

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

CRB No. 12-103

MILDRED T. WARE,
Claimant-Respondent,

v.

DIVERSITY SERVICES and GUARANTEE INSURANCE CO.,
Employer/Carrier-Petitioner.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2012 OCT 11 PM 11 57

Appeal from a Compensation Order by
The Honorable Belva D. Newsome
AHD No. 08-029C, OWC No. 642739

Todd S. Sapiro, Esquire for the Petitioner
Frank R. Kearney, Esquire for the Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY, and JEFFREY P. RUSSELL,¹ *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.²

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On September 17, 2007, Ms. Mildred Ware injured her left shoulder, back, neck, legs, and abdomen at work. She and her employer, Diversity Services, entered into a settlement agreement for a lump-sum payment of indemnity benefits, but Ms. Ware remains entitled to reasonable medical treatment that is causally related to her compensable injuries.

In August 2010, the parties proceeded to a formal hearing to determine Ms. Ware's entitlement to a bone density study, physical therapy, epidural steroid injections, facet block injections, and opioid medications. In a Compensation Order dated September 8, 2010, Ms. Ware was awarded physical therapy from May 6, 2009 through August 1, 2009 but not physical therapy prior to May 6, 2009 or

¹ Judge Russell has been appointed a temporary CRB member pursuant to the Department of Employment Services' Director's Administrative Policy Issuance No. 12-01 (June 20, 2012).

² Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to D.C. Code §§32-1521.01 and 32-1522 (2004), 7 DCMR §250, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

after August 1, 2009 because physical therapy during those periods was not reasonable or necessary. The bone scan, office treatment and visits to Dr. Peter Moskowitz, prescription opioids, recommendation for evaluation and treatment for depression, and one epidural injection also were authorized, but additional epidural injections and facet block injections were found to not be reasonable and necessary to treat her compensable injuries.

With the passage of time, another dispute arose. This time, Ms. Ware sought continuing medical treatment from Dr. Moskowitz and payment of his outstanding medical bills. Diversity Services disputed the causal relationship between Dr. Moskowitz's medical treatment and the compensable injury.

In a Compensation Order dated June 21, 2012, Ms. Ware was awarded her claim for relief, and another appeal has ensued. This time, Diversity Services asserts it presented evidence sufficient to rebut the presumption of compensability. Diversity Services also asserts that as a matter of law, there is no medical opinion to support a ruling that after September 1, 2011, Ms. Ware's treatment for her low back condition is casually related to her September 17, 2007 compensable injury. Consequently, Diversity Services requests the June 21, 2012 Compensation Order be vacated and reversed.

Ms. Ware did not file a response to the Application for Review.

ISSUE ON APPEAL

1. Is the June 21, 2012 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS³

Pursuant to §32-1521(1) of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* ("Act"), a claimant may be entitled to a presumption of compensability ("Presumption").⁴ In order to benefit from the Presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.⁵ "[O]nce an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the

³ 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 Act. 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).

⁴ Section 32-1521(1) of the Act 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."

⁵ *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

Act.”⁶ There is no dispute the administrative law judge (“ALJ”) appropriately ruled that the Presumption properly had been invoked.

Once the Presumption was invoked, it was Diversity Services’ burden to come forth with substantial evidence “specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event.”⁷ Only upon a successful showing by Diversity Services would the burden return to Ms. Ware to prove by a preponderance of the evidence, without the benefit of the Presumption, her ongoing injuries arose out of and in the course of employment.⁸

With the Presumption invoked, the ALJ wrote

[Diversity Services] relies upon the two (2) IMEs of Dr. Gary London, Ware’s medical records, Dr. London’s examination of Ware, and the medical history obtained from Ware. Dr. [sic] The opinions offered by Dr. [sic] would be sufficient to rebut the presumption and sever the causal relationship between the [sic] Ware’s current complained of condition and her September 17, 2007 injury. The September 28, 2010 Compensation Order considered both the June 17, 2010 IME of Dr. London and the August 8, 2010 response of Dr. Moskowitz. [sic] The September 8, 2010 Compensation Order did not accept Dr. London’s opinion that Ware’s disability was not medically causally related to Ware’s September 17, 2007 injury by concluding that the medical care with the exception of periods of physical [sic] were reasonable and necessary. The January 9, 2012 IME and the February 24, 2012 Addendum of Dr. London are premised the conclusion of Ware suffering a new injury on the lack of medical causal relationship between Ware’s September 17, 2007. The law of the case is that Ware’s herniated disc at L4-5 is medically causally related to her September 17, 2017[sic] injury.^[9]

It is completely unclear whether or not the ALJ found Dr. London’s opinions are sufficient to rebut the Presumption, and the law requires we remand this matter for clarification on this issue.

Furthermore, an argument focused on the weight an ALJ gives to evidence ordinarily is not likely to be successful because so long as a Compensation Order is supported by substantial evidence, the CRB is constrained to affirm that Compensation Order.¹⁰ In this case, however, assuming the Presumption was rebutted, there is no explanation given as to how the evidence was weighed:

It is well established in this jurisdiction, a preference is accorded to the opinions of treating physicians as more reliable than the medical opinions of independent

⁶ *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000).

⁷ *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

⁸ See *Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003).

⁹ *Ware v. Diversity Services*, AHD No. 08-029C, OWC No. 64739 (June 21, 2012), p. 5.

¹⁰ *Marriott, supra*.

physicians who have not rendered medical treatment. *Short v. District of Columbia Dept. of Employment Services*, 723 A.2d 845 (D.C. 1998); *Stewart v. District of Columbia Dept. of Employment Services*, 606 A.2d 1350 (D.C. 1992). Dr. Moskowitz's [*sic*] opinion that Ware suffered an exacerbation of her September 17, 2007 injury is preferred.^[11]

Although the ALJ stated the treating physician preference and preferred Dr. Moskowitz's opinion that Ms. Ware suffered an exacerbation of her compensable injury, there is no analytical review of Dr. Moskowitz's records as is necessary for a proper weighing of the evidence or for consideration of Ms. Ware's intervening accident on September 1, 2011 when an "oxygen dependent relative required assistance and she attempted to move and [*sic*] oxygen tank. This caused acute low back if [*sic*] reinjury with exacerbation of leg pain."¹² To the contrary, the ALJ found

[o]n September 1, 2011, Ware returned to Dr. Moskowitz [*sic*] after an acute exacerbation of her low back and left leg pain, and Ware was assessed with an herniated disc L4-5 probably exacerbated by the strain, perhaps with an extrusion of a fragment. Objectively, Dr. Moskowitz [*sic*] noted that the asymmetry of Ware's gait had worsened requiring external aid for emulation or cruises among furniture. Ware Ex. 4, p. 35.^[13]

And conspicuously absent from the ALJ's finding of fact is any recognition that the September 1, 2011 exacerbation is associated with a history of this non-work-related accident and that this non-work-related accident has the potential to cause Ms. Ware's disability from September 1, 2011 forward.

Given the intervening accident on September 1, 2011 that caused an acute exacerbation of Ms. Ware's low back and left leg pain, if the Presumption is rebutted by Diversity Services' evidence, it is imperative that careful consideration be given to all the evidence of record. Without a clear explanation of how the evidence in the record as a whole preponderates in Ms. Ware's favor, we are unable to perform an appellate review and are constrained to remand this matter.¹⁴

¹¹ *Ware, supra*, at p. 5.

¹² Claimant's Exhibit 4, p. 34.

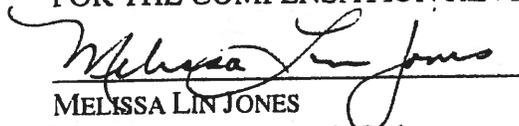
¹³ *Ware, supra*, at p. 3.

¹⁴ *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012).

CONCLUSION AND ORDER

The June 21, 2012 Compensation Order is not supported by substantial evidence and is not in accordance with the law. The Compensation Order is VACATED IN PART and is REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:


MELISSA LIN JONES
Administrative Appeals Judge

October 11, 2012

DATE