

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 14-118**

**CHARLES HAWES,  
Claimant-Respondent,**

**v.**

**THYSSENKRUPP ELEVATOR and  
SEDGWICK CLAIMS MANAGEMENT  
Employer/Carrier-Petitioner.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 FEB 24 PM 1 55

Appeal from a September 18, 2014 Compensation Order by  
Administrative Law Judge Joan E. Knight  
AHD No. 13-299, OWC No. 692835

David M. Schloss for the Claimant  
Michael L. Dailey for the Employer

Before LINDA F. JORY, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY, for the Compensation Review Board.:

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Claimant has worked for Employer as an elevator mechanic apprentice since 2011. Claimant has a documented history of back injuries, lumbar disc disease and ruptured lumbar intervertebral disc disease at L4-5 and L5-S1. Claimant was involved in a motor vehicle accident (MVA) on December 14, 2011 and treated with Dr. Jeffrey Phillips for cervical, lumbosacral and right shoulder strains. Claimant did not miss any work due to the MVA and was discharged from care on April 9, 2012. On June 1, 2012, Claimant was in an elevator shaft and suffered a posterior cervical injury after a weighted elevator pulley rope malfunctioned and the cord struck the back of his neck. Claimant was strapped in a safety harness and the weight of the cord hit him with such force that it knocked him to his knees and left him partially hanging over the open elevator shaft until co-workers pulled it off of his neck. On June 13, 2012, claimant was evaluated at an urgent care facility for blunt trauma to the spine, burning neck pain radiating down to his lumbar spine and headaches.

Cervical and lumbar MRI's taken on June 19, 2012, revealed disc herniations at C5-6, C4-5, bulging disc C3-4; left mild disc bulge L4-5 and large left lateral disc herniation L5-S1. Claimant was referred for a neurological evaluation with Joshua Ammerman, who had treated claimant for his previous lumbar problems. After reviewing claimant's MRI scans, Dr. Ammerman found a larger disc herniation at the L5-S1 level when compared to the lumbar MRI taken in 2009 and recommended claimant undergo a decompressive left lumbar laminectomy.

Neurosurgeon Mark Klein examined Claimant and the MRIs and reported claimant's lumbar condition preceded the June 2012 work injury.

Dr. Ammerman performed the laminectomy and discectomy at the L5-S1 level. Claimant has not been cleared to return to work and permanent repetitive lifting, kneeling and bending restrictions have been imposed.

A full evidentiary hearing occurred on August 1, 2013. Claimant sought an award of temporary total disability benefits from October 19, 2012 to the present and continuing as well as payment of causally related medical benefits.

An administrative law judge (ALJ) issued a Compensation Order (CO) on September 18, 2014. The ALJ concluded Claimant met his burden under the Act to establish his disabling lumbar problems which gave rise to surgical intervention was causally related to the June 1, 2012 work injury and as a result Claimant was temporarily and totally disabled.

Employer timely appealed. Employer asserted that the CO should be reversed because the ALJ failed to properly apply the presumption and improperly relied upon the opinion of the treating physician. Claimant opposed Employer's appeal, asserting the ALJ applied the law correctly and relied on substantial evidence in reaching her conclusions.

#### STANDARD OF REVIEW

The scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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. Code § 32-1521.01(d)(2)(A). "Substantial evidence", as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this panel are bound 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*, 834 A.2d at 885.

## ANALYSIS

Employer initially incorrectly argues that the long established treating physician preference in the private sector has been challenged and cites *District of Columbia Public Schools v. DOES*, 95 A.3d 1284 (DC 2014)(*DCPS*). We disagree.

The DCCA in *DCPS* determined that the common law adoption of the private sector treating physician preference in public sector cases that resulted from *Kralick v. DOES*, 842 A.2d 705 (DC 2004) was statutorily eliminated by an act of the DC Council and that continuing to apply it in public sector cases was error. The DCCA made no legal analysis of the preference when it decided that it had been eliminated in public sector cases by legislation. No such statutory change has been made to the private sector act, nor will the CRB revisit this long established principle at this time.

Employer asserts the opinion stated in the independent medical examination of neurosurgeon, Mark Klein constitutes substantial evidence to overcome the presumption and sever the causal relationship of the 2012 work accident and the subsequent need for surgery. Employer further asserts that Claimant failed to offer the necessary evidence from his neurosurgical expert to support the alleged causal relationship of a back injury or need for surgery.

Claimant responds that Employer incorrectly assumes that the presumption in favor of causation was found to be un rebutted. Claimant asserts that the ALJ based her decision upon the weight of the medical opinions.

In the (CO), the ALJ first determined Claimant was entitled to the rebuttable presumption that there is a causal relationship between Claimant's work accident and his current back condition and that Employer's evidence sufficiently rebutted the presumption. The ALJ stated:

To rebut the presumption, Employer argues Claimant had prior low back injuries with degenerative lumbar problems and the need for surgical intervention was related to trauma to his back in 2007 when he sustained a lumbar disc herniation and in 2009 when [he] sustained a rupture of the lumbar disc and not the rope striking his neck in June 2012. In support of its position Employer offers *inter alia*, the Independent Medical Evaluation (IME) of Dr. Klein dated October 4, 2012 and addendum dated February 26, 2013 respectively. In his report, Dr. Klein noted prior MRI scans taken in 2009 revealed a ruptured and herniated disc at L5-S1. Dr. Klein stated there is no medical causal relationship of the lumbar spine damage and the June 1, 2012 incident.

The independent medical evaluation adduced by the Employer is sufficient to rebut the presumption that has been invoked. The recorded evidence is therefore reviewed without reference to any presumption in order to determine whether the Claimant has shown, by a preponderance of the evidence, his lumbar condition is causally related to his employment. It is well established there is a preference

accorded to the opinions of treating physicians that are generally more reliable than the medical opinions of independent physicians who have not rendered medical treatment and/or have been retained to examine injured workers solely for purposes of litigation.

CO at 6.

The ALJ correctly determined Claimant was entitled to the benefit of the presumption that the complained of back condition and the requested surgery are causally related to the stipulated work injury. The Panel further concludes the ALJ found that Employer had rebutted the presumption and reviewed the record evidence as a whole, without reference to the presumption, but taking into account the preference that is accorded to the opinions of treating physicians in this jurisdiction. *Short v. DOES*, 723 A.2d 845 (D.C. 1998), *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992). The ALJ determined Claimant has established by a preponderance of the evidence, that Claimant's condition is causally related to the stipulated work injury. We find no error committed by the ALJ in her analysis.

Rejecting the opinion of the IME physician, Dr. Klein, the ALJ explained:

The record evidence establishes Drs. Phillips, Salters, Meyer and Dr. Ammerman treated Claimant following his June 2012 work accident and for his prior lumbar injuries and therefore are in better positions to give a more reliable medical opinion addressing Claimant's current lumbar condition.

Treatment notes show Claimant's lumbar condition worsened following the work accident as evidence by treatment notes dated April; 9, 2012, that establish Claimant was asymptomatic and not under active care for his lumbar condition. Moreover, Dr. Ammerman's medical assessments and opinions regarding an enlargement of Claimant's disc herniation following the June 1, 2012 work accident are most consistent [and] substantiated by objective medical findings. Dr. Ammerman, who was treating Claimant for bulging [disc] and disc disease at L4/L5 and L5/S1, opined in May 2008, Claimant was not a surgical candidate at that time. Treatment records establish that it was not until Claimant suffered a new debilitating lumbar strain and a herniated disc enlargement following the June 1, 2012 work accident that Dr. Ammerman advised surgical intervention.

CO at 6.

The CRB finds the ALJ's decision is supported by substantial evidence. .

The CRB does not reweigh evidence so long as there is substantial evidence in the record to support the ALJ's finding. Employer is correct that the record does not contain an opinion specifically stating that the need for the lumbar surgery is causally related to the June 2, 2012 incident. The Panel does not however, agree with Employer's assertion that treatment records should not be relied on as the ALJ is required to consider the record evidence as a whole and the

treatment records support the ALJ's determination that Claimant's lumbar condition worsened following the work accident. The ALJ particularly referenced the April 9, 2012 record of Dr. Jeffrey Phillips, who discharged Claimant upon finding he had recovered from his December 14, 2011 automobile accident and advised him to discontinue any medication prescribed by his office.

It is well settled in this jurisdiction that an employee's disability is compensable if it arose "even in part" out of the course of his employment and an aggravation of a pre-existing condition may constitute a compensable accidental injury. *Ferreira v. DOES* 531 A.2d 651, (D.C. 1987) citing *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 407 F.2d 308 (1968)(en banc) and *Hensley v. Washington Metropolitan Area Transit Authority*, 210 U.S.App. D.C. 151, 655 F.2d 264 (1981); *Parodi v. DOES*, 560 A.2d 524 (D.C. 1989).

Claimant testified at the formal hearing that he has to lift 80 to 100 pounds almost every day; that he was not recommended to have surgery after the 2007 injury; and that he was not having any trouble with his lower back immediately prior to the June 1, 2012 work incident. Hearing Transcript at 62, 72, 82. The Panel further acknowledges that claimant was working since 2011 as an elevator apprentice without any limitations until the work incident of June 1, 2012. The ALJ found claimant to be a credible witness

With claimant's credible testimony about his physical condition prior to the work incident and Dr. Ammerman's report that claimant's disc herniation was larger on claimant's 2012 MRI when compared to the 2009 MRI, this panel finds the ALJ's determination that Claimant met his burden of establishing a causal relationship between his lumbar surgery is supported by substantial evidence. Dr. Klein's opinion that the need for any surgery to the lumbar spine would have predated and continues to predate the injury which occurred at work is not consistent with Claimant's credible testimony or the treating physician read of the MRI results.

Employer has not appealed the ALJ's nature and extent analysis. We find the ALJ's conclusion that Claimant was temporarily and totally disabled to be in accordance with the law and supported by substantial evidence.

#### CONCLUSION AND ORDER

The September 18, 2014 Compensation Order is supported by substantial evidence and is in accordance with the law and is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

  
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LINDA F. JORY  
*Administrative Appeals Judge*

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February 24, 2015  
DATE