

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402-Fax

CRB No. 08-219

YOVANY AQUINO-MONTIEL,

Claimant – Respondent,

v

EASTERN WATERPROOFING & RESTORATION AND AMERICAN HOME ASSURANCE,

Employer/Carrier –Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 08-257, OWC No. Unknown

Michael S. Levin, Esquire, for the Petitioner

David M. Schloss, Esquire, for the Respondent

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

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the 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 § 250 *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

OVERVIEW

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 Order, which was filed on August 25, 2008, the Administrative Law Judge (ALJ) granted the request by Claimant-Respondent (Respondent) for temporary total disability benefits from March

11, 2008 and causally related medical expenses. On September 8, 2008, Employer-Petitioner (Petitioner) appealed that Order.

As grounds for this appeal, Petitioner alleges that the ALJ's decision is not supported by substantial evidence and is not in accordance with the law.

Since the ALJ's decision is supported by substantial evidence and is in accordance with the law, the granting of Respondent's request for temporary total disability benefits from March 11, 2008 should not be disturbed.

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. D.C. Official Code §32-1522(d)(2). "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 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, Petitioner asserts that the ALJ erred in concluding that there was proper jurisdiction under the Act to resolve Respondent's request for relief. If there was proper jurisdiction to resolve this matter, Petitioner contends that the Compensation Order should be reversed, as Petitioner more than adequately rebutted the presumption. Respondent counters that the ALJ's finding that jurisdiction was proper is supported by substantial evidence and is consistent with the law and that the ALJ correctly found that Petitioner failed to rebut the presumption that Respondent's injury arose out of and in the course of his employment.

At the hearing, Petitioner argued that the District of Columbia lacked jurisdiction to hear this matter, as Respondent was a Maryland resident, he was hired in Maryland, where Petitioner had secured workers' compensation insurance for Respondent and that Respondent's employment in the District was temporary. Under D.C. Code §32-1503(a), there is an exemption from coverage under the Act for an employee and employer who are not residents of the District, the employment contract was executed in another state, the employer has furnished workers' compensation insurance under another state and the employee is doing work "temporarily or intermittently" within the District for the nonresident employer.

The ALJ determined that the length of Respondent's employment in the District of Columbia, along with the possibility of continued future employment within the District, conferred proper jurisdiction in the District. Respondent's most recent and longest work was in the District from December 17, 2007 to April 4, 2008, where Respondent was told by his employer that his job at the District location would continue for about two years. The ALJ found, and the record reveals, that although Respondent had worked about the same amount of time in the state of Virginia as in the District before his work injury, the employment in Virginia was not recent and there was no prospect of continued employment in the future. As far as Respondent's employment contacts with Maryland, he worked in Maryland on one occasion, for a period of one month and 20 days, and likewise as in Virginia, there was no possibility of future employment at the Maryland location.

In summarizing Respondent's contacts with the District and ultimately resolving this issue, the ALJ stated:

In the case at bar, at the time of his injury, claimant had been working at a Washington, D.C. work-site for a period of over four months with the prospect of continued employment at the same location for the succeeding two years, however, unlike Washington, D.C., he had no such possibility of continued future employment in the neighboring Virginia. Therefore, the length of claimant's District employment, especially the possibility of continued future employment therein confers proper jurisdiction in the District of Columbia.

Compensation Order at 7.

On appeal, Petitioner argues that it contended that this case is an exception to jurisdiction, as Respondent's employment in the District was temporary, but the ALJ erred as the cases that the ALJ cites on the jurisdiction issue, relate to the "principally localized" test, which applies to employees who are injured outside of the District. While the ALJ did, in fact, cite authority interpreting the "principally localized" test, it is clear that the ALJ correctly evaluated this matter under the appropriate "temporarily or intermittently" standard and found, after reviewing the evidence of record, that Respondent's employment in the District was not temporary or intermittent. There is no reason to reverse the ALJ on this point. See *Hart v. Dist. of Columbia Dep't. of Employment Servs.*, 843 A.2d 746 (D.C. 2004); *Adjei v. Dist. of Columbia Dep't. of Employment Servs.*, 817 A.2d 179 (D.C. 2003)

Accordingly, after reviewing the record in this matter, this Panel concludes that the ALJ's determination that Respondent's contact with the District was neither temporary nor intermittent and that there was proper jurisdiction in the District of Columbia is supported by substantial evidence and is in accordance with the law.

Petitioner also argues that the ALJ erred in finding that Petitioner failed in rebutting the presumption that Respondent's injury arose out of and in the course of his employment, as the ALJ specifically found that Petitioner failed to produce comprehensive and specific evidence rebutting the presumed connection between Respondent's March 11, 2008 shoulder dislocation and his employment with Petitioner.

In analyzing this matter, initially the ALJ correctly noted that an employee's claim is presumed to come within the provisions of the Act. D.C. Official Code § 32-1521(1). Upon presentation of credible evidence of an injury and a work-related event or activity that has the potential of resulting in or contributing to the injury, a claimant invokes the protection of the presumption. *Ferriera v. District of Columbia Department of Employment Services*, 531 A.2d 651, 655 (D.C. 1987). The focus then shifts to the employer to produce evidence specific and comprehensive enough to sever the presumed connection between the employment-related event and the injury. Without this production by an employer, the claim will be presumed to fall within the scope of the Act. *Parodi v. District of Columbia Department of Employment Services*, 560 A.2d 524, 526 (D.C. 1989). In addition, the scope of the application for the presumption has been expanded to include the causal relationship between the current disabling condition and the injury. *Whittaker v. District of Columbia Department of Employment Services*, 668 A.2d 844, 846-847 (D.C. 1995).

To invoke the presumption, the ALJ found that a Georgetown University Hospital emergency room report, dated March 11, 2008, documented Respondent's emergency room treatment and diagnosis of a dislocated shoulder. In addition, Respondent was issued a work excuse for March 11 and 12, with a no heavy work restriction with his left hand for five days. After finding that Respondent satisfied his initial burden to invoke the presumption, the burden shifted to Petitioner to present evidence to rebut the presumed nexus between Respondent's injury and his employment.

Petitioner did not submit any medical evidence of its own in rebuttal, but relied on two of Respondent's exhibits to support its contention that Respondent's injury did not result from his employment. Petitioner referred to Respondent's exhibit no. 4, mainly an orthopedic consultation report of Dr. Nigel Azer and exhibit no. 7, a medical report of Dr. David Darin, which the ALJ found did not offer any precise and comprehensive evidence to rebut the presumption. On appeal, Petitioner asserts that these medical reports do not contain precise descriptions of the mechanics and history of Respondent's injury and that an employee, who worked with Respondent on the day Respondent alleges that he was injured, did not witness the injury.

However, this Panel must note that there is evidence in the record consistent with Respondent's testimony that he injured his shoulder and felt pain when he was cutting caulk overhead. Moreover, as Respondent points out, the referencing of other events at work on that day in the medical reports, is quite consistent with Respondent's testimony that he felt sharp pain several times during that day. Petitioner's argument on different mechanisms of injury found in these two reports must be rejected, as the reports as a whole, are consistent with Respondent's testimony and these descriptions are consistent

with a compensable work-related injury. The ALJ's finding that the medical evidence relied on by Petitioner was not specific and substantial enough to rebut the presumption is supported by substantial evidence and should not be disturbed.

Petitioner also argues that it rebutted the presumption with the testimony of one of Respondent's co-workers, Robert Hardy, who stated that he did not witness the injury and that Respondent did not complain that he had injured himself on that day. However, this Panel must reject this contention, as this is not substantial evidence that is specific and comprehensive enough to rebut the presumption. Although Mr. Hardy testified that he worked with Respondent on the day in question, it surely is not reasonable to conclude that Mr. Hardy was observing every single task undertaken by Respondent in performing his daily duties as a mechanic. In addition, the simple fact that Respondent apparently did not mention an injury to Mr. Hardy is not comprehensive evidence that Respondent did not, in fact, injure his shoulder while caulking overhead, as Respondent testified. Moreover, as cited by Respondent, "disclaimers of . . . knowledge are unsatisfactory and unacceptable substitutes for evidence." *Hummer v. Levin*, 673 A.2d 631, 639 (D.C. 1996).

Accordingly, the ALJ's conclusion that the District of Columbia had proper jurisdiction in this matter and that Petitioner's evidence was not specific and comprehensive enough to sever the medical causal connection between Respondent's injury and his employment, is supported by substantial evidence and is in accordance with the law.

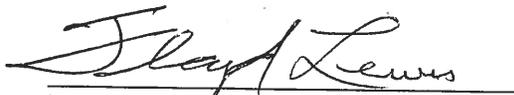
CONCLUSION

The Compensation Order of August 25, 2008 is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order of August 25, 2008 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW
BOARD:



FLOYD LEWIS
Administrative Appeals Judge

October 17, 2008
DATE