GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-094

DAMASSE PIERRE,
Claimant-Respondent,

v.

ABP CORPORATION and
LIBERTY MUTUAL INSURANCE COMPANY,
Employer-Petitioner.

Appeal from a June 29, 2016 Compensation Order
of Administrative Law Judge Amelia G. Govan
AHD No. 15-241, OWC No. 707222

(Decided November 18, 2016)

William J. Inman for Claimant
Christopher R. Costabile for Employer

Before LINDA F. JORY, GENNET PURCELL, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND PARTIAL REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Damasse Pierre ("Claimant") is an 81-year-old Haitian immigrant. He worked for Au Bon Pain restaurant which is owned by ABP Corporation ("Employer"). Claimant's duties varied and included numerous restaurant/kitchen activities such as stocking, bussing tables, kitchen cleaning, food preparation, warehouse running and yard cleaning.

On June 26, 2013, Claimant fell on a wet floor, injuring his left knee. Claimant returned to work but sought treatment for left knee swelling and pain on July 11, 2013 at Washington Adventist Hospital. He was released for full duty on July 14, 2013. Claimant worked on July 18, 2013 and did not work again for Employer. No treatment was rendered until May 1, 2014 when Claimant

started treating with Dr. Harvey Mininberg. Claimant underwent an MRI of his left knee ordered by Dr. Mininberg on May 9, 2014. The MRI revealed significant bone bruising and edema of the medial tibial plateau, with moderate osteoarthritic changes. Dr. Mininberg recommended Claimant try to return to full duty work on July 14, 2014 but Claimant returned to him on July 28, 2014 stating he could not return to full duty work due to his left knee complaints. Dr. Mininberg opined on that date that Claimant was unable to work.

On September 15, 2014, Claimant was examined by Dr. Larry Becker, an orthopedic specialist at the request of Employer. Dr. Becker reviewed Dr. Mininberg's records as well as the x-rays and the May 9, 2014 MRI of the left knee and reported the second page of the MRI report was not included.

A dispute arose as to whether Claimant's alleged wage loss was causally related to the June 26, 2013 work injury and a formal hearing was held on October 22, 2015.

The issues presented to the administrative law judge ("ALJ") were:

1. Is Claimant's current disability causally related to the June 26, 2013 work injury?

2. What is the nature and extent of Claimant's current disability, if any?

3. In that Claimant's average weekly wage is lower than the minimum compensation rate per D.C. Official Code § 32-1505(c), are permanent total disability benefits to be paid at the minimum compensation rate?

The ALJ concluded that Claimant was temporarily totally disabled from his usual employment between July 19, 2013 and October 3, 2014; permanently and totally disabled as of October 4, 2014 and for the period subsequent to October 3, 2014, he is entitled to the statutory minimum compensation rate. *Damasse Pierre v. ABP Corporation*, AHD No. 15-241, OWC No. 707222 (June 29, 2016) ("CO").

Employer timely appealed the CO to the Compensation Review Board ("CRB") by filing Employer's Application for Review and Memorandum of Points and Authorities in Support of Application for Review ("Employer's Brief"). In its appeal, Employer asserts that the CO is not supported by substantial evidence and not in accordance with law and must be reversed.

Claimant opposed the appeal by filing Claimant's Opposition to Employer's Application for Review ("Claimant's Brief"). In its opposition, Claimant requests an affirmation of the CO and asserts that the CO is in accordance with prevailing law and is supported by substantial evidence.

ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act ("Act") and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise 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. 2003) ("*Marriott*"). Consistent with this scope of review, the CRB is also 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Is the determination that Claimant's alleged disability is causally related to the June 26, 2013 work injury supported by substantial evidence and in accordance with the law?

On the medical causal relationship issue Employer asserts:

> In addition to ignoring the fact that the Washington Hospital Center [sic] records and the inferences that flow logically from those records rebut the presumption, the ALJ finds that Dr. Becker's opinion insufficient to rebut the presumption because it is "not unambiguous". She does not explain what she finds "ambiguous" about his decision. His opinion in the July 20, 2015 report is that "the injury of June 26, 2013 did nothing to prevent this patient from performing his pre-injury job". That opinion is clear.

Employer's Brief (unnumbered) at 7.

The remainder of Employer's argument focuses on the ALJ's weighing of the evidence. As it is our duty to review the CO to determine whether the legal conclusions drawn from the facts flow rationally from the facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A), we are compelled to review the ALJ's application of the presumption of compensability with regard to the first issue raised which is whether Claimant's alleged disability is causally related to the injury of June 26, 2013.

When considering a causal relationship, the DCCA has held that a claimant is entitled to a rebuttable presumption that his claim arises out of and in the course of his employment if he produces credible evidence of an injury and of a work-related event which has the potential of causing the injury. *See Spartin v. DOES*, 584 A.2d 564 (D.C. 1990). Further, the scope of application of the statutory presumption includes the medical causal relationship between the disabling condition in question and the injury. *Whittaker v. DOES*, 668 A.2d 844, 846 (D.C. 1995).

In order to invoke the presumption, a claimant must meet the initial threshold requirement which is some evidence of a "work-related event, activity or requirement which has the potential of resulting in or contributing to the death or disability." *See Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987). Where employer has presented evidence "specific and comprehensive" to sever the presumed connection, the presumption is rebutted and the conflicting evidence is weighed without reference thereto. *Id.*

Although the ALJ cites to Claimant's "credible testimony" in finding Claimant made an initial showing of an injury to his left knee and a work-related event that has the potential to cause or contribute to his symptoms, we find the records of the July 11, 2013 Washington Adventist Hospital support the ALJ 's finding that Claimant invoked the presumption.

We further find the ALJ correctly set forth the applicable standard for medical rebuttal evidence on causation which has been established by the DCCA in *Washington Post v. DOES and Raymond Reynolds,* 852 A.2d 909 (D.C. 2004) (*Reynolds*)[1].

The ALJ's discussion with regards to Employer's rebuttal evidence consists of the following:

> In this case, Employer has not produced the requisite rebuttal evidence. There is no persuasive medical opinion to contradict or contest the opinion of Dr. Mininberg, Claimant's treating specialist. Employer's examining orthopedic specialist, Dr. Larry Becker, has not rendered an unambiguous opinion that the June 2013 work accident did not contribute to Claimant's current disability. Employer's contention that Claimant's left knee condition was not permanently aggravated by his 2013 work accident is inconsistent with the record evidence regarding his work assignments and the events preceding his medical consultations, treatment and prescribed therapy protocols during the period at issue.

CO at 6.

We must note that the CO does not explain nor can we ascertain what "work assignments" the ALJ is referring to or to what "events preceding his medical consultations" during the period at issue she refers. Nevertheless, this paragraph and the following footnote the ALJ included are troubling. Nowhere in the CO's analysis does the ALJ acknowledge what Dr. Becker reported in the addendums produced after reviewing additional medical evidence provided to him by Employer. Instead the ALJ wrote in a footnote:

> After repeated prodding from Employer, Dr. Becker's third addenda IME letter stated that Claimant's current inability to work was not significantly affected by the June 2013 temporary aggravation of his pre-existing arthritic condition. RX 2. This was not considered to be an unambiguous medical opinion that the 2013 work injury did not contribute to Claimant's current disability. It does not meet the *Reynolds* test of being an unambiguous opinion. Dr. Becker states that the work accident aggravated Claimant's left knee condition and that 5% of a 45 % permanent impairment is causally related to the accident. Thus, his opinion does not rebut the statutory presumption.

Id.

[1] The law is clear that to rebut the presumption the employer must proffer the opinion of a qualified independent medical expert who, having examined the employee and reviewed the employee's medical records, renders an unambiguous opinion that the work injury did not contribute to the disability. *Reynolds, supra.*

We agree with Employer that:

> The fact that there is both an impairment rating and an opinion that Claimant is not prevented from working by the injury is simply not evidence of ambiguity. The fact that additional reports were generated after review of additional medical records were made possible in no way diminishes the credibility of the opinion.

Employer's Brief at unnumbered page 9.

While it is not in our purview to reweigh the evidence presented and arrive at conclusions of law, we find it necessary to review Dr. Becker's report to determine if the ALJ's determination is supported by substantial evidence.

On September 15, 2014, after his examination and review of Claimant's records, Dr. Becker stated that the second page of Claimant's MRI report was not included. Dr. Becker opined:

> We have under consideration an 80-year-old gentleman who had a sprain and strain to his left knee as a result of the incident at work [sic] June 26, 2013.
>
> In my opinion, this patient's initial treatment was reasonable and necessary. I believe that he aggravated the underlying degenerative arthritis and at this point, his symptoms in his knees, mainly left, are based on is progressive, severe degenerative arthritis of each knee.

EE 3 at 3.

On September 21, 2014 Dr. Becker wrote in an addendum:

> I had reviewed this patient's MRI when I had evaluated him on September 15 2014. Unfortunately, the second page of the MRI report was not forwarded to me to review. I have reviewed the MRI report and the second page only adds to the first page by stating that there might be a small tear of the medical meniscus and some small amount of fluid in the semimembranosus tendon, possible minimal tendinitis, that all relates to the left knee.
>
> After reviewing that information, this adds nothing further to the report I dictated. My statement made in my report of September 15 2014 stand as dictated.

EE 3 at 4.

On June 29, 2015, Dr. Becker wrote:

> I reviewed the MRI report of the left knee as well as the MRI CD of the left knee. I agreed with the impression that this patient has significant bone bruising in the medial tibial plateau region. No sign of fractures noted. The patient also has moderated osteoarthritis changes in the knee.

After reviewing the MRI and reviewing my report, I see no reason to alter any statements made.

I believe this 80-year-old gentleman sustained what appeared to have contusion to his left knee. In addition to his contusion, there is pre-existing significant degenerative arthritis in his left knee.

I believe that the objective findings are related to the bone bruising and edema seen in the medial tibial plateau. However, I do not feel that the osteoarthritis changes have been altered in any way.

EE 3 at 5.

On July 20, 2015, Dr. Becker noted that he was provided with additional medical records of Claimant that pertain to Claimant's prostate surgery performed in 2011. Dr. Becker opined:

I reviewed records of Dr. Kumar relating to his prostate problem.

I reviewed MRI reports of the lumbar spine and pelvis. I reviewed radiation oncology reports regarding this patient. I reviewed records from the Law Office of Christopher Costabile.

Assessment/Plan We have under consideration, an 81 year-old-gentleman, who had pre-degenerative arthritis and subsequently had an injury on June 26, 2013, that appeared to aggravate his degenerative arthritis.

The patient was found to have severe bilateral genus varum[2] which predisposes patients through severe degenerative arthritis, medial compartment of the knee.

After reviewing all of the records, I see no reason to alter any of the statements that I have made regarding this patient. The injury of June 26, 2013, did nothing to prevent this patient from performing his pre-injury job. I believe that this was merely a temporary aggravation of a pre-existing condition that did not significantly affect this patient's ability to work.

EE 3 at 8.

Having reviewed Dr. Becker's report and addendums we cannot conclude that the ALJ's determination that Employer failed to rebut the presumption is supported by substantial evidence as we find no evidence of ambiguity on the part of Dr. Becker. The ALJ's determination that Employer failed to rebut the presumption is accordingly reversed.

[2] In his previous reports, Dr. Becker defined genus varum as "bow legs".

While it would have indeed been more efficient to state that in light of the ALJ's eventual weighing of the evidence notwithstanding her finding that Employer did not rebut the presumption, her error was harmless, we cannot. The ALJ stated only:

> Assuming arguendo, that Dr. Becker's opinion rebuts the statutory presumption, weighted review of the record evidence and testimony supports Claimant's position. The opinion of Dr. Becker is not unambiguous or persuasive. Employer's argument that the passage of time between Claimant's July 2013 emergency treatment and the May 2014 narrative report of Dr. Mininberg destroys the possibility of a causal connection is also rejected. It is negative evidence that is not sufficient to inform a conclusion negating causation in this case.

CO at 6.

The determination that Employer did not rebut the presumption as Dr. Becker's opinion was ambiguous was error. The ALJ continued with this misconception that Dr. Becker's opinion was ambiguous in her brief weighing of the evidence. The ALJ's determination that Employer has adduced no medical opinion sufficiently negating Claimant's evidence is not supported by substantial evidence. The matter is remanded to the ALJ to re-weigh the evidence, placing the burden of proof by a preponderance of the evidence upon Claimant, but taking into account the preference generally accorded to the opinion of treating physicians in this jurisdiction.

Is the determination that Claimant is entitled to TTD and PTD benefits supported by substantial evidence and in accordance with the law?

With regard to the nature and extent of Claimant's disability, the ALJ correctly stated that Claimant has the burden of proving by a preponderance of evidence that he is entitled to the relief requested. Employer's only challenge to the ALJ's award of temporary total disability (TTD) benefits hedges on the ALJ's credibility determination. While we note the following language is contained in the ALJ's findings of facts, there is no discussion in the analysis section with regard to the period of TTD from July 18, 2013 to July 28, 2014, she awarded:

> There is no medical documentation to support Claimant's absence from the workplace after July 18, 2013 and no written documentation of medical restrictions between that date and July 28, 2014. However, Claimant's credible and uncontradicted testimony is that he was unable to continue to perform his usual work.duties after his last work day. Employer has adduced no testimony or medical evidence to indicate that Claimant could perform those duties during the period at issue.

CO at 4.

Because we have determined that the matter requires further consideration on the issue of medical causal relationship, the awards for TTD and permanent total disability ("PTD") must be vacated, only to be considered if after the further consideration Claimant is found to have met his

burden regarding medical causation. This should not be taken as conflicting with the discussion and decision that follows in this Decision and Partial Remand Order, affirming the manner in which the CO resolves the minimum compensation rate in PTD awards.

As the determination that Claimant's alleged disability is causally related to the June 26, 2013 is reversed and remanded, we are precluded from affirming the ALJ's determination that as a result of the June 26, 2013 injury, Claimant remains permanently and totally disabled. If on remand the ALJ finds Claimant met his burden of establishing by a preponderance of the evidence that Claimant is totally disabled as a result of an injury that occurred on June 26, 2013, the ALJ shall revisit Claimant's request for TTD and PTD benefits consistent with the DCCA's decisions in *Golding-Alleyne v. DOES,* 980 A.2d 1209 (D.C. 2009) and *Logan v. DOES,* 805 A.2d 237, 242-243 (D.C. 2002).

Is the determination that PTD benefits are to be paid at the minimum compensation rate if Claimant's average weekly wage is less than the minimum compensation rate.

In this regard the ALJ stated:

> The Court of Appeals has resolved this question in Claimant's favor. Although the minimum compensation rate does not apply to temporary total disability awards, it does apply to permanent total disability payments. Claimant's average weekly wage of $219.07 is lower than the minimum compensation rate of $354.00. Pursuant to D. C. Code § 32-1505, his permanent total disability benefits are to be paid according to the minimum compensation rate. *Hiligh* [*v. DOES*, 935 A.2d 1070 (D.C. 2007)], *supra.*

CO at 9.

Employer asserts:

> . . . The statute authorizing permanent total disability benefits, however, provides as follows:
>
> > In case of total disability adjudged to be permanent, 66 2/3% of the employee's average weekly wages shall be paid to the employee during the continuance thereof. D.C. Code Ann. Section 32-1508(1).
>
> This section does not, by its terms, make the amount payable subject to any other section of the Act. Accordingly, by the plain meaning of the terms of the statute authorizing permanent total disability benefits, the rate at which they are paid is limited to 2/3 of average weekly wage.
>
> A review of the section of the Act establishing a "minimum" compensation rate, Section 32-1505(c), reveals that it does not contain any language referencing the

apparent conflict created by establishing a "minimum" compensation rate for permanent total disability benefits.

In *Hiligh v. DOES*, 935 A.2d 1070 (D.C. 2007) [*Hiligh*], the Court of Appeals held that Section 1505(c) does not apply to temporary total disability benefits, but also, that 1508(2) established that the compensation rate for temporary total disability benefits is 2/3 of average weekly wage. The court overruled the CRB's finding that where claimant's average weekly wage was less than the minimum compensation rate, temporary total disability was payable at claimant's average weekly wage, rather than 2/3 of the average. In so doing, the court noted that:

> While this court appreciates that the Act is [sic] be interpreted in a manner consistent with its humanitarian purpose, that mandate is not so broad as to allow the Board to create statutory remedies that are inconsistent with other express provisions of the Act. The District of Columbia's Act clearly states, without exception, "in case of disability total in character, but temporary in quality, 66 2/3% of the employee's average weekly wages shall be paid . . . " D.C. Code § 32-1508 (2). As there is no provision in the District's statute from which the Board's interpretation can reasonably arise, we conclude that the Board's conclusion is legally erroneous.

Hiligh, at 1075.

Employer/insurer argue that the same rationale applies to the instant question of the compensation rate for permanent total disability, i.e., that the statutory section that authorizes permanent total disability benefits also limits those benefits to 2/3 of [sic] average weekly wage.

Employer's Brief at unnumbered pages 10-12.

Acknowledging that there is ambiguity in D.C. Code § 32-1505(c), the CRB has previously stated:

> D.C. Official Code § 32-1505(c) states: "[t]he minimum compensation for total disability or death shall be 25% of the maximum compensation." The terms "total disability" appear to be clear. However, an in-depth consideration of alternative constructions that could be ascribed to the terms reveals an ambiguity. First, under the Act, there are two (2) types of compensation payable for total disability: permanent and temporary. *See* D.C. Official Code §§ 32-1508 (1) and (2). Second, as indicated by the issue on appeal and the various decisions by the agency, there exists confusion as whether the term "total disability" refer to "permanent total disability" or "temporary total disability" or to both. Consequently, the Panel recognizes there is an ambiguity present in D.C. Official Code § 32-1505(c) and will examine the legislative history and purposes of the Act to help resolve this matter.

> A review of the legislative history shows that in drafting D.C. Official Code § 32-1505 the District of Columbia City Council stated, "[t]his section also establishes minimum compensation for Total Permanent Disability or death of 25% of the maximum compensation." COMMITTEE ON HOUSING AND ECONOMIC DEVELOPMENT, REPORT ON THE DISTRICT OF COLUMBIA WORKERS' COMPENSATION ACT OF 1979, Bill 3-106, at 14 (Jan. 29, 1980). Thus, although the language in D.C. Official Code § 32-1505(c) uses the terms "total disability", which causes an ambiguity, it is clear that in drafting this section of the Act, the City Council intended the minimum compensation rate to be applicable to cases of permanent total disability only.

Hiligh v. Federal Express, CRB No. 05-36 (December 22, 2005).

On appeal to the DCCA, the Court affirmed the CRB's determination that the minimum compensation rate does not apply to temporary total disability benefits but reversed the CRB's determination that claimant *Hiligh* was entitled to his actual average weekly wage in lieu of the minimum rate. *Hiligh v. DOES*, 935 A.2d 1070 (November 8, 2007). Contrary to the ALJ's statement that the DCCA decided this issue in Claimant's favor, the DCCA did not discuss or overturn the CRB's determination that the minimum rate applies only to the permanent total disability and this determination remains the law.

Accordingly, we conclude the ALJ's determination that permanent total disability benefits are to be paid at the minimum compensation rate if Claimant's average weekly wage is less than the minimum compensation rate is in accordance with the existing law and is affirmed.

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant's alleged disability is causally related to the June 26, 2013 work injury is not supported by substantial evidence and not in accordance with the law and is REVERSED. The ALJ's determinations that Claimant is entitled to TTD benefits from July 19, 2013 to October 3, 2013 and PTD benefits from October 4, 2013 are VACATED, subject to further consideration, should the ALJ on remand again find the alleged disability to be causally related to the work injury The ALJ's determination that PTD benefits, to which Claimant may be entitled to, are to be paid at the minimum compensation rate if Claimant's average weekly wage is less than the minimum compensation rate is in accordance with the existing law and is AFFIRMED. The matter is remanded to AHD for further consideration consistent with the law and the foregoing discussion.

So ordered.