

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-149

**MONTENETTE ODOM,
Claimant-Petitioner,**

v.

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

Appeal from an October 30, 2013 Compensation Order by
Administrative Law Judge Leslie A. Meek
AHD No. 08-245A, OWC Nos. 597185; 653174

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 MAY 21 AM 9 14

Danny R. Siedman, for the Petitioner
Donna J. Henderson, for the Respondent

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

HENRY W. MCCOY, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On February 18, 2004, Claimant was working as a Station Manager when she injured her left arm, shoulder, and neck while in the process of trying to open a malfunctioning station gate. Claimant received initial treatment on February 21, 2004 at the Bowie Health Center and followed-up with her treating physician, Dr. Norman McKoy.

Commencing August 10, 2004, Claimant came under the care of Drs. Stephen Webber and Leonid Selya, orthopedic surgeons, with Dr. Selya performing an anterior cervical fusion

February 27, 2006.¹ Claimant was off work for four years and then returned to work, initially in the light duty position of a parking lot attendant, and then back to full-duty in her pre-injury position as a Station Manager.

On August 29, 2008, Claimant was opening another malfunctioning gate and injured her shoulders, arms, left thumb, right index finger, neck and back. Claimant treated with Dr. Selya on September 11, 2008 whose assessment was that she had aggravated her prior neck injury and recommended that she take off work for a couple of months. Claimant did return to work and filed a claim seeking a schedule award for permanent impairment to each upper extremity, 30% to the left and 15% to the right.

Following a formal hearing, the presiding Administrative Law Judge (ALJ) denied Claimant's claim for relief after determining that she had failed to meet her burden of proof showing entitlement to the level of relief requested.² Claimant filed a timely appeal with Employer filing in opposition.

On appeal, Claimant argues the ALJ erred by improperly applying a burden to prove a causal relationship between her left arm disability and both accidental injuries when this was stipulated to by the parties. In opposition, Employer asserts that the ALJ applied the correct burden with regard to causal relationship and that the Compensation Order (CO) is supported by substantial evidence and is in accordance with the law and should be affirmed.

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.³ *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 ("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.

¹ The ALJ made a finding that the surgery was performed on February 7, 2006, when in fact, CE 2, the operative report, shows the surgery was performed on February 27, 2006.

² *Odom v. WMATA*, AHD No. 08-245A, OWC Nos. 597185 and 653174 (October 30, 2013) (CO).

³ "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).

Claimant contends the ALJ improperly made findings of fact and conclusions of law on an uncontested issue, *i.e.*, the stipulated issue that her left arm disability was causally related to the work injuries of February 18, 2004 and August 29, 2008. Claimant requests that this matter be returned to the ALJ to determine only the extent of her disability. We agree for other reasons.

At the formal hearing, the ALJ stated that the only issue was the nature and extent of Claimant's disability (Hearing Transcript at 18). The ALJ stated in the "Findings of Fact" in the CO that:

The parties have also stipulated that Claimant's current medical conditions regarding her left and right upper extremities are causally related to the work incidents of February 18, 2004 and August 29, 2008 respectively.⁴

The ALJ goes on to make the following findings:

I find there are no medical reports or medical tests in Claimant's evidence that show Claimant's current left arm condition is the result of the 2004 or 2008 work incidents.

I find there are no medical reports or tests in Claimant's evidence that address a medical malady concerning Claimant's right arm.

I find there are no medical reports or medical tests in Claimant's evidence that show Claimant's current right arm condition is the result of the 2008 work incident.

The ALJ's findings of fact with regard to the current condition of Claimant's left and right arms as related to the two work incidents directly contradict the parties' stipulation that the current "medical conditions" of her right and left arms are medically causally related to the 2004 and 2008 work incidents. This obvious inconsistency might be viewed as harmless if not for the fact that the ALJ's separate findings were used as the basis to support her ultimate determination on the nature of Claimant's disability.

It is undisputed that Claimant experienced two separate accidental work incidents, one in 2004 and the other in 2008. In 2004, she injured her left arm, left shoulder and neck; and, in 2008, she injured both shoulders and both arms, and aggravated her neck injury. With these as the accepted injuries, the parties stipulated that Claimant's current medical conditions regarding her left and right extremities are causally related to the respective work accidents. However, at the same time, the ALJ independently has found no medical evidence relating the current left or right arm condition to the respective work incident. Once causal relationship was stipulated to, it was error for the ALJ to revisit the issue and make any findings on an uncontested issue, especially findings contradicting the stipulation.

⁴ CO at 2.

In evaluating whether Claimant had met her burden in proving entitlement to the request level of benefits and deciding that she had not, the ALJ determined that

Claimant has presented no medical evidence to prove her current left arm disability is a result of the February 18, 2004 work injury. Claimant has failed to prove her entitlement to a permanent partial disability award for her asserted February 18, 2004 left arm injury.⁵

In making this determination, the ALJ has not taken into account the fact that the parties stipulated that current left arm condition is related to the 2004 work injury, thus obviating the need to present evidence of proof. In addition, Claimant's 2004 left arm injury is an accepted fact and not an assertion that requires proof.

With regard to Claimant's 2008 injury, the ALJ stated

Although Claimant has set forth a claim for injuries she suffered as a result of an August 29, 2008 work incident, in Claimant's case, there is a dearth of medical evidence concerning the medical treatment and condition of Claimant in relation to this incident.

This statement again conflicts with the parties' stipulation that Claimant's current right arm condition is causally related to the 2008 work incident. In revisiting the issue of causal relationship as to each upper extremity, the ALJ has endeavored to negate the stipulated disability to each upper extremity while at the same time compromising the assessment of any impairment to the upper extremities by misreading the medical impairment rating from Claimant's independent medical evaluation (IME) from Dr. Mininberg.

In his September 15, 2011 report, Dr. Mininberg stated:

On 2-18-04 and again on 8-29-08 while at work for WMATA the patient sustained an injury to her neck and primarily to her left shoulder but eventually radiating pain to the right shoulder as well. She has underwent anterior cervical discectomy and fusion with plate and fixation at C5-C6, C6-C7.

At the present time, the patient continues to have significant complaints and findings. With reference to the left shoulder taking into account AMA Guides as well as pain, weakness, loss of endurance and/or loss of function, the patient is entitled to 30% permanent impairment to the left upper extremity and with reference to the right upper extremity in accordance with the AMA Guidelines as well as taking into account pain,

⁵ CO at 4.

weakness, loss of endurance and/or loss of function, the patient is entitled to 15% permanent impairment of the right upper extremity.⁶

In evaluating this statement, the ALJ reasoned:

On September 15, 2011, Dr. Mininberg conducted an independent medical evaluation of Claimant and offered a medical opinion regarding Claimant's right and left upper extremities. In that report Dr. Mininberg referenced Claimant's neck and shoulder pain however, Dr. Mininberg made no mention of Claimant's arms, nor does Dr. Mininberg state that Claimant's neck and shoulder pain is the cause of a medical disability in either of Claimant's arms.

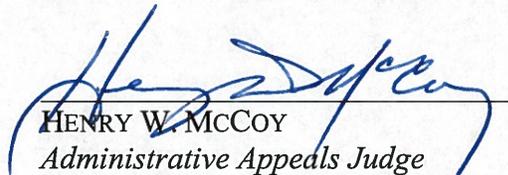
In her reasoning, the ALJ observes that while Dr. Mininberg evaluated Claimant's right and left upper extremities, she faults the opinion for failing to mention Claimant's arms. However, an evaluation of an "upper extremity" is an evaluation of an arm.

Claimant is seeking separate schedule awards for permanent partial disability to each upper extremity and that is what Dr. Mininberg rated. The ALJ's reasoning that Claimant has failed to prove by a preponderance of the evidence her entitlement to the requested level of benefits is not supported by substantial evidence in the record and is not in accordance with the law. We are constrained to return this matter for further consideration.

CONCLUSION AND ORDER

The ALJ's determinations that Claimant's current left arm and right arm disabilities are not causally related to the 2004 and 2008 work incidents are not supported by substantial evidence in the record and are VACATED. The ALJ's determination that Claimant did not prove her entitlement to benefits by a preponderance of the evidence is REVERSED and REMANDED. Accordingly, the October 30, 2013 Compensation Order is VACATED IN PART and REVERSED IN PART AND REMANDED for further consideration consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

May 21, 2014

DATE

⁶ CE 1, p. 2.