

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

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



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**CRB No. 08-040**

**ROBERT MOORE,**

**Claimant–Petitioner,**

**v.**

**PROTEUS CONSTRUCTION AND DONEGAL COMPANIES,**

**Employer/Carrier–Respondent.**

Appeal from a Compensation Order of  
Administrative Law Judge Nata K. Brown  
AHD No. 01-291F, OWC No. 560052

David M. Schloss, Esquire, for the Petitioner

Cheryl Hale, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

**DECISION AND REMAND 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).<sup>1</sup>

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<sup>1</sup> 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

## 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 October 29, 2007, the Administrative Law Judge (ALJ) denied Petitioner's claim for temporary total disability benefits and causally related medical care. Petitioner filed an Application for Review (AFR) on November 13, 2007, seeking review of that Compensation Order. Respondent has filed no opposition thereto.

As grounds for this appeal, Petitioner alleges as error that the ALJ's decision to deny the claimed benefits was not in accordance with the law, because the denial was based upon a finding that the disability claimed is not medically causally related to the work injury of November 3, 2000, and was not in accord with the presumption of causality contained in the Act and as enunciated by the District of Columbia Court of Appeals in *Whittaker v. District of Columbia Department of Employment Services*, 531 A.2d 844 (D.C. 1995).

Because the ALJ erroneously concluded that the evidence of record was sufficient to rebut the *Whittaker* presumption, we reverse the denial of benefits and remand the matter with instructions that a Compensation Order and an award of the claimed benefits be issued.

## 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 International v. District of Columbia Dep't. of Employment Serv's.*, 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 alleges that the ALJ's decision is contrary to law, specifically, contrary to the principle established by the District of Columbia Court of Appeals in *Whittaker, supra*, that given an established work related injury and a claimed disability, there is a presumption under the Act that the latter is causally related to the former.

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

Review of the record herein reveals that, in addition to relying upon the presumption, Petitioner also put forth medical opinion evidence in the form of a report from Petitioner's treating physician, Dr. Leonid D. Selya, to the effect that Petitioner's "failed back syndrome" is the cause of the claimed disability (i.e., the claimed inability to work), as set forth in CE 1, Report dated April 26, 2006, and is "job related", as set forth in CE 1, Report of October 12, 2005.<sup>2</sup> Prior to authoring that report, Dr. Selya diagnosed Petitioner's "failed back syndrome" prior to the October incident (see, CE 1, Report of May 4, 2005), said "syndrome" being the result of the failure of the surgery performed upon Petitioner's back as a result of the work injury sustained on November 3, 2000. Although Respondent raised lack of causal relationship as a defense to the claimed period of disability (see, HT 23), asserting the happening of an intervening event while employed with a subsequent employer as an alternative cause, Respondent produced no medical evidence in support of the defense or, more significantly, in opposition to the causal relationship asserted by Dr. Selya.

In the Compensation Order, the ALJ recognized Petitioner's entitlement to the benefit of the *Whittaker* presumption, but found that the evidence in the record contained in Petitioner's own exhibits and in his testimony acknowledging an intervening incident was sufficient to rebut that presumption. The evidence cited by the ALJ was (1) the uncontroverted evidence of the intervening incident having occurred, and (2) "Claimant's own testimony that he was able to perform the tasks required of the job with Suburban" (Suburban being a subsequent employer for which Petitioner was working at the time of the intervening incident).

Petitioner's testimony is not described in detail in the Compensation Order. However, the record reveals that, following the work related injury sustained while working for Respondent as a pipe fitter, Petitioner had returned to work in an alternative position with a new employer, Suburban, as a fuel oil truck delivery driver, for approximately a year and a half (HT 27) or two years (HT 35). He testified that the oil truck driver job required significant physical exertion, including daily "climbing on top of the truck" and "opening the hatch, depositing ... 2400 gallons of fuel" and climbing back down (HT 28), to perform a complete inspection of the truck involving "crawling underneath" to check the underside for cracked hoses and air lines (HT 30), then delivering fuel oil to homes, a process in which he would "drag" a 150 foot long 2 inch wide hose, perhaps having to climb a fence, or go under a gate, to make the delivery, then return the hose to the truck, dragging it back before using the electric rewind mechanism to wind the hose back into the reel (HT 31). Throughout the course of performing these duties, Petitioner testified that he regularly engaged in stooping, pulling and reaching overhead, in addition to the strenuous activities involved in merely driving the truck, which he described as involving engagement of a "heavy clutch you have to push down", and that sometimes he was required to "jack the whole [truck] cab up so they can look under the motor since 9/11 to make sure you are not a bomb threat" when, as sometimes happened, the delivery was to a military installation (HT 32). He testified that his work involved driving "150, 200 miles a day" punctuated by getting "in and out of the truck and up on top of it sometimes" throughout the day (HT 33). Beyond these daily activities, Petitioner testified that he sometimes was required to "cut up old fuel tanks", a task

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<sup>2</sup> These two references are by no means the only such references. They are, however, sufficient to be dispositive in connection with creating an obligation on Respondent to produce medical evidence in opposition, in order to prevail on the medical question of causation.

involving sawing steel tanks in half, then vacuuming out any waste oil, and then scrubbing the empty tanks, loading them onto a truck and hauling them to a dump (HT 34 – 35).

Petitioner testified that he was able to perform all these tasks until he “started having some difficulty” in “April—well, probably May, June of ’05” (HT 36). He testified that he continued to work, with gradually increasing “problems” until October 2005, when, while pulling a hose to make a delivery, the chain on the rewind mechanism came off its reel, causing the hose to suddenly lock up. As a result, he was “yanked” backwards and caused fell to the ground. After getting up, Petitioner fixed the reel, made the delivery, and then called in to the office to report the incident. He returned directly to the office, driving approximately 15 miles. During the drive, his back “started to get tightening” (HT 40 – 41).

As a general rule, we would have no problem accepting that Petitioner’s testimony in this case, standing alone, could sustain a finding by the ALJ of a subsequent independent intervening cause, and a new injury sustained, while employed in suitable alternative employment, sufficient to sever the relationship between the work injury suffered while employed by Respondent as a pipe fitter. However, in this case that evidence does not stand alone; rather, it must be read in context with the medical evidence in the record, and must be considered as part of the record “as a whole”.

As discussed above, in addition to this testimony, the record contains the medical reports and opinions of the treating physician, Dr. Selya, and it is evident that Dr. Selya had diagnosed failed back syndrome long prior to the October 2005 incident, and that he attributes the current disability to that syndrome. That medical opinion stands uncontradicted in this record.

The District of Columbia Court of Appeals has enunciated a clear test for determining whether a medical opinion asserting a causal relationship between a disability and the work injury the Court of Appeals has written as follows:

We hold that an employer has met its burden to rebut the presumption of causation when it has proffered a qualified independent medical expert who, having examined the employee and reviewed the employee’s medical records, renders an unambiguous opinion that the work injury did not contribute to the disability.

*Washington Post v. District of Columbia Department of Employment Services and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004). The Court has, in this passage, established the following criteria for determining whether there is sufficient medical evidence to overcome the causation presumption: (1) an opinion from (2) a qualified medical expert which (3) follows an examination of the claimant by that expert and (4) a review of the relevant medical records, which opinion is (5) unambiguous, and which asserts both (6) a lack of causation of and (7) a lack of “contribution”, or, in a phrase used more frequently in workers’ compensation law, “aggravation” of the disabling condition.

In this case, Respondent failed to produce any medical evidence to overcome the clearly enunciated medical opinion of the treating physician that Petitioner is unable to work in either

his pre-injury job, or in the subsequent job which for a time may have been “suitable alternative employment”, but which is now no longer suitable due to the “failed back syndrome” resulting from the initial work injury. Had such evidence been produced, the ALJ would have been free to consider the competing evidence, in light of the treating physician preference rule, but also considering whether the competing opinions adequately took into account the significant duration of the successful return to work, and the significant physicality of that subsequent job. Why Respondent failed to produce any such medical evidence we do not know, but neither we nor the ALJ can relieve them of that obligation where, as here, the claimant has produced expert, treating physician evidence of such a causal relationship.

Accordingly, the determination by the ALJ that the presumption of medical causation has been rebutted is not in accordance with the law, and must be reversed. Because the nature and extent of disability and reasonableness and necessity of the claimed medical care were not issues in contest (see, HT 12 – 13), there is no need for further proceedings to consider any additional matters at this time.

#### CONCLUSION

The Compensation Order of October 29, 2007 is not in accordance with the law.

#### ORDER

The Compensation Order of October 29, 2007 is REVERSED, and the matter is REMANDED to AHD with instructions to issue a new Compensation Order awarding the requested benefits.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
Administrative Appeals Judge

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January 17, 2008  
DATE