand by
Administrative Law Judge Karen R. Calmeise
AHD No. 12-115, OWC No. 682335

Matthew Peffer, Esquire, for the Claimant/Petitioner
Mark H. Dho, Esquire, for the Self-Insured Employer/Respondent

Before: HENRY W. MCCOY, MELISSA LIN JONES, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant, who worked as a train operator, suffered work-related injuries to both wrists on April 15, 2008 and subsequently underwent surgical releases, June 23, 2009 on the right wrist and July 14, 2009 on the left. Claimant filed a claim for temporary total disability (TTD) for the period August 12, 2010 to September 7, 2010 and for temporary partial disability (TPD) for the period September 7, 2010 [sic] to October 17, 2010. On February 28, 2011, a Compensation Order (CO) was issued granting the claim for relief.

On November 18, 2011, the Office of Workers' Compensation (OWC) approved a stipulated agreement between the parties awarding Claimant a permanent partial schedule award of 23% to the left arm and 21% to the right arm.

After working for another employer for a brief period, Claimant returned to work for Employer as a station manager. On June 30, 2011, Claimant was working in this position when he claims he suffered another work-related injury to both hands and wrists while pulling the station's gate open. Claimant filed a claim for TTD wage loss for the period October 14, 2011 to October 29, 2011 and from November 18, 2011 to the present and continuing. On June 8, 2012, a CO was issued denying the claim for relief. Claimant timely appealed to the CRB.

On August 8, 2012, the CRB issued a Decision and Remand Order. After reviewing the CO, the CRB determined:

> Here, the ALJ weighed the medical record evidence and the claimant's testimony and concluded that he had not proven that his current disability and need for medical care was caused by the 2011 injury and that his disability and medical care was caused by the 2008 injury. However, she did not analyze the evidence in accordance with the presumption analysis.[1]

Noting that the ALJ's failure to make factual findings on each materially contested issue required a remand for the ALJ to do so, the CRB went on to state:

> The ALJ determined the comparative evidentiary weight to be given the evidence, without first determining whether the evidence submitted by employer, standing alone, rebutted the presumption. Therefore, because the ALJ's conclusion was reached without applying proper legal principles, the CO is not in accordance with the law.[2]

On October 5, 2012, the ALJ issued a Compensation Order on Remand (COR) which again denied Claimant's claim for wage loss benefits after concluding Claimant failed to show that his bilateral hand condition resulting from the June 30, 2011 work injury was not a separate injury but rather an aggravation of the 2008 work injury.[3] Claimant has filed a timely appeal with Employer filing in opposition.

On appeal, Claimant argues that the ALJ failed to apply the presumption of compensability, that he proved his entitlement to wage loss benefits, and that the case of *Smith v. DOES* [4] is not applicable to the facts of this case and thus as a matter of law it was applied erroneously by the ALJ. Employer argues to the contrary that the presumption was invoked and rebutted but the preponderance of the evidence did not support Claimant's claim for disability

[1] *Burke v. WMATA*, CRB No. 12-101, AHD No. 12-115, OWC No. 682335 (August 8, 2012), p. 4.

[2] *Id.*

[3] *Burke v. WMATA*, AHD No. 12-115, OWC No. 682335 (October 5, 2012).

[4] *Smith v. DOES*, 548 A.2d 95 (D.C. 1988).

benefits and that the ALJ correctly applied the *Smith* case to further support the denial of those benefits.

STANDARD OF REVIEW

The scope of review by the CRB, 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.[5] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (the "Act"), at § 32-1521.01(d)(2)(A). 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.

In his first argument on appeal, Claimant asserts that the ALJ failed to apply the presumption of compensability as required by D.C. Code § 32-1521(1) of the Act.[6] With specific regard to the instant case under review, it is accepted in this jurisdiction that the presumption extends to the medical causal relationship between an alleged disability and the work place injury.[7]

After citing the provision of the Act affording Claimant the presumption of compensability and associated case law, the ALJ stated:

> In the instant case, it is not contested that the Claimant sought medical treatment for complaints of pain in his right and left hands and wrists and [sic] after he pulled a gate closed at a Metro Station. Claimant gains the presumption that his current condition is medically causally related to his work duties and the incident which occurred on June 30, 2011.[8]

With this determination by the ALJ, the presumption of compensability has been invoked; whereupon the ALJ commenced the presumption analysis as directed by the CRB. Thus, no error is found.

Once the presumption has been invoked, the burden then shifts to Employer to present evidence in rebuttal by producing evidence specific and comprehensive enough to sever the causal connection between the work injury and the alleged subsequent disability. Employer can meet its burden to rebut the presumption of causation when it proffers a medical expert who,

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[5] "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 International v. DOES*, 834 A.2d 882 (D.C. 2003).

[6] D.C. Code § 32-1521(1) 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;…."

[7] *Whittaker v. DOES*, 531 A.2d 844 (D.C. 1995).

[8] COR at 5.

having examined Claimant and reviewed his medical records, renders an unambiguous opinion that the work injury did not contribute to the disability.[9] If Employer meets its burden, the statutory presumption drops out of the case entirely and the burden reverts back to Claimant to prove by a preponderance of the evidence, without the aid of the presumption, that a work-related injury caused or contributed to his disability.[10]

Claimant also asserts on appeal that Employer did not adduce medical evidence specific and comprehensive enough to rebut the presumption of compensability. Claimant argues that he received a new diagnosis of bilateral wrist tendonitis and sprain on July 1, 2011 from Dr. Monica Riley at Kaiser Permanente and Dr. Draper's March 23, 2012 IME does not rebut this diagnosis.

In determining whether the presumption was rebutted, the ALJ stated

> To rebut the presumption Employer presented the IME report by Dr. Robert Franklin Draper, Jr., orthopedic surgeon who examined the Claimant on March 23, 2012. When referencing the June 2011 incident Dr. Draper opined that the Claimant experienced pain in the right and left hands after pulling the gates very hard. (EE 1) However, the IME physician further states that the Claimant "continued to complain of pain in the right and left wrist" after the right and left wrist surgery. (EE 1, pg 1) Dr. Franklin [sic] noted the Claimant's "long history of problems with both hands" and attributed the Claimant's continued complaints of pain in his right and left wrist to his De Quervain condition. (EE, IME diagnosis)
>
> I find the Employer's evidence to be specific and comprehensive therefore it is sufficient to meet the *Reynolds* standard, under the Act, to rebut the presumption of a medical causal relationship between the June 30, 2011 work incident and Claimant's complained of wrist and hand condition.[11]

In order to successfully rebut the presumption of compensability, it is not required that the medical evidence rebuts any diagnosis given, rather it must opine as to whether the work injury contributed to the disability or not. In assessing Dr. Draper's IME, the ALJ has determined that it was unambiguous, specific, and comprehensive enough to rebut the presumption of compensability.

Dr. Draper acknowledged that the work incident on June 30, 2011 caused increased pain in Claimant's right and left hands and that the repetitive motions of opening and closing gates "would cause his de Quervain's to worsen or recur." The diagnosis given is "De Quervain's tenosynovitis of the right wrist" and of the "left wrist" both status post surgical release in May

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[9] *Washington Post v. DOES and Reynolds, Intervenor*, 852 A.2d 909, 910 (D.C. 2004) (Reynolds) (an employer meets its burden to rebut the presumption of causation when it proffers a medical expert who, having examined the employee and reviewed his medical records, renders an unambiguous opinion that the work injury did not contribute to the disability).

[10] *Id*. at 911.

[11] COR at 5.

and July 2010, respectively, and as such, related to the 2008 work injury with no further reference to the 2011 work incident. We agree.

As Dr. Draper's entire IME report is couched in terms of the 2008 work injury and the history of resulting problems, we agree that this is unambiguous, specific, and comprehensive enough to rebut the presumption. While Dr. Draper does not render an unambiguous opinion that the June 30, 2011 work incident did not contribute to the current disability, his diagnosis relates the current condition to the prior work injury. Accordingly, the presumption drops out of the case with the burden shifting back to Claimant to show by a preponderance of the evidence that his current disabling condition is causally related to the June 30, 2011 work incident.

After deciding that the presumption had been rebutted and noting that the burden shifted back to Claimant for the evidence to be weighed without the benefit of the presumption, the ALJ determined without further comparative analysis of the evidence:

> However, after review of the medical reports and testimony presented, I find the medical evidence fails to support the claim that the Claimant suffered a distinct and separate injury on June 30, 2011, significant enough to warrant an award of additional wage loss benefits.[12]

We are not clear what the ALJ means by this conclusory statement. If Claimant has suffered a "distinct and separate injury", *i.e.*, a new injury, there is no requirement that it be "significant" to qualify as an exception to the preclusion on the receipt of additional TTD benefits following a schedule award.[13] We find this conclusion by the ALJ to be confusing and incomplete because it does not determine whether Claimant has sustained a new injury, a recurrence, or "flare-up" of his prior injury and on-going symptoms.

The parties stipulated that Claimant sustained injuries to both hands on June 30, 2011. The question becomes whether this stipulation equates to an acknowledgement by the parties that Claimant has incurred a new injury as asserted by Claimant, or whether it means he merely sustained a recurrence or "flare-up" of the 2008 injury, as advocated by Employer. The ALJ's conclusion stated above does not resolve this issue. The need to resolve this confusion requires that we return this matter for further consideration.

The issue for resolution before the ALJ was whether Claimant's current disabling bilateral hand condition was medically causally related to the work incident of June 30, 2011. The conclusion reached by the ALJ does not resolve this question because the medical evidence on causal relationship has not been weighed with the required deference given to the opinion of the treating physician.[14] Instead of answering the question presented to determine entitlement to the requested wage loss benefits, the ALJ has leaped ahead to a consideration of Employer's defense that such benefits are precluded under the circumstances of this case.

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[12] COR at 6.

[13] See *Cherrydale Heating and Air Conditioning v. DOES*, 722 A.2d 31 (December 24, 1988).

[14] See *Kralick v. DOES*, 842 A.2d 705, 712 (D.C. 2004).

The ALJ's use of the decision in *Cherrydale*, especially with reference to the Court's affirmance in the case of Howard Poole[15], only adds to the confusion in this matter, as apparent in the following

> I find that Claimant's pulling incident and subsequent increased pain and discomfort in his bilateral wrists was a foreseeable complaint and the fact that he suffered increased disability following the incident does not rise to the level of an exception that would warrant an award of additional benefits outside of the schedule award.

In this statement, we are confronted with a "pulling incident" producing "increased pain and discomfort" that is deemed to be "a foreseeable complaint" from which the Claimant has experienced an "increased disability".[16] Increased pain producing increased disability would suggest the occurrence of a "distinct and separate" new injury. Under those circumstances there would again be no need to "rise to the level of an exception" afforded to Howard Poole in *Cherrydale*.

CONCLUSION AND ORDER

As the ALJ has applied the test of whether Claimant has suffered an unusual and extraordinary condition after receiving a schedule award to determine entitlement to additional TTD benefits without first determining the type of injury incurred, new or flare-up, the decision is not supported by substantial evidence in the record and is not in accordance with the law. The Compensation Order of October 5, 2012 is VACATED and REMANDED for further consideration consistent with the Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

March 11, 2013
DATE

[15] See *Cherrydale, supra*.

[16] We caution the ALJ in finding Claimant's pulling incident to have produced "foreseeable complaints" comes close to introducing the element of fault, a concept that is not recognized in this jurisdiction's workers' compensation scheme.