GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-036

MARIA A. ROMERO,
Claimant–Petitioner,

v.

J.W. MARRIOTT HOTEL and MARRIOTT INTERNATIONAL, LLC,
Employer/Carrier–Respondents.

Appeal from a February 25, 2013 Compensation Order By
Administrative Law Judge Gerald Roberson
AHD No.13-003, OWC No. 680258

David Kapson, Esquire, for the Petitioner
Joel E. Ogden, Esquire, for the Respondent

Before HEATHER C. LESLIE, MELISSA LIN JONES *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the February 25, 2013, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for disability benefits, finding that the Claimant's lower back and left leg conditions were not medically causally related to the April 24, 2011 work injury. We AFFIRM.

BACKGROUND AND FACTS OF RECORD

The Claimant is a housekeeper for the Employer. Prior to the work injury, the Claimant sought treatment for persistent low back pain. Specifically, the Claimant underwent an MRI on April 22, 2011 which revealed degenerative changes to her low back and a small disc protrusion.

On April 24, 2011, the Claimant injured her back while moving a refrigerator from a room into a hallway. The Claimant sought medical treatment a short time later at the Washington Adventist Hospital for back pain and was diagnosed with a thoracic sprain.

Ultimately, the Claimant came under the care and treatment of Dr. Andrew Dutka. Dr. Dutka diagnosed the Claimant with a compression fracture in the thoracic spine and spinal stenosis of the lumbar region. Dr. Dutka mentioned that the Claimant was lifting at work when she felt a snap and then pain in the upper back, between the shoulder blades. The Claimant was placed under a 5 pound lifting restriction. The Claimant continued to seek treatment for her work injuries, undergoing physical therapy, epidural injections, and receiving medication.

The Claimant, at the request of the Employer, underwent an independent medical evaluation (IME) with Dr. James Tozzi on November 17, 2011. At that IME, Dr. Tozzi took a history of the Claimant's injury, performed a physical examination, and reviewed medical records. Dr. Tozzi reserved his opinions until radiographs were obtained. An addendum was issued on August 22, 2012 after x-rays and the MRI were obtained. Dr. Tozzi opined that the cause of her lumbar back pain and leg pain is due to a pre-existing degenerative condition. Dr. Tozzi further opined that the Claimant "will continue to be symptomatic from her low back condition, and that this low back condition will experience flare-ups or worsening of symptomatology when performing physically demanding tasks." Employer's exhibit 1 at 1.

On January 31, 2013 a full evidentiary hearing was held. The Claimant sought an award of temporary total disability from September 6, 2012 to the present and continuing, causally related medical expenses and interest. The issues presented for resolution were whether or not the Claimant's low back and left leg condition arose out of and in the scope of the Claimant's employment, whether those conditions were medically causally related to the work injury, and the nature and extent of the Claimant's disability, if any. A CO issued on February 25, 2013 which denied the Claimant's claim for relief. While the CO found the low back and left leg condition to be legally causally related to the work injury,[1] the ALJ determined the Claimant had failed to prove her low back condition and left leg condition were medically casually related.

The Claimant timely appealed. The Claimant argues the ALJ misapplied the standard for medical causal relationship. The Employer opposes the Application for Review arguing the CO is supported by the substantial evidence in the record and is in accordance with the law.

[1] The Employer did not appeal the CO's conclusion that the low back condition and left leg condition arose out of and in the scope of the Claimant's employment.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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 § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, 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. *Id.*, at 885.

DISCUSSION AND ANALYSIS

The Claimant's argues that the CO's findings that the Claimant's lower back and left leg symptoms are not medically casually related to the work accident is in error and is not supported by the substantial evidence in the record. The Claimant states the analysis followed by the ALJ misapplied the standard for medical casual relationship. Claimant's argument at 8.

Prior to addressing the Claimant's argument, we note, Claimant's reliance on *Washington Post v. DOES*, 852 A.2d 909, 914 (D.C. 2004) (Raymond Reynolds, intervenor) and *Romero v. V&V Const. Inc.*, CRB No. 11-025, (September 9, 2011). The Claimant's characterization of these cases is similar, if not identical, to prior arguments made in other appeals in which Claimant's counsel appeared before the CRB. We refer Claimant's counsel to the discussion in *Moore v. Howard University*, CRB No. 13-066, AHD No. 09-054A (July 23, 2013):

> In his Memorandum of Points and Authorities in Support of Application for Review (Memorandum), Mr. Moore makes a rather astonishing and unfortunately inaccurate statement concerning the law in this jurisdiction as it relates to what the CRB has held in connection with overcoming the presumption that a claimed current condition or injury is causally related to employment. The Memorandum states:
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> > The CRB has noted that for an IME report to be considered unambiguous, the IME must affirmatively state that the work accident *could not* have caused the disability. [...] If the IME concedes there is a possibility, no matter how remote, that the claimant's disability is causally related to the work accident, the IME is insufficient as a matter of law to rebut the presumption.
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> Memorandum of Points and Authorities in Support of Application for Review, page 7 - 8 (italics added). The source citation for this inaccurate statement of the law is said to be *Romero v. V&V Construction Company,* CRB No. 11-025**,** AHD No. 10-267, OWC No. 657345 (September 9, 2011).
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> This is not the first time that *Romero* has been so mischaracterized, and we will merely quote at length from the most extensive of the CRB's attempts to disabuse

counsel of the error, *Thomas v. WMATA,* CRB No. 11-121, AHD No. 10-092A, OWC No. 643201 (October 4, 2012). Before we do so, in order to make crystal clear that what follows is not a CRB decision that disagrees with *Romero,* it is a decision correcting counsel's mischaracterization of its holding, we note that the author of the *Romero* decision was a panel member in *Thomas,* and joined in the decision. Quoting from *Thomas:*

> She [Ms. Thomas] asserts that "The CRB has noted for an IME to be considered unambiguous, the IME must affirmatively state that the work accident *could not have caused* the disability", citing but not quoting from *Romero v. V&V Construction,* CRB No. 11-025, AHD No. 10-267, OWC No. 657345 (September 9, 2011). Claimant's Memorandum, unnumbered page 6 (emphasis added).
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> It is not surprising that she does not quote *Romero,* since it nowhere stands for the proposition for which it is cited. First, contrary to Ms. Thomas's apparent understanding, the physician in *Romero* was a treating physician, not an IME physician. Second, the physician in *Romero* stated (or at least implied) that he never examined the body part in question. Third, the physician in *Romero* did not express a considered medical opinion on whether the injury at issue in that case was or was not, in fact, causally related to the subject work incident at issue in that case. As the CRB stated in *Romero:*
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> > In order to properly assess the ALJ's determination, it becomes necessary to evaluate the treating physician's letter to see if it meets the standard established by the D.C. Court of Appeals when seeking to rebut medical causation. That standard holds that an employer meets its burden to rebut the presumption when it proffers a qualified independent medical evaluator (IME) who, after examining the employee and reviewing his medical records, unambiguously opines that the work injury did not contribute to the disability. *Washington Post v. D.C. Dept. of Employment Services,* [and *Raymond Reynolds, Intervenor*] 852 A.2d 909 (D.C. 2004) [(*Reynolds*)].
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> *Romero, supra,* (bracketed material added).
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> We point out that, unlike Ms. Thomas in this appeal, the CRB in *Romero* accurately states that it is the expression of the opinion that the subject employment condition or incident *did not* cause the complained of condition, and not that it *could not* have done so that is the legal standard for adequacy in overcoming the presumption established by the DCCA in *Reynolds.* The CRB continued:
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> > In his July 29, 2010 letter, Dr. Means prefaced his opinion by stating

> "[I] have not diagnosed Mr. Romero with any specific condition with regard to the left shoulder as he has not been formally evaluated for this yet". As to a causal connection he went on to say:
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> *"It is possible that he could have developed some left shoulder symptoms from an avulsion fracture type injury, but I do not think this is very likely, and Mr. Romero did not note any of these symptoms until 10/22/2009, at least to us [i.e., his treating physician's office and staff]. Therefore, I think the possibility that it is related to the 2/13/2009 injury is a very remote possibility."*
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> If we apply the DCCA's standard, we first note that Dr. Means arguably has rendered an opinion without an express examination of the left shoulder and has stated that he has not diagnosed any specific condition to the left shoulder. We further note that by stating that there "is a very remote possibility" of a causal relationship between Petitioner's left shoulder symptoms and the work injury, Dr. Means has rendered an opinion that is anything but unambiguous. We are left to conclude using the test established by the DCCA, it was error for the ALJ to find that this evidence was comprehensive enough to rebut the presumption.

*Romero**,** supra,* (bracketed material added).

We stress the significance of the analytical error and the potential folly that ensues by confusing Dr. Means's identity. The ALJ in *Romero* relied upon this passage as evidence upon which to rebut the presumption of causation. In *Romero,* if Dr. Means been an IME physician, the employer would have been required to elicit from him an opinion not on the *possibility* that the work conditions or incidents caused the complained of injury, but on the ultimate question of whether it did *in fact and in this case* cause *these conditions.* As it is, Dr. Means did not express an opinion that "the remote possibility" that he recognizes exists does not apply to this case. Indeed, he left it open, by prefacing that he hadn't ever actually formally examined the shoulder for any such purpose, and presumably had therefore not taken a shoulder-related history from Mr. Romero, performed x-rays or other studies upon the shoulder, or reviewed any pertinent medical records relating to the shoulder, any of which might have provided information making the possibility more or less remote.

Indeed, it is to avoid having these types of cursory, off-the-cuff remarks form the basis of a rebuttal of the presumption that the DCCA requires that such opinion be (1) from a qualified medical doctor, (2) following an actual examination of the patient (3) and a review of the pertinent medical records and that it (4) unambiguously states (5) that there is no such causal

> relationship in the case at hand. That is the point of *Romero.* Dr. Means was not engaged to offer an opinion on this question in the context of resolving a legal dispute. Rather, he was asked what amounts to a hypothetical question to which he gave a hypothetical answer.

Thomas, supra, 3 - 5.

Inasmuch as this is not the first time that *Romero* has been so mischaracterized, and that we have had to go to extraordinary lengths to correct the misstatement, *we strongly urge counsel to refrain from repeating this error*.

And, before proceeding to addressing the appeal at hand, we will note that Mr. Moore's Memorandum contains an additional, albeit less extreme, error when discussing the evidence required to overcome the presumption. The Memorandum states:

> An Employer's IME report will be sufficient to break the presumption when that IME is one who possesses unchallenged professional qualifications, bases his opinions on a personal examination of the Claimant, and renders a firm and unambiguous medical opinion. *See Washington Post v DOES,* 852 A.2d 909, 914 (D.C. 2004)(*Raymond Reynolds, intervenor*).

Memorandum, page 7.

In fact, what the DCCA in *Reynolds* wrote was:

> 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.

Reynolds, supra, at 910.

There is no mention or requirement that the expert's qualifications be "unchallenged", and while the DCCA requires a lack of ambiguity as to the opinion expressed, it is silent on how "firmly" the opinion must be held. As with all expert medical opinion, one assumes that it is sufficient (and necessary) that the opinion be held "to a reasonable degree of medical certainty". Such a degree of certainty may well be very "firm" in the eyes of one beholder, and less so in another's eyes. Regardless, such a standard is certainly not nearly so stringent as to require the expert to "affirmatively state that the work accident *could not* have caused the disability" or to support the proposition that "if the IME concedes there is a possibility, *no matter how remote,* that the claimant's disability is causally related to the work accident, the IME is insufficient as a matter of law to rebut the presumption."

Moore, supra (emphasis added)

Claimant's counsel has made the same mistakes in the memorandum before us that we urged to avoid in *Moore* and *Thomas*. We again remind Claimant's counsel of the above discussion and again urge counsel to refrain from repeating the same error.

Turning now to the appeal at hand, the Claimant specifically argues that the ALJ's conclusion that Dr. Tozzi's opinion was not enough to rebut the presumption of compensability when determining whether or not the injury arose out of and in the course of the Claimant's employment, but then used that same evidence to find the Claimant's low back and left leg conditions to not be medically causally related to the work injury is contradictory, and therefore in error and not supported by the substantial evidence in the record. Specifically, the Claimant argues,

> The ALJ then relies on the same opinion of Dr. Tozzi and the treating physicians at Kaiser to find that the evidence in this case does not medically causally relate the Claimant's lower back pain and left leg pain to the work incident of April 24, 2011.

Claimant's argument at 9.

We reject the Claimant's argument. 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. It is possible that a claimant could sustain an injury that is work related, but that the specific conditions for which he seeks benefits are not, as a medical matter, related to the injury that was sustained.

In other words, having found that an injury occurred under circumstances that arose out of and were in the course of a claimant's employment, "legal causation" has been established, leaving the question of whether the complained of conditions (that is, the conditions for which the claimant seeks benefits) are medically causally related to that injury. *See, Nettleford v. Cambridge Management*, CRB No. 06-055, AHD No. 05-509, OWC No. 603267 (August 2, 2006). Having found the medical opinion of Dr. Tozzi insufficient to rebut the presumption that the Claimant's injury arose out of and in the course of the Claimant's employment, the ALJ then turned to the issue of medical causal relationship and found the medical opinion to be sufficient to rebut the presumption that the Claimant's medical condition is medically casually related to the work injury. See, *Nettleford v. Cambridge Management*, CRB No. 06-055, AHD No. 05-509, OWC No. 603267 (August 2, 2006). A review of the CO reveals that in addressing whether or not the Employer rebutted the presumption of compensability,

> To challenge medical causal relationship and rebut the presumption, Employer relied on the IME report of Dr. Tozzi dated November 17, 2011. Dr. Tozzi noted

> a prior history of back pain, stating Dr. Mark Scheer treated her in March and April 2008 for low back pain secondary to underlying degenerative disk changes detected by x-rays and MRI scanning. He reported Claimant complained of back pain which traveled down her left lower extremity. Dr. Tozzi stated Claimant underwent a MRI in April 2011, which revealed degenerative disk at T12-L1 and a degenerative disk at L4-5 with a large spinal canal and no sign of spinal stenosis. Dr. Tozzi explained Claimant had evidence of disk degeneration in the thoracolumbar and lumbar spine without signs by the MRI report of fracture, malalignment, stenosis, disk herniation or nerve root compression. Dr. Tozzi stated Claimant had reached maximum medical improvement from what would have been a back strain, but he requested the diagnostic evidence before making a recommendation regarding Claimant's work status. CE 4, p. 168.
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> Dr. Tozzi provided an addendum on August 22, 2012. Following his review of the relevant diagnostic evidence, Dr. Tozzi stated Claimant had a pre-existing 9 year low back condition, and sought treatment almost yearly. He noted an MRI taken five days before her reported back and leg pain revealed spinal stenosis at L4-5, and the diagnostic studies showed sacralized or partially sacralized L5, a congenital condition. Dr. Tozzi remarked the diagnostic studies showed signs of spinal stenosis, a condition which causes back pain and leg pain, numbness and weakness dependent upon the level of activity. Dr. Tozzi stated "There have been no reports to indicate the patient sustained a structural new injury to her lumbar spine nor have there been radiographic studies that support that." Dr. Tozzi remarked the primary underlying cause for her back pain and reported leg pain is a preexisting degenerative condition. CE 5, p. 169. With the medical evidence from Dr. Tozzi, Employer has rebutted the presumption of compensability regarding medical causal relationship. Therefore, Claimant loses the benefit of the statutory presumption, and the record medical evidence must be weighed without further reference thereto.

CO at 6-7.

We affirm the above finding. The ALJ found Dr. Tozzi's opinion to be sufficient to rebut the presumption of compensability that the Claimant's lower back and left leg condition is medically casually related to the work injury.

We also reject the Claimant's argument that the IME performed by Dr. Tozzi, did not provide a clear unambiguous statement that the work accident in question could have caused her low back and left leg condition. Dr. Tozzi attributed her low back and left leg malady to a "attritional wear and tear condition, that I knew over time would continue to bother her, but was not really a work injury that would prevent her from functioning." Employer's exhibit 7 at 51. At this juncture, the presumption dropped from the case and the Claimant had the burden to prove, by a preponderance of the evidence, that the low back and left leg condition are casually related to the work injury. Bearing that in mind, the ALJ stated,

> In this case, the evidence does not medically causally relate Claimant's lower back pain and left leg pain to the work incident of April 24, 2011. The treating physicians from Kaiser Permanente have not offered an opinion concerning medical causation. The records from Kaiser Permanente referenced Claimant's employment activities, but did not offer any specific findings that the employment incident of April 24, 2011 aggravated the preexisting condition. While Dr. Dutka provided medical history on May 4, 2011 noting Claimant had lifted something heavy at work, he did not offer a diagnosis in connection with the incident. CE 1, p. 143. Dr. Dutka also mentioned Claimant's standing and bending worsened her back pain, and she worked as a housekeeper. CE 1, p. 143. Dr. Dutka stated the pain in the upper back correlated with the compression fracture, and recommended a five pound weight lifting limitation and bone density test. Dr. Dutka remarked the low back pain correlated with the degenerative disease of the spine, and stated she should continue meloxicam. CE 1, p. 143. Dr. Dutka did not offer any medical rationale to support Claimant's contention that the work incident aggravated her underlying condition. His assessment lacks sufficient medical rationale to resolve the issue. Dr. Dutka has attributed Claimant's low back condition to degenerative disease of the spine without providing support medical rationale whether Claimant suffered an aggravation as a result of the work incident of April 24, 2011. Dr. Ergener, who performed the back surgery on September 11, 2012, did not offer an opinion regarding the work-relatedness of Claimant's lower back and left leg conditions.
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> Conversely, Employer provided deposition testimony of Dr. Tozzi to challenge medical causal relationship. Dr. Tozzi stated x-rays revealed disc degeneration, and Claimant had partially sacralized L5 vertebrae, which puts more load on the L4-5 disc. EE 7, Depo at 14-15. Dr. Tozzi testified the MRI revealed Claimant had a congenitally spinal, narrow spinal canal, which produced spinal stenosis. He stated congenital narrowing or developmental spinal stenosis is not a traumatic condition, and it is genetically acquired. EE 7, Depo at 15. Dr. Tozzi attributed Claimant's condition to attritional wear and tear, and he did not find her condition to be related to being acute or traumatic. EE 7, Depo at 16-17. Dr. Tozzi indicated Claimant's complaints were upper back pain at the time of the work incident, and she was more focused on her lower back and left leg at the time of his examination. EE 7, Depo at 18. As such, the evidence does not medically causally relate Claimant's lower back and left leg conditions to the work incident of April 24, 2011.

CO at 7-8.

Thus, the ALJ concluded that the Claimant failed to meet her burden to prove, by a preponderance of the evidence that the low back condition and left leg condition is medically casually related, a finding we affirm. At no time do the physicians at Kaiser attribute her low back and left leg condition to the accident that happened on April 24, 2011. As the Claimant failed to carry her burden, the conclusion that the Claimant’s condition is not medically casually related to the work accident is supported by the substantial evidence in the records and is in

accordance with the law. What the Claimant is asking us to do is to reweigh the evidence in her favor, a task we cannot do.

CONCLUSION AND ORDER

The February 25, 2013 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

November 13, 2013
DATE