

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. 03-138

GERMAINE WHITFIELD,

Claimant-Respondent,

v.

HOWARD UNIVERSITY HOSPITAL,

Self-Insured Employer-Petitioner,

And

GERMAINE WHITFIELD,

Claimant-Respondent,

v.

HADLEY MEMORIAL HOSPITAL

Self-Insured Employer-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Linda F. Jory
OHA/AHD Nos. 03-309 and 03-291, OWC Nos. 584319 and 555289, Consolidated for formal
hearing by order of AHD/OHA

William H. Schladt, Esquire, for the Petitioner

Neil J. Fagan, Esquire, for the Claimant-Respondent

Jeffrey W. Ochsman, Esquire, for Self-Insured Employer-Respondent

Before E. COOPER BROWN, *Acting Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and
FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

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 05-01 (February 5, 2005).¹

BACKGROUND

This appeal follows the issuance of a Compensation Order 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, which was filed on October 14, 2003, the Administrative Law Judge (ALJ) granted Claimant-Respondent's (Claimant's) claim against Self-Insured Employer-Petitioner (Petitioner), over the objection of Petitioner and its claim that liability for any benefits sought rests upon Self-Insured Employer-Respondent (Respondent) for temporary total disability benefits and causally related medical care. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the finding that Claimant's current medical condition and the related claimed disability rests upon Petitioner is unsupported by substantial evidence in the record and is not in accordance with the Act. Petitioner further contends that the award of temporary total disability benefits is not in accordance with the law, in that Claimant had failed to produce sufficient evidence in rebuttal of Petitioner's showing of availability of suitable alternative employment under *Logan v. District of Columbia Dep't. of Employment Services*, 805 A.2d 237 (D.C. App. 2002).

Respondent opposes the appeal, asserting that the ALJ's decision in the Compensation Order, as it relates to the assigning of responsibility for the claimed disability and medical care, is supported by substantial evidence and is in accordance with the law. Respondent took no position concerning the issues relating to nature and extent of disability.

Claimant opposes this appeal, asserting that the Compensation Order is supported by substantial evidence and is in accordance with the law.

¹Pursuant 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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained 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.

Turning to the case under review herein, the parties stipulated to the occurrence of two separate work injuries, one occurring on May 24, 2000, when Claimant slipped and fell, while working as a special police officer (OWC No. 555289, OHA/AHD No. 03-291), and the second occurring on July 20, 2002, when Claimant, having gone to work for Petitioner as a special police officer, was involved in a struggle with a recalcitrant patient (OWC No. 584319, OHA/AHD No. 03-309). Petitioner and Respondent each contended at the formal hearing, and contend on appeal, that the other is responsible for Claimant's present physical condition as it relates to her neck.

In the Compensation Order, the ALJ analyzed the claim for relief from Claimant first with respect to whether Respondent had overcome the statutory presumption, under *Whittaker v. District of Columbia Department of Employment Services*, 531 A.2d 844 (D.C. 1995), that Claimant's condition and claimed disability is causally related to the first work injury. This conclusion was based upon: the stipulated fact of a subsequent intervening injury while employed by Petitioner; Respondent's submission of a series of three MRIs of Claimant's neck, the first two of which revealed "minimal disc bulging" and then a "small herniation" at C5-C6, with the third (and the only one taken after the second injury) showing "moderate to large broad based disk osteophyte complex ...[and] a mild mass effect upon the ... cord", (Compensation Order, page 7); and Respondent's IME report from Dr. Gary London, who expressed the opinion that the third MRI was the "most significant", and that any required surgery would be the result of the subsequent injury, and not the first injury (Compensation Order, page 7). We detect no error in the ALJ having concluded that such evidence was sufficient to meet Respondent's burden of overcoming the presumption that Claimant's claimed neck condition at the time of the formal hearing was the result of the first work injury.

The ALJ then proceeded to undertake a similar analysis in connection with the second injury, and concluded that, unlike Respondent, Petitioner had failed to adduce sufficient evidence to overcome the *Whittaker* presumption as it pertains to the second injury. In so concluding, Petitioner's evidentiary materials were as follows: two IME reports from Dr. Kevin Hanley, an orthopaedic surgeon, one of which predated the second injury, and the second of which followed

it; an IME report from Dr. Robert Gordon, also an orthopaedic surgeon, who performed an IME following the second injury; and reports from Drs. Talaat Maximous and Hampton Jackson, colleagues in a medical practice from which Claimant sought orthopaedic care. The ALJ reviewed the Hanley reports, and noted that, despite being of the opinion that Claimant was not “fit for duty” in March 2000, his opinion in November 2002 that Claimant could not work was stated to be the result of the second injury.

The ALJ found Dr. Gordon’s opinions to be lacking in inherent reliability, given his acknowledgement that he had never reviewed the MRIs, and his admission that he didn’t know if Claimant had developed neck symptoms within twenty four hours of the second injury, while acknowledging that if so, “it’s certainly possible that some neck strain had occurred”. Compensation Order, page 8.

The ALJ reviewed the Maximous/Jackson reports, and concluded that they do not contain any expression of opinion on the question of assignment of causality of the claimed disability or ongoing complaints to the first as opposed to the second injury.

Based upon this view of the evidence, the ALJ declined to find that Petitioner had overcome the presumption that the complained of neck condition is causally related to the second injury.

Review of those records confirms the absence of any such opinion being espoused by Dr. Maximous, the author of 19 out of 20 reports of visits to that office. In it’s appeal, however, Petitioner points to the one report authored by Dr. Jackson, that of August 27, 2002 report, in which he does, contrary to the assertion of the ALJ, express the opinion that the second injury was a temporary cervical strain, which did not aggravate the pre-existent condition in Petitioner’s neck for which a previous recommendation for surgery had been made, and that the strain would be expected to resolve within six weeks, at which time the surgery could be performed.

We find no error in the ALJ’s declining to accept the reports of Dr. Maximous as having bearing on this specific issue, since, despite the notations on those reports that they dealt with the first injury date, nothing in the text of those reports suggests that Dr. Maximous was aware of any intervening injury, and nothing in those reports constitutes an expression of a considered opinion as to the causality issue in the context of two separate injuries.

However, regarding the lone report by Dr. Jackson, the ALJ wrote “While Dr. Jackson notes in his report that claimant was a surgical candidate prior to the July 20, 2002 injury [the second injury], he failed to provide an opinion with regard to the causal connection between claimant’s most recent wage loss and injuries.” Compensation Order, page 8.

In that report, this is what Dr. Jackson wrote:

I have examined the medical records and compared the history, complaints and findings from July 20, 2002, and after it is my impression that she has sustained a cervical strain as a result of the injury of 7/20/02. I do not believe that she has had pain with aggravation of a pre-existing cervical disc injury. Therefore I am

recommending that she continue with the therapy measures to see if these acute symptoms subside.

Also this patient does have a cervical disc herniation and that she really was a surgical candidate before her injury of July 20, 2002. This patient really should give strong consideration to correct her cervical disc condition as soon as the acute strain has subsided, which I would imagine will happen in the next four to six weeks.

She is not fit for gainful employment. She is to continue with therapy measures...

We cannot say that this passage is consistent with the conclusion that Dr. Jackson is not of the opinion that the second injury appeared to him to be transitory and short lived strain which has no impact upon the underlying cervical problems which pre-dated the second injury and which did not aggravate that condition on a permanent basis, at least as of the time of the examination. Otherwise put, we do believe that a reasonable person might conclude, based upon that report, that the second injury eventually ceased to be of medical significance upon the resolution of the cervical strain caused in the second injury. It is, in other words, substantial evidence in opposition to the presumed relationship between the second injury and the complaints presented at the time of the formal hearing.

We do not mean to suggest that it is controlling, nor do we discount the possibility that upon further consideration of the record, the same ultimate conclusion could be reached. However, on this record, we do believe that Petitioner has overcome the presumption that the injury complained of at the time of the formal hearing was related second work incident.

This is a case in which the central issue between the parties is whether the second injury included within it's effects an aggravation of the first injury such that the second injury contributes to the need for surgery and the claimed disability. Dr. Jackson's report can most easily be read to support a negative conclusion. As such, the evidence must be evaluated on the record as a whole.

On remand, the ALJ must be mindful that one or the other employer appears to be liable, there being no evidence presented of some other cause.

Since the Act has no provision for division or apportionment of responsibility for any of the benefits sought, and in that both employers have presented substantial evidence that the other employer's injury date may be the sole legally cognizable causally related event, either outcome is possible, and a decision must be made by weighing the competing medical evidence with each contesting party having the burden of persuasion, by a preponderance of the evidence. However, on remand, the ALJ may need to take into account the following somewhat complex issue which could effect the proper disposition, should it appear that both injuries contribute to the present condition and disability.

Perhaps the most frequently cited proposition relating to workers' compensation under the Act is this, or a variant thereof:

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. District of Columbia Department of Employment Services*, 560 A.2d 524 (D.C. 1989). *See also, Spartin v. District of Columbia Department of Employment Services*, 584 A.2d 564 (D.C. 1990); and, *Muller v. Lanham Company*, Dir. Dkt. 8601, H&AS No. 85-36, OWC No. 0700456 (March 15, 1988).

It might be argued, then, that in this case, on these facts as presented, there is a presumption that Claimant's present complaints and condition are causally related to either or both stipulated work injuries. However, the presumption, as noted, exists to assist claimants in obtaining benefits to which they may otherwise not be able to demonstrate entitlement, as a humanitarian matter. Arguably, the presumption has no place where there is no question as to whether a claimant is entitled to benefits, and where determination of causation has no potential adverse impact on a claimant's level of benefits (e.g., there is no difference in the compensation rate) or as to a claimant's likelihood of being given that to which he or she is entitled (e.g., there is no suggestion that one potential employer or its insurer is any more or less likely to pay what is owed, due to bankruptcy or other similar issues).

Similarly, there is an oft-quoted maxim in the compensation law of this jurisdiction that holds that the aggravation of a pre-existing condition by work related conditions constitutes a compensable injury under the Act. Like the presumption rule, however, the aggravation rule is intended as an aid to a claimant who might otherwise not be entitled to benefits. *See generally, King v. District of Columbia Department of Employment Services*, 742 A.2d 460 (D.C. App. 1999), and *Harris v. District of Columbia Department of Employment Services*, 660 A.2d 404 (D.C. App. 1995). In *King*, the aggravation rule was used to award benefits where the claimant had a pre-existing, non-occupational condition which was aggravated by his job; in *Harris* it was held that aggravation of a pre-existing work related injury for which claimant was still entitled to receive ongoing wage and medical benefits (under the predecessor compensation statute, the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, et seq. (LHWCA) constitutes a new injury, thereby permitting the claimant in that case to obtain benefits at a higher compensation rate.

Whether these two rules have application in disputes between employers as to who is on the risk and who is off, where a claimant has no stated position on the matter and apparently no stake in its outcome, is an open question. To blindly apply either rule without some justification for its application on such facts would seem overly formulaic and pedantic.

In such cases, however, there is an ancillary benefit to applying these two rules, and that is uniformity and predictability in the application and interpretation of the Act. That is, in the vast majority of cases in which the application of the presumption and aggravation rules are relevant, their application is of significance to a claimant's receipt of benefits. The remaining cases are far fewer; further, it is hard to see what mischief is caused by applying the rules even where the underlying rationale is missing, in light of the benefits of uniformity.

In *Washington Post, et al., v. District of Columbia Department of Employment Services and Steven Malik, Intervenor*, 825 A.2d 296 (2003), the claimant had sustained a back injury in the District of Columbia, from which he had recovered sufficiently to return to his usual duties as a mechanic. He was transferred to his employer's plant in Virginia, where he sustained two "aggravating" injuries while working in an awkward position. The Court of Appeals upheld the Administrative Law Judge's awarding benefits under the Act, despite it being fairly clear that, under *King* and *Harris*, the new "aggravations", had the jurisdictions been reversed, would have been held to be "new injuries" compensable under the Act. The distinguishing factor that we discern is that in *Malik*, the claimant benefited by not applying the established aggravation rule as a defensive principal (that is, had the "aggravations" been treated as new injuries, there would have been no jurisdiction in the District of Columbia), whereas in *King* and *Harris*, the claimants benefited by its application.

The unifying humanitarian principal in *Harris* and *Malik* appears to be this: an aggravation of a prior compensable work injury constitutes a new injury where the effect upon the injured employee of such a finding is either beneficial or neutral; such an aggravation does not, however, constitute a new injury where such a finding would be adverse to the interests of the injured employee.

In this case, there is no doubt that applying the presumption and the aggravation rules results in both employers having *potential* liability. And, there seems little likelihood that, under *Harris*, if Claimant proved an aggravation of the first injury and sought to have this case treated as a new injury because treating it as such would provide higher benefits (as in *Harris*) or would result in jurisdiction under the Act (as in *Malik*), that outcome would be appropriate. That is, Claimant here, as in *Harris*, may have two separate avenues for compensation available.

In the absence of a showing that application of the aggravation rule will negatively impact Claimant, the rule ought to be applied in the interests of uniformity. Further, where application of the rule aids Claimant in obtaining the maximum benefits that the Act provides to which he is entitled, it ought to be applied, assuming, of course, the evidence supports the finding of such an aggravation.

Finally, regarding Petitioner's appeal of the determination of the issue of nature and extent of disability, we detect no error in the ALJ's evaluation of the evidence presented by Petitioner touching upon Claimant's purported ability to return to work, and the rejection of that evidence for the reasons cited, being the failure of Petitioner's labor market witness to present a convincing case of employability, not having met with or even spoken with Petitioner, and only having been retained by Petitioner a week prior to the formal hearing. While we do not state that such facts are, of necessity and as a matter of law, such as to undermine such evidence, we defer to the judgment of the ALJ in assessing the character and quality of the testimony presented on that issue.

CONCLUSION

The Compensation Order of October 14, 2003 is not in accordance with the law in that the ALJ failed to recognize that Petitioner had produced substantial evidence that the complained of injury and disability was not causally related to the second injury, which evidence, if accepted, would possibly obviate Petitioner's liability for the benefits sought and awarded.

ORDER

The Compensation Order of October 14, 2003 is AFFIRMED IN PART AND REVERSED IN PART, and is remanded with instructions that on remand, Petitioner's evidence and Respondent's evidence be weighed, without reference to any presumptions, and liability for the claimed relief be assigned in accordance with the aggravation rule, if appropriate, in light of the foregoing discussion.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

August 10, 2005
DATE