

**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. 07-169

LAWANN SMITH-JOHNSON,

Claimant - Respondent

v.

HUNTON AND WILLIAMS AND CHUBB INSURANCE GROUP,

Employer-Chubb/Petitioner

and

HUNTON AND WILLIAMS AND PMA MANAGEMENT CORPORATION,

Employer-PMA/Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Belva D. Newsome
AHD No. 07-129A, OWC No. 608331, 571199,600038

Heather C. Leslie, Esquire for the Claimant/Respondent

Michael D. Dobbs, Esquire, for the Employer-Chubb/Petitioner

Douglas Datt, Esquire for the Employer-PMA/Respondent

Before LINDA F. JORY, SHARMAN J. MONROE, *Administrative Appeals Judges* AND E. COOPER BROWN, *Chief, Administrative Appeals Judge*

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

DECISION AND 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 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005)¹. Pursuant to 7 D.C.M.R § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on August 28, 2007, the Administrative Law Judge (ALJ) concluded that Claimant-Respondent's stipulated accidental injury of November 16, 2004 arose out of and in the course of her employment; is medically causally related to her employment; her disability is temporary and total as of August 9, 2005 to the present and continuing; and all requested diagnostic tests are to be authorized. Employer had two insurers for injuries sustained at work by Claimant-Petitioner. Chubb Insurance Group was the insurer on the risk when the most recent injury occurred found to be responsible for the claim, and thus the designations of Employer-Chubb/Petitioner and Employer-PMA/Respondent.

Employer-Chubb/Petitioner (Petitioner) filed an Application for Review (AFR) on September 27, 2007 and its Memorandum of Points and Authorities in support thereof, on September 28, 2007. As grounds for this appeal, Petitioner alleges the ALJ erred in the application of the standard of review of the medical evidence. Specifically Petitioner asserts the ALJ's reliance on the opinions of Dr. Dorn is flawed based on his failure to have reviewed any prior medical records and that he relied on the history as relayed to him by claimant. Petitioner further asserts the ALJ improperly rejected the opinion of Dr. Collins, an independent medical examiner retained by both Insurer/Respondent and Petitioner. Employer-PMA/Respondent filed a response to the AFR asserting that the findings in the Compensation Order are based on substantial evidence; were properly reasoned, are in full accordance with the applicable law and the decisions should be affirmed by the CRB.

¹Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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 scope of review, the CRB and this panel are bound 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 Panel finds one minor flaw in the ALJ’s application of the presumption to the facts of the instant matter, we conclude the ALJ’s conclusions that the presumption has not been rebutted by Employer-Chubb/Petitioner and Claimant-Respondent’s temporary total disability is related to the work related injury of November 16, 2004 are supported by substantial evidence and are in accordance with the law.

The Compensation Order reveals that the ALJ began her discussion of the application of the presumption with a summary of the claimant’s injuries including a work related injury to neck and back on July 16, 2001, and a work related injury to the left shoulder on February 12, 2004. In addition, the ALJ states “the parties have stipulated that Claimant suffered a work-related injury on November 16, 2004” and “Since Employer Chubb has stipulated to the accidental injury of November 16, 2004, Claimant is entitled to the presumption of compensability”. *Citing Whitley v. Howard University and Liberty Mutual Insurance*, CRB No. 06-71, OHA No 03-500, OWC No. 578967(February 16, 2007).

The Panel notes the ALJ interchanges the word “accidental” with “work-related” when describing the Respondent’s injury. However, these descriptions are not interchangeable. In order to show an accidental injury within the purview of the Act, it is only necessary to show that “something unexpectedly has gone wrong with the human frame”. *See WMATA v. District of Columbia Department of Employment Services*, 506 A.2d 1127 (D.C. 1986). With the establishment of an accidental injury, the question becomes whether said injury arose out of and in the course of one’s employment, i.e., whether the injury is work-related. The Court of Appeals has expanded the scope of application for the presumption of compensability to include the causal relationship not just between the original injury and the employment but between the current disabling condition and the injury. *See Charles Whittaker v. District of Columbia Dept. of Employment Services*, 668 A.2d 844 (D.C. December 18, 1995).

This Panel notes that when an employer stipulates that a work related injury occurred, the presumption is in fact *invoked* and the burden of production shifts to the Employer to set forth substantial evidence to show that the *disability* is not work-related. Thus when employer stipulates that a work related injury did occur, claimant need not meet the initial threshold requirement which is some evidence of a "work-related event, activity or requirement which has

the potential of resulting in or contributing to the death or disability." See *Ferreira v. District of Columbia Dept. of Employment Services*, 531 A.2d 651, 655 (D.C.1987).

Nevertheless, having found the presumption invoked, the ALJ properly shifted the burden to the Petitioner stating that she would follow the precedent established in *Washington Post v. District of Columbia Department of Employment Services*, 852 A.2d 909, 914 (D.C. 2004)(Raymond Reynolds, intervenor)(*Reynolds*) as well as that set forth by the CRB in *Owens v. Washington Metropolitan Area Transit Authority*, CRB No. 03-73, OHA No. 02-416, OWC No. Unknown (March 14, 2005)². The ALJ concluded that the opinion of Dr. Robert E. Collins did not meet the standard set forth in *Owens* as adapted from *Reynolds* as the ALJ concluded that Dr. Collins does not present an unambiguous opinion that the work injury of November 16, 2004 did not contribute to Claimant's disability. In support of its conclusion, the ALJ cited to Dr. Collins July 16, 2001 IME wherein he "rendered an unambiguous finding that Claimant's July 16, 2001 work-related accidental injury had reached maximum medical improvement, required no further treatment, and needed no work restrictions for Claimant to return to work full duty". The ALJ found Dr. Collins contradicted his 2004 report by stating in his 2007 report that, "Claimant has had continued trouble from the injury of 2001; that Claimant had been having some intermittent neck and shoulder pain and that Claimant had never gotten back to full duty still unrestricted". The ALJ cited to other inconsistencies in Dr. Collins report that we need not repeat herein, but agree that the ALJ's conclusion that Petitioner has not met its burden of producing "specific and comprehensive evidence" on the question of causality is supported by substantial evidence. It is well settled in this jurisdiction that an employee's disability is compensable if it arose "even in part" out of the course of his employment. *Ferreira, supra*.

After concluding that Claimant-Respondent was entitled to the presumption that her disability is work related, the ALJ again discussed Petitioner's challenges of whether Claimant-Respondent's "stipulated" November 16, 2004 injury arose out of and in the course of her employment, and whether a medical causal relationship exists between Claimant-Respondent's employment and her injury. The ALJ appears to review the evidence again to determine if the presumption is rebutted and also appears to weigh Dr. Collin's opinion against that of the treating physician, Dr. William Dorn, and concludes "Based upon the medical opinion of [Claimant-Respondent's] treating physician and the failure of [Employer-Chubb/ Petitioner] to rebut the presumption of compensability, [Claimant-Respondent's] November 16, 2004 injury is medically causally related to her employment". CO at 7. The Panel concludes this step is unnecessary based on the ALJ's initial statements that Petitioner stipulated that a work related injury occurred on November 16, 2004. In that the parties stipulated to the work related event, Employer-Chubb/Petitioner, we conclude, is required to meet one burden of production to rebut the presumption (that the disability is causally connected to the work-related event) and if it fails to do so its evidence is not weighed against the evidence of record³.

² In *Owens*, the CRB held:

We hold that an employer has met its burden to rebut the presumption of causation when it has proffered a qualified independent medical expert who having examined the employee and reviewed the employee's medical records, renders an unambiguous opinion that the work injury did not contribute to the disability.

³ The Panel is mindful that in its recent decision in *Walter McNeal v. District of Columbia Dept. of Employment Services(WMATA, intervenor)* 917A.2d 652 (February 22, 2007)(*McNeal*) , the Court inferred that an injured worker may be entitled to two chances to invoke the presumption i.e., when his own testimony as to how an incident occurred is not found to be credible but his co-workers testimony, according to the Court, reveals an alternative

Although this Panel concludes Petitioner has done nothing more than assert numerous reasons why the ALJ might have ruled differently, had the ALJ accepted Petitioner's views as to the weight to be accorded to the evidence presented on the causation issue⁴, Petitioner has not set forth any opposition to the ALJ's findings of fact and conclusions of law with regard to the nature and extent issue. According to the Compensation Order, the ALJ relied on the August 9, 2006 report of Dr. Dorn wherein he stated that on March 9, 2005 he placed Claimant-Respondent on temporary total disability status and that she has remained on that status. The ALJ further concluded that Petitioner has not met its burden of proving work for which the Claimant-Respondent is qualified is available. *See Logan v. District of Columbia Department of Employment Services*, 805 A.2d 237, 239 (D.C. 2002). Given the preference afforded the treating physician in this jurisdiction, this Panel concludes the ALJ's determination that Claimant-Respondent is temporarily totally disabled from August 9, 2005 to the present is supported by substantial evidence of record and shall not be disturbed.

CONCLUSION

The ALJ's conclusions that the injury of November 16, 2004 arose out of and in the course of Claimant-Respondent's employment; the disability is medically causally related to her employment; and the nature and extent of disability is temporary total from August 9, 2005 to the present, are supported by substantial evidence of record, and are in accordance with the law.

ORDER

The Compensation Order issued on August 28, 2007 is hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

October 31, 2007

DATE

theory of employment causation. Whether or not the employer in *McNeal* was prepared to rebut an alternative theory of causation notwithstanding, the *McNeal* scenario would require two burdens of production on the employer.

⁴We may not substitute our judgment for that of the ALJ, whose decision is supported by substantial evidence produce to the effect that Claimant-Respondent's alleged disability is causally related to the injury she sustained on November 16, 2004. *Marriott*, 834 A.2d at 885.