

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

CRB No. 11-054

ARTHUR THOMAS III,

Claimant–Petitioner,

v.

THE SHAKESPEARE THEATER COMPANY and GREAT DIVIDE INSURANCE COMPANY,

Employer–Respondent.

Appeal from a Compensation Order of  
Administrative Law Judge Gerald D. Roberson,  
AHD No. 10-362A, OWC No. 664288

William B. Newton, Esquire, for the Petitioner

Joseph C. Veith III, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,<sup>1</sup> LAWRENCE D. TARR and MELISSA LIN JONES, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

**DECISION AND ORDER**

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the claimant, Arthur Thomas III, for review of a May 11, 2011 Compensation Order issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudications section of the District of Columbia Department of Employment Services (DOES). In that Order, the ALJ denied Mr. Thomas's request for an award of temporary partial disability benefits and medical care resulting from an injury to Mr. Thomas's left shoulder, based upon the ALJ's determination that the injury, a torn left bicep labrum,<sup>2</sup> is not

<sup>1</sup> Judge Russell is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

<sup>2</sup> In his deposition testimony, Dr. James Gardiner explained briefly that the muscle in question "surrounds the glenoid or the [shoulder] socket". EE 2, page 12, line20 – 21. The terms "labral" and "labrum" are "general term[s] for an edge,

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
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medically causally related to the injury that the parties stipulated occurred on October 10, 2009. The ALJ also found that Mr. Thomas was voluntarily limiting his income by declining to work in a sedentary position in the theater's box office. Mr. Thomas appealed the denial of benefits related to the torn labrum; the remainder of the Compensation Order was not appealed.

#### BACKGROUND

Mr. Thomas was employed by The Shakespeare Theater Company as a "flyman", in which position he was called upon to work backstage performing multiple tasks involving the sets and scenery changes during the performance of stage shows. The work involves manipulation of the sets by operation of weighted and counterweighted lifts and pulleys, and sometimes requires that workers move about the backstage area by ducking under low spaces. On October 10, 2009, Mr. Thomas had to walk through an area in which there were air ducts approximately four feet off the floor. As he navigated his way, he stood up before completely clearing the ducts, struck the top of his head on the underside of a duct, and fell to his knees. After collecting himself, Mr. Thomas sat out the duration of the shift with an ice pack on his head. That night after work he sought medical care for the injury at an emergency room, where he was treated for a concussion injury and released.

Thereafter Mr. Thomas obtained orthopedic and neurologic medical care from various physicians, missed time from work, underwent physical therapy and ultimately recovered from his injuries sufficiently to return to work in a medium work level capacity. Because of the limited amount of such work that the theater has available, Mr. Thomas was offered a work schedule that included sedentary work in the box office, which work he declined to do. The details of this aspect of the case are not relevant to the appeal before us.

Among other conditions, Mr. Thomas was ultimately diagnosed as having a tear at the bicep-labral anchor. The employer declined to provide compensation benefits, including medical care and wage loss benefits, related to that condition. Mr. Thomas sought a hearing to obtain an award for benefits related to this torn shoulder muscle, and the ALJ denied the claim for those benefits.

Mr. Thomas timely appealed.

#### STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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 § 32-1501, *et seq.*, at § 32-1521.01 (d)(2)(A), (the Act), and *Marriott International v. D.C. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review

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brim or lip", and as it relates specifically to the glenoid, they refer to "a ring of fibrocartilage attached to the rim of the glenoid cavity of the scapula". DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29<sup>TH</sup> EDITION, W. B. Saunders Company, 2000, page 953.

substantial evidence to support a contrary conclusion, and even where this panel might have reached a contrary conclusion. *Id.*, at 885.

#### DISCUSSION AND ANALYSIS

In the Compensation Order, the ALJ initially determined that Mr. Thomas's testimony to the effect that he hit his head as described above, that he subsequently developed left shoulder pain, that he sought treatment from various physicians including Dr. Shaheer Yousaf, an orthopedist, and Dr. George Matthews, a neurologist, coupled with the medical reports from those doctors to the effect that they are of the opinion that the shoulder injury is medically causally related to the work injury, are sufficient to invoke the presumption, under *Whittaker v. D.C. DOES*, 531 A.2d 844 (D.C. 1995), that the shoulder injury is causally related to the stipulated work injury.

The ALJ thereupon considered whether the employer had produced sufficient evidence to overcome that presumption, and determined that in producing two independent medical evaluation (IME) reports from physicians who had examined Mr. Thomas and reviewed the medical records in which both physicians opined that the shoulder injury was not causally related to the work injury, the employer had adduced substantial evidence in opposition to the presumption and that it dropped from the case, requiring that the evidence be re-evaluated without reference to any presumption.

It is not clear from Petitioner's Memorandum whether Mr. Thomas maintains that the ALJ's determination that the employer's evidence was sufficient to overcome the presumption was erroneous. The only discussion of this issue appears on page 9 of the memorandum, and reads as follows:

Even assuming, arguendo, that the Employer rebutted the presumption of compensability through the introduction of IME reports, and that, therefore, the preference for the opinions of the treating physicians are no longer automatically accorded greater weight, the ALJ failed to properly weigh the evidence before him according to the preponderance of the evidence standard, and drew his conclusions based on a fundamental misreading of the facts.

We note in passing that this passage contains a significant error in stating the law relating to presumptions *vis a vis* the treating physician preference. Simply stated, there is no relationship between the two concepts. The treating physician preference rules stand apart from and are unrelated to presumption analysis; they apply whenever conflicting medical opinion evidence is being weighed and considered. Further, in applying them, it goes too far to say that, when applying them, the treating physician's opinion is "automatically accorded greater weight". A more accurate statement would be that in weighing conflicting medical opinion, treating physician opinion is (1) initially accorded greater weight, which it retains (2) unless and until adequate and persuasive reasons for rejecting it and accepting competing, non-treating physician medical opinion are identified and enunciated by the fact finder. Lastly, overcoming the presumption of compensability in no way alters the evaluative rules governing conflicting medical opinion.

In any event, we have reviewed the IME evidence, including the report and deposition of Dr. James Gardiner, an orthopedist, and the report of Dr. Donald Hope, a neurosurgeon, and are satisfied that they constitute direct, unambiguous medical opinion that the torn labrum is unrelated to and was not caused by the October 2009 incident, and that the condition does not represent an aggravation by that incident of some pre-existing condition. In reaching this conclusion, we are mindful that the IME reports and the deposition fail to address aggravation explicitly. Nonetheless, the theoretical underpinnings of the two doctors' opinions are the same: there was a three month delay between the October incident and the January onset of shoulder symptoms, and the mechanism of injury—banging the head against an overhead structure on standing—is inconsistent with a labral tear. These two bases appear sufficiently exhaustive to rule out not only direct causation, but aggravation. We note that there is nothing in the medical evidence adduced by Mr. Thomas to suggest that the shoulder injury represents an aggravation of a pre-existing condition, nor is there in evidence anything suggesting the existence of any such condition to be aggravated. Thus, the ALJ's determination that the presumption has been overcome is supported by substantial evidence and is in accordance with the law. The balance of our review will therefore be addressed to whether the ALJ's weighing of the evidence is likewise in accordance with the law.

In this appeal, Mr. Thomas asserts that the ALJ's determination that the torn muscle that was uncovered by MRI performed August 4, 2010 is not causally related to the work injury of October 10, 2009 (approximately ten months earlier) is not supported by substantial evidence, and was made in violation of the treating physician preference rule that governs the evaluation of conflicting medical opinion in cases arising under the Act.

In explaining the basis for this appeal, Mr. Thomas characterizes the ALJ's determination thus:

On May 11, 2011, the ALJ issued a Compensation Order finding that the Claimant did not medically causally relate his left upper extremity [injury] to the workplace injury of October 10, 2009, and that the Claimant voluntarily limited his income.

Memorandum of Points and Authorities in Support of Claimant's Application for Review (Petitioner's Memorandum), page 2. Then, on page 8 thereof, Mr. Thomas describes his view as to the first of the ALJ's errors:

The ALJ states repeatedly in the Compensation Order that the Claimant did not develop any symptoms in his left upper extremity until three months after the accident. For example, the ALJ stated that "Dr. Matthews and Dr. Yousaf did not explain why Claimant did not develop left shoulder symptoms until three months after the work incident," C.O. at 8. This finding reappears throughout the Compensation Order, and had a fundamental, negative impact on the ALJ's subsequent findings.

Petitioner's Memorandum, page 8. Mr. Thomas then argues that, because the record demonstrates that he complained of left arm pain from very early on in the case, and long before the three months that he asserts the ALJ found, the conclusion of no causal relationship is fundamentally unsound as being based upon a demonstrably false premise.

However, the flaw in Mr. Thomas's argument is that the ALJ did not find as Mr. Thomas suggests. What the ALJ found was that there were no *left shoulder* complaints or abnormalities until three months after the work incident, not that there were no left arm complaints. Indeed, the Compensation Order contains a detailed and accurate description of the medical history, including complaints of "neck pain shooting into the left arm associated with numbness and paresthesias in the left little finger and ring finger" as noted by a neurologist, Dr. Ahmen Kafaji on December 4, 2009.

By couching the ALJ's findings as being premised upon a lack of left arm complaints for three plus months, Mr. Thomas has erected a straw man, which is then knocked down by showing that he did in fact complain of abnormalities in his left arm earlier. However, the ALJ did not find as is suggested in this appeal. Rather, despite there being shooting pains from the neck down the arm and into the fingers, in focusing upon the matter in dispute, i.e., the shoulder itself, the ALJ accurately noted that on October 30, 2009, Dr. Yousaf, an orthopedist, performed an examination that included both shoulders, and which revealed a normal range of motion, yielded normal responses to compression, and yielded no evidence of impingement or shoulder instability. Compensation Order, page 3. In other words, the ALJ found, and the record supports, that despite neck pain radiating into the left arm, Mr. Thomas's *shoulder* examination on December 4, 2009, was completely normal, and that it was not until January 18, 2010 that the same doctor, re-examining the same shoulder, noted for the first time the presence of "crepitation in the left shoulder with positive impingement." Compensation Order, page 3. This finding was repeated on re-examination on February 4, 2010 (Compensation Order, page 3) and the left shoulder range of motion, having been normal in October 2009, was found to be limited on examination by Dr. George Matthews on April 8, 2010 (*id.*).

Although not expounded upon in detail, Mr. Thomas appears to raise the question of whether the ALJ, in accepting the IME opinions of Drs. Gardiner and Hope, did so in a manner consistent with the treating physician preference rules in our jurisdiction. It is well established that, under the law of this jurisdiction, the opinions of a treating physician are accorded great weight, and are generally to be preferred over a conflicting opinion by an IME physician. *See, Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986), *Short v. D. C. DOES*, 723 A.2d 845 (D.C. 1998), and *Stewart v. D.C. DOES*, 606 A.2d 1350 (D.C. 1992). The rule is not absolute, and where there are persuasive reasons to do so, IME opinion can be accepted over that of treating doctor opinion, with sketchiness, vagueness, and imprecision in the treating physician's reports having been cited as legitimate grounds for their rejection, and personal examination by the IME physician, as well as review of pertinent medical records and diagnostic studies, and superior relevant professional credentialing as reasons to support acceptance of IME opinion instead of treating physician opinion. *Erickson v. Washington Metropolitan Area Transit Authority*, OWC No. 181489, H&AS No. 92-63, Dir. Dkt. No. 93-82 (June 5, 1997).

In this case, the ALJ explained his reasons for rejecting the opinions of the treating physicians, Drs. Matthews and Yousaf.

In the case of Dr. Matthews, the ALJ noted that his opinion was based in part upon the erroneous premise that Mr. Thomas's shoulder complaints commenced at the time of the incident, a premise not supported by the records of Dr. Yousaf, in which there are no shoulder symptoms until three months later. The ALJ also noted that Dr. Yousaf fails to explain how the tear discovered so long after the incident could be related to it. Further, the ALJ indicated that neither Dr. Matthews nor Dr.

Yousaf provided an adequate explanation for the mechanism of a causal relationship between banging one's head while standing up, and tearing a muscle in one's shoulder. Dr. Matthews, we note, gave no explanation. As to Dr. Yousaf's explanation, found in CE 1, the ALJ rejected it as being unsupported by Mr. Thomas's own description of the incident. That is, while Dr. Yousaf explained the tear as being the result of Mr. Thomas's sudden exertions in trying to catch himself while falling, the ALJ noted that Mr. Thomas never described any such action or maneuver, and never described any trauma to the shoulder, in his testimony at the hearing, or in the pretrial deposition that he gave (EE 9). It was these factors that caused the ALJ to accept the opinions of Drs. Gardiner and Hope, both of whom based their opinions in part upon these factors (that is, upon the delay between the date of the initial incident and the onset of shoulder symptoms, and the lack of a correlation between the torn labrum and the mechanism of the trauma as reported by the patient), in preference to the treating physicians. In our view, they are adequate to justify setting aside the initial preference to which treating physician opinion is entitled when the evidence is weighed.

We discern no error in the findings of fact, which are supported by substantial evidence in the record, nor in the application of those facts to the law, in the ALJ's conclusion that the labral tear has not been shown to be causally related to the work injury of October 10, 2009.

#### CONCLUSION

The Compensation Order of May 11, 2011 is supported by substantial evidence and is in accordance with the law.

**ORDER**

The Compensation Order of October 10, 2009 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



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JEFFREY P. RUSSELL  
*Administrative Appeals Judge*

August 23, 2011

DATE