

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-160

STAR M. FOWLER,  
Claimant–Petitioner/Cross-Respondent,

v.

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

Appeal from an August 27, 2015 Compensation Order on Remand  
by Administrative Law Judge Nata K. Brown  
AHD No. 12-212, OWC No. 644656

(Decided March 23, 2016)

Krista N. DeSmyter for Claimant  
William H. Schladt for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

**DECISION AND ORDER**

BACKGROUND

*Preliminary Matters*

The caption of the Compensation Order on Remand under review bears an Administrative Hearings Division (AHD) number of 14-058. Although we do not know how the caption came to include this number, we are fairly certain that it is in error, based upon past practices in AHD concerning docket numbers.

On August 8, 2012, administrative law judge (ALJ) Belva Newsome issued a Compensation Order in AHD No. 12-212 (CO 1). That Compensation Order was appealed to the Compensation Review Board (CRB) by Employer. On December 5, 2012, the CRB issued a Decision and

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Remand Order under CRB No. 12-150 (DRO 1), remanding the matter for reasons more fully discussed below in this Decision and Order.

ALJ Newsome left the Department of Employment Services (DOES) without issuing a Compensation Order on Remand, and the matter was reassigned to a different ALJ, Nata K. Brown. On April 10, 2014, ALJ Brown issued a Compensation Order on Remand (titled merely “Compensation Order”), again bearing AHD No. 12-212, consistent with the AHD practice of maintaining the same AHD number on compensation orders on remand as the original Compensation Order.

That “Compensation Order” (COR 1) was appealed to the CRB, and on September 2, 2014, the CRB issued a second Decision and Remand Order (DRO 2) and, following our usual practice, it bore a new CRB docket number, because it was the result of a new Application for Review (AFR) and was hence a new matter for the CRB. That new number was CRB No. 14-058.

On August 27, 2015, ALJ Brown issued a properly titled Compensation Order on Remand (COR 2), which is presently before us. It bears AHD No. 14-058, a number of unknown origins. COR 2 was appealed to the CRB by Claimant filing Claimant’s Application for Review and Memorandum of Points and Authorities in support thereof (Claimant’s Brief). However, Claimant’s counsel used AHD No. 12-212A as the AHD number on Claimant’s Brief.

This was apparently an attempt by counsel to “correct” the AHD number so that it would remain consistent with past AHD practices. However, the addition of an “A” or other sequential alphabetic suffixes to an AHD number has been the practice only in cases where a claimant has brought one claim for a certain set of benefits to AHD by way of an Application for Formal Hearing (AFH), and then subsequently files a new Application for Formal Hearing (AFH) in AHD seeking a different set of benefits, or a party files a new AFH in AHD seeking modification of a prior compensation order. In other words, an alphabetic suffix is appended when one of the parties to an earlier litigation files a new AFH in connection with the same injury that was the subject of a prior AFH (regardless of whether the prior AFH resulted in the issuance of a Compensation Order).

In issuing the preliminary notices and orders in the instant appeal, the CRB’s clerk’s office utilized the AHD number created by Claimant’s counsel, or, AHD No. 12-212A.

In order to promote clarity and consistency, we *sua sponte* amend the case caption so that the AHD number for the purposes of this appeal is AHD No. 12-212.

#### *The Instant Appeal*

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 ALJ in AHD 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, the hatch incident. She sought an award of 25% permanent partial disability under the schedule to the right hand and “no less than 12%”<sup>1</sup> permanent partial disability to the right arm. For reasons not apparent on the record, she did not bring any such claim in that proceeding for any award based upon the incident of March 6, 2009, the ladder incident.

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

On August 20, 2012, the ALJ issued a Compensation Order (CO 1) awarding Ms. Fowler 25% permanent partial disability to the right hand and 20% permanent partial disability “to the right shoulder”.

Employer appealed the awards to the CRB, arguing that (1) the ALJ impermissibly ignored Employer’s evidence contesting the causal relationship between the right arm and shoulder injury and the October 12, 2007 hatch 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.

Claimant opposed the appeal, arguing that the award to the shoulder should be affirmed as an award to the arm, because that was what Claimant 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 hatch incident is supported by substantial evidence. Claimant did not address the treating physician issue in her opposition filings.

On December 5, 2012, the CRB issued a Decision and Remand Order (DRO 1). 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 Employer 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 hatch incident was reversed and the matter was remanded for further consideration of the claims.

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<sup>1</sup> The Compensation Order that ensued misstated the claim as being for “20% for right shoulder”.

Because the ALJ authoring the CO 1 had retired prior to issuing a Compensation Order on Remand, and, the matter was re-assigned to a new ALJ, and because the parties did not agree to proceed upon the record established at the first hearing, a new formal hearing was conducted on June 6, 2013.

On April 10, 2014, the new ALJ issued a Compensation Order (COR 1) in which Claimant's claim for an award of 25% permanent partial disability to the right hand was granted in connection with the hatch incident of October 12, 2007, and the claim for schedule benefits for the right arm was denied. In COR 1 the ALJ found as a matter of fact that Claimant 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.

Claimant appealed the denial of the claim for an award to the right arm, arguing that the ALJ erroneously concluded that Claimant "did not file a timely claim for a shoulder injury on October 12, 2007", since Employer 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, Claimant argued that she injured her right shoulder and arm in the hatch incident and was entitled to the presumption that her alleged arm disability is related thereto.

Employer opposed the appeal, arguing that the COR 1's denial of the schedule award to the arm is supported by substantial evidence, that the reference to failing to file a "timely claim" is an obvious typographical error, and that reading the COR 1 as a whole it is evident that the ALJ meant to refer to a lack of timely notice, not timely claim.

Employer 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 Employer's independent medical evaluation (IME) for insufficient and inaccurate reasons.

On September 2, 2014 the CRB issued a Decision and Remand Order (DRO 2) in which it affirmed the COR 1's award of schedule benefits to the right hand, vacated the denial of the claim for a schedule award to the arm, and remanded the matter to AHD for further consideration. The CRB also denied Employer's Cross-Appeal.

The CRB wrote in pertinent part:

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).

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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.

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#### 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.

DRO 2 at 4, 5.

On August 27, 2015, the ALJ issued a Compensation Order on Remand (COR 2) in which it was found that the injury to the right arm was not causally related to the October 12, 2007 hatch incident and denied her claim for benefits.

Claimant filed Claimant's Application for Review of COR 2 and a memorandum of points and authorities in support thereof (Claimant's Brief). Employer filed Employer/Insurer's Opposition to Claimant's Application for Review and memorandum of points and authorities in support thereof (Employer's Brief).

Because the factual findings upon which the ALJ relied are supported by substantial evidence in the record, they are affirmed. Because a reasonable person could rationally conclude based upon those facts that Claimant's shoulder injury was not caused by the hatch incident, we affirm the denial of the schedule award claim.

#### 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 under review 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 ALJ found, and Employer does not contest, that the Claimant adduced sufficient evidence, in the form of a medical report by Dr. Allan Macht dated August 11, 2011 and a stipulation that Claimant sustained a work-related injury on October 12, 2007, to invoke the presumption that Claimant sustained the claimed injury in that incident.

Claimant's complaint in this appeal is that the ALJ erred in finding that Employer adduced sufficient evidence to overcome that presumption, while Employer argues that its evidence was adequate for that purpose.

The injury in this case is a shoulder injury. At the second formal hearing, Employer adduced the same evidence that it offered at the first formal hearing: (1) Employee's Notice of Accidental Injury concerning the hatch incident; (2) Employee's Claim Form for that incident; (3) Employer's First Report concerning the injury; (4) the Howard University Hospital Employee Health Unit report prepared at the time Claimant first sought medical care for the hatch incident; and (5) the Employee Accident Report filled out by Claimant at the time of the hatch incident.

As Employer notes, none of these documents refer to any injury to Claimant's shoulder. Rather, they all refer to a crush type injury to the hand or finger. Employer further argues now, as it did

in the prior formal hearing and appeal, that the medical records contain no complaints concerning the shoulder or arm until approximately two years later when Claimant suffered an injury to her shoulder in March 2009 in the ladder incident. Claimant does not dispute any of these facts in this appeal.

As Employer points out, the CRB has previously determined that this evidence is, as a matter of law, sufficient to overcome the presumption that Claimant's shoulder injury is causally related to the hatch incident. Employer's Brief, at 7, quoting from DRO 1 as follows:

Notably, the CRB has already ruled on this issue. In the CRB's December 5, 2012 Decision and Remand Order, the Board reviewed the evidence presented by Employer/Insurer and stated that "[t]his evidence is clearly sufficient to overcome the presumed relationship between the incident of October 12, 2007 and her current shoulder complaints, as a matter of law. Decision and Remand Order, at 9. This holding is correct and is the law of the case. The Administrative Law Judge's finding is legally correct and supported by substantial evidence.

Employer is not correct in arguing that this finding was, at the time COR 2 was issued, the law of the case. That is because a new formal hearing was conducted when the parties did not agree to have the reassigned ALJ decide the matter based upon the record created at the first formal hearing, so there was no "law of the case" on that issue until a new record was created. However, Employer's general point is well taken: inasmuch as it offered the same evidence at the second formal hearing as at the first, its legal effect regarding the presumption and its rebuttal are the same. We see no reason to reach a different conclusion on this identical record.

We take this opportunity to address one specific argument put forth by Claimant concerning "negative evidence". The argument is laid out in Claimant's Brief as follows:

In a conclusory fashion, the Compensation Order on Remand cites the absence of mention of a right arm injury in various non-medical reports as enough to rebut the presumption [citing COR 2 at 4]. A lack of specificity of body parts in non-medical forms does not come close to fulfilling the *Reynolds* standard for rebuttal evidence. *Washington Post v. District of Columbia Dep't of Employment Servs. and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004), *see also Shipman v. Fresenius Medical Care Holding*, CRB No. 06-13, AHD No. 05-103A, OWC No. 603796 [*Shipman*] (holding negative evidence alone is insufficient to rebut the presumption).

Claimant's Brief at 5.

Claimant overstates and oversimplifies the law on this point. The following is the relevant portion from *Shipman*:

While it is true that any member of this panel could have reached another result, *i.e.*, that Petitioner's evidence, specifically Respondent's failure to tell Dr. Azer that she had suffered a work injury on March 31, 2004 was sufficient to rebut the

presumption, the ALJ's approach is consistent with the Court of Appeals finding that negative evidence is not sufficient to rebut the presumption as it is neither specific nor comprehensive. See *Bobby Brown v. Dept. of Employment Services*, 700 A.2d 787 (1997) [*Brown*]; *Onofre v. Lorinczi*, Dir. Dkt. 95-48, OHA No. 92-302A, OWC No. 209231 (September 15, 2000).

The first sentence in the *Shipman* quote makes clear that a contrary result would have been permissible, and then the remainder of the quote explains that nonetheless the ALJ's analysis in that case was not without support from court precedent.

To accurately understand *Shipman*, one must also consider the underlying court ruling. The *Shipman* quote is a brief distillation of the District of Columbia Court of Appeals far less sweeping analysis in *Brown v. DOES*, 700 A.2d 787 (D.C. 1997):

Negative evidence, in some circumstances, may be adequate to inform a factual determination. See *Swinton v. J. Frank Kelly, Inc.*, 180 U.S. App. D.C. 216, 224, 554 F.2d 1075, 1083 (1976). The court in *Swinton* provided the example that "if a man has no blood in the sputum, no cough, no weakness, no headache, no elevation of temperature or pulse, no stuffiness or pain in the chest -- then from all these facts, a doctor can say 'with reasonable medical certainty,' or as a matter of probability that this man does not have pneumonia." *Id.* (quoting *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 183, 407 F.2d 307, 313 (1968) [*Wheatley*]). The evidence relied on by WMATA is not of that nature. Evidence that *some* of the medical reports of 1990 and 1991 do not contain statements attributed to Brown about the nature of his work or the 1983 and 1987 accidents is not the caliber of evidence required to meet the burden of overcoming the presumption of compensability. "The statutory presumption *may be dispelled by circumstantial evidence* specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Id.* In order for the absence of statements in the reports in this case to have evidentiary significance, we must assume not only that Brown had the level of knowledge sufficient to make the association in 1990 and 1991 between his condition and the earlier injuries and was obliged to report it each time he saw a doctor, but also that any such statements, if made, would have been recorded in the reports. Such a leap would require undue speculation. Therefore, we do not view the absence of the statements attributed to Brown in some of the medical reports to rise to the level required to sever the connection between the 1992 injury and Brown's prior injury and disability.

*Brown*, 700 A.2d at 792, 93 (emphasis added).

Far from supporting a blanket rule that negative evidence can *never* be sufficient to overcome the presumption, *Brown* explicitly states the opposite, and *Shipman* allows that it would not have been error had the ALJ in that case so found. We emphasize the proposition enunciated in *Brown* that "Negative evidence, in some circumstances, may be adequate to inform a factual determination.; its reliance on *Wheatley* that 'The statutory presumption may be dispelled by

circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event.” *cf. Swails v. Forever 21*, CRB No. 14-138 (March 2015) (the failure of a medical report for an alleged work-related injury to contain reference to a work-connection is insufficient to rebut the presumption).

The case before us involves a claimant who never reported *any* shoulder or arm complaints in *any* medical records, including the first report of medical treatment immediately following the incident, until nearly two years after the hatch incident, and only started to report them after the ladder incident.

It does not require “undue speculation” for a reasonable person to conclude that the absence of reference to an arm or shoulder injury in *any* of the multiple medical and non-medical reports or forms *where one would expect such references* had such an injury been sustained and known to the person who allegedly sustained it, coupled with a later incident<sup>2</sup> in which that same person complains of injuring the arm and shoulder in a specific new incident, is substantial evidence that the arm and shoulder were not injured in the earlier incident.

Claimant makes no argument directly attacking the ALJ’s weighing of the evidence and finding it wanting as regards Claimant’s burden of proving the causal relationship by a preponderance of the evidence, and even if such an argument were made we would decline to interpose our judgment for that of the ALJ in such an instance.

#### CONCLUSION AND ORDER

The determinations that Employer’s evidence was sufficient to overcome the presumption of causal relationship between Claimant’s arm and shoulder injury and the accident of October 12, 2007 and that Claimant failed to establish such a relationship by a preponderance of the evidence are supported by substantial evidence, are in accordance with the law and are affirmed.

*So ordered.*

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<sup>2</sup> As Claimant concedes: “Ms. Fowler acknowledged that she injured her shoulder in 2009, but she testified that she has had problems with her shoulder since the October 12, 2007 accident.” Claimant’s Brief, at 6. While the documentary record supports the acknowledgment, it fails to corroborate the testimony.