

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
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CRB No. 08-039

AUDREY SAMPSON,

Claimant – Respondent

v.

EXTREME STEEL, INC, AND AIG CLAIMS SERVICES, INC. ,

Employer/Carrier – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge David L Boddie¹
AHD No. 05-225, OWC No. 603958

Howard Miller, Esq., for the Petitioner

Heather Leslie, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, SHARMAN J. MONROE and
JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *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 § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

OVERVIEW

On October 15, 2007, the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES) issued a Compensation Order in this case. In the Compensation Order, the

¹ The caption of the Compensation Order indicates this case was before ALJ Boddie. The record shows ALJ Boddie conducted the formal hearing. However, Footnote 1 and the signature page indicate ALJ Newsome, pursuant to an Order to Show Cause, authored the Compensation Order.

Administrative Law Judge (ALJ) granted the Claimant-Respondent's (Respondent) request for temporary total disability benefits continuing from August 18, 2004, causally related medical expenses, accrued interest and authorization for an MRI, for physical therapy, for arthroscopy of the left shoulder and to see a neurologist. The ALJ found the Respondent's injury arose out of and in the course of her employment, the Respondent was unable to work due to her injuries, and the Respondent's average weekly wage was \$960.00.

On November 13, 2007, the Employer/Carrier-Petitioner (Petitioner) filed an Application for Review appealing the Compensation Order. As grounds for this appeal, the Petitioner alleges a lack of substantial evidence to support the ALJ's award of benefits. Specifically, the Petitioner asserts because the formal hearing was held on August 9, 2005 and the record closed on August 26, 2005, "it would be impossible" for the ALJ to have any evidence to support findings of a disability over two (2) years after the conclusion of the hearing. The Petitioner maintains such findings are based on "pure speculation" and not on substantial evidence. *See* Memorandum of Points and Authorities in Support of Employer and Carrier's Application for Review at pp. 4-5.

On November 28, 2007, the Respondent filed a Response advocating the Compensation Order be affirmed. The Respondent asserts AHD issued an Order to Show Cause why this case should not be assigned to another ALJ and the Petitioner did not respond. The Respondent maintains the Petitioner, although given the opportunity, did not request to re-open the record or to conduct a re-hearing to introduce new evidence before the ALJ issued the Compensation Order. The Respondent asserts the Petitioner, therefore, waived any objections to a Compensation Order based upon the record made at the August 9, 2005 hearing.

After a review of the record, the Panel affirms the Compensation Order.

ISSUE

The issue on appeal is whether the grant of benefits is supported by substantial evidence in the record and is in accordance with the law.²

STANDARD OF REVIEW AND APPLICABLE PRINCIPLES OF LAW

As an initial matter, the standard 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 § 32-1521.01(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. 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 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,

² In this appeal, neither party challenged the ALJ's findings on the Respondent's average weekly wage. Therefore, the Panel will not address the Respondent's average weekly wage.

and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In this jurisdiction, once an injured worker establishes a *prima facie* case of total disability, the employer must present sufficient evidence of suitable job availability to overcome a finding of total disability. If the employer fails, the injured worker is entitled to a finding of total disability. See *Logan v. D.C. Department of Employment Services*, 805 A.2d 237, 244 (D.C. 2002).

ANALYSIS

At the outset, the Panel finds the ALJ erred in stating a stipulation of accidental injury entitled the Respondent to the presumption of compensability based upon *Whitely v. Howard University*, CRB No. 06-71, OHA No. 03-500, OWC No. 578967 (February 16, 2007). In *Whitely*, the Panel determined the presumption had been invoked because the parties stipulated the injured worker “sustained an accidental injury on March 13, 1986 which arose out of and in the course of his employment.” *Whitely* at pp. 6-7. [emphasis added]. The language in the stipulation invoking the presumption was “arose out of and in the course of his employment”. When “it is undisputed that [an] injury arose out of and in the course of . . . employment, . . . the presumption is no longer part of the case.” *Dunston v. D.C. Department of Employment Services*, 509 A.2d 109, 111 (D.C. 1986). The language “accidental injury” merely means “something unexpectedly goes wrong with the human frame”. *Jones v. D.C. Department of Employment Services*, 519 A.2d 704, 708 (D.C. 1987). Despite finding the ALJ erred, the Panel also finds the error is harmless because the ALJ later properly applied the presumption to the facts of this case and found the Respondent’s injury arose out of and in the course of her employment.

After a review of the record, the Panel finds the Petitioner’s challenge of the ALJ’s award of benefits without merit. The Panel determines the ALJ’s finding is supported by substantial evidence in the record. The ALJ reviewed the record medical evidence from Dr. Jeffrey Sabloff, the treating physician, and Dr. Arthur Kobrine, the independent medical examiner. Dr. Sabloff, based upon his examinations and treatment of the Respondent for her work injuries, opined the Respondent was totally restricted from employment. The ALJ applied this jurisdiction’s treating physician preference and accorded great weight to Dr. Sabloff’s medical opinion. See *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350, 1353 (D.C. 1992). Although not required, the ALJ stated her reason for rejecting Dr. Kobrine’s medical opinion. See Compensation Order at p. 6. Further, the ALJ found, and the finding is supported by record, the Petitioner offered no evidence of suitable work available for the Respondent.

The Panel rejects the Petitioner’s argument that the ALJ did not have any evidence to support findings of a disability over two (2) years after the conclusion of the hearing. The Petitioner did not respond to the Order to Show Cause or object to this matter being decided on the record made at the August 9, 2005 formal hearing. The Petitioner’s recourse at this point is to request a modification under D.C. Official Code § 32-1524.

The record fully supports the ALJ's decision, and the Panel affirms the Compensation Order.

CONCLUSION

The Compensation Order of October 15, 2007 granting benefits to the Respondent is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of October 15, 2007 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

April 25, 2008
DATE