GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

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MAYOR

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DIRECTOR

COMPENSATION REVIEW BOARD

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2013 FEB 14 AM 9 40

CRB No. 11-132

TODD SCHNEIDER,
Claimant–Respondent,
v.

KCI TECHNOLOGIES,
Self-Insured Employer–Petitioner.

Appeal from an October 28, 2011[1] Compensation Order of
Administrative Law Judge Belva D. Newsome
AHD No. 10-454A, OWC No. 657356

Allan H. Kittleman, Esquire, for the Petitioner
Charles Krikawa, IV, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[2] HEATHER C. LESLIE,[3] *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

A Compensation Order was issued February 3, 2011, by an Administrative Law Judge (ALJ) in the Department of Employment Service (DOES). In that Compensation Order, Todd Schneider was found to have sustained an accidental injury arising out of and occurring in the course of his employment when he was exposed to propane gas at the construction site where he was employed as a communications systems installer. The injuries were neurological in nature, and were found to have deleterious effects upon Mr. Schneider's cognitive abilities, including short and long term memory, concentration, focus, and mood, as well as causing him to experience light headedness and dizziness. He was awarded causally related medical care; he made no claim for wage loss benefits.

[1] Although the signature line of the Administrative Law Judge is dated accurately, the Certificate of Service erroneously gives the year of issuance as 2009.

[2] Judge Russell is appointed by the Director of DOES as a Board Member pursuant to DOES Administrative Policy Issuances No. 12-01 (June 20, 2012).

[3] Judge Leslie is appointed by the Director of DOES as a Board Member pursuant to DOES Administrative Policy Issuances No. 12-02 (June 20, 2012).

Subsequently, Mr. Schneider sought temporary total disability benefits commencing October 7, 2010,[4] which KCI declined to pay. The dispute was presented for resolution before another ALJ in DOES at a formal hearing conducted September 22, 2011.

On October 28, 2011, the ALJ issued a Compensation Order in which the claim was granted. KCI appealed the award to the Compensation review Board, to which appeal Mr. Schneider has filed an opposition.

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 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

KCI's first and primary argument in this appeal concerns the lack of findings in the Compensation Order relating to the physical or mental abilities required of Mr. Schneider to perform his pre-injury job. KCI maintains that without such basic factual findings, it is impossible to establish the extent of a claimed disability under the Act. KCI argues, correctly, that under *Dunston v. DOES,* 509 A.2d 109 (D.C. 1986), it is a claimant's burden to establish the facts constituting the extent of disability, and under *Logan v. DOES*, 805 A.2d 237 (D.C. 2002), the fact that must be established to make a *prima facie* case of total disability is the inability to return to the pre-injury job. KCI posits that such a showing requires factual findings concerning the requirements of the pre-injury job, findings concerning the claimant's functional capacities during the period for which disability is claimed, and consideration of whether the latter precludes performing the former.

Specifically, KCI argues that a Compensation Order that fails to make explicit findings concerning the requirements of the pre-injury job is deficient as a matter of law, and that an ALJ may not merely refer generally to having relied upon a claimant's testimony and a physician's opinion that a claimant can not yet return to work to establish disability.

Mr. Schneider argues in this appeal that the record contains adequate evidentiary support for the legal conclusions and award of temporary total disability made in the Compensation Order. He asserts that the presence of such evidence in the record is all that is required, and identifies such evidence (including the claimant's testimony concerning the effects of his inability to concentrate sufficiently to perform what is a job requiring significant focus and concentration, as well as

[4] Whether any wage loss benefits were paid on a voluntary basis prior to the period claimed is not revealed in the record.

memory). In other words, it is the presence of substantial evidence in the record, and not recitation of that evidence in the Compensation Order, that controls.

As a general rule, we agree with KCI that a failure to identify the requirements of the pre-injury job and the post-injury level of functional capacity possessed by a claimant seeking a disability award would be fatal to the sufficiency of an award of disability.

Review of the hearing transcript confirms Mr. Schneider's assertion in this appeal that his testimony concerning the mental and physical requirements of the pre-injury job, including not only the need to be able to focus and concentrate, but also to work from heights up to a hundred feet was impeded by his ongoing dizziness, went unchallenged either on cross examination or by any witness or other evidence presented by KCI. See, HT 14 – 15.

He also testified that since the accident, he suffers "confusion, dizziness, headaches, and my limbs, my arms and my feet have numbness in them" (HT 20) and that he attempted to return to work and perform his pre-injury job but "When I went back I felt totally out of place with [sic] didn't know what I was doing, was very confused, couldn't remember how to do my job, was doing things wrong, was experiencing a lot of dizziness. I was up on ladders and just couldn't do my same job that I've done for 12 years." HT 23.

The Compensation Order contains the following findings in the "Findings of Fact" section:

> 1. The testimony of Schneider was credible in that it was supported by the evidence of record. HT. Ex. 1 – 4.
> 2. Schneider suffered injuries to his memory, balance, concentration, and general cognitive functioning on April 29, 2008, when he was exposed to propane fumes while working in an enclosed area alone. HT at 20; Schneider Ex. 1, p. 6.
>
> [...]
>
> 10. On April 8, 2011 [Schneider's treating physician] Dr. Rao diagnosed Schneider with poisoning by propane gas that caused Schneider to experience sadness, irritability, numbness, headaches, weight loss, reduced sleep, short-term memory loss, distractibility, poor concentration, word finding difficulties, "fuzzy brain", among other symptoms. Schneider Ex. 2.
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> 11. On April 8, 2011, Dr. Rao stated that Schneider is temporarily totally disabled to return to his work with KCI. Schneider Ex. 2.

Further, review of KCI's closing argument suggests that, at least at the time of the formal hearing, it conceded that this case turned upon which medical evidence the ALJ credited, that of the treating physician or those provided by KCI's independent medical evaluators (IMEs). See, HT 40 – 44. In that regard, relying upon the treating physician's preference, the ALJ accepted Dr. Rao's opinion that Mr. Schneider's condition precludes him from return in to work at KCI over that of KCI's IMEs. Compensation Order, page 5.

The acceptance by the ALJ of Mr. Schneider's testimony as being credible without caveat, coupled with the testimony itself to the extent that he described both his pre-injury requirements and his post-injury inability to perform them, as well as the reliance upon the opinion of the treating physician that Mr. Schneider is unable to return to work render the decision of the ALJ supported by substantial evidence and in accordance with the law.

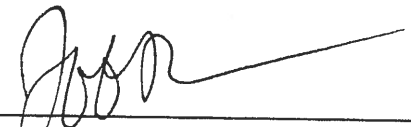
KCI's remaining argument is that, even assuming the evidence is sufficient to support a finding that Mr. Schneider is totally disabled, KCI's evidence is so superior to that of Mr. Schneider that it should prevail. KCI goes so far as to concede the possibility that an award up to April 2011 (the date of Dr. Rao's most recent assessment of Mr. Schneider's incapacity from work) "is a reasonable thing to consider", arguing that thereafter the claim should be rejected because there are no subsequent reports from Dr. Rao addressing the question.

As we note in virtually every case, our role in reviewing a Compensation Order is to determine whether the decision is supported by substantial evidence, and if it is, to affirm it even where there is substantial evidence in that same record to support a contrary conclusion, and even if we would have reached a contrary conclusion on the same record. We are not inclined or empowered to reweigh the evidence or to substitute our judgment for that of the ALJ, where the ALJ's conclusions flow rationally from facts that are supported by substantial evidence.

CONCLUSION AND ORDER

The finding that Mr. Schneider's work related condition precludes him from returning to his pre-injury job as a telecommunications systems installer is supported by substantial evidence and the conclusion that he is temporarily totally disabled is in accordance with the law and is affirmed.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

February 14, 2013
DATE