CRB 12-101

KEVIN BURKE,
CLAIMANT-PETITIONER,

v.
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
SELF-INSURED EMPLOYER -RESPONDENT.

Appeal from a Compensation Order by
Administrative Law Judge Karen R. Calmeise
AHD No. 12-115, OWC No. 682335

Matthew J. Peffer, Esquire, for the Claimant
Mark H. Dho, Esquire, for the Self-Insured Employer

Before LAWRENCE D. TARR, HEATHER C. LESLIE,[1] AND JEFFREY P. RUSSELl,[2] *Administrative Appeals Judges.*

LAWRENCE D. TARR, *Administrative Law Judge* for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the claimant, Kevin Burke, of a June 8, 2012, Compensation Order (CO) by Administrative Law Judge (ALJ) Karen R. Calmeise. In the CO, Judge Calmeise denied the claimant's request for temporary total disability benefits.

PROCEDURAL HISTORY AND BACKGROUND FACTS OF RECORD

The claimant, Kevin Burke, is employed by the Washington Metropolitan Area Transit Authority (WMATA) as a station manager, a job that, among other tasks, involves opening and closing the entrance gates at the Georgia Avenue-Petworth subway station. He previously was employed by

[1] Judge Leslie has have been appointed by the Director of DOES as a CRB member pursuant to DOES Policy Issuance No. 12-02 (June 20, 2012).

[2] Judge Russell has been appointed by the Director of DOES as a CRB member pursuant to DOES Policy Issuance No.12-01(June 20, 2012).

WMATA as a train operator. Burke has had two accidents at work, one on April 15, 2008, and the other on June 30, 2011.[3] Each accident involved injuries to both his wrists.

On April 15, 2008, while working for WMATA as a train operator, the claimant injured both wrists from repetitively opening and closing cab windows and continually using a master controller. The claimant received medical care at Kaiser Permanente and then from Dr. Joel D. Fechter. Dr. Fechter diagnosed bilateral deQuervain's tenosynovitis. The claimant underwent bilateral wrist surgery in 2010, continued to have pain and limitations in both wrists and continued to treat with Kaiser Permanente and Dr. Fechter.

The claimant filed a claim for the 2008 injury and an ALJ awarded him temporary total disability benefits from August 12, 2010 to September 7, 2010, temporary partial disability benefits from September 7, 2010 through October 17, 2010, and further held the claimant did not voluntarily limit his income. *Burke v. WMATA*, AHD No. 10-511, OWC No. 650205 (February 28, 2011). Thereafter, the claimant received permanent partial disability benefits for the 23% loss to his left arm and the 21% loss to his right arm.

The claimant's second injury occurred on June 30, 2011, when he pulled a station gate and experienced pain in both hands and wrists. He went to Kaiser Permanente and was diagnosed with a wrist sprain and deQuervain's tendonitis. After treating there for about three weeks, the claimant returned to Dr. Fechter.

The claimant filed a claim for this injury also. On April 25, 2012, ALJ Calmeise held an evidentiary hearing to consider his request for temporary total disability benefits from October 14, 2011 to October 29, 2011, and temporary total benefits from November 18, 2011, through the date of the hearing and continuing. The employer defended the claim on the ground that the claimant's disability solely related to the April 15, 2008, injury and that no indemnity benefits were owed because the claimant previously received an award for the permanent partial disability to both arms for that injury.

In her CO, the ALJ denied the claim. The ALJ held that the claimant had not sustained a new injury on June 30, 2011 but that his medical treatment and disability after that event were related to the 2008 injury. The ALJ, primarily relying on *Smith v. DOES*, 548 A.2d 95 (D.C. 1988), and *Cherrydale Heating and Air Conditioning v. DOES*, 722 A.2d 31 (D.C. 1988), also held that the claimant was not entitled to indemnity payments after the scheduled award for the 2008 injury:

> Although Claimant initially received, by the intake physician, a diagnosis of wrist sprain on this date (along with a diagnosis of bilateral wrist tendonitis), I find the Claimant's medical treatment following the June 2011 work injury and during the claimed "off-work" periods was not attributable to a "new or different wrist injury(") but was related to his post-surgical deQuervain's tenosynovitis.

[3] At various places in the June 8, 2012, CO, the ALJ identified the date of injury as either June 30, 2012, or June 30, 2011. It is clear the date of injury was June 30, 2011.

> Having reviewed the circumstances of the instant matter and particularly Claimant's treatment reports and recommendation referral to Dr. Barth for assessment following the June 30, 2011 pulling incident, I am not persuaded that Claimant's bilateral wrist condition, unlike that in *Poole* warrants a departure from the statutory conclusiveness of the schedule award recognized in *Smith*. I find that Claimant's pulling incident and the subsequent increased pain and discomfort in his bilateral wrists was a foreseeable complaint and the fact that he suffered increased disability following the incident does not rise to the level of an exception that would warrant an award of additional benefits outside of the schedule award.

CO at 6.

The claimant timely appealed. On review, the claimant argues that the ALJ failed to apply the presumption of compensability with respect to the 2011 event in that the additional trauma caused substantially greater disability to a pre-existing condition. The claimant also argues that the ALJ's decision should be reversed and an award entered because the employer did not present any evidence severing the presumption.

In opposition, WMATA asserts that even though the ALJ did not specifically reference the presumption, this omission should be considered harmless error because the medical evidence from Dr. Draper and Dr. Johnson, together with the claimant's testimony, rebutted the presumption and the ALJ's denial of benefits for both injuries is supported by substantial evidence in the record.

THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. "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) and §32-1521.01(d) (2) (A) of Act.

Consistent with this standard of review, the CRB is constrained to uphold an order 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. *Marriott, supra.*

DISCUSSION AND ANALYSIS

The ALJ made two substantive determinations in the CO. She first decided that the claimant's medical treatment and disability after the June 2011 event were related to his "post-surgical DeQuervain's tenosynovitis", i.e. the 2008 injury. She then decided that the claimant cannot receive additional temporary total benefits for this injury because he previously received permanent partial disability benefits

As to the first determination, in finding that the medical treatment and disability only was caused by the 2008 injury, the ALJ noted that while the first post-2011 injury medical report, the July 1, 2011 report from Kaiser Permanente, diagnosed a sprain in addition to bilateral wrist tendonitis, the later

reports "Tenosynovitis, deQuervains" as the primary cause. The ALJ also noted that between July 12, 2011 and March 16, 2012, Dr. Fechter's report did not say anything about a wrist sprain or new injury but referred to the claimant's history of deQuervain's tenosynovitis.

D.C. Code §32-1521 provides a presumption of compensability. This presumption extends not only to the occurrence of an accidental work place injury, but also extends to the medical causal relationship between an alleged disability and the accidental injury. *Whittaker v. DOES, 531 A. 2d 844 (D.C. 1995).*

Once the claimant makes an initial demonstration of two facts: (1) death or disability and (2) a work-related event, activity, or requirement that has the potential of resulting in, or contributing to, death or disability, he has invoked the presumption. The burden then shifts to the employer to present evidence that rebuts the presumption. If the employer does, then the presumption is eliminated and the burden reverts to the claimant to prove his case by a preponderance of the evidence and the evidence is weighed without the presumption.

Also relevant to this discussion is the law in our jurisdiction with respect to an aggravation of a pre-existing condition. A worker who has a preexisting condition is entitled to compensation if the workplace conditions or events aggravate that condition, even in part, rendering the previously employed worker unable to work. *McCamey v. DOES,* 947 A.2d 1191 (D.C. 2008).

Here, the ALJ weighed the medical record evidence and the claimant's testimony and concluded that he had not proven that his current disability and need for medical care was caused by the 2011 injury and that his disability and medical care was caused by the 2008 injury. However, she did not analyze the evidence in accordance with the presumption analysis.

When an ALJ fails to make factual findings on each materially contested issue, an appellate body is not permitted to make its own finding on the issue; it must remand for the proper factual finding. *See Jimenez v. DOES*, 701 A.2d 837, 838-840 (D.C. 1997) and *Sturgis v. DOES,* 629 A. 2d 547 (D.C. 1993). The CRB can no more "fill the gap" by making its own findings from the record than can the Court of Appeals upon review of a final agency decision, but must remand the case to permit the ALJ to make the necessary findings. *See Mack v. DOES,* 651 A.2d 804, 806 (D.C. 1994).

The ALJ determined the comparative evidentiary weight to be given the evidence, without first determining whether the evidence submitted by the employer, standing alone, rebutted the presumption. Therefore, because the ALJ's conclusion was reached without applying proper legal principles, the CO is not in accordance with the law.

The employer does not dispute that the ALJ failed to use the presumption analysis. The employer, apparently conceding that the claimant's evidence invoked the presumption, argues that the ALJ's failure to determine if the presumption was rebutted is harmless error.

The employer, in effect, asks that the CRB make the initial determination as to whether the evidence it presents was sufficient to rebut the presumption. Such a request is beyond the CRB's authority. The CRB does not hear cases *de novo*. It is authorized to review findings of fact and conclusions of law. 7 DCMR §§266.1 and 266.2.

Because the ALJ did not analyze the record evidence in accordance with the applicable law, we must remand this case. The CRB cannot affirm a CO that "'reflects a misconception of the relevant law or a faulty application of the law.' *D.C. Dep't of Mental Health v. DOES*, 15 A. 3d 692, 698 (D.C.2011), *WMATA v. DOES, 992* A.2d 1276, 1280 (D.C. 2010) (quoting *Georgetown University v. DOES and Ford, Intervenor*, 971 A. 2d 909, 915 (D.C. 2009).

CONCLUSION

The ALJ's June 8, 2011, Compensation Order is not in accordance with the law.

ORDER

The June 8, 2011, Compensation Order s VACATED and this matter is REMANDED for further consideration in accordance with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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LAWRENCE D. TARR
Administrative Appeals Judge

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DATE