

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-058

STAR M. FOWLER,
Claimant-Petitioner and Cross-Respondent,

v.

HOWARD UNIVERSITY,
Self-Insured Employer-Respondent and Cross-Petitioner.

Appeal from an April 10, 2014 Compensation Order on Remand
by Administrative Law Judge Nata K. Brown
AHD No. 12-212, OWC No. 644656

2014 SEP 2 AM 10 46
DEPT OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD

Krista N. DeSmyter for the Petitioner and Cross-Respondent
William H. Schladt for the Respondent and Cross-Petitioner

Before JEFFREY P. RUSSELL, MELISSA LIN JONES, *Administrative Appeals Judges*, and LAWRENCE
D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Star Fowler was employed by Howard University (Howard) as a facilities maintenance engineer. Among her duties were repairing heating and air conditioning system components, as well as plumbing maintenance and repair. On October 12, 2007, she sustained an injury while working on the roof, repairing an exhaust fan. The injury occurred when a latch intended to keep a hatch cover open failed, causing the hatch to fall closed on her right hand. The injury caused her to miss an unspecified period of time from work, but she ultimately returned to her regular job.

On March 6, 2009, Ms. Fowler sustained additional injuries while working in a mechanical room, performing plumbing repairs. The injury occurred when a ladder she was standing on fell from under her, leaving her hanging from a pipe for a period of time, after which her strength gave out and she fell to the floor.

Ms. Fowler filed claims for both injuries. On June 27, 2012, she presented to an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) her claim for schedule

awards to her right hand and right arm. Her claim was that she had sustained permanent partial disabilities to her right hand and right arm as a result of the October 12, 2007 incident. She sought an award of 25% permanent partial disability under the schedule to the right hand and “no less than 12%”¹ permanent partial disability to the right arm. For reasons not apparent on the record, she did not bring any such claim in this proceeding for any award based upon the incident of March 6, 2009.

Howard opposed the claim, arguing that Ms. Fowler was entitled to only a 2% permanent partial disability award to the right hand. Howard opposed any award for the right arm, arguing that the claimed arm disability stemmed from problems with Ms. Fowler’s right shoulder, which problems it asserted resulted not from the October 12, 2007 incident, but from the March 6, 2009 incident.

On August 20, 2012, the ALJ issued a Compensation Order awarding Ms. Fowler 25% permanent partial disability to the right hand, and 20% permanent partial disability “to the right shoulder”.

Howard appealed the awards to the Compensation Review Board (CRB), arguing that (1) the ALJ impermissibly ignored its evidence contesting the causal relationship between the right arm and shoulder injury and the October 12, 2007 incident, (2) the ALJ improperly accorded the opinion of Dr. Robert Macht the status of treating physician opinion, while Dr. Macht was not, in fact, a treating physician, and (3) the award for disability to “the shoulder” is improper, in that the shoulder is not a schedule member or body part under the Act.

Ms. Fowler opposed the appeal, arguing that the award to the shoulder should be affirmed as an award to the arm, because that was what Ms. Fowler claimed in her claim for relief at the time of the hearing, and the Compensation Order granted her claim for relief, and because the finding that the right shoulder and arm complaints were causally related to the October 12, 2007 incident is supported by substantial evidence. Ms. Fowler did not address the treating physician issue in her opposition filings.

On December 5, 2012, the Compensation Review Board (CRB) issued a Decision and Remand Order (DRO), the CRB vacated the awards because they were premised upon the improper application of the treating physician preference rule under circumstances where the rule is not applicable. The award of disability “to the shoulder” was vacated for the additional reason that the Act has no provision for any such award. The ALJ’s determination that Howard failed to adduce sufficient evidence to overcome the presumption that the shoulder injury underpinning the arm disability claim is causally related to the October 12, 2007 incident was reversed and the matter was remanded for further consideration of the claims.

Because the ALJ authoring the Compensation Order had retired prior to issuing a Compensation Order on Remand, and because the parties did not agree to proceed upon the record established at the first hearing, the matter was re-assigned to a new ALJ.

¹ The Compensation Order misstates the claim as being for “20% for right shoulder”.

On June 6, 2013, a new formal hearing was conducted, and on April 10, 2014, the new ALJ issued a Compensation Order in which Ms. Fowler's claim for an award of 25% permanent partial disability to the right hand was granted in connection with the injury of October 12, 2007, and the claim for schedule benefits for the right arm was denied. In the Compensation Order, the ALJ found as a matter of fact that Ms. Fowler had filed a claim on May 6, 2009 for "another work-related injury", referring to the Claim and Notice Forms concerning the March 26, 2009 "ladder incident".

Ms. Fowler appealed the denial of the claim for an award to the right arm, arguing that the ALJ erroneously concluded in the Conclusions of Law that Ms. Fowler "did not file a timely claim for a shoulder injury on October 12, 2007", since Howard had stipulated to the timely filing of a claim for that date of injury, and that the law does not require exactitude in identifying each body part in giving notice or filing a claim. In essence, Ms. Fowler argues that she injured her right shoulder and arm in the "hatch incident", and is entitled to the presumption that her alleged arm disability is related thereto.

Howard opposes the appeal, arguing that the Compensation Order's denial of the schedule award to the arm is supported by substantial evidence, and that the reference to failing to file a "timely claim" is an obvious typographical error, and that reading the Compensation Order as a whole it is evident that the ALJ meant to refer to a lack of timely notice, not timely claim.

Howard also filed an alternative Cross-Appeal, asserting that if the matter is remanded, the amount of the right hand award also be reconsidered because the ALJ rejected Howard's independent medical evaluation (IME) for insufficient and inaccurate reasons.

We affirm the Compensation Order awarding schedule benefits to the right hand. We vacate the denial of the claim for a schedule award to the arm, and remand for further consideration.

STANDARD OF REVIEW

The scope of review by the CRB 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 and this review panel 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

In the concluding two paragraphs of the Findings of Fact, the ALJ wrote:

[On October 12, 2007] The Employee Health Unit (hereinafter EHU) diagnosed Claimant with blunt trauma to the right hand. She was not treated for an injury to

the shoulder at EHU. In March 2009, Claimant fell off of a ladder while working for Employer, and injured her right hand, arm, shoulder and her back. She remained in her engineer/HVAC position until she sought employment elsewhere in November of 2010. (HT 40-42, 57; EE 5, pp. 7-8).

Claimant sustained an injury to her right hand on October 12, 2007, and is entitled to a 25% permanent partial disability award to the right hand. She filed a claim for injury to her shoulder on May 6, 2009, after another work-related injury occurred. Therefore, Claimant is not entitled to compensation for an October 12, 2007 shoulder injury, as there was not timely notice of such claim.

Compensation Order, p. 3.

In the analysis portion of the Compensation Order, the ALJ wrote:

In order to invoke [sic] the presumption, Claimant must meet the two prongs listed above: first, that the event causing or contributing to the disability arose out of and in the course of employment; second, that a medical causal relationship exists between the claimed disability and the work related event.

Compensation Order, p. 4.

This formulation is a misstatement of the law, even though it appears to be referring to her earlier statement that “To raise the statutory presumption of compensability, the claimant must make an ‘initial demonstration’ of ‘both and injury and a relationship between that injury and the employment’”, citing *Georgetown University v. DOES*, 971 A.2d 909 (D.C. 2009). Compensation Order, p. 4.

D.C. Code §32-1521 (1) provides claimants with a rebuttable presumption that the claim for workers’ compensation benefits comes within the provisions of the Act. This presumption exists “to effectuate the humanitarian purposes” of the compensation statute, and evidences a strong legislative policy favoring awards in close or arguable cases. *Parodi v. DOES*, 560 A.2d 524 (D.C. 1989). See also *Spartin v. DOES*, 584 A.2d 564 (D.C. 1990) and *Muller v. Lanham Company*, Dir. Dkt. 86-001, H&AS No. 85-36, OWC No. 0700456 (March 15, 1988).

The statutory presumption is invoked upon a showing by the claimant of an injury and a work place incident, condition or event that has the potential of causing the injury. *Parodi, supra*; see also *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987). This presumption extends not only to the occurrence of an accidental work place injury, but also to the medical causal relationship between an alleged disability and the accidental injury. *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995).

The erroneous misstatement of the law requires a remand for reconsideration under the correct standard.

We do not hold that on this record, Ms. Fowler must prevail. The ALJ made separate findings of fact concerning both the ladder incident and the hatch incident, finding that they both occurred, and that Ms. Fowler's shoulder (arm) injury occurred in the March 2009 incident, and not the October 12, 2007 incident. Ms. Fowler does not claim in this appeal any injury occurring in March 2009 was presented to the ALJ for an award. She sought no benefits in connection with the incident of that date, and does not contest that it occurred or that she filed a separate, later claim for that incident. These facts may be relevant in considering whether the presumption that her claimed right arm disability has been overcome and/or in weighing the evidence if it is determined that it has been.

However, the Act presumes that, given a stipulated work injury, a claimed disability that *could* have been caused by the stipulated work injury is *presumed* to have caused it.

On remand, the ALJ must make further findings of fact concerning whether the stipulated work injury could have caused the claimed arm disability, and if so, whether there has been sufficient evidence to rebut causal connection in this case. If there is such evidence, then the evidence must be reconsidered and reweighed without the benefit of any presumption, and with Ms. Fowler bearing the burden of proof by a preponderance of the evidence. Furthermore, it is noted that if it is found that Ms. Fowler sustained a shoulder injury arising out of and in the course of her employment as a result of the 2007 accident, when analyzing the notice issue, pursuant to §32-1521(2), there is a presumption of timely notice.

Regarding Howard's cross-appeal, the arguments raised are nothing more than Howard's request that we reweigh the evidence in a fashion more compelling to Howard than the ALJ. In other words, Howard requests that we substitute our judgment for that of the ALJ, which is something we are not empowered to do. And we specifically note that the language in the Act concerning the use of the "most recent edition" of the American Medical Association Guides to the Evaluation of Permanent Impairment is permissive, not mandatory.

CONCLUSION AND ORDER

The award to the hand is supported by substantial evidence and is affirmed. The denial of the award to the arm was premised on a faulty application of the statutory presumption of compensability, and is vacated and remanded for further consideration in a manner consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

September 2, 2014
DATE