

**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. 06-014**

**ROY T. ECKERT,**

**Claimant–Petitioner/Cross-Respondent,**

**v.**

**A.D. HEATH CORPORATION AND ERIE INSURANCE GROUP,**

**Employer/Carrier–Respondent/Cross-Petitioner.**

Appeal from a Compensation Order of  
Administrative Law Judge Fed D. Carney, Jr.  
AHD No. 05-120, OWC No. 586974

William S. Sands, Esquire and William S. Hopkins, Esquire, for the Petitioner/Cross-Respondent

Jeffrey W. Ochsman, Esquire, for the Respondent/Cross-Petitioner

Before JEFFREY P. RUSSELL, LINDA F. JORY and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation 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).<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 District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia 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 District of Columbia 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 Compensation Order, which was filed on October 31, 2005, the Administrative Law Judge (ALJ) denied Petitioner/Cross-Respondent's claim for medical care and wage loss benefits in connection with a claimed neck, right arm and shoulder and left arm and shoulder injury, based upon a finding that the left arm and shoulder injury were not causally related to stipulated work injury occurring January 7, 2003. Petitioner/Cross-Respondent now seeks review of that Compensation Order, asserting as grounds for this appeal that the finding of lack of causal relationship is unsupported by substantial evidence, and asserting further that, regardless of the finding of no causal relationship between the work injury and the left arm and shoulder injury, the ALJ failed to address the claim for temporary total disability benefits in connection with the stipulated neck and right arm and shoulder injury. Respondent/Cross-Petitioner opposes the appeal in connection with the ALJ's finding that the left arm and shoulder injury is not causally related to the stipulated work injury of January 7, 2003, asserting that there is substantial evidence to support that conclusion, but concedes in its cross Application for Review that the ALJ failed to address the claim for temporary total disability, and the defense thereto raised below that the claim for wage loss benefits is barred due to Petitioner/Cross-Respondent's failure to give adequate and timely notice of the work injury under D.C. Code § 32-1513.

Both parties agree that the matter requires a remand to the ALJ for findings of fact and conclusions of law in connection with the notice issue as it relates to the claim for wage loss benefits.

## 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 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, 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, Petitioner/Cross-Respondent (Petitioner) alleges that the ALJ's conclusion that the left shoulder and arm injury is not causally related to the stipulated work injury of January 7, 2003 is not supported by substantial evidence. In making this argument, Petitioner notes that the ALJ found that Petitioner had provided sufficient evidence to invoke the

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statutory presumption that the claimed injury was causally related to the stipulated work injury (a point that Respondent/Cross Petitioner (Respondent) does not dispute), and argues that the evidence cited by the ALJ is insufficient, as a matter of law, to rebut and overcome that presumption, and therefore the decision must be reversed.

In opposition to this argument, Respondent asserts that it provided adequate evidence, in the nature of an independent medical evaluation (IME) report and addendum thereto, from Dr. Robert O. Gordon, that neither the work injury of January 7, 2003, nor the subsequent surgery of May 9, 2003 (which Petitioner asserted was (1) required as a result of the stipulated work injury to the neck and right arm and shoulder, and (2) caused the ensuing complaints of pain in the left arm and shoulder) caused or contributed to Petitioner's left arm and shoulder complaints, to overcome the presumption.

The Court of Appeals has held that, where the record demonstrates that an IME physician has performed a personal examination of a claimant, has reviewed the relevant medical records, and has stated an unequivocal opinion contrary to the causal relationship presumption, there is substantial evidence in opposition to it, sufficient to overcome the presumption. *Washington Post v. District of Columbia Department of Employment Services and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004).

Review of Respondent's hearing exhibit 7 (a report of October 5, 2004, and an addendum dated October 28, 2004) reveals that Dr. Gordon wrote the statement that "There is absolutely nothing to indicate that his shoulder condition or the surgery that was performed on the shoulder was in any way related to his January 17, 2003 injury or the subsequent neck surgery that was performed." Aside from an error concerning the date of the injury (January 17 as opposed to a stipulated date of January 7), there is nothing equivocal about this opinion. While the report does not expressly identify what specific medical records were reviewed, the addendum does expressly indicate that the IME doctor reviewed the operative report from the surgery performed by Dr. Lennon [sic], which surgery is alleged by Petitioner to have been the cause of the left arm and shoulder injury.<sup>2</sup> The records, in other words, comport with the standard described by the Court of Appeals in *Washington Post, supra*. Accordingly, Respondent has produced sufficient evidence to overcome the statutory presumption that the ALJ found to have been invoked. Review of the Compensation Order reveals that the ALJ then proceeded to consider the contents of the various medical records from the treating physicians and he found that the records produced by Petitioner, none which asserted that the neck surgery caused the subsequent left arm and shoulder condition, failed to demonstrate a causal relationship by a preponderance of the evidence. Petitioner does not challenge the ALJ's assessment that none of these records assert such a relationship between the surgery and the left arm and shoulder injury, and we detect no error in that analysis, particularly in light of the fact that the only evidence on the question of the possible connection between the neck surgery and

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<sup>2</sup> We note that the ALJ acknowledged that one of Petitioner's treating physicians, Dr. Lennen, provided an "alternate" theory or ground upon which the left arm and shoulder injury might have been claimed to be the result of Petitioner's employment, apart from being, as argued by Petitioner, the result or the effect of the neck surgery. The ALJ declined to consider this theory, due to Petitioner's failure to assert this alternate theory. In that Petitioner has not challenged the ALJ's declining to consider this alternate theory in this appeal, we assume that Petitioner and his counsel have made a conscious decision, based upon facts or circumstances that we do not know, that pursuing such a theory in this claim, either at the formal hearing or at this time on appeal, is not in Petitioner's best interests, and we therefore will not consider same.

the subsequent left arm and shoulder complaints is contained in the IME reports, and is to the contrary, and it is therefore affirmed. Compensation Order, pages 6 – 7.

However, the ALJ never discussed any of the facts concerning the issue of timely notice, made no findings thereon, and reached no legal conclusions related thereto. In that both parties to this appeal assert that the claim for wage loss benefits was not dependant upon the allegation that the left arm and shoulder problems are causally related to the stipulated work injury, we must assume that the claim for temporary total disability was based, in part at least, upon the effects of that stipulated injury. Accordingly, there remains a need for a resolution of the notice issue in order to fully adjudicate this claim. The failure to consider the issue is erroneous as a matter of law.

#### CONCLUSION

The Compensation Order of October 31, 2005, finding that there is no causal relationship between the stipulated work injury and the claimed injury to Petitioner's left arm and shoulder is supported by substantial evidence, is in accordance with the law, and is affirmed. The failure to consider the claim for temporary total disability benefits, and the question of timeliness of notice under the Act, is not in accordance with the law.

#### ORDER

The denial of benefits in connection with the claimed injury to Petitioner's left arm and shoulder is AFFIRMED. The matter is REMANDED to AHD with instructions that the ALJ undertake further consideration of the claim for temporary total disability benefits and the defense of untimely notice under the Act.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
Administrative Appeals Judge

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January 11, 2006  
DATE