

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-150

**NICHOLAS WEST,
Claimant–Petitioner,**

v.

**PREVENTIVE MAINTENANCE SERVICES COMPANY
and LIBERTY MUTUAL INSURANCE COMPANY,
Employer/Insurer–Respondent.**

Appeal from an August 18, 2015 Compensation Order by
Administrative Law Judge Gennet Purcell
AHD No. 15-233, OWC No. 705209

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 FEB 8 AM 9 18

(Decided February 8, 2016)

David J. Kapson for Claimant
Christopher R. Costabile for Employer

Before: LINDA F. JORY, JEFFREY P. RUSSELL *Administrative Appeals Judges* and Lawrence D. Tarr, *Chief Administrative Appeals Judge*.

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Nicholas West (Claimant) was employed as a maintenance mechanic with Preventive Maintenance Services (Employer). On May 30, 2013, while parking his vehicle on Employer’s grounds, Claimant struck his left shoulder and neck crevice on the crossbar of a temporary scaffolding. Claimant sought medical care initially at Johns Hopkins Medical Center’s emergency room. Claimant was advised to see an orthopedic physician if his left shoulder pain did not improve. Prior to the May 30, 2013 incident, Claimant had pain medication prescribed by his primary care physician. Claimant did not seek treatment for his shoulder pain until April 21, 2014, when he saw Dr. Edward R. McDevitt, orthopedic surgeon. Dr. McDevitt ordered an x-ray and an MRI of the left shoulder. Claimant did not complain of neck pain at that time.

Dr. McDevitt referred Claimant to pain specialist Dr. Zvezdomir Zamfirov. Dr. Zamfirov referred Claimant for a cervical epidural steroid injection procedure to explore if pain management could be achieved. Dr. Zamfirov also recommended an EMG and nerve conduction study to pinpoint the source of his persistent neck symptoms.

As arranged by Employer, Dr. Mohamad H. Zamani performed an independent medical evaluation (IME) of Claimant on March 24, 2015.

Claimant has not missed any time from work due to the work-related injury.

A full evidentiary hearing occurred on July 14, 2015. A Compensation Order issued on August 18, 2015. The ALJ concluded Claimant's current neck complaints are not causally related to the work injury of May 30, 2013 and his treatment, including the prescribed EMG and nerve conduction study was denied.

Claimant timely appealed, asserting the ALJ's finding that he did not demonstrate that his neck condition is medically related to the May 30, 2013 work injury is not supported by substantial evidence.

PRELIMINARY MATTER

Pursuant to 7 DCMR § 258.8, "Any response in opposition must be filed with the Clerk of the Board within fifteen (15) calendar days from the date of filing of the Application for Review." Claimant's Application for Review was filed on September 16, 2015. In order to be timely, Employer's opposition must have been filed no later than October 3, 2015 as the fifteenth calendar day fell on October 1, 2015, which is a Saturday. Employer's opposition was filed late on October 6, 2015 and has not been considered in the resolution of this appeal.

ANALYSIS¹

Claimant asserts:

The employer submitted the report of Dr. Zamani to attempt to rebut the presumption EE-1. The ALJ quoted Dr. Zamani's review of Mr. West's medical records, MRI results, and findings on physical exam in making the determination that the employer and insurer rebutted the presumption. ALJ [sic] did not rely on

¹ The scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the District of Columbia Workers' Compensation 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. 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. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). 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

any opinion by Dr. Zamani in making the determination that the employer and insurer rebutted the presumption. This finding is not supported by substantial evidence as the ALJ does not rely on a specific and comprehensive opinion which states that Mr. West's neck condition neither arose out of or in the course of his employment. The portion of the report that ALJ [sic] relies on also does not definitively state that Mr. West's neck condition is not medically causally related to the work accident of May 30, 2013. The opinion portion of Dr. Zamani's report, which states that Mr. West had a minor trauma, he was fully recovered, and his current complaints are unrelated to the work injury. EE-1. This opinion is not specific and comprehensive enough to rebut the presumption. This opinion does not state whether the current complaint in the neck, the shoulder, or some other body part. It is simply a vague statement that does not meet the standard set forth in the case law promulgated by the D.C. Court of Appeals. Accordingly, the ALJ's finding must be reversed.

Claimant's Brief at 8, 9.

We disagree and conclude the ALJ accurately stated that Dr. Zamani "denied any medical causation between Claimant's neck condition and the May 30, 2013 accident" and his opinion is sufficient to rebut the presumption pursuant to *Washington Post v. DOES*, 852 A.2d 909 (D.C. 2004) is supported by substantial evidence. In so concluding, we note Dr. Zamani wrote in his "Summary/Discussion" section:

I feel he had minor trauma with full recovery, and his current complaint is not causally related to above-dated accident, and is related to fatigue and usage of the body as a maintenance person.

EE 1 at 3.

While Dr. Zamani did not state what the "current complaint" was in the summary, we further note in the "Chief Complaint/History of Present Illness" section Dr. Zamani included: "He states he feels some ache and pain in left side of the neck and left shoulder area". EE 1 at 1.

We conclude the ALJ's determination that Employer rebutted the presumption to be supported by substantial evidence. The CRB's role is limited to determining whether the CO is supported by substantial evidence in the record and in accordance with the law. We cannot reweigh the evidence as Claimant would wish us to do. The CRB must affirm 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 this panel might have reached a contrary conclusion. *Marriott, supra*.

We further reject Claimant's argument that the ALJ mischaracterizes the treating physician, Dr. McDevitt's opinion. The ALJ correctly cited this jurisdiction's treating physician preference and with regard to Claimant's neck provided:

Dr. McDevitt did not find any abnormality regarding Claimant's neck upon his exam and Claimant made no complaint regarding his neck prior to Dr. McDevitt's initial diagnosis. Indeed, Dr. McDevitt's initial medical reports are devoid of any reference or notation regarding neck spasms, numbness or tingling in the neck or left arm. Dr. McDevitt stated he was "pretty confident at [the] time [of the initial diagnosis] that . . . the problem was related to his acromioclavicular joint". An MRI to confirm the osteolysis diagnosis was ordered and upon review of the MRI, Dr. McDevitt's diagnosis remained unchanged.

Dr. McDevitt then reassessed his approach to the osteolysis diagnosis when a prescribed cortisone shot did not offer Claimant the typical relief anticipated. Probing further, Dr. McDevitt then ordered an x-ray and repeat MRI which then revealed a bulging disk and disk herniation in Claimant's spine. When questioned whether the second diagnosis of bulging and herniation looked like they were caused by trauma, Dr. McDevitt replied, 'It could be. I can't prove that one way or the other. But it certainly could be'.

CO at 7.

The ALJ summarized her reason for rejecting the treating physician's opinion on causality:

In weighing the conflicting medical opinions presented, for the reasons discussed herein, and in consideration of the totality of the evidence and testimonial record, I reject the treating physician opinion of Dr. McDevitt. Dr. McDevitt's opinion is imprecise and inconsistent as it pertains to the cause, symptoms, diagnosis and ultimately, the medical causal relation of Claimant's neck condition. Moreover, in his own words, Dr. McDevitt asserts that the neck condition Claimant now complains of did not exist in the 11 months immediately subsequent to the date of injury, and was not apparent on any medical exam or evaluation. CE 7. He, in effect, flip-flops in his medical diagnosis when formulating his opinion on injury and causally relationship and his approach to diagnosis, notwithstanding the 11 month delay in treatment, is largely trial and error, hit and miss.

CO at 8.

We note that throughout his deposition testimony, Dr. McDevitt is more concerned with his misdiagnosis than with the fact that Claimant did not complain of any neck pain until Dr. McDevitt decided to explore the neck to see if it was causing shoulder problems, which we note was more than a year after the work injury.

Dr. McDevitt admitted:

Well I honestly, I didn't find anything, any complaints about his neck on the first time, nor did I find any on the exam about his neck. It was really mostly on his shoulder. So I was pretty confident, at that time that his problem was related to the fall at the end of his collar bone and that the problem was related to the AC

joint. Where the clavicle comes together with the scapula. I was pretty confident I was right about that, but I wanted an MRI to confirm my initial diagnosis.

CE 7 at 11, 12.

Dr. McDevitt's attempt to connect claimant's cervical MRI findings of bulging and herniated discs with the work injury is not persuasive in light of the fact that Claimant did not complain of his neck pain when he first saw Dr. McDevitt eleven months after the event. As the ALJ quoted in the CO when asked:

Q. So the areas where he had the bulging, the herniation, I think you said earlier it looked like they were caused by a trauma?

A. It could be. I can't prove that one way or the other. But it certainly could be.

CO at 7; CE 7 at 26.

We conclude the ALJ sufficiently explained her decision to reject the medical causal opinion of Dr. McDevitt. We further conclude the ALJ's determination that Claimant did not establish by a preponderance of evidence that his alleged neck problems are causally related to the work-related injury is supported by substantial evidence.

CONCLUSION AND ORDER

The ALJ's Conclusion of Law that Claimant's current neck condition is not medically causally related to the May 30, 2013 work injury is supported by substantial evidence, in accordance with the law and is **AFFIRMED**.

So ordered.