

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**  
**Labor Standards Bureau**

**Office of Hearings and Adjudication**  
**COMPENSATION REVIEW BOARD**



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**CRB No. 07-114**

**CLAUDE MILLER,**

**Claimant – Respondent**

**v.**

**D.C. WATER & SEWER AUTHORITY AND PMA GROUP,**

**Employer/Carrier –Petitioner.**

Appeal from a Compensation Order of  
Administrative Law Judge Belva D. Newsome  
AHD No. 05-291, OWC No. 604485

Douglas A. Datt, Esquire for the Petitioner

Howard B. Ackerman, Esquire for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the Review Panel:

**DECISION AND REMAND 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).<sup>1</sup>

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<sup>1</sup> 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 District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, 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. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), 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.

## BACKGROUND

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 Order, which was filed on May 2, 2007, the Administrative Law Judge (ALJ) granted the request by Claimant-Respondent (Respondent) for temporary total disability benefits from November 9, 2004 until August 14, 2005. Employer-Petitioner (Petitioner) now appeals that Compensation Order.

As grounds for this appeal, Petitioner alleges that the ALJ's decision is not supported by substantial evidence and is not in accordance with the law.

## ANALYSIS

As an initial matter, the scope 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 §32-1522(d)(2). "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 scope 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, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, the Petitioner alleges that the ALJ's determination that it had failed to rebut the presumption was erroneous as a matter of law and as such, the ALJ erred in concluding that Respondent's condition was causally connected to any work injury in November of 2004. In addition, Petitioner argues that the ALJ erred in failing to consider Petitioner independent medical report in the analysis of the nature and extent of Respondent's disability. Respondent counters that the Compensation Order is fully supported by substantial evidence in the record and by the applicable facts and law and therefore should be affirmed.

As to the presumption, Petitioner argues that Dr. Robert Gordon, after personally examining Respondent, reviewed the relevant medical records and stated an unequivocal opinion contrary to the causal relationship presumption, which is sufficient to rebut the presumption. As such, the burden is reverted to Respondent to prove, by a preponderance of the evidence, without aid of the presumption, a causal relationship between his current disability and the work injury.

After reviewing the evidence in the record, the ALJ stated:

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Employer has not presented any sufficiently specific and comprehensive evidence to sever the now-presumed connection between the employment related activity and the injury. Therefore, I find Claimant sustained an accidental injury that arose out of and in the course of Claimant's employment.

Compensation Order at 6.

However, to rebut the presumption of compensability, "an employer [need] only to offer 'substantial evidence' to rebut the statutory presumption of compensability, not to disprove causality with absolute certainty." *Washington Hospital Center v. Dist. of Columbia Dep't. of Employment Servs.*, 744 A.2d 992, 1000 (D.C. 2000). Substantial evidence is relevant evidence that a reasonable person would consider adequate to support a conclusion. *Dell v. Dist. of Columbia Dep't. of Employment Services*, 499 A.2d 102, 108 (D.C. 1985). Other than stating that "substantial evidence" means "more than a mere scintilla," the Court of Appeals has not established a precise quantum of proof required to meet the substantial evidence threshold. However, in *Safeway Stores, Inc. v. Dist. of Columbia Dep't. of Employment Servs.*, 806 A.2d 1214, 1220 (D.C. 2002), the Court has indicated that the statutory presumption "is not so strong as to require the employer to prove causation is impossible in order to rebut it." As such, "it is sufficient for the employer to present substantial medical evidence - as opposed to unequivocal medical evidence - to rebut the statutory presumption." *Id.* at 1221.

The record in this matter reveals that in his report of July 12, 2005, Dr. Gordon stated:

In summary, it appears that the patient made a good recovery from the 12/26/2001 work injury and I believe that it is most likely that the increasing symptoms that he developed in his shoulder in November, 2004, were not related to that injury. I believe that his increasing symptoms could be related to the motor vehicle accidents that occurred in October and November of 2003, for the reason noted above and in my previous reports. They also could have been related to a gradual increase in his degenerative condition, causing some impingement. That would be consistent with the fact that these symptoms increased in November of 2004 without any new trauma.

In a July 26, 2006 letter to Petitioner's counsel, Dr. Gordon wrote:

Also, as I indicated previously, I do not believe that these restrictions on his physical capacity are related to the scapular fracture that occurred when he fell on 11/26/2001 and I do not believe that any injury to his shoulder occurred on 11/09/2004, which is specifically what the patient told me when I saw him on 01/11/2005. I believe that any problems he has with his shoulder are either related to other injuries or to a combination of degenerative and congenital conditions, including AC joint impingement from degenerative change and a downsloping acromion as was noted by the radiologist.

Petitioner's Exh. No. 1.

As such, the record contains Dr. Gordon's clear opinion that no causal relationship exists between Respondent's claimed disability and his work injury, as Petitioner's evidence provided a medical opinion that Respondent's claimed disability was not related to his work injury and provided alternative explanations to the causation issue. See *Washington Post v. Dist. of Columbia Dep't. of Employment Servs.*, 852 A.2d 909 (D.C. 2004)(*Reynolds*). Based upon the foregoing medical opinion of Dr. Gordon, the substantial evidence of record does not support the ALJ's conclusion that Petitioner failed to produce sufficient evidence to rebut the presumption of compensability.

Therefore, this Panel concludes that after presenting relevant evidence that a reasonable person would consider adequate to support its position of no causal relationship, Petitioner carried its burden in the instant matter. Thus, the statutory presumption drops out of this case entirely and the burden reverts to the Respondent to prove by a preponderance of the evidence, without the aid of the presumption, that a work-related injury caused or contributed to his disability. See *Reynolds*, 852 A.2d at 911.

This Panel does acknowledge that one could argue that despite clearly finding that Petitioner did not rebut the presumption, there is some discussion in which the ALJ arguably seems to weigh the competing medical evidence. However, since this is not completely obvious, and particularly since it appears that the ALJ failed to clearly distinguish findings of fact from conclusions of law, it seems more prudent to remand this matter for the ALJ to resolve Respondent's request for benefits, after properly weighing the competing medical evidence, without aid of the presumption. In *Vanhoose v. Respicare Home Respiratory Care*, CRB No 07-022, AHD No. 06-342 (July 23, 2007), the CRB, in great detail, discussed how the ALJ's decision must state findings of fact on each material contested factual issue, that those findings must be based on substantial evidence and that conclusions of law must rationally follow from the findings. The CRB stated:

Thus, where an ALJ fails to make express findings on all contested issues of material fact, 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. D.C. Department of Employment Services*, 651 A.2d 804, 806 (D.C. 1994).

*Vanhoose* at 3.

Finally, it should be noted that on appeal Petitioner argues that the ALJ erred by failing to consider Dr. Gordon's report, in analyzing the nature and extent of Respondent's disability. Petitioner protests that while correctly stating that Respondent is not entitled to any presumption regarding the nature and extent of his disability, citing *Dunston v. Dist. of Columbia Dep't. of Employment Servs.*, 509 A.2d 109, 111 (D.C. 1986), the ALJ did not consider Dr. Gordon's July 26, 2005 report in which the physician concluded that based on the job description, Respondent could return to his employment effective July 26, 2005. On remand, after weighing the competing medical evidence, should the ALJ conclude that Respondent sustained an accidental injury arising out of and in the course of his employment, the ALJ must consider and weigh the conflicting

medical evidence submitted by Petitioner and Respondent, in resolving the issue of the nature and extent of Respondent's disability.

Accordingly, this matter must be remanded for the ALJ to properly weigh the competing medical evidence on causation submitted by Petitioner and Respondent and make further findings of fact and conclusions of law to resolve Respondent's request for benefits.

**CONCLUSION**

The Compensation Order of May 8, 2007 is not supported by substantial evidence and is not in accordance with the law.

**ORDER**

The Compensation Order of May 8, 2007 is hereby VACATED and REMANDED for further proceedings consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

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FLOYD LEWIS  
Administrative Appeals Judge

July 31, 2007  
DATE