

**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. 07-065**

**TERRENCE S. NETTLEFORD,**

**Claimant - Petitioner**

**v.**

**CAMBRIDGE MANAGEMENT AND TRAVELERS INSURANCE COMPANY,**

**Employer/Carrier - Respondent**

Appeal from a Compensation Order of  
Administrative Law Judge Henry W. McCoy  
AHD No. 05-509, OWC No. 603267

Heather C. Leslie, Esquire for the Petitioner

Amy L. Epstein, Esquire, for the Respondent

Before E. COOPER BROWN *Chief Administrative Appeals Judge*, LINDA F. JORY and SHARMAN J. MONROE, *Administrative Appeals Judges*.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel; E. COOPER BROWN *Chief Administrative Appeals Judge*, concurring:

**DECISION AND ORDER ON REMAND**

**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 (1994), 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 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005),

Pursuant to 7 D.C.M.R § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

#### BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand 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 on Remand, which was filed on February 20, 2007, the Administrative Law Judge (ALJ), concluded Claimant – Petitioner (Petitioner)'s low back pain was not medically causally related to the injury he sustained at work on November 10, 2003. The Compensation Order on Remand followed the issuance of the Decision and Order on Remand issued by the CRB on August 1, 2006, wherein the CRB affirmed the AHD's denial of temporary total disability based upon Petitioner's untimely notice of injury but found that the finding that Petitioner did not adduce sufficient evidence to invoke the presumption that his complained of low back injury is medically causally related to the work injury of November 10, 2003 was not in accordance with the law.<sup>2</sup> The Compensation Order was accordingly remanded for the sole determination of whether Petitioner's claimed medical care is causally related to the injury the ALJ determined occurred at work on November 10, 2003. *See Nettleford v. Cambridge Management*, CRB No. 06-055, AHD No. 05-509, OWC NO. 603267 (August 1, 2006)(*Nettleford*, CRB No. 06-055)<sup>3</sup>.

As grounds for this appeal, Petitioner alleges that the determination that Respondent had rebutted the presumption of compensability was not supported by substantial evidence. Employer responds asserting that the ALJ properly found that contrary to Petitioner's assertions the medical reports generated for months after the date of the alleged injury are completely devoid of any reference to a work injury.

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including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

<sup>2</sup> While Petitioner is precluded from receiving wage loss benefits due to his previously affirmed untimely notice, he is however entitled to reimbursement for medical expenses as they are deemed reasonable and necessary pursuant to *Safeway Stores, Inc. v. District of Columbia Dept. of Employment Services*, 832 A.2d 1267 (D.C. 2003).

<sup>3</sup> In its remand, the Panel stated "While it is possible that the ALJ could have concluded that no injury occurred in this case, he did not do so. Having decided that Petitioner did in fact sustain an injury to his back when he and a co-worker were lifting and carrying a heat pump weighing in excess of 250 pounds up a ladder, it is presumed, under *Whittaker* that Petitioner's ongoing back problems are causally related to that incident. This is particularly evident when one considers the fact that Petitioner presented a document, albeit a cursory one, from his treating physician asserting such a causal relationship and the fact the Respondent's own independent medical evaluation (IME) report states that 'if the original work injury is accepted as work related, then his current condition is related as well'. Such evidence clearly supports a finding that the incident which the ALJ found to have occurred had the potential to cause not just an injury, but the injury, from which Petitioner suffered at the time of the formal hearing, and is therefore sufficient to invoke the presumption of a medical causal relationship between the work injury and the current and apparently uncontested condition of Petitioner's back". *Nettleford*, CRB No. 06-055 at 4.

## ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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. D.C. Official Code § 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 Int’l. v. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this panel are bound 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.

The Panel notes the ALJ began his analysis of the causal relationship of Petitioners’ claim for medical benefits acknowledging that pursuant to *Whittaker v. D.C. Department of Employment Services* 668 A.2d 844 (D.C. 1995)(*Whittaker*) the scope of the presumption of compensability is expanded to include the medical causal relationship between the condition in question and the injury. The ALJ determined that “with the finding that [Petitioner] sustained an accidental injury, this evidence of a disabling condition and a work place incident capable of causing that condition is sufficient to invoke the presumption, notwithstanding [Petitioner’s] basic lack of credibility”.

At this juncture, the Panel notes that while the ALJ used the term “disabling” condition in invoking the presumption there is nothing in the Compensation Order to lead the Panel to believe that the ALJ actually was of the opinion that the condition was required to be disabling in order to invoke the presumption. Petitioner asserts that the ALJ erred by concluding that the lack of any reference to a work related injury in Petitioner’s medical records is not substantial evidence to rebut the existing presumption.

Review of the ALJ’s analysis with regards to Respondent’s rebuttal evidence reveals the ALJ found that “employer’s rebuttal evidence demonstrates a lack of any reference in Claimant’s medical reports linking his low back pain and his workplace injury of November 10, 2003. This constitutes substantial evidence sufficient to sever the presumption of compensability and thus the evidence on this issue must be weighed without further reference to the presumption”. Specifically, the ALJ referred to thirteen office visit reports of Dr. Satish Angra which the Panel notes are handwritten office notes using many medical abbreviations and somewhat illegible. The ALJ relies on reports of Petitioner’s “other treating physician”, Dr. Nathan Moskovitz, who examined Petitioner on March 5, 2004 and recorded that he developed low back pain two years ago and there was no mention of an intervening work place injury in this reports or the succeeding seven reports”. The ALJ acknowledged that Dr. Moskovitz did “remember” that Petitioner related how he had injured himself and recorded that it as having happened in the process of lifting an air conditioning unit not a heat pump.

In light of the Court of Appeals opinions with regard to evidence sufficient to rebut the presumption under §32-1521, the Panel must conclude the ALJ's conclusion is not in accordance with the law.

In *Bobby Brown v. District of Columbia Dept. of Employment Services*, 700 A.2d 787 (D.C. 1997) the Court conceded that “negative evidence in some circumstances may be adequate to inform a factual determination” citing the following example:

... 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.

*Brown*, 700 A.2d at 792-93, citing *Swinton v. J. Frank Kelly, Inc.*, 180 U.S. App. D.C. 216 (1976) (quoting *Wheatley v. Adler*, 132 U.S. App. D.C. 177 (1968)).

The court in *Brown* stated that the evidence relied on by *Brown's* employer 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. 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 v. DOES, supra* at 790.

In that the ALJ relied on no other evidence other than the absence of language in the treating physician's medical reports referring to a work related injury which the ALJ concluded rendered Petitioner incredible, we cannot conclude that the negative evidence relied upon by the ALJ “rises to the level of evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job related event”. *Whittaker, supra*; (quoting *Parodi v. District of Columbia Dept. of Employment Services*, 560 A.2d 524 (D.C. 1989)).

As Petitioner also asserts, the ALJ having relied solely on the lack of recording of a work injury by the treating physician, notwithstanding that the ALJ previously found that a work injury did occur, the ALJ ignored the report of Employer's own IME physician, Dr. Wattenmaker, who

stated unequivocally that if the original injury is accepted as work related then his current condition is related to it as well. The Panel concludes that given the fact that this report has been generated by Employer, the ALJ ignored it in order to utilize the absence of any record by the treating physicians of a work injury to rebut the presumption. The Panel concludes that in keeping with *Brown, supra*, the finding that Petitioner's low back pain is not medically causally related to the work injury Petitioner sustained on November 10, 2003 is not supported by substantial evidence and is not in accordance with the law.

#### CONCLUSION

The ALJ's conclusion that any problems Petitioner has with his lower back are not causally related to the injury Petitioner sustained on November 10, 2003 is not supported by substantial evidence of record, and is not in accordance with the law.

#### ORDER

The ALJ's determination that the complained of low back pain is not causally related to the work injury of November 10, 2003 is **REVERSED**. The Compensation Order on Remand is accordingly remanded to the ALJ for further consideration and findings of fact consistent with the foregoing Decision and Order and in keeping with the Court of Appeals holding in *Brown, supra*.<sup>4</sup>

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY  
Administrative Appeals Judge

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May 3, 2007

DATE

Concurring Opinion of E. Cooper Brown, *Chief Administrative Appeals Judge*:

The instant appeal presents the limited issue of whether the ALJ's finding that Petitioner's lower back condition for which he seeks disability benefits is not medically causally related to his previously sustained work-related injury is supported by substantial evidence of record. On this issue there is, as the majority opinion notes, evidence of record that the ALJ either ignored or disregarded (for reasons that are not explained), evidence consisting of a medical report by Employer's IME expert that states in relevant part, "if the original work injury is accepted as

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<sup>4</sup> Cf. *Katherine Olson v. District of Columbia Dept. of Employment Services*, 736 A.2d 1032 (September 2, 1999) citing *Brown, supra*.

work related, then his current condition is related as well.” Employer’s Exhibit (EE) 6. Unless reasons exist that would discredit its evidentiary value, as such this evidence would appear to lead to but one conclusion, *i.e.* that there is a medical causal relationship between Petitioner’s back condition and his work-related injury.

In light of the foregoing, I have questioned the necessity of reversal and remand to AHD in light of the Board’s authority under D.C. Official Code § 32-1521.01(d)(2) and 7 DCMR 267.1(c) and 267.5, which permit the CRB to issue an Amended Compensation Order in lieu of reversal and remand where the Review Panel’s decision can lead to but one result before the ALJ upon remand. *See Brumfield v. Greyhound Lines*, CRB No. 07-073, AHD No. 03-442A (April 25, 2007). I ultimately am persuaded, however, that the majority’s chosen course, of returning this matter to the ALJ for a fuller examination of the evidentiary record, is the proper course in light of the Court of Appeals’ repeated admonition that factual findings on each materially contested issue should in the first instance be made at the trial or hearings level, and not by this appellate body. *See e.g., Mack v. D.C. Dept. of Employment Services*, 651 A.2d 804, 806 (D.C. 1994); *Jimenez v. D.C. Dept. of Employment Services*, 701 A.2d 837, 838-840 (D.C. 1997); *King v. D.C. Dept. of Employment Services*, 742 A.2d 460, 465 (D.C. 1999). *See also, Hines v. Washington Metropolitan Area Transit Authority*, CRB No. 07-004, AHD No. 98-263D (December 22, 2006).

Thus, I join with the majority in remanding the case to permit the ALJ to make the necessary findings of fact after further review of the evidence record consistent with the majority’s opinion. In so doing, I also add in support of the majority’s reliance upon *Brown v. D.C. Dept. of Employment Services*, 700 A.2d 787 (D.C. 1997), the Court of Appeals’ recent decision in *McNeal v. D.C. Dept. of Employment Services*, 917 A.2d 652 (D.C. 2007), wherein the Court pointed out that a claimant is not obliged to present expert opinion or medical evidence of causation in order to enjoy the benefit of the presumption of compensability under the Act; that it is not his burden to do so unless and until the employer has presented sufficient evidence to rebut the presumed causal connection.

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E. Cooper Brown  
Chief Administrative Appeals Judge