CRB No.03-73

THOMAS C. OWENS, Claimant – Respondent

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Self-Insured Employer – Petitioner

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 02-416, OWC No. Unknown

Eugene I. Kane, Esquire, for the Petitioner

William L. Kohler, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, SHARMAN J. MONROE and FLOYD LEWIS, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, *Administrative Appeals Judge,* on behalf of the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004) and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[1]

BACKGROUND

[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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, 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 D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq*., and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.1 *et seq*., 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.

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 April 29, 2003, the Administrative Law Judge (ALJ) granted Claimant-Respondent's claim for temporary total disability from June 28, 2002 through the date of the formal hearing and continuing. Employer - Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Employer-Petitioner alleges as error that the ALJ's determination that Employer-Petitioner had failed to present sufficient evidence to rebut the presumption that Claimant-Respondent's claimed injury and disability were causally related to a stipulated work injury is not in accordance with the Act.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this 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*, District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, at §32-1522 (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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App.2003). Consistent with this standard of review, the CRB and this Compensation 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*, *supra*, 834 A.2d, at 885.

Turning to the case under review herein, Employer-Petitioner argued that, despite the stipulation that Claimant-Respondent suffered a work-related injury on September 27, 2001, Claimant-Respondent's claimed disability was not related to that injury. The theoretical basis of this argument was that the work-related injury had been to Claimant-Respondent's skin and head, but that the disability claimed was the result of an injury to his neck and arm. In support of that argument, Employer-Petitioner presented an independent medical evaluation (IME) report, CE 1, authored by Dr. Kenneth W. Eckman, in which Dr. Eckman opined that the neck and arm complaints were unrelated to the injury that occurred on September 27, 2001.

In that report, Dr. Eckman writes:

> I have reviewed clinical notes from the treating neurologist, Dr. Joan Oshinsky. […] No mention of cervical radicular symptoms is made. In this note, Dr. Oshinsky specifically states: "his neck has not significantly bothered him until he was roughhousing with his football player son and acutely activated the cervical strain […]" In a later note of February 7, 2002, at a point more than four months after the injury, Dr. Oshinsky states, "he

> complains now of left arm numbness radiating from the neck to the left shoulder and associated tingling in digits four and five of the left hand."
>
> An EMG was performed in this office on April 17, 2002. The left upper extremity and cervical paraspinal muscles were studied. The study was normal and provided no evidence left cervical radiculopathy.
>
> Based on my review of this information and my prior evaluation of the claimant, I do not believe there to be a causal relationship between the injury on September 27, 2001 and the pain radiating from the neck to the left upper extremity, which appears to have appeared quite some time later.

From that report, Dr. Eckman is identified as being a Fellow in the American Academy of Disability Evaluating Physicians. Two prior IME reports in RE 1[2] reveal that Dr. Eckman had personally examined Claimant - Respondent on two occasions, December 3, 2001 and April 1, 2001.

In concluding that Employer-Petitioner's evidence was insufficient to rebut the presumption of medical causal relationship to the work-injury, the ALJ wrote:

> The legal issue is whether [Employer - Petitioner's] evidence is "sufficient and comprehensive enough" to rebut the presumption. The undersigned holds that it is not. [Claimant-Respondent's] testimony he experienced [sic] pain in the neck, lower neck area, going down to his left arm and numbness in his left hand does not negate that he had continuing neck pain since he was injured on September 27, 2001 […].

The Compensation Order contains no additional discussion or analysis concerning the presumption and what it takes to rebut same.

In its most direct holding to date on the nature of the evidence that is required to be produced in order to overcome the presumption, the Court of Appeals has written as follows:

> We hold that an employer has met its burden to rebut the presumption of causation when it has proffered a qualified independent medical expert who, having examined the employee and reviewed the employee's medical records, renders an unambiguous opinion that the work injury did not contribute to the disability.

Washington Post v. District of Columbia Department of Employment Services and Raymond Reynolds, Intervenor, (Reynolds), 852 A.2d 909 (D.C. App. 2004). The Court has, in this passage, established the following criteria for determining whether an employer has produced sufficient medical evidence to overcome the causation presumption: (1) an opinion from (2) a qualified medical expert which (3) follows an examination of the claimant by that expert and (4) a review of the relevant medical records, which opinion is (5) unambiguous, and which

[2] Although denominated "CE 1" in the Compensation Order, the transcript of proceedings identifies Dr. Eckman's reports collectively as "RE 1".

asserts both (6) a lack of causation of and (7) a lack of "contribution", or, in a phrase used more frequently in workers' compensation law, "aggravation" of the disabling condition.

The ALJ nowhere discusses in what way the report and opinion of Dr. Eckman is deficient as evidence in opposition to the presumption. Review of the quoted report, as well as the prior IME reports by Dr. Eckman all contained within RE 1 indicate that Employer - Petitioner has produced an opinion from a qualified expert which followed a review of the pertinent medical records and multiple examinations of the patient, and that he expressed an unequivocal opinion that the claimed disability is unrelated to the work-related injury. By all appearances, then, the ALJ's determination is in error, being contrary to the holding in *Reynolds*. Accordingly, the matter must be reversed and remanded for reconsideration as to whether Claimant-Respondent's evidence demonstrates the claimed causal relationship by a preponderance of all the evidence.

No error has been asserted concerning the ALJ's determination as to the nature and extent of disability, and those findings are therefore undisturbed.

CONCLUSION

The finding in the Compensation Order of that Employer - Petitioner has failed to present adequate evidence to rebut the presumption of causal relationship between the claimed disability and the work injury not in accordance with the law, and must be reversed.

ORDER

The Compensation Order April 29, 2003 is hereby reversed and remanded with instructions that on remand, the ALJ consider the issue of causal relationship without reference to the presumption of compensability and with the burden being placed upon Claimant-Respondent, by a preponderance of the evidence.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

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DATE