**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**Department of Employment Services**
**Labor Standards Bureau**

**Office of Hearings and Adjudication**
**COMPENSATION REVIEW BOARD**

**(202) 671-1394-Voice**
**(202) 673-6402-Fax**

**CRB No. 06-41**

**WANDA S. PATTERSON,**

**Claimant–Petitioner,**

**v.**

**KAISER PERMANENTE OF THE MID-ATLANTIC STATES,**

**Self-Insured Employer–Respondent**

Appeal from a Compensation Order of
Administrative Law Judge Henry W. McCoy
AHD No. 05-388, OWC No. 609163

Heather C. Leslie, for the Petitioner

Joseph Tarpine, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation 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, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[1]

[1] Pursuant 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 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers'

## 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 March 6, 2006, the Administrative Law Judge (ALJ) granted Petitioner's claim for medical benefits and denied her claim for temporary total disability benefits. Petitioner now seeks review of that Compensation Order. Respondent has not filed any response to this appeal.

As grounds for this appeal, Petitioner alleges as error that the ALJ's decision is "inconsistent with the substantial evidence in the record and the law applicable thereto"[2], and that the decision of the ALJ is "arbitrary and capricious".

## ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003). 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.

Turning to the case under review herein, Petitioner sought an award for temporary total disability and causally related medical care, in connection with a claimed psychological injury stemming from an incident occurring between herself and a co-worker, Dr. Charles Levy. The ALJ found that the claimed stressors failed to meet the objective test set forth discussed in *West v. Washington Hospital Center*, CRB (Dir. Dkt.) No. 99-97 (August 5, 2005) and more recently in *Thompson v. Avaya Communications and Gates McDonald*, CRB (Dir. Dkt.) No. 04-055 (December 14, 2005), wherein we wrote as follows:

> Review of the Compensation Order on Remand reveals that it was issued prior to the decision issued by the CRB in *West v. Washington Hospital Center*, CRB (Dir. Dkt.)

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Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

[2] We point out that this is technically not a proper assertion of error. The law requires that we review the case to determine whether the ALJ's decision is consistent with the record evidence, not whether there is record evidence consistent with a contrary result. We will take this phraseology to mean that the Petitioner asserts that there is insufficient record evidence to support the factual findings made by the ALJ, and further that the decision of the ALJ is in error based upon an improper application of those findings under the Act.

No. 99-97 (August 5, 2005). Prior to that decision, there was a split in opinion (and conflicting decisions from the Director of DOES) concerning the evidentiary requirements in connection with invocation of the presumption of compensability in claims for psychological or psychiatric injuries. In that decision, the CRB established the rule that all claims for psychological injuries under the Act must be evaluated under the objective test established in *Dailey v. 3M Company*, H&AS No. 85-259, OWC No. 066512 (Final Compensation Order, May 19, 1988), regardless of the whether the claimed injury was related to workplace stress or was the claimed sequalae of a physical injury. The CRB also made clear that the analysis under *Dailey* is part of the "potentiality" prong of the quantum of evidence needed to be produced by a claimant to invoke the presumption of compensability. Specifically, the CRB ruled, in overturning a Compensation Order issued November 9, 1999, in which the ALJ declined to apply the *Dailey* test to a claim for psychological injury alleged to result from the aftereffects of a physical trauma, as follows:

> Accordingly, we hold that in order to invoke the statutory presumption that an emotional or psychological condition, claimed to be the consequence or medical sequalae of an employment-related physical injury, arises out of and in the course of one's employment, the claimant must present credible evidence demonstrating that his/her physical injury and its aftereffects (or sequalae) could have caused the same or similar emotional injury in a person of normal sensibilities not significantly predisposed to such injury.

*Thompson*, *supra*, page 2 – 3.

Petitioner alleges that the ALJ's decision in this case is deficient because it improperly applied the *Dailey* test. Generally speaking, Petitioner argues that the only possible outcome of the facts in this case are that a person of average or normal sensibilities when subjected to the same stressors as occurred in this case could have experienced the same or similar psychological injury claimed by Petitioner, thus entitling her to the presumption that, in this case, those stressors did in fact cause the complained of condition, which presumption the ALJ declined to invoke. In support of this argument, Petitioner asserts, under the sub-heading "Facts", that a certain set of events occurred, which included the supposed fact that a red-faced and angry "Dr. Levy became agitated and abusive", that he "kicked the door" to Petitioner's office, that he put his foot in the door to prevent its being closed, that he refused her demand that he leave, that he threatened her, and that her supervisor refused to order the doctor to leave.

The putative cause of Petitioner's claimed injury, which is a claim for purely psychological injury, was a confrontation between Petitioner, employed as a Member Assistance and Resource Specialist, and a Dr. Levy, an infectious disease specialist, both of whom are employed by Respondent at its health care facility. That confrontation arose when Dr. Levy declined to treat a patient, leading Petitioner to advise him via telephone that he was required to do so under the terms of Respondent's care-giver agreement. This conversation was terminated by Petitioner, following which Dr. Levy came to Petitioner's office, and the confrontation ensued. During the exchange at Petitioner's office, Petitioner's supervisor did not intercede on her behalf.

While the ALJ does recite that Petitioner *testified* that Dr. Levy was abusive and threatening, that he harangued her for at least 40 minutes, and that he was yelling and threatening her throughout this harangue, that Dr. Levy not only knocked on her office door, but actually kicked it, and that Petitioner felt "trapped" throughout the encounter, a close reading of the Compensation Order reveals that the ALJ found that these "facts", which are alluded to in the Memorandum as being "Facts", are the *truthful* yet *inaccurate* perceptions of the Petitioner (i.e., the subjective perception that she had, rather than the objective factual reality; see, Compensation Order, page 7, second paragraph). While these characterizations of Petitioner's perception of the encounter are alluded to in the "Discussion" section of the Compensation Order, it is clear that they are absent in the "Findings of Fact" portion thereof, which contained the ALJ's less provocative and threatening description of the incident: following a disagreement with Petitioner in a telephone call concerning Dr. Levy's refusal to treat a particular patient, Petitioner "terminated" the phone call, prompting Dr. Levy to come to Petitioner's office from several floors away; Dr. Levy arrived "flushed faced and angry", but he did not raise his voice or threaten Petitioner, despite Petitioner raising hers. There was no finding that the encounter did, indeed, last 40 minutes, nor is there any indication in the findings of fact that Petitioner's supervisor or a nearby co-worker *improperly* or unreasonably declined to intercede on Petitioner's behalf.

The gist of the Compensation Order is that, while Petitioner *perceived* that she was being verbally abused, that she was under threat of additional verbal and perhaps physical abuse, that she was abandoned by her supervisor and co-worker, that she was subjected to threats and intimidation while trapped in her office by an angry physician, and that this all persisted for 40 minutes, her subjective *perception* was inaccurate. Rather, the ALJ determined that the actual incident was merely an argument between co-workers, not in each other's supervisory "chain of command" (CO, page 8), which was overheard on an open telephone line by Petitioner's supervisor, who, based upon what she heard, determined that it was Petitioner who shouted and was rude (warranting a five day suspension, CO page 7). The ALJ, after considering the testimony and evidence, determined that, based upon his assessment of the testimony of three other witnesses (Offeta Burch, the supervisor who was on the telephone, Wanda Miller, an administrator in a conference room adjacent to Petitioner's office, and Dr. Levy himself), was "a common workplace argument or disagreement". Compensation Order, page 7.

Petitioner asserts that the ALJ had no choice but to find that this case warrants a finding of compensability, because the only medical evidence of the incident's potential for causing a similar psychological reaction in an average worker of ordinary sensibilities not pre-disposed to psychological injury is the report and deposition testimony of Dr. Brian Schulman, a psychiatrist who performed an independent medical evaluation (IME) of Petitioner Respondent's request. In the report, Dr. Schulman expressed his opinion that Petitioner had sustained an "acute stress disorder, resolved", as a result of the confrontation, and that she exhibited no evidence of any predisposition to such a reaction to such stressors as were described to him by Petitioner in the course of his examination. EE 8.

Petitioner fails, however, to cite the reason given by Dr. Schulman for his opinion: he assumed a certain set of facts actually occurred, most notably that a 40 minute verbal assault with shouted threats, which included door kicking and other verbal and physical intimidation by Dr. Levy and

knowing connivance by a supervisor transpired, with Petitioner being helplessly trapped inside her office.

However, the ALJ adequately explained[3] his rejection of Dr. Schulman's opinion, on page 7 of the Compensation Order, where he pointed out that that opinion was premised and "entirely dependant upon" acceptance of the description of the incident as provided by Petitioner being accurate, including what Dr. Schulman described as a "very unusual" factor of an extended incident 40 minutes duration. EE 10, page 10. See also, EE 10, page 17: "[T]hat opinion is entirely predicated on that being the objective description of what happened."

In that the ALJ found, based upon substantial evidence, that the description was not accurate, there is no error in rejecting the IME opinion. Put another way, while Dr. Schulman opined that a person of average sensibilities not otherwise pre-disposed to psychological injury who is subjected to the stressors as described by Petitioner could have sustained the same or similar psychological injury that he diagnosed in Petitioner (an acute stress disorder, resolved), he did not testify, and hence there was no medical evidence, that such a person who experienced the actual incident as found by the ALJ to have occurred could be expected to suffer from an acute stress disorder.[4]

We do note an analytical issue in the Compensation Order, which does not affect the outcome in this case, but which we nonetheless believe should be clarified.

On page 5 of the Compensation Order, the ALJ embarks upon a discussion of the objective *Dailey* test, and its place in the presumption of compensability analysis. He wrote as follows:

> Once Claimant satisfies the threshold requirement needed to invoke the presumption that her actual working conditions could have caused her emotional injury, pursuant to *Ferreira*, she must present evidence that the injury inducing stressors are a function of the actual working conditions of her employment, such that said conditions could have caused similar emotional injury in persons of ordinary sensibilities.

As we have recently pointed out (and as the ALJ noted later in the Compensation Order, at page 6) in *Thompson v. Avaya Communications and Gates McDonald*, CRB (Dir. Dkt.) No. 04-055 (Decision and Order December 14, 2005), the objective test in *Dailey* is part of the "potentiality" prong of the quantum of evidence needed to be produced by a claimant to invoke the presumption of compensability. Thus, the language quoted above appears to reflect the erroneous view that the presumption could be invoked prior to applying the *Dailey* test.

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[3] Dr. Schulman was not a treating physician, and thus the ALJ would not have normally been under any obligation to explain why his opinion was rejected. However, in the absence of competing opinion from another expert, it was certainly good practice that he did. While "uncontradicted evidence is substantial evidence" is an oft-quoted phrase, an ALJ is free to reject even uncontradicted evidence, where the evidence itself is inherently faulty. Otherwise put, inherently faulty evidence can be said to contradict itself.

[4] In her appeal, Petitioner also asserts error in the ALJ's usage of the word "would" as opposed to "could", in connection with the potential for causation of a particular psychological injury following a given set of stressors. To the extent that Petitioner argues that *Dailey* does not require a showing that a given stressor would, in every case, result in a given psychological injury, we agree. However, we do not detect that the ALJ ruled otherwise.

We wish to be clear: the proper place to conduct *Dailey* analysis is when deciding whether sufficient evidence has been produced to invoke the presumption that the claimed stressors caused the claimed psychological injury. If not, the claim is denied. If however the complained of stressors have the requisite *Dailey* potential, they by definition have the potential to have caused the injury in the case at hand, making what appears to have been a "first step" undertaken by the ALJ in this case superfluous. Where the actual conditions as found by the ALJ have the requisite potential to cause the complained of condition in a person of average sensibilities, the presumption that the complained of condition was in fact caused by those stressors is invoked. The ALJ is then to proceed and analyze the evidence of employer to determine if it is sufficient to overcome the presumption that the complained of stressors did, in fact, cause the complained of condition in the specific claimant in the case at hand. If not (that is, if employer's evidence is insufficient to overcome the now-presumed causal relationship), the claim is granted. If so, the presumption falls from the case, and the evidence is again to be weighed to determine whether, in this specific case, the actual work conditions did cause the claimed injury, without reference to any presumptions, and with the claimant having the burden of proof, under *Dunston v. District of Columbia Dep't. of Employment Serv's.,* 509 A.2d 109 (D.C. App. 1986).

Lastly, we note that the ALJ denied the claim for temporary total disability, but inexplicably granted the claim for causally related medical care. While we do not know why the ALJ made this inconsistent award, Respondent has not filed an appeal, and therefore we have no jurisdiction to rule thereon.

## CONCLUSION

The denial of temporary total disability benefits in the Compensation Order of March 7, 2006 is supported by substantial evidence in the record is in accordance with the law.

## **ORDER**

The denial of the claim for temporary total disability benefits contained in the Compensation Order of March 7, 2006 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

May 23, 2006
DATE