

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-154

**PHYLLICE GILES,
Claimant-Respondent,**

v.

**ST. PHILLIPS EPISCOPAL CHURCH and LIBERTY MUTUAL INSURANCE CO.,
Employer/Insurer-Petitioner.**

Appeal from a November 30, 2011 Compensation Order By
The Honorable Leslie A. Meek
AHD No. 10-481A, OWC No. 669991

Christopher R. Costabile, Esquire, for the Petitioner
Benjamin Boscolo, Esquire, for the Respondent¹

Before MELISSA LIN JONES, HEATHER C. LESLIE,² and JEFFREY P. RUSSELL,³ *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board panel.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (“CRB”) pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers’ Compensation Act of 1979, D.C.

¹ Ms. Giles has filed no response in this appeal.

² Judge Leslie has been appointed by the Director of the DOES as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

³ Judge Russell has been appointed by the Director of the DOES as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

Code, as amended, §32-1501 *et seq.*, (“Act”), 7 DCMR §250, *et seq.*, and the Department of Employment Services Director’s Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

On May 3, 2010, while working as a daycare cook at St. Phillips Episcopal Church (“St. Phillips”), Ms. Phyllice Giles slipped and fell. St. Phillips voluntarily paid temporary total disability benefits for a closed period of time, but Ms. Giles requested ongoing benefits.

Following a formal hearing to resolve the issues of causal relationship and nature and extent, a Compensation Order issued on November 30, 2011. The administrative law judge (“ALJ”) awarded Ms. Giles temporary total disability benefits from May 11, 2011 to the date of the formal hearing and continuing because Ms. Giles’ back condition is causally related to her work-related back injury.

On appeal, St. Phillips argues the ALJ inappropriately gave greater weight to the allegedly contradictory medical findings of Ms. Giles’ treating physician, Dr. Kenneth Fine. Specifically, St. Phillips asserts a “more comprehensive review of the record . . . specifically of Dr. Fine’s deposition testimony [*sic*] reveals that he opined that it is equally likely that claimant’s [*sic*] onset of back pain was the result of the natural deterioration of her overall condition, unrelated to the May 3 injury.”⁴

St. Phillips does not directly attack the ALJ’s findings regarding the nature and extent of Ms. Giles’ disability. Instead, if there is no causal relationship between Ms. Giles’ back injury and her inability to return to work, St. Phillips asserts the finding of entitlement to temporary total disability must be reversed.

ISSUES ON APPEAL

1. On the issue of causation, did the ALJ apply the treating physician preference incorrectly?
2. Is the November 30, 2011 Compensation Order supported by substantial evidence in the record and in accordance with applicable law?

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence⁵ in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.⁶ Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order

⁴ Memorandum of Points and Authorities, unnumbered p. 3.

⁵ “Substantial evidence” is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁶ Section 32-1521.01(d)(2)(A) of the Act.

that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion.⁷

Pursuant to §32-1521(1) of the Act, a claimant is entitled to a presumption of compensability (“Presumption”).⁸ In order to benefit from the Presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.⁹ “[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.”¹⁰ There is no dispute the ALJ appropriately ruled the Presumption properly had been invoked.

Once the Presumption was invoked, it was St. Phillips’ burden to come forth with substantial evidence “specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event.”¹¹ The ALJ agreed with St. Phillips that at one point, Dr. Fine did deem Ms. Giles back condition to be unrelated to her May 3, 2010 accident at work; however, when the Presumption fell from the case, the ALJ considered Dr. Fine’s opinions in light of the totality of the circumstances:

Claimant began treating with Dr. Fine on July 19, 2010. (CE 8, p. 129). Before that, Claimant treated with Dr. Manning but switched physicians with Employer’s consent as Dr. Manning’s medical reports were difficult to decipher. (TR pp. 35-36). In correspondence written to Claimant’s counsel, Dr. Fine advised, among other things, he diagnosed Claimant with low back strain. (CE 1, p. 32). In his July 19, 2010 medical report, Dr. Fine notes he examined Claimant’s right knee, left knee, left ankle, left shoulder and cervical spine. He makes no mention of Claimant’s low back. During his testimony given in a September 21, 2011 deposition, Dr. Fine explains that during his treatment of Claimant, he advised Claimant he would treat her back complaints after he treated her other complaints. (CE 8, p. 126). Dr. Fine went on to explain that his reasoning for treating Claimant’s back secondary to her other complaints was due to the complications created by insurance companies. That the insurance company in this instance told him that Claimant’s back was not something that was considered a part of the “spectrum of her problem.” (CE 8, p.127). Dr. Fine was of the belief that because the insurance company indicated Claimant’s back pain was not part

⁷ *Marriott, supra*.

⁸ Section 32-1521(1) of the Act states, “In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter.”

⁹ *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

¹⁰ *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000).

¹¹ *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

of the worker's compensation formula, he was required to exclude Claimant's back issues from treatment. (CE 8, p. 140, 136).

In his deposition, Dr. Fine acknowledges he is unaware of Claimant's having any back problems that preceded her May 3, 2010 work incident. (Ce [sic] 8, p. 133). He states, "I think that there is a likelihood that her back pain was exasperated [sic] by the injury, the original injury by itself and compensation due to alterations in gait or other alterations from her knee injuries." (CE 8, p. 135). That is the same opinion that Dr. Fine expresses in his October 22, 2010 medical report where he states, "My judgment is that these pains are indirectly related to her injury and that there has been increased stress in these areas, so we can contribute these indirectly to the injury." (CE 1, p.18).

In two correspondences written to Employer's insurance company on May 24, 2011 and June 1, 2011, Dr. Fine stated Claimant's low back pain is not related to her work injury. (CE 1). When asked to clarify these statements in light of his previously opining that Claimant's back injury was indirectly caused by the work injury, Dr. Fine asserts he made such statements due to his reliance upon the directives of the insurance company and because Claimant did not mention any back pain when he first saw her. (CE 8, p.136).^[12]

St. Phillips argues that the ALJ's "selective choice of only part of Dr. Fine's 'medical findings' as support for a finding in favor of claimant [sic] on causation is not supported by substantial evidence."¹³ St. Phillips' position is without legal foundation:

We respectfully reject the argument that an ALJ must either accept or reject the entire range of opinions offered by one physician or set of physicians in order to remain sufficiently consistent to withstand review under a substantial evidence test.^[14]

Despite the portions of Dr. Fine's opinions and findings which support Ms. Giles' position, had the ALJ favored those portions of Dr. Fine's medical findings that support St. Phillips' position, St. Phillips would have no issue with such findings; however, the very role of an ALJ is to apply the Presumption to the facts and to weigh the evidence if necessary. St. Phillips essentially requests we reweigh the evidence differently than did the ALJ by giving more weight to certain portions of Dr. Fine's opinions and the opinions of St Phillips' independent medical examination physician. This request exceeds our authority.¹⁵

¹² *Giles v. St. Phillips Episcopal Church*, AHD No. 10-481A, OWC No. 669991 (November 30, 2011), pp.4-5.

¹³ Memorandum of Points and Authorities, unnumbered p. 4.

¹⁴ *Mwabira-Simera v. Sodexo Marriott Management*, CRB No. 08-186, AHD No. 08-126, OWC No. 629496 (January 28, 2009).

¹⁵ *Marriott, supra*.

CONCLUSION AND ORDER

The ALJ properly applied the treating physician preference in the context of the Presumption, and the November 30, 2011 Compensation Order is supported by substantial evidence in the record and is in accordance with applicable law. The November 30, 2011 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

March 7, 2012
DATE