

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 (Dir. Dkt.) No. 99-97

ROBERTA WEST,

Claimant - Respondent,

v.

WASHINGTON HOSPITAL CENTER,

Self-Insured Employer - Petitioner.

Appeal from a Compensation Order of Hearing Examiner Jeffrey P. Russell
H&AS No. 99-276A, OWC No. 281076
Upon Remand from the D.C. Court of Appeals, No. 03-AA-582

William P. Dale, Esquire, for the Petitioner

Richard W. Galiher Jr., Esquire, for the Respondent

Before: E. COOPER BROWN, *Acting Chief Administrative Appeals Judge*, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*

E. COOPER BROWN, *Acting Chief Administrative Appeals Judge*, on behalf of the Review Panel:

SUPPLEMENTAL DECISION AND ORDER

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, and the Department of Employment Services Director's Directive, Administrative Policy Issuance No. 05-01 (February 5, 2005).¹

¹ 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 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, § 1102 (October 1, 2004), *codified at* D.C. Official Code §§ 32-1521.01 and 32-1522 (2004). In accordance with Director's Policy Issuance No. 05-01, 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. Official Code §§ 32-1501 to 32-1545 (2004), and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1-643.7 (2004), 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.

BACKGROUND

Claimant-Respondent (Respondent) sustained an employment-related back injury as the result of a slip and fall, which condition deteriorated over time to include radiculopathy in her right leg and continuing pain. Over a period of time subsequent to her physical injury, Respondent developed chronic depression requiring treatment, which she asserted, as part of her claim before the Hearings and Adjudication Section (H&AS),² was caused by and/or the result of her employment-related physical injury and thus compensable under the D.C. Workers' Compensation Act.

The instant proceeding is before the Board pursuant to Order of record remand by the D.C. Court of Appeals, issued October 28, 2003 in *Washington Hospital Center v. D.C. Dept. of Employment Services and Roberta West*, No. 03-AA-582. In accordance with the Court of Appeal's remand, the Board is directed to enter a supplemental ruling with respect to Employer-Petitioner's psychological injury liability. Specifically to be addressed, pursuant to the Court of Appeal's remand, is whether the Hearing Examiner, in the Compensation Order from which the instant appeal was taken, applied the proper legal standard for assessing whether Respondent's psychological injury, claimed to have resulted from Respondent's work-related physical injury and its aftereffects, was causally related to her employment within the meaning of the D.C. Workers' Compensation Act.

On November 9, 1999, a Compensation Order was issued by the Hearings and Adjudication Section in OHA No. 97-276A, in which the presiding Hearing Examiner concluded, *inter alia*, that Respondent's psychological injury was causally related to the accidental work injury that she had sustained, and that Employer-Petitioner (Petitioner) was thus liable for medical treatment obtained by Claimant in connection with her psychological injury. In reaching this conclusion, and assessing liability to Petitioner for Respondent's psychological injury, the Hearing Examiner determined that the standard for invoking the statutory presumption of a causal relation articulated in *Dailey v. 3M Company*, H&AS No. 85-259, OWC No. 066512 (May 19, 1988) did not apply. Instead, the Hearing Examiner relied upon *Whittaker v. D.C. Dept. of Employment Services*, 668 A.2d 844 (D.C. 1995), to conclude that Respondent had satisfactorily invoked the Act's presumption of causation with respect to her psychological condition.³

Upon appeal of the Compensation Order, the Director upheld the Hearing Examiner's determination that Employer was liable for all causally-related medical care provided to Claimant pursuant to a series of multiple referrals made by Claimant's attending physician,

² Since issuance of the Compensation Order in this matter, H&AS was redesignated as the Office of Hearings and Adjudication (OHA), and Hearing Examiners reclassified as Administrative Law Judges. Pursuant to the Director's Administrative Policy Issuance No. 05-01 (February 5, 2005), OHA has now been redesignated as the Administrative Hearings Division (AHD).

³ In *Whittaker* the Court of Appeals extended the presumption of causation articulated in *Ferreira v. D.C. Dept. of Employment Services*, 531 A.2d 651 (D.C. 1987), to the medical causal relationship between a subsequently occurring medical condition and an accidental injury, thereby conferring a causal relationship between a claimant's employment and his/her medical condition.

including that received by Claimant related to her psychological injury. *Roberta West v. Washington Hospital Center*, Dir.Dkt. No. 99-97, H&AS No. 99-276A (July 10, 2000).⁴ Appeal of the Director's Decision and Order was made to the D.C. Court of Appeals, which subsequently remanded the case to the Director to address questions related to the criteria to be used in determining who is a chosen "attending physician" and the extent to which that physician without further authorization may make referrals to other medical care providers, and the extent to which they in turn may make further referrals. *Washington Hospital Center v. D.C. Dept. of Employment Services*, 789 A.2d 1261 (D.C. 2002).⁵ On May 14, 2003, the Director issued his Decision on Remand, limited to the issues that had been posed, and a renewed appeal to the D.C. Court of Appeals followed. Before the Court of Appeals following this second appeal, Claimant moved (without opposition from Employer) for the limited remand that has resulted in return of this matter to the Board.

This Decision and Order is entered pursuant to the Court of Appeals Order of October 28, 2003, following supplemental briefing by the parties and oral argument before the Board held May 18, 2005.⁶

ANALYSIS

The question presented in the instant case is whether a psychological condition claimed to be the consequence or medical sequelae of a physical injury arising out of and in the course of employment, rather than the result of workplace stress, must meet the same standard for invoking the presumption of compensability under the Act as a psychological injury alleged to have resulted from workplace stress without a physical injury.

D.C. Official Code § 32-1521 provides a claimant with a rebuttable presumption that his/her claim for workers' compensation benefits comes within the provisions of the D.C. Workers' Compensation Act of 1979, as amended. Upon presentation of credible evidence of (1) an injury and (2) a work-related event, activity or requirement that has the *potential* of resulting in or contributing to the injury, a claimant invokes the benefit of this presumption. *Ferreira v. D.C. Dept. of Employment Services*, 531 A.2d 651, 655 (D.C. 1987). *See also, Parodi v. D.C. Dept. of Employment Services*, 560 A.2d 524, 525-526 (D.C. 1989). "[O]nce an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act." *Washington Hospital Center v. D.C. Dept. of Employment Services*, 744 A.2d 992, 996 (D.C. 2000). "The statutory presumption operates to establish a causal connection between the

⁴ Although raised by Employer as an issue on appeal at the time, the Director failed to specifically address whether Claimant's psychological injury was related to her employment or Employer's liability for the psychological and psychiatric treatments afforded Claimant.

⁵ In its 2002 remand, the Court of Appeals expressly deferred addressing the issue of whether Claimant's psychological condition was causally related to her work injury, noting that "its relevance may be affected by the proceedings on remand." 789 A.2d at 1263 n.1.

⁶ Over the objection of Claimant-Respondent, an *amicus brief* submitted (with accompanying motion) by the Association of Compensation Insurance Attorneys for the District of Columbia was also accepted into the administrative appellate record pertaining to the instant matter.

disability and the work-related event.” *Baker v. D.C. Dept. of Employment Services*, 611 A.2d 548, 550 (D.C. 1992) (citing *Ferreira, supra*). In addition, the scope of the presumption extends to include the medical causal relationship between an alleged disability and the accidental injury, conferring a causal relationship between the claimant’s employment and his/her medical condition. *Whittaker v. Dist. of Columbia Dep’t. of Employment Servs.*, 668 A.2d at 846-847. See 1 Larson, Workers’ Compensation Law, § 10.01 (2000 ed.).

Notwithstanding this general rule of causation in workers’ compensation cases, in *Dailey v. 3M Company*, H&AS No. 85-259, OWC No. 066512, 1988 DC Wrk. Comp. LEXIS 1 (May 19, 1988), the Director established a special standard for invoking the Act’s presumption of compensability applicable to emotional and/or psychological injury claims attributable to job-related stress. *Dailey* established an objective standard, based on actual working conditions, for invoking the presumption of compensability for claims of emotional injury attributable to job-related stress:

[I]n order for a claimant to establish that an emotional injury arises out of the mental stress or mental stimulus of employment, the claimant must show that actual conditions of employment, as determined by an objective standard and not merely the claimant’s subjective perception of this working conditions, were the cause of his emotional injury. The objective standard is satisfied where the claimant shows that the actual working conditions could have caused similar emotional injury in a person who was not significantly predisposed to such injury.

Dailey, 1988 DC Wrk. Comp. LEXIS 1, at *7-8.⁷

In the instant case, before the Office of Hearings and Adjudication (now the Administrative Hearings Division), the Hearing Examiner found that Respondent sustained psychological injury in the form of persistent and recurring depression as the result of a work-related physical injury. In reaching his conclusion, the Hearing Examiner rejected application of the test for invoking the presumption of compensability articulated in *Dailey*, explaining:

[T]his is not a claim involving an allegation that job related stress caused the claimant to sustain a psychic injury. Thus, unlike the claimants in *Spartin v. D.C. Dept. of Employment Services*, 584 A.2d 564 (D.C. 1990), or *Dailey v. 3M Company*, H&AS No. 85-259, OWC No. 066512 (Final Compensation Order, May 19, 1988), or *Porter v. D.C. Dept. of Employment Services*, 625 A.2d 886 (D.C. 1993), or *Gary v. D.C. Dept. of Employment Services*, 723 A.2d 1205 (D.C. 1998), claimant herein does not need to show that the stressor causing her injury would have produced a similar psychic injury in an average employee or worker without any predisposition to psychic injury. Rather, this is a straightforward case of determining whether the psychological injury was caused by the accidental injury at work, which injury is presumed under *Whittaker v. D.C. Dept. of Employment Services*, 668 A.2d 844 (D.C. 1995), to be the cause of her present

⁷ This special standard, the Court of Appeals has recognized, is consistent with similar special standards that have been established by the Director for certain types of claimed injuries. See *Spartin v. D.C. Dept. of Employment Services*, 584 A.2d 564, 568 (D.C. 1990).

disability.

West, Compensation Order, OHA No. 99-276A, pp. 6-7 (November 9, 1999).

Before the Compensation Review Board, Petitioner argues that the test for invoking the presumption of compensability articulated in *Dailey* should apply notwithstanding that Respondent's psychological injury is claimed to have resulted from a job-related physical injury rather than workplace stress. In support, Petitioner relies upon a series of Director's decisions issued since *Dailey*, including *Gladys Jones v. PEPCO*, Dir.Dkt. No. 02-48, OHA No. 02-73, 2003 DC Wrk. Comp. LEXIS 80 (Feb. 11, 2003); *Shirley Tate v. The Washington Home*, Dir.Dkt. No. 01-26, OHA No. 00-547, 2002 DC Wrk. Comp. LEXIS 41 (Jan. 15, 2002); *Earnestine Aycock v. American Ass'n of Retired Person*, Dir.Dkt. No. 01-30, OHA No. 01-12A, 2002 DC Wrk. Comp. LEXIS 38 (Jan. 15, 2002); *Oliver Amaechi v. D.C. Dept. of Corrections*, Dir.Dkt. No. 12-00, OHA No. PBL 99-31, 2001 DC Wrk. Comp. LEXIS 314 (Jan. 9, 2001); and *Abdella Ali v. J.W. Marriot*, Dir.Dkt. No. 97-62, H&AS No. 93-358, 1997 DC Wrk. Comp. LEXIS 277 (Oct. 23, 1997). Petitioner also cites the Court of Appeals decisions in *Landesberg v. D.C. Department of Employment Services*, 794 A.2d 607 (D.C. 2002), and *Porter v. D.C. Department of Employment Services*, 625 A.2d 886 (D.C. 1993).

Respondent counters by arguing that the *Dailey* standard does not apply to the instant matter. In support, Respondent relies upon the Director's decisions in *Charlene McCamey v. D.C. Public Schools*, Dir.Dkt. No. 10-03, OHA No. PBL 02-31, 2004 DC Wrk. Comp. LEXIS 2 (Feb. 10, 2004); *Lunar Volcy v. McDonald's*, Dir.Dkt. No. 98-85, H&AS No. 91-685A, 1999 DC Wrk. Comp. LEXIS 336 (July 28, 1999); and *Gabriella O'Rose v. Washington Hospital Center*, Dir.Dkt. No. 98-96, H&AS No. 97-188A, 1999 DC Wrk. Comp. LEXIS 319 (Apr. 2, 1999). In the alternative, Respondent asserts that if the Board holds that the *Dailey* standard for invoking the presumption of compensability applies, Respondent nevertheless prevails based on the evidence of record.

Given the facts before the Director in *Dailey*, the decision therein focused upon the issue of emotional injury as the result of workplace stress, and indeed *Dailey* has become synonymous with that issue. Yet, it would require an overly restrictive reading of *Dailey*, and a misapplication of the body of law that *Dailey* represents, to limit the standard enunciated therein to job stress induced emotional and psychological claims only. Even though *Dailey* established an objective standard for evaluating whether the alleged stressors of the work place had the potential to cause the emotional injury asserted, the standard articulated therein for invoking the Act's presumption of compensability applies equally to consequential emotional/psychiatric injury claims. It is the nature of the injury asserted (*i.e.* emotional and/or psychological injury), rather than the conditions of the workplace environment, that warrants application of the *Dailey* standard. This is because mental and emotional injury claims are, as the Director explained, inherently more difficult to objectively determine than are claims of physical injury:

[C]laims of work related emotional injury are among the most difficult claims to handle and adjudicate. While in theory work related mental injuries are as compensable as work related physical injuries, the adjudication of mental injury claims clearly presents more difficult problems. Mental injury claims are more

difficult because of the inherent difficulties of objectively determining the existence of an injury and its source.

Dailey, 1988 DC Wrk. Comp. LEXIS 1, at *15.

Petitioner argues that subsequent decisions of the Director, e.g. *Oliver Amaechi v. D.C. Dept. of Corrections*, Dir.Dkt. No. 12-00, suggest the appropriateness of applying a “sliding scale” involving severity of injury that would relieve a claimant of the obligation to make the showing required by *Dailey* in the most severe of physical injury cases, without overruling the applicability of *Dailey* to consequential injury claims. We agree. The holding in *Dailey* must be viewed within the context of the broad spectrum of mental and emotional injury claims that may be presented under the D.C. Workers’ Compensation Act. As the Director in *Dailey* noted, where the most physically traumatic of cases involving psychological consequences is claimed, it may be reasonable to presume that emotional impairment to a person of ordinary sensibilities will result:

Claims of mental injury cover a broad spectrum; and not all claims of work related mental injury present such difficult problems of adjudication. On one end of the spectrum, are cases typified by a situation where a worker claims an emotional injury caused by a dramatic/traumatic event at work that would reasonably be expected to result in an emotional impairment to a person of ordinary sensibilities. . . . On the opposite end of the spectrum, are cases typified by a situation where a worker imagines events or conditions at work which while real to the worker would appear to be mere figments of the worker’s imagination to a neutral objective and reasonable person. The former category of cases are rather clearly compensable, the latter are not. The cases that fall somewhere between the respective ends of the spectrum are the cases which pose the real difficulties.

Dailey, at *15, n.4. A careful reading of the Director’s decisions since *Dailey* involving claims of non-stress related, physical trauma-induced mental and emotional injury reveals the application of the *Dailey* standard, in virtually every instance, to claims that “fall somewhere between the respective ends of the spectrum.” As hereafter demonstrated, with one exception, the claims involved require, by their nature, an objective standard in order to assure the proper invocation of the Act’s presumption of compensability.⁸

The first post-*Dailey* case to come before the Director in which a claimant asserted the compensability of an emotional injury claimed to have resulted from work-place physical trauma was *Collis Porter v. George Washington Hospital*, Dir.Dkt. No. 88-37, H&AS No. 86-515, 1992 DC Wrk. Comp. LEXIS 42 (Feb. 13, 1992), *aff’d sub nom. Porter v. D.C. Dept. of Employment*

⁸ The notable exception is *Lunar Volcy v. McDonald’s*, Dir.Dkt. No. 98-85. As discussed, *infra*, regardless of the articulated rationale of the decision reached in *Volcy*, the facts of that case indicate that it appropriately belongs at “the one end of the spectrum . . . typified by a situation where a worker claims an emotional injury caused by a dramatic/traumatic event at work that would reasonably be expected to result in an emotional impairment to a person of ordinary sensibilities” without the necessity of further inquiry.

Services, 625 A.2d 886 (D.C. 1993). In *Porter* the claimant had been struck by a gurney while performing her duties as a nursing assistant, which resulted in physical injury that was successfully treated and resolved. The Director affirmed the Hearing Examiner's determination, based on the medical evidence presented, that the claimant's psychological condition pre-existed her physical injury and was not work-related. Upon appeal of the Director's decision, the Court of Appeals noted that while neither the Hearing Examiner nor the Director expressly applied the *Dailey* test to ascertain whether the gurney incident would have similarly affected an individual not predisposed to the claimant's depressive condition, in essence the test was applied. "Both the examiner and the Director concluded . . . that the gurney accident would not have caused a person lacking petitioner's subjective, pre-existing personality disorder to suffer the disability she now experienced." *Porter*, 625 A.2d at 889.

Abdella Ali v. J.W. Marriott, Dir.Dkt. No. 97-62, is the first case in which the Director expressly applied the *Dailey* standard to a claim of emotional injury resulting from employment-related physical injury. In upholding the Hearing Examiner's denial of the claim, the Director noted that the claimant had failed to produce sufficient evidence to establish that an average employee not predisposed would have suffered a similar psychological injury as that experienced by the claimant.

In *Ernestine Aycock v. American Association of Retired Persons*, Dir.Dkt. No. 01-30, and *Shirley Tate v. The Washington Home*, Dir.Dkt. No. 01-26, both issued January 15, 2002, the Director affirmed the applicability of the *Dailey* standard to cases of emotional/psychological injury claimed to be causally related to physical job injury. Given that the two decisions were issued on the same day, it is instructive to read the decisions in concert. In *Aycock*, the Director affirmed the ALJ's conclusion that the claimant had satisfactorily invoked the presumption of compensability pursuant to *Dailey*, having presented evidence that a person of normal sensibilities, with no predisposition to emotional injury, would have suffered the same or similar emotional and/or psychological injury suffered by the claimant.⁹ In *Tate*, which involved a claim for psychological injury arising nine years after the original physical job injury, the Director affirmed the ALJ's conclusion that the claimant had *failed* to invoke the *Dailey* standard because the claimant had *not* presented evidence showing that a person of normal sensibilities, with no predisposition to emotional injury, would have suffered the same or similar emotional and/or psychological injury as that suffered by the claimant. As previously mentioned, in both cases the Director expressly affirmed his prior holding in *Abdella Ali* as to the applicability of the *Dailey* standard, and in *Tate* went on to expressly reject the "direct and natural consequences" test as an alternative to *Dailey* for emotional/psychological injuries claimed to be the consequence or medical sequelae of a physical injury.

⁹ In *Aycock*, the claimant met the objective evidentiary requirement of *Dailey* through medical evidence establishing that the claimant was not pre-disposed to suffer the condition of which she complained. The Director held that "one could reasonably conclude" that the medical evidence presented establishing that the claimant was not predisposed to suffer the depression of which she complained, "in conjunction with the pain and debilitation of claimant's work injury, had the potential to cause a similar injury in a non-predisposed person." *Aycock*, 2002 DC Wrk. Comp. LEXIS 38, at 4-5.

A year later, in *Gladys Jones v. PEPCO*, Dir.Dkt. No. 02-48, the Director again affirmed the applicability of the *Dailey* standard for emotional/psychological injuries claimed to be the consequence of a job-related physical injury.¹⁰

In the instant case, Respondent makes much of the Director's decisions in *Gabriella O'Rose v. Washington Hospital Center*, Dir.Dkt. No. 98-96, and *Luner Volcy v. McDonald's*, Dir.Dkt. No. 98-85. Respondent's reliance upon these cases is, however, misplaced. To begin with, *O'Rose* never reached the question of the applicability of *Dailey* because it was determined that the evidence of record failed to establish that the claimant's claimed psychological condition was the result of a work-related event having the potential to cause the complained-of condition. *Volcy*, on the other hand, had the right outcome but for the wrong reasons, and can at best be characterized as a misunderstanding of the *Dailey* standard.

In *Volcy*, the Director declined to apply *Dailey* to a psychological injury claim involving physical trauma to the head, resorting instead to the "direct and natural consequences" test recognized in *Whittaker v. D.C. Dept. of Employment Services*. As a consequence, *Volcy* is both cited for the proposition that psychological injury claims resulting from head injuries constitute an exception to the *Dailey* presumption standard as well as the proposition that the "direct and natural consequences" test should be retained for psychological injury claims arising out of or as a result of a physical injury. The Board herewith categorically rejects both contentions. *Volcy*, properly understood, merely constitutes the "one end of the spectrum" of emotional injury cases "typified by situation[s] where a worker claims an emotional injury caused by a dramatic/traumatic event at work that would reasonably be expected to result in an emotional impairment to a person of ordinary sensibilities." *Dailey*, at *15 n.4. In such instances, as was the situation in *Volcy*, where the facts of the case are such that it can reasonably be expected that the physical injury involved would result in an emotional impairment to a person of ordinary sensibilities, scrutiny through the articulated lens pronounced in *Dailey* is obviated.¹¹

The foregoing cases all involve claims under the D.C. Workers' Compensation Act. The Director has also applied the *Dailey* standard to "public sector" claims involving psychological and emotional injuries alleged to have resulted from work-related physical injury, notwithstanding the fact that there is no comparable provision in the D.C. Government Comprehensive Merit Personnel Act to D.C. Official Code § 32-1521(1).¹²

¹⁰ In *Jones*, the ALJ had applied the *Dailey* standard. The Director reversed and remanded the case because the ALJ had failed to properly consider evidence of record indicating that the objective test of *Dailey* had been met.

¹¹ We find it significant that the Director in *Volcy*, having concluded that the facts of the case therein obviated the need to apply the *Dailey* standard, nevertheless found evidence in the record that would support a finding that a person of normal sensibilities, not predisposed, could have suffered the same psychological injury as had the claimant due to the head injury the claimant sustained.

¹² The basis for the presumption with respect to "private sector" claims is the existence of a statutory provision creating the presumption, found at D.C. Official Code § 32-1521(1). *Ferreira v. D.C. Dept. of Employment Services*, *supra*. However, as the Board has on two recent occasions explained, unlike the D.C. Workers' Compensation Act of 1979, as amended, there is no similar statutory provision affording a presumption of compensability for "public sector" claims under the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended. *See, Susan Lerner v. D.C. Dept. of Human Services*, CRB No. 05-216, OHA No. PBL 01-18 (May 24, 2005); *Martha Corley v. D.C. Office of Corporation Counsel*, CRB No. 18-03, OHA No. PBL 02-029A (April 11, 2005). While the statutory presumption thus does not exist under the D.C. Government Comprehensive Merit

For example, in *Oliver Amaechi v. D.C. Dept. of Corrections*, the Director held that the *Dailey* standard was met notwithstanding the lack of an express finding by the Hearing Examiner from whom the appeal was taken that psychological injury would have occurred to a non-predisposed individual of normal sensibilities. In reaching this conclusion, the Director cited uncontroverted evidence of record demonstrating: (1) the extreme nature of the work-related physical trauma experienced by the claimant; (2) that the claimant's emotional impairment was at least partially attributable to the physical injuries the claimant sustained; and (3) that the claimant was not predisposed to emotional injury.

Charlene McCamey v. D.C. Public Schools, Dir.Dkt. No. 10-03, also a "public sector" case, involved a claim of psychological injury sustained as a result of a work-related head trauma. The Director held that the *Dailey* standard was applicable, and based thereon affirmed the ALJ's rejection of the claimant's claim, citing the lack of any evidence that the physical injury sustained by the claimant would have resulted in the same or similar psychological injury to an individual of normal sensibilities not predisposed to the anxiety disorder suffered by the claimant.¹³

From the foregoing it is clear that the Director has chosen to apply the objective *Dailey* standard for invoking the presumption of compensability under the D.C. Workers' Compensation Act not only to work place stress-related claims, but to emotional and psychological injury claims that are the consequence or medical sequelae of employment-related physical injury. We are not persuaded by Respondent's arguments to diverge from this line of authority, particularly when the Director's decision to apply the *Dailey* test beyond merely stress-related emotional injury claims has met with the approval of the D.C. Court of Appeals. See, *Porter v. D.C. Department of Employment Services*, *supra*, and *Landesberg v. D.C. Dept. of Employment Services*, *supra*. As the Court of Appeals stated in *Porter*, "Whatever the triggering event or disorder, the Director may properly apply a rule of causation in this difficult area of emotional injury that discourages spurious claims – one focusing on the objective conditions of the job and their effect on the 'normal employee' not predisposed to the injury by a mental disorder." 625 A.2d at 889. Applying the objective *Dailey* standard for invoking the statutory presumption of compensability to consequential emotional and psychological injury claims, as with stress-related emotional/psychological injury claims, adheres to and is consistent with the fundamental statutory requirement that the injury arise out of and in the course of employment.

Personnel Act, that is not to say that the *Dailey* test may not apply to "public sector" claims, see e.g., *Oliver Amaechi v. D.C. Dept. of Corrections*; *Charlene McCamey v. D.C. Public Schools*. However, that issue is not herein reached, as the Board's holding in the instant case is limited to "private sector" claims under the D.C. Workers' Compensation Act.

¹³ In applying *Dailey*, the Director felt compelled to distinguish *Volcy* in light of the Court of Appeals decision in *Porter v. D.C. Dept. of Employment Services*. The Director erroneously did so on the basis that it is "the existence of a psychological condition before a physical trauma occurs to the head that triggers the use of the *Dailey* standard." *McCamey*, 2004 DC Wrk. Comp. LEXIS 2, at *6. Whether or not a claimant suffers from a pre-existing psychological condition is *irrelevant* to the application of the *Dailey* standard for invoking the presumption of compensability. The test "is objective: it focuses on whether the stresses of the job were so great that they could have caused harm to *an average worker* . . . Thus, an employee with a predisposition to mental illness is not precluded from recovering under *Dailey*." *Spartin*, 584 A.2d at 569-570.

Accordingly, we hold that in order to invoke the statutory presumption that an emotional or psychological condition, claimed to be the consequence or medical sequelae of an employment-related physical injury, arises out of and in the course of one's employment, the claimant must present credible evidence demonstrating that his/her physical injury and its aftereffects (or sequelae) could have caused the same or similar emotional injury in a person of normal sensibilities not significantly predisposed to such injury.

Having concluded that the *Dailey* standard should have been applied in the instant case, we address Respondent's argument that she nevertheless prevails because the *Dailey* test is met. Respondent asserts that evidence of record exists, in the form of medical testimony of the independent medical expert retained by Petitioner, indicating that Respondent's emotional/psychological reaction to the pain resulting from her physical injury was not unusual, but similar, to that experienced in normal chronic pain cases. In light of this evidence, Respondent argues that the objective standard articulated in *Dailey* is met.

The problem with Respondent's argument is the fact that the evidence of record cited by Respondent does not support the proposition that her emotional reaction to the aftereffect of her physical injury (*i.e.* her pain) was typical to that of the average, emotionally non-predisposed individual. To begin with, the deposition testimony of Dr. Panagos that Respondent cites is to the contrary. Respondent argues that "Dr. Panagos unequivocally shows that West's pain-related depression could have also happened to an 'average employee not previously predisposed to psychological injuries. Respondent's Supplement Brief, p. 16. However, the testimony cited discounts the notion that Respondent's reaction would or could be that of the average person: "He [Dr. Panagos] stated that it was not fair to compare West to the average patient or even the average chronic pain patient, because 'they are all unique'." Respondent's Supplemental Brief, p. 14. Moreover, the testimony of Dr. Panagos states that what is "typical" about Respondent's condition is "to have patients for whatever reasons to have escalated complaints of pain *because* they are depressed or anxious," Panagos deposition, pp. 30-31 (emphasis added), rather than to suffer depression because of the pain.¹⁴

The Director's decisions in *Aycock v. American Ass'n of Retired Persons* and *Amaechi v. D.C. Dept. of Corrections* demonstrate that the *Dailey* standard may be satisfied notwithstanding the lack of evidence showing that the psychological or emotional injury sustained by the claimant would have similarly resulted to a non-predisposed individual of normal sensibilities. Required in such instances is evidence as to the nature of the employment-related physical injury sustained, that the claimant's psychological/emotional impairment is at least partially attributable to the sustained physical injury or its aftereffects, and that the claimant was not predisposed to the emotional/psychological injury of which he/she complains.

While there appears to exist evidence in the record of the instant case that would satisfy the first

¹⁴ Respondent also argues that there is a *lack* of any evidence that Respondent's physical injury could *not* have caused similar emotional injury to a non-predisposed individual. However, it is a showing of evidence demonstrating that the physical injury sustained could have caused similar injury in a non-predisposed person, rather than the lack of evidence showing that it could not, that is required.

two prongs of *Aycock/Amaechi*,¹⁵ there is no evidence that Respondent has brought to our attention that would indicate that the third prong is satisfied. Respondent cites the *lack* of any evidence of record indicating that Respondent was pre-disposed to the emotional injury she suffered. It is not, however, the lack of evidence of pre-disposition that is required, but the affirmative showing of evidence that Respondent was not pre-disposed that is required. That evidence, or at least the evidence that has been brought to this Review Panel's attention, is not a matter of record.

In light of the foregoing, we find that the substantial evidence of record does not support the conclusion that the *Dailey* standard for invoking the statutory presumption of compensability has been met.

If the instant case was currently before the Board in the posture of an appeal directly from the Administrative Hearings Division, we would remand the case to AHD for application of the *Dailey* standard following additional findings of fact,¹⁶ and for such further proceedings as might prove necessary. However, given the limited nature of the Board's jurisdiction under the remand ordered by the Court of Appeals,¹⁷ the Board is left with no alternative but to return this case to the Court of Appeals having addressed the legal question posed.

CONCLUSION

The Hearing Examiner in the instant case, by disregarding *Dailey v. 3M Company, supra*, failed to apply the appropriate legal standard for invoking the presumption of compensability under the D.C. Workers' Compensation Act for a claim of emotional/psychological injury alleged to be the consequence or medical sequelae of an employment-related physical injury.

¹⁵ Arguably the requirement that the claimant's psychological/emotional impairment be at least partially attributable to the sustained physical injury is met by the following cited passage from Dr. Panagos' deposition testimony, although the testimony could be read as also stating that the level of pain that Respondent asserts led to her depression, was actually the manifestation of her depression: "Pain is a perceived thing. . . . How you perceived pain . . . is something totally different based on your previous experiences . . . your mental state at the time, and she clearly has had depression as a result of this accident *and it has had an impact on her level of pain.*" Panagos deposition (emphasis added).

¹⁶ It is noted that even had we determined that there existed evidence of record supporting Respondent's contention that the *Dailey* standard had been met, no findings of fact to that effect exist within the Compensation Order from which the appeal in this matter arises.

¹⁷ The Order of the Court of Appeals remanding the instant matter to the Board expressly notes that jurisdiction of the case was not returned to the Board, but that the Board's ruling on the limited question of proper standard for invoking the Act's presumption of compensability with respect to the psychological injury issue be certified back to the Court of Appeals as a supplemental record once the Board has concluded its proceedings.

ORDER

That portion of the Compensation Order issued by the Hearing Examiner on November 9, 1999 in *Roberta West v. Washington Hospital Center*, OHA No. 97-276A, wherein it was concluded that Respondent's psychological injury was causally related to the accidental work injury that she had sustained, and that Petitioner was thus liable for medical treatment obtained by Respondent in connection with her psychological injury, is herewith VACATED for the reasons as stated herein.

Consistent with the Order of record remand by the District of Columbia Court of Appeals entered with respect to this matter on October 28, 2003, this Supplemental Decision and Order is ORDERED to be transmitted to the District of Columbia Court of Appeals, to be included in the appellate record in *Washington Hospital Center v. D.C. Department of Employment Services and Roberta West*, No. 03-AA-582.

FOR THE COMPENSATION REVIEW BOARD:

E. COOPER BROWN
Acting Chief Administrative Appeals Judge

August 5, 2005
DATE

