

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
INTERIM DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 13-167**

**TRACY PHILPOT**  
**Claimant-Respondent,**

v.

**KBC NURSING GROUP and GUARD INSURANCE GROUP,**  
**Employer and Carrier-Petitioners.**

Appeal from a November 25, 2013 Compensation Order by  
Administrative Law Judge Leslie Meek  
AHD No. 13-186, OWC No. 697094

Michael Kitzman, for the Respondent  
Jennifer L Ward, for the Petitioner

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL and MELISSA LIN JONES, *Administrative Appeals Judges.*

HEATHER C. LESLIE, for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**OVERVIEW**

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the November 25, 2013, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted the Claimant's claim for relief. The CO awarded the Claimant temporary total disability benefits from September 6, 2012 to the present and continuing and casually related medical expenses. We VACATE, in part, and REMAND.

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
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## FACTS OF RECORD AND PROCEDURAL HISTORY

On September 6, 2012, the Claimant was employed by the Employer as a home health aide to Mr. Henry Paul. On that day, the Claimant was injured when she was attacked by her uncle, who lived with Mr. Paul. The Claimant injured her back, right arm and right hand.

The Claimant came under the care and treatment of Dr. Richard Palmer, her primary care physician. Dr. Palmer subsequently referred Claimant to Dr. George H. Drakes, an orthopedist who recommended a course of conservative care, including physical therapy. While undergoing physical therapy, the Claimant suffered a seizure. The Claimant has not returned to work.

The Employer sent the Claimant for an independent medical evaluation (IME) with Dr. Louis Levitt. Dr. Levitt took a history of the injury and performed a physical examination. Dr. Levitt opined the Claimant's complaints of back pain and complaints of right hand pain are casually related to the work trauma of September 6, 2012. Dr. Levitt further opined the Claimant was able to return to work without restrictions.

A Formal Hearing was held on June 12, 2013. The Claimant sought an award of temporary total disability from September 6, 2012 to the present and continuing along with casually related medical expenses. The issues raised were whether the Claimant suffered an accidental injury, whether the injury arose out of and in the course of the Claimant's employment, and the nature and extent of the Claimant's disability, if any. A Compensation Order was issued on November 25, 2013 which granted the Claimant's claim for relief.

The Employer timely appealed. The Employer argues CO erred in finding the Claimant's injury arose out of and in the scope of the Claimant's employment as having failed to apply the law as enunciated in *Grayson v. DOES*, 516 A.2d 909 (D.C. 1986). The Employer further argues that the CO erred in finding the Claimant's seizures are medically causally related to the injury, and the Claimant can return to work per the opinion of Dr. Levitt.<sup>1</sup>

The Claimant opposed the Employer's Application for Review arguing the CO is supported by the substantial evidence in the record and in accordance with the law.

## THE STANDARD OF REVIEW

The scope of review by the CRB 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 District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

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<sup>1</sup> The Employer did not appeal the conclusion that an accidental injury occurred.

## DISCUSSION AND ANALYSIS

Prior to addressing the Employer's argument, we must first address whether the contested issues raised in the case were properly addressed. The CO lists three issues to be adjudicated:

1. Did Claimant suffer a work related injury on September 6, 2012?
2. Is Claimant's claimed medical condition casually related to the work incident of September 6, 2012?
3. What is the nature and extent of Claimant's disability if any?

CO at 2.

A review of the transcript and the joint pre-hearing statement show that the parties in fact raised not only whether or not an accidental injury occurred and the nature and extent of the Claimant's disability, but also whether or not the Claimant's injury arose out of and in the course of the Claimant's employment. The parties stipulated to medical causal relationship. Questions pertaining to "arising out of and occurring in the course of" employment deal with legal causation, i.e., the question of whether a particular incident which caused (or is alleged to have caused) an injury occurred under circumstances making the injury a compensable event under the Act. "Medical causal relationship", on the other hand, presents the question of whether a given condition for which medical or disability benefits are sought is related to the work injury.

A review of the CO reveals the following discussion:

Employer asserts, the confrontation that occurred between Claimant and her uncle while she was at work, was outside of Claimant's work obligations. Employer characterizes Claimant's September 6, 2012, interaction with her uncle as "entertaining guests" (TR p. 86), and asserts further that "confronting guests" is not a condition of Claimant's employment and as such, the resultant injuries did not "arise out of her employment." Employer further contests the causal relation between Claimant's seizures and the work incident, asserting the seizures are the result of a long history of drug use, and contest the nature and extent of Claimant's condition, asserting she can return to work full duty. To support this position, Employer presents *inter alia*, the medical report of orthopedic surgeon, Dr. Louis Levitt, the medical reports of Dr. Richard Palmer, and a correspondence written by Claimant's home-care client, Henry Paul.

In his May 6, 2013 independent medical evaluation, Dr. Levitt notes his review of Claimant's history and his physical examination of Claimant. Dr. Levitt, opines, "Complaints of back pain and complaints of right hand pain are causally [related] to the work trauma of 9/6/12." Dr. Levitt further relates claimant's back and right hand issues to the work incident stating, "We have a middle aged female who was assaulted at work in 9/12 and sustained what appears to have been a muscular strain to her lumbar spine and a soft tissue strain to the right ring finger." He states, "...there is not role for pain management...She has had adequate conservative care with six months of therapy." The doctor further notes, "Pain management only perpetuates the patient's notion she is ill absent any measured

disease.” (EE 1, p.2). Dr. Levitt asserts Claimant can return to work immediately.

Employer presented as evidence, the written statement of Claimant’s home-care client, Mr. Henry Paul. In this document Mr. Paul states he gave Claimant’s uncle permission to live in his home and that the uncle is a long-time friend of his. He notes Claimant had no prior knowledge of her uncle’s living arrangements and states that the confrontation between Claimant and her uncle started when her uncle interfered with Claimant carrying out her work duties. (EE 7, p. 30).

Employer has not presented any evidence to prove its assertion that Claimant’s seizures are the result of illicit drug use.

Employer has failed to rebut the presumption that Claimant suffered a work injury and that Claimant’s right hand, back, and seizure conditions are casually related to the work incident of September 6, 2012.

CO at 5.

The CO conflates the issues of legal causal relationship and medical causal relationship requiring remand. The CO begins to address legal causal relationship in its outline of the Employer’s arguments. However, the ALJ never fully analyzes the issue nor addresses facts that would support a finding that the Claimant’s accidental injury arose out of and in the course of the Claimant’s employment. We agree with the Employer that the ALJ failed to fully address this issue, as delineated in *Grayson v. DOES*, 516 A.2d 909 (D.C. 1986).

It is well settled under the Act that to be compensable an injury must both arise out of, and in the course of, the employment. D.C. Code § 36-301(12); *Grayson*, *supra*. Both requirements must be met to be compensable. *Id.* Furthermore, the District of Columbia has adopted the “positional risk” doctrine in defining and analyzing whether an alleged cause of an injury under its workers’ compensation laws “arises out of” a claimant’s employment.<sup>2</sup> See, *Clark v. DOES*, 743 A.2d 722 (D.C. 2000). As the court noted in *Grayson*, this is a “liberal” standard which obviates any requirement of employer fault or of a causal relationship between the nature of the employment and the risk of injury. *Grayson*, *supra* at 912. Nor need the employee be engaged at the time of the injury in activity of benefit to the employer. *Harrington v. Moss*, 407 A.2d

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<sup>2</sup>The positional risk doctrine is summarized in the leading treatise on workers’ compensation law at 1 Arthur Larson & Lex K Larson, *Larson’s Workers’ Compensation Law*, § 3.05, which reads:

An important and growing number of courts are accepting the full implications of the positional-risk test: An injury arises out of the employment if it would not have occurred “but for” the fact that the conditions and obligations of the employment placed claimant in the position where he was injured. It is even more common for the test to be approved and used in particular situations. This theory supports compensation, for example, in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he or she was injured by some neutral force, meaning by “neutral” neither personal to the claimant nor distinctly associated with the employment.

658, 662 (D.C. 1979). Only if the risk is neutral, meaning neither personal to the claimant nor distinctly associated with the employment, does the positional risk doctrine apply. See footnote 2.

“In the course of” refers to whether the injury took place within the time, place and circumstances of the employment. *Kolson v. DOES*, 699 A.2d 357 (D.C. App. 1997).

While we are sympathetic to the Claimant’s arguments in opposition, it is clear the CO confuses the issues to be addressed and without proper analysis, we cannot review the CO before us to determine whether or not the substantial evidence in the record supports whether or not the injury arose out of and in the course of the Claimant’s employment. We must remand the case with instructions for the ALJ to fully address whether or not the injury arose out of and in the course of the Claimant’s employment and the nature and extent of the Claimant’s disability. A failure to address and resolve all material issues renders an agency decision unsupported by substantial evidence. See, *Perkins v. DOES*, 482 A.2d 401, 402 (D.C. 1984); *Committee of 100 on the Federal City v. D.C. Dep’t of Consumer and Regulatory Affairs*, 571 A.2d 195 (D.C. 1990); See also, *Braxton v. Marty’s Restaurant*, CRB No. 09-032, AHD No. 06-092, OWC No. 618209 (January 29, 2009) *Mendez v. D.C. Public Schools*, CRB No. 08-163, AHD No. PBL 02-024 (May 30, 2009), *Ramirez v. Whole Foods Market*, CRB No. 13-164, AHD No.13-032, OWC No. 687785 (March 18, 2014).

This brings us to the Employer’s second argument that the ALJ erred in finding the Claimant’s seizures casually related to her employment. The Employer emphasizes that with respect to the Claimant’s seizures, the Claimant failed to enter into evidence any medical opinion relating the two. The Employer’s argument is misplaced. As pointed out above, the issue of whether or not the Claimant’s conditions are medically casually related to the work injury was stipulated to by the parties. The Employer cannot now raise on appeal a stipulated issue. If the ALJ, upon reconsideration, finds the Claimant’s injury is legally related to the Claimant’s employment, then her medical conditions, including her seizures, are medically casually related to the work injury by stipulation. We reject the Employer’s argument.

The Employer’s last argument is that the nature and extent of the Claimant’s injuries are not preventing her from working and per the opinion of Dr. Levitt, the Claimant can work full duty. A review of the CO shows that the ALJ accepted the opinion of the treating physician’s opinion over that of the Employer’s IME. As the CO correctly noted, the District of Columbia Court of Appeals as stated it is only with respect to the treating physician’s opinion where reasons for rejecting a physician’s opinion must be explained. *Washington Hospital Center v. DOES (Paul A. Thielke)*, 821 A.2d 898 (D.C. 2003). The Employer’s argument simply summarizes Dr. Levitt’s opinion and does not put forth any basis to overturn the CO’s reliance on the treating physician.<sup>3</sup> We reject the Employer’s argument.

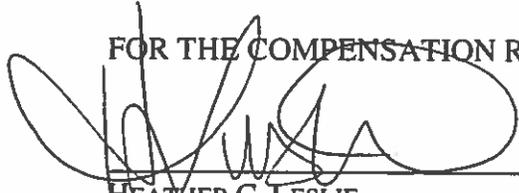
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<sup>3</sup> In the District of Columbia, there is a preference for the testimony of treating physicians over doctors retained for litigation purposes. See *Short v. DOES*, 723 A.2d 845 (D.C. 1998); see also, *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

**CONCLUSION AND ORDER**

The November 25, 2013 Compensation Order is not supported by the substantial evidence in the record and is not in accordance with the law. The Compensation Order's conclusion that an accidental injury occurred and that the Claimant is temporarily and totally disabled is affirmed. The award is VACATED and REMANDED for further findings of fact and consideration of whether or not the Claimant's injury arose out of and in the course of the Claimant's employment.

FOR THE COMPENSATION REVIEW BOARD:



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HEATHER C. LESLIE  
*Administrative Appeals Judge*

April 1, 2014

DATE