

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

**MURIEL BOWSER**  
MAYOR



**DEBORAH A. CARROLL**  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-080**

**MIGUEL CONTRERAS,**  
**Claimant–Respondent,**

**v.**

**BODOGS, LLC and ERIE INSURANCE GROUP,**  
**Employer and Carrier–Petitioner.**

Appeal from an April 21, 2015 Compensation Order by  
Administrative Law Judge Gregory P. Lambert  
AHD No. 15-031, OWC No. 718735

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 SEP 25 PM 9 03

(Decided September 25, 2015)

David J. Kapson for Claimant  
Zachary Shapiro for Employer and Carrier

Before: LAWRENCE D. TARR, *Chief Administrative Law Judge* with LINDA F. JORY AND JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

LAWRENCE D. TARR for the Compensation Review Board.

**DECISION AND ORDER MODIFYING AWARD**

This case is before the Compensation Review Board (“CRB”) on the request of Bodogs LLC and Erie Insurance Group’s (“Employers”) for review of the Administrative Law Judge’s (“ALJ’s”) April 21, 2015 Compensation Order (“CO”) that found Miguel Contreras (“Claimant”) sustained a work-related injury on June 24, 2014, and awarded Claimant continuing temporary total benefits beginning July 31, 2014 (minus a two month credit to Employer), and all causally related medical expenses, which included a neurological consultation recommended by treating physician, Dr. Joel Fechter. Employer also appeals the ALJ’s denial of its post-CO Motion for Reconsideration.

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Claimant worked part-time for Employer, a hot dog restaurant that was located at Gallery Place in Washington, D.C. Claimant’s regular duties involved moving items in boxes, chopping onions and other vegetables, and filling containers with hot dog toppings.

Claimant testified that on June 24, 2014 he injured his neck and right arm when he almost fell to the floor while carrying a box on his shoulder. Claimant slipped on a wet area on the floor between the stock room and the kitchen. As he fell, the box he was carrying struck a wall and prevented him from falling to the floor.

Claimant further testified that he told Employer's chef that he had fallen and continued working for four days. Claimant's first medical treatment after June 24, 2014 was at Unity Health Care on July 11, 2014. After that he began treating with Dr. Joel Fechter on July 31, 2014. Dr. Fechter restricted Claimant from all work until August 11, 2014, when he released Claimant to working with restrictions against lifting more than twenty pounds. Dr. Fechter also referred Claimant for a neurosurgical consultation.

After the restricted work release by Dr. Fechter, Claimant was not able to work for Employer because it was no longer in business. Claimant testified that for approximately two months, he worked for another company installing metal doorframes. Claimant characterized this work as light duty work within the restrictions set by Dr. Fechter. Employer sent Claimant for an Independent Medical Examination with Dr. Clifford Hinkes on January 30, 2015.

Claimant filed for a formal hearing because Employer did not voluntarily accept his workers' compensation claim and did not authorize the neurosurgical consultation. On March 12, 2015, the ALJ held a formal hearing at which Claimant sought an award for continuing temporary total disability benefits beginning on July 31, 2014, authorization for medical treatment that included the neurosurgical consultation, and all other causally related medical expenses. The ALJ issued his CO on April 21, 2015 and awarded the entire claim for relief.

On May 1, 2015 Employer filed with the ALJ a Motion for Reconsideration asking the ALJ to modify the April 21, 2015 CO because it learned from Claimant that after the formal hearing Claimant began working for another employer and as of about March 21, 2015, no longer had any wage loss.

On May 6, 2015, Claimant, by counsel, filed a letter in response to Employer's Motion in which he agreed that Claimant was working and that as of about March 21, 2015 did not have any wage loss with respect to the June 24, 2014 accident at work. The ALJ was advised that Claimant requested Employer suspend ongoing payments pursuant to the CO's award during the time he is working and not experiencing any wage loss. Claimant further stated he did not consent to modifying the CO.

On May 13, 2015, Employer filed an appeal of the April 21, 2015 CO and also filed a motion to stay the CRB's review until after the ALJ ruled on its Motion for Reconsideration. While these were pending at the CRB, the ALJ ruled on Employer's Motion for Reconsideration. On May 12, 2015, the ALJ issued an Order denying the Motion for Reconsideration. Employer withdrew its motion for a stay at the CRB on May 18, 2015. Claimant filed his Opposition to Employer's appeal on June 2, 2014.<sup>1</sup>

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<sup>1</sup> Claimant titled his Opposition "Claimant's Opposition to WMATA's Application For Review." This clearly is a typographical error as the caption of the Opposition and the memorandum correctly identify the employer as Bodogs.

As will be more fully discussed below, although the ALJ made several errors in the CO, none require remand because the CO is supported by substantial evidence and in accordance with the law. However, the ALJ's Order denying the Motion for Reconsideration is arbitrary and not in accordance with the law.

The CRB separately will discuss Employer's appeal of the ALJ's CO and Employer's appeal of the Order denying its Motion for Reconsideration.

### THE STANDARD OF REVIEW FOR THE COMPENSATION ORDER

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed CO are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. The CRB must affirm a CO 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).

### DISCUSSION

#### The ALJ's Credibility Finding

In the CO, the ALJ made a separate determination that the Claimant was credible. Employer appeals this determination and argues that the ALJ's credibility finding in favor of Claimant is not supported by substantial evidence.

Employer identified the following as examples of evidence that does not support the ALJ's finding that Claimant was a credible witness:

- The Unity Health Care<sup>2</sup> medical records contradict Claimant's testimony that he never treated at Unity Health Care and that he never was diagnosed with carpal tunnel syndrome prior to June 24, 2014.
- Claimant's testimony that he only injured his low back and left shoulder in a 2013 work-related accident while working for a different employer was inconsistent with medical reports that show Claimant injured his neck and right arm in that accident.
- Claimant testified that after he was injured he notified Employer's chef and cashier. Employer argues this testimony is not credible because at the hearing Claimant could not remember the names of these people and that at his deposition Claimant testified that he did not discuss the accident with any of the Employer's personnel.
- Claimant testified he sought treatment from Dr. Fechter four days after the June 24, 2014 accident at work. Dr. Fechter's reports show he first treated Claimant on July 31, 2014, 33 days later.

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<sup>2</sup> Throughout its memorandum, Employer refers to this Unity Health Care as "Unity Healthcare."

The ALJ acknowledge some of these inconsistencies in the CO. The ALJ also stated why, despite them, he believed Claimant:

I believed Mr. Contreras. Although his testimony was occasionally inconsistent, I do not attribute those inconsistencies to an intent to mislead. *See, e.g.* HT at 25:14-22. Not once did I find his responses evasive or intentionally ambiguous. Instead, his answers and demeanor consistently struck me as forthright and honest. I was particularly persuaded by his sincerity with he said that he wanted to work. HT at 39. (“Of course, I’d like to have a job. I mean, something light, I don’t want to be living a lazy life, something to work for.”)

CO at 3.

The CRB will not disturb the ALJ’s credibility finding regarding Claimant. Because an ALJ sees and hears a witness testify, an ALJ is in a better position to assess credibility and the CRB usually defers to the ALJ’s finding. Here, the ALJ found that Claimant’s inconsistent testimony was caused by his imperfect memory and not by any intent to lie. We see no reason to overturn this finding.

Although the ALJ did not specifically address the other inconsistencies in the record, we do not find any one of them, or all of them together, are so significant or critical as to present a reason not to defer to the ALJ’s credibility determination.

#### The Presumption of Compensability

Employer further argues that the ALJ committed legal error by finding Claimant’s injuries arose out of and in the course of his employment. Within this assignment of error, Employer first asserts the ALJ erred by finding that it did not rebut the presumption of compensability.

Employer argues that the presumption was rebutted by the July 11, 2014 medical report from Unity Health Care, the first place where Claimant received medical treatment after June 24, 2014. Employer asserts that the presumption was rebutted because the medical report does not say Claimant was injured and says Claimant was in no apparent distress. Employer states:

Assuming *arguendo* that the Claimant’s testimony is given some weight, the Employer and Carrier presented the requisite information to rebut the presumption. Specifically, the Employer presented the July 11, 2014 report from Unity Healthcare [sic] which does not mention a workers’ compensation injury or any related complaints. EE 4, p. 57. This was the Claimant’s first medical treatment following the alleged incident of June 24, 2014. This report mentions the Claimant is “in no apparent distress.” The Employer and Carrier provided evidence through July 11, 2014 report form Unity Healthcare [sic] that a reasonable mind could find rebutted the presumption. As such the Administrative Law Judge committed legal error.

Memorandum at 11.

This is the discussion in the CO regarding whether Employer rebutted the presumption of compensability that Claimant sustained an accidental injury at work:

In response, Bodogs relies primarily on negative evidence to rebut the presumption. But negative evidence is insufficient for this purpose. *See, generally Swails v. Forever 21 Inc.*, CRB No. 14-138, AHD No. 13-105 (March 25, 2015). To the extent Bodogs relies on other evidence, I do not find it persuasive in light of the record evidence and Mr. Contreras's credible testimony. *See* EE 4. Bodogs did not rebut the presumption.

Mr. Contreras credibly testified that he fell at work while carrying a heavy box that he was ordered to carry by a Bodogs chef. HT at 53-55. His testimony was sufficient to invoke the presumption of compensability, which Bodogs did not rebut. His fall arose out of and in the course of employment with Bodogs.

CO at 7.

Employer asserts the ALJ's finding that it did not rebut the presumption should be reversed because the ALJ made an error of law when he held negative evidence cannot rebut the presumption. We agree the ALJ erred when he stated that negative evidence could never be used to rebut the presumption but disagree that this requires remand.

In the case identified by the ALJ to support his view that negative evidence always is insufficient to rebut the presumption, *Swails v. Forever 21 Inc.*, CRB No. 14-138, AHD No. 13-105 (March 25, 2015), the CRB cited the District of Columbia Court of Appeals case *Brown v. DOES and WMATA intervenor*, 700 A. 2d 787 ((D.C.1997). In *Brown*, the DCCA held that negative evidence, "in some circumstances", might be sufficient to rebut the presumption:

Negative evidence, in some circumstances, may be adequate to inform a factual determination. *See Swinton v. J. Frank Kelly, Inc.*, 180 U.S. App. D.C. 216,224, 554 F.2d 1075, 1083 (1976). The court in *Swinton* provided the example that "'if a man has no blood in the sputum, no cough, no weakness, no headache, no elevation of temperature or pulse, no stuffiness or pain in the chest -- then from all these facts, a doctor can say 'with reasonable medical certainty,' or as a matter of probability that this man does not have pneumonia.'" *Id.* (quoting *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 183, 407 F.2d 307, 313 (1968)).

*Id.* at 792-793.<sup>3</sup>

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<sup>3</sup> The DCCA in *Brown* held that the negative evidence presented in that case was insufficient to rebut the presumption:

The evidence relied on by WMATA is not of that [*Swinton*] nature. Evidence that some of the medical reports of 1990 and 1991 do not contain statements attributed to Brown about the nature of his work or the 1983 and 1987 accidents is not the caliber of evidence required to meet the burden of overcoming the presumption of compensability. "The statutory presumption may be dispelled by circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Id.* In order for the absence of

Here, Employer argues that the presumption was rebutted because the report from the first medical treatment after June 24, 2014, the Unity Health Care's July 11, 2014 report, did not mention a workers' compensation injury or any complaints relating to an injury at work. Employer further points out that this medical report also stated Claimant presented in no apparent distress. Memorandum at 11.

We disagree with Employer that the negative evidence in this case is sufficient to rebut the presumption. The evidence relied on by Employer is similar to the evidence rejected in *Swails*:

Here, the employer argues that the presumption was rebutted because Claimant did not identify the August 24, 2012 injury at work as the cause of his problems when he presented to the emergency room on August 30, 2012, that he did not receive treatment for his injury until the week after the accident, that the contemporaneous reports do not identify the August 24, 2012 incident and that there is no mention of the incident in the reports until treating Dr. Anders' report of September 28, 2012.

*Swails* supra at 9.

Therefore, we find that although the ALJ misstated the holding in *Swails*, the ALJ's analysis of the negative evidence presented in this case is in accordance with the proper legal standard and his finding that the presumption was not rebutted is affirmed.

#### Medical Causal Relationship

Employer next challenges the ALJ's determination that Claimant's injuries were medically causally related to the June 24, 2014 event at work. Employer argues the ALJ erred because he failed to give sufficient weight to the record evidence by improperly excluding Exhibits 2 and 3 (previous medical reports from Dr. Fechter), the ALJ erred by not giving sufficient probative weight to the records from Unity Health Care and that the ALJ erred by finding Employer did not rebut the presumption of compensability for medical causal relationship.

#### Admissibility of Exhibits 2 and 3 and the Unity Health Care Records

Claimant alleges he sustained injury to his cervical spine and right arm in the June 24, 2014 accident. Employer's Exhibits 2 and 3 show claimant received treatment from Dr. Fechter to these same body parts in a January 8, 2013 accident while working for a different employer.

Treatment for the January 2013 accident continued until, at least, July 5, 2013. The July 5, 2013 report showed that Claimant continued to have pain in his right shoulder and had intermittent neck pain. Dr. Fechter's assessment and plan noted, "The patient has had continued difficulties."

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statements in the reports in this case to have evidentiary significance, we must assume not only that Brown had the level of knowledge sufficient to make the association in 1990 and 1991 between his condition and the earlier injuries and was obliged to report it each time he saw a doctor, but also that any such statements, if made, would have been recorded in the reports. Such a leap would require undue speculation. Therefore, we do not view the absence of the statements attributed to Brown in some of the medical reports to rise to the level required to sever the connection between the 1992 injury and Brown's prior injury and disability

*Id.* at 293.

Dr. Fechter injected Claimant's right shoulder and advised Claimant to "Continue limited activities, home exercise and therapy. Recheck 2 weeks."<sup>4</sup>

Employer argues the ALJ committed reversible error by excluding prior medical reports from Dr. Fechter, which were offered as exhibits 2 and 3. These reports were conditionally admitted at the hearing but ultimately ruled inadmissible in the CO.

An ALJ has broad discretion when it comes to evidence at a formal hearing. D.C. Code § 32-1525 (a) provides that in conducting a hearing an ALJ is not bound by formal rules of evidence but "but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties."

However, an ALJ's discretion regarding evidence is not unfettered. 7 DCMR § 223 mandates that an ALJ "shall receive" all relevant and material evidence.

There can be no serious dispute but that medical reports relating to treatment to same body parts that continued for less than a year prior to the present accident are relevant and material to the present claim.

However, in the CO the ALJ excluded Exhibits 2 and 3:

Upon closer review, Employer's Exhibits 2 and 3 are irrelevant and excluded. These are records that reflect care for a now-healed injury related to a previous workers' compensation claim for a different employer and accident. EE 2; EE 3. Although some of Mr. Contreras's treatment was associated with symptoms similar to the ones at issue in this case, Dr. Fechter has treated Mr. Contreras following both the accident in 2013 and 2014. EE 2 at 7 (pain in neck, right arm); EE 3 (cadaver drawing); CE 1. Dr. Fechter addresses the pre-Bodogs complaints by writing: "He has a previous history of neck complaints 1-8-13 for which he was treated. *There were no residuals*. Also, low back, right shoulder, right heel[.]" CE 1 at 32 (emphasis added). Dr. Fechter's current opinion is not made unreliable merely because Mr. Contreras received medical treatment before the 2014 accident.

CO at 4.

As this shows, while the ALJ characterized the two exhibits as irrelevant, his discussion is inconsistent with his characterization. By comparing Exhibits 2 and 3 to Dr. Fechter's post-June 24, 2014 reports and by finding those earlier medical reports did not impeach Dr. Fechter's medical opinion that the present symptoms were caused by the present accident, the ALJ analyzed the evidentiary weight of Exhibits 2 and 3, not their relevancy or materiality.

Employer argues that because of this error, the CO "must be vacated and remanded so that the Administrative Law Judge gives the appropriate weight to the medical reports of Dr. Fechter." We disagree.

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<sup>4</sup> Although this report indicates there was follow-up treatment after July 5, 2013, neither party presented additional reports from the January 2013 accident.

Despite the ALJ's mistake in conflating relevancy with evidentiary weight and in not admitting the exhibits, we find this error is harmless. As the above quoted passage from the CO shows, the ALJ determined that exhibits 2 and 3 did not impeach Dr. Fechter's current opinion. That is to say, while he did not admit the two exhibits, he considered them.

Therefore, even if we were to remand because of this error, the ALJ has already given what he thought is the appropriate weight to be given these exhibits; they were not entitled to decisional weight on the issue of medical causal relationship.

Employer next challenges the ALJ's decision to give little probative weight to the medical records from Unity Health Care on the issue of medical causal relationship. At the hearing Claimant could not recall treating at Unity Health Care; he only recalled treating somewhere for high blood pressure.

However, the Unity Health Care records showed Claimant treated at Unity Health Care less than two weeks after the accident for high blood pressure and carpal tunnel syndrome. These records were presented as Employer's exhibit 4. Employer's exhibit 4 also was conditionally admitted at the hearing.

In the CO, the ALJ held that this exhibit was relevant, admitted the records into evidence but determined they were "of very little probative value":

Employer's Exhibit 4 is logically relevant, and therefore admitted, but carries almost no prejudicial weight. A record from Unity Health Care dated July 11, 2014 does not discuss Mr. Contreras's workplace injury. EE 4 at 57. Taken in context with the other Unity Health Care records and his credible testimony, the absence of a discussion of Mr. Contreras's workplace injury is unsurprising: the care he received from them focused on his blood pressure. EE 4; HT at 48 ("The doctor that I see that gives me pills and things is Dr. Juan Cardozo."). Mr. Contreras even initially appeared unaware at the hearing that the facility where he received blood pressure pills was called Unity Health Care. HT at 48. And although those records discuss carpal tunnel syndrome, Mr. Contreras credible testimony indicated that he did not understand he received treatment for that condition. HT at 48 ("I don't know. I mean, all I do is, I go to the doctor, and he gives me pills and he sends them to Target, and I pick them up."); HT at 66 ("I've always gone to that clinic, but I go to request those little pills that they give me for the blood pressure and nothing else."). Mr. Contreras apparently did not even regularly see the doctors at Unity Health Care:

The only thing they do [at Unity] is, they take my name down, and because the doctor that I see is not there, so what they do is, they take my information down, they call the doctor, the doctor has gives them to approval to send the prescriptions to go get picked up and then [I] pick them up

HT at 69. Weighed against the other record evidence, which is discussed in greater detail below, the records from Unity hold very little probative value on any of the contested issues presented in this matter. Even so, the records were relevant and duly considered during the deliberative process.

*Id.*

Employer argues that the ALJ's decisions not to give decisional weight to Exhibit 4 and his determination that Claimant proved his injuries were medically causally related are not supported by substantial evidence.

The ALJ fully explained why he did not think the Unity Health Care reports outweighed the other evidence that supported a medical causal relationship. The fact that there is contrary evidence in the record is not a reason to reverse an ALJ's decision. *Marriott International v. DOES*, *supra.* at 885.

#### The Medical Causal Relationship Presumption

Employer further argues that the ALJ erred in finding that it did not rebut the presumption of compensability on to the issue of the medical causal relationship. Employer argues that the IME opinion of Dr. Hinkes was sufficient to rebut the presumption.

Dr. Clifford Hinkes, an orthopedist, examined Claimant for Employer on January 30, 2015 and submitted two reports; one from that examination and the other, dated February 28, 2015, was sent after he reviewed a February 3, 2015 MRI and a February 11, 2015 EMG.

In the CO, the ALJ began his discussion of this issue by identifying the three-step analysis for a presumption case. However, with respect to the second step, although the ALJ knew that the Employer tried to rebut the presumption by an IME report and also cited a portion of the *Washington Post v. DOES and Reynolds* case to state generally what an Employer must prove to rebut the presumption at the second step, the ALJ failed to cite the critical part of the *Reynolds* decision that related to an IME:

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.

852 A. 2d at 910.

Moreover, the ALJ failed to follow the three-step analysis with respect to the second-step. Instead of judging whether Dr. Hinkes's IME reports were sufficient to rebut the presumption, the ALJ jumped to the third step; he weighed the evidence by comparing Dr. Hinkes's opinion with that of Dr. Fechter.

The ALJ wrote:

Dr. Fechter is Mr. Contreras's treating physician and warrants the treating physician preference. *See generally Jackson v. District of Columbia Dep't of Employment Servs.*, 979 A.2d 43, 49 (D.C. 2009); *Golding-Alleyne v. District of*

*Columbia Dep't of Empl. Servs.*, 980 A.2d 1209 (D.C. 2009). He makes an unambiguous medical-causal link between Mr. Contreras's neck and right arm complaints and the June 2014 accident. CE 1 at 14 ("The patient's diagnosis is cervical spine strain injury with right upper extremity radicular complaints and exacerbation of pre-existent degenerative changes in the neck. I do believe that this was caused by the work injury of 6-24-14...."); CE 1 at 32-33. Mr. Contreras also credibly testified that he did not have pain in his neck or right arm immediately prior to the June 2014 accident. HT at 52-53.

Dr. Hinkes's diagnosis was essentially the same as Dr. Fechter's. EE 1 at 3 ("cervical strain and sprain with a possible radiculopathy."). Dr. Hinkes wrote that Mr. Contreras's bulging discs "may have been aggravated in the accident." EE 1 at 6. Of note, employers are obligated to take employees as they are, including those with preexisting conditions that might be aggravated by a workplace injury. *See generally Ferreira*, 531 A.2d at 660; *McCamey*, 947 A.2d at 1197. But he also concludes that the "slight bulging" in the MRI "probably" is unrelated to the accident. EE 1 at 5. Considering the apparent inconsistencies in his opinion and the reference to aggravation, Dr. Hinkes's equivocal language is not enough to reject Dr. Fechter's opinion in this matter. Dr. Hinkes's opinion carries less weight than Dr. Fechter's.

Mr. Contreras invoked the presumption that there is a medical-causal relationship, which Bodogs did not rebut. His impairment is medically-causally related to the workplace accident at Bodogs.

CO at 5-6.

Despite this incorrect analysis, we must note that Dr. Hinkes's January 30, 2015 report did not say anything regarding medical causal relationship of the accident and the cervical spine or the right upper extremity. His February 28, 2015 report stated:

The bulging discs are probably normal variants. They may have been aggravated in the accident by claim.

Thus, Dr. Hinkes's opinion was not unambiguous and also conceded that Claimant's preexisting cervical spine condition may have been aggravated by the accident at work. Therefore, as a matter of law, it fell short of rebutting the presumption.

Employer places great reliance on that part of Dr. Hinkes's report that talked about carpal tunnel syndrome. Although Claimant claims injuries to his neck and right upper extremity, we note that Dr. Hinkes's January 30, 2015 report does not say anything about that condition.

In his February 28, 2015 report, Dr. Hinkes noted that the Unity Health Care records showed "that carpal tunnel syndrome was diagnosed several times on the right hand during 2013" and that a 2015 EMG/NCV study "showed the preexisting right carpal tunnel syndrome along with a mild cervical radiculopathy without any denervation." Dr. Hinkes further stated, "The carpal tunnel syndrome was preexisting."

The CRB finds that these statements also are insufficient to rebut the presumption as a matter of law. That a condition pre-existed an injury by accident at work does not necessarily mean the condition was not aggravated or accelerated by the accident.

Therefore, as with the other errors that the ALJ made, this error is not sufficient to require remand because Dr. Hinkes's opinion is insufficient to rebut the presumption.

#### The Award for Continuing Temporary Total Disability

Employer's also challenges the ALJ's decision to award Claimant temporary total disability benefits from July 31, 2014 to the present and continuing. Employer argues that the ALJ's decision is not supported by substantial evidence.

The ALJ properly utilized the analysis stated in *Logan v. DOES*, 805 A. 2d 237 (D.C. 2002) to analyze whether to grant the claim for temporary total disability benefits. Employer argues the ALJ misapplied *Logan*.

Employer first asserts Claimant did not meet his initial burden under *Logan*, that is, he did not establish a *prima facie* case of total disability. The ALJ held Claimant met this burden by Dr. Fechter's release that restricted Claimant from lifting over twenty pounds. The ALJ interpreted this release as a release to light duty work.

Employer asserts this interpretation is wrong and that Claimant did not prove a *prima facie* case of total disability by Dr. Fechter's twenty-pound work restriction because Claimant had been released to this level of work when Claimant started working for Employer. Therefore, Employer argues that when Dr. Fechter limited Claimant to no lifting over twenty pounds, "Claimant has returned to his pre-injury employment level and is not entitled to temporary total disability." Employers' memorandum at 16.

To support this argument, Employer points to the September 23, 2013 report from Unity Health Care that advised Claimant to "dramatically" reduce the repetitive use of his right arm and wrist at work, the February 21, 2014 report that states Claimant no longer was able to do the hard labor required of construction work, and the March 4, 2014 report that said Claimant wanted to apply for disability because of his right arm pain.

The ALJ did not interpret these reports as restricting Claimant to light duty work:

I also decline to interpret a portion of the Unity Healthcare [sic] records to mean that a qualified healthcare professional restricted Mr. Contreras to light duty work.

CO at 7.

We cannot say that the ALJ's interpretation of the medical evidence is wrong. The statements in the records from Unity Health Care that Employer relies on are unclear, vague and ambiguous and can support the interpretation given to them by the ALJ.

Along similar lines, Employer argues that the ALJ erred in his interpretation of the evidence that Claimant's pre-injury work required lifting seventy pounds. Employer says this mistake caused the ALJ to err when he found Dr. Fechter's twenty-pound lifting restriction limited Claimant to light duty.

In other words, Employer argues that a twenty-pound restriction did not stop claimant from working at his pre-injury level. Employer does not cite testimony at the formal hearing that established that Claimant's pre-injury work required lifting twenty pounds or less.

We also find no conclusive support in the record to back up Employer's assertion that:

The Compensation Order misstates the record evidence by stating the Claimant had to lift 70 pounds for the Employer. Specifically, the Claimant testified that he did not have to lift 70 pounds. HT p. 29 (stating "The box sealed full as it is, that box is 70 pounds. So if I take it by part it's got to weigh less."). The Compensation Order is factually incorrect by finding the Claimant had to lift 70 pounds and must be remanded for the appropriate finding.

*Id.*

While Claimant did testify as Employer reported, Claimant also testified:

I would always bring in the boxes in by parts, regular parts. That day, I saw the box, and we were really busy. And I told [the chef] it was really heavy, and he saw me bring it in in parts. He said just fill up the box and bring the whole one, because he saw me bringing it in parts. HT at 27.<sup>5</sup>

Employer also argues that the evidence showed Claimant could do full duty work because after the accident Claimant "worked numerous jobs", citing the evidence that Claimant continued to work for four days following the incident and that he worked for nearly two months as a construction sweeper. Therefore, according to Employer, applying the *Joyner* analysis [*Joyner v. Sibley Memorial Hospital*, 826 A.2d 362 (D.C. 2003)], Claimant does not get temporary total benefits because "there are jobs available in the perceived disability level alleged by the Claimant."<sup>6</sup>

The ALJ, however, did not believe that the evidence cited by Employer proved Claimant could do his pre-injury job after the accident. The ALJ believed Claimant that the construction work he did was within his restrictions, that he stopped working because it was too difficult for him, and that he could not find other work because of his lifting restrictions. The CRB will not reweigh the evidence with respect to the ALJ's credibility determination.

Moreover, as a matter of law, we find that working four days after the accident and making a good faith effort to work within restrictions for less than two months, does not disqualify this Claimant, who is in his mid-sixties, has a fourth grade education, and does not speak English, from receiving temporary total disability benefits.

#### Employer's Motion For Reconsideration

On May 1, 2015, nine days after the ALJ issued the CO, Employer filed with the ALJ a Motion for Reconsideration. Employer's Motion was based on the facts that after the evidentiary hearing, Employer learned that Claimant had returned to work around March 21, 2015 and that Claimant no longer had a wage loss with respect to his June 24, 2014 accident at work.

Claimant filed a letter in opposition to the motion on May 6, 2015 in which he admitted that beginning on or around March 21, 2015 Claimant did not have a wage loss. Claimant further

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<sup>5</sup> Similar testimony to the effect that while Claimant usually took out containers from the box but that on the day in question he did not remove any containers from the box can be found on page 28 of the hearing transcript.

<sup>6</sup> Employer also cited the work Claimant currently is performing. We shall discuss this work in the next part of this decision that involves Employer's Motion For Reconsideration.

stated that he has asked Employer to suspend ongoing payments pursuant to the CO's award during the time he is working and not experiencing any wage loss and that Claimant did not consent to modifying the CO.

The ALJ denied the Motion on May 4, 2015. Employer argues that the ALJ "committed plain error" by denying the Motion for Reconsideration. We agree.

Because the Order denying the Motion for Reconsideration is not based on an evidentiary record produced at a formal hearing, the applicable standard of review by which we judge the Order is whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See*, 6 Stein, Mitchell & Mezines, *Administrative Law*, § 51.03 (2001).

The ALJ's May 12, 2015, Order said in its entirety:

On May 4, 2015, [Employer] filed a Motion for Reconsideration with this Agency. Mr. Contreras filed correspondence opposing the Motion on May 11, 2015. After review of the papers, the Compensation Order dated April 21, 2015, and the relevant law, the Motion is **DENIED**.

Nowhere in the Order did the ALJ explain the basis for his decision. The ALJ also never identified "the relevant law" on which he says he relied. No person reading the ALJ's Order would have any idea why the ALJ held the way he did.

This failure is particularly disquieting since it is a fundamental principle of workers' compensation law that a claimant only is entitled to temporary total disability benefits if the claimant has a wage loss. Claimant not only did not challenge Employer's statement that he did not have a wage loss, he agreed that he did not have a wage loss and that he asked Employer to stop paying him benefits.

Because the ALJ chose neither to explain his decision nor cite the "relevant law" upon which he relied, his Order is arbitrary and cannot stand.

We should not be understood as saying that an ALJ must provide a new explanation every time a party files a motion for reconsideration. Often a party will ask an ALJ to reconsider the decision without filing any new evidence or legal authority. In those situations, the ALJ could deny the motion without explanation. Since there was nothing new presented, a denial without explanation would suffice.

Here, one party presented a motion for reconsideration that was based on new and uncontested evidence that could affect the ALJ's award of ongoing temporary total benefits. The parties were entitled to an explanation for the ALJ's decision not to amend his Award. *See Tomlin v. D.C. Public Schools*, CRB 14-009, AHD No. PBL 12-013, DCP No. 30080945683-0001 (April 13, 2014) ("A party is entitled to have all of its legitimate arguments considered and addressed in an agency decision.").

## CONCLUSION AND AMENDED AWARD

Except as amended herein, the April 21, 2015 Compensation Order is AFFIRMED.

7 DCMR § 267.5 authorizes the CRB to issue an Amended Compensation Order in lieu of reversal and remand in the very limited circumstance when the Review Panel's decision can lead to but one result after a remand:

The Review Panel shall only issue an amended compensation order where a remand to the Administrative Hearings Division or the Office of Workers' Compensation would be unnecessary (e.g. where there is but one action that the Review Panel decision would permit), and thus remand would be superfluous.

Sine there is but one action that our decision would permit, terminating the ongoing award on the date claimant returned to work with no wage loss; we shall issue an Amended Compensation Order as follows:

Claimant is hereby awarded temporary total disability benefits from July 31, 2014 to March 21, 2015. Employer is entitled to a credit during the period in late 2014 when Claimant found work installing doorframes. Claimant also is entitled to all reasonable and necessary, causally related medical expenses and the neurological consultation recommended by Dr. Fechter.

*So ordered.*