

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

**Office of Hearings and Adjudication
Compensation Review Board**

**(202) 671-1394 - Voice
(202) 673-6402 - Fax**



CRB No. 7-11

GLORIA A. ESTES,

Claimant – Petitioner

v.

BEST WESTERN CAPITOL SKYLINE AND MANUFACTURERS ALLIANCE INSURANCE,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 06-143, OWC No. 611820

Jessica G. Bhagan, Esq., for the Petitioner

Gerard J. Emig, Esq., for the Respondent

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

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the 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).¹

¹ 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

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 13, 2006, the Administrative Law Judge (ALJ) denied the requested relief for Temporary total disability benefits from October 9, 2005 to November 11, 2005 with interest thereon and causally related medical expenses on the basis that the Claimant-Petitioner (Petitioner) failed to accept suitable alternative employment. The Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the Compensation Order is unsupported by substantial evidence and is not in accordance with the law.

ANALYSIS

As an initial matter, the standard 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 § 32-1521.01 (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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 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.

First, the Petitioner asserts that although the ALJ found the Respondent failed to rebut the presumption of medical causal relationship between the April 2, 2005 injury and her current right knee condition, the ALJ denied her request for medical expenses. Second, the Petitioner argues that when an employer does not make employment commensurate with an injured worker’s limitations available, an injured worker is entitled to total disability benefits. The Petitioner maintains that the evidence does not support a finding that she failed to accept suitable

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 (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.

alternative employment. The Petitioner asserts the Respondent failed to make light duty employment consistent with her restrictions available to her after the initial short period of duty in the laundry. She asserts that the testimony of the witnesses, upon whom the ALJ relied to support the finding of failure to accept suitable alternative employment, in fact corroborate that she working her regular employment and that she was having problems doing so. The Petitioner further asserts that Ms. Dixie Eng, another witness upon whom the ALJ relied, had no personal knowledge of her daily activities and the problems she was having in performing her activities.

After reviewing the record, the Panel agrees with the Petitioner's argument with respect to her request for medical expenses. The ALJ found that the Petitioner's current complaints were causally related to her April 2, 2005 work incident. *See Compensation Order at pp. 4, 7.* Yet, the ALJ did not award causally related medical expenses and did not provide a basis for not making such an award. The Panel is not aware of any law or regulation that precludes the payment of medical expenses when a claimant fails to accept suitable alternative employment. *Cf. Safeway Stores, Inc. v. D.C. Department of Employment Services*, 832 A.2d 1267 (D.C. 2003) (claims for causally related medical expenses are not barred by the failure of the employee to give the notice). The denial of medical expenses is reversed.

In challenging the ALJ's conclusion that she failed to accept suitable alternative employment, the Petitioner argues, citing *Shaw, Pittman, Potts & Trowbridge v. D.C. Department of Employment Services*, 641 A.2d 172 (D.C. 1994), that although a reviewing court may not substitute its judgment for that of an ALJ, it can do so if the evidence upon which the ALJ relied is inherently unreliable. The Petitioner maintains that the testimony of Ms. Eng is inherently unreliable because she had no personal knowledge of the work activities she performed while "on light duty".

It is well settled that an injured employee is not entitled to a presumption on the nature and extent of her disability, but must prove, by a preponderance of the evidence, that she suffers a wage loss due to a work injury. *See Washington Hospital Center v. D.C. Department of Employment Services*, 744 A. 2d 992, 998 (D.C. 2000). Once an injured employee shows that she has a work-related disability, she is entitled to a finding of impairment unless the employer demonstrates availability of suitable alternative employment. *See Washington Post v. D.C. Department of Employment Services*, 853 A.2d 704, 707 (D.C. 2004)(*Berthault*).

Herein, the ALJ found, and the finding is supported by substantial evidence, that the Petitioner, via her testimony and her medical evidence, showed that she was unable to earn wages from October 9, 2005 through November 11, 2005 due to her work injury. In making this finding, the ALJ accepted that Dr. Fetcher released the Petitioner to light duty work with "no repetitive bending, stooping or lifting and no lifting over 20 lbs." Further, the ALJ indicated that the Respondent did not present any medical evidence which controverted the Petitioner's medical evidence. *See Compensation Order at pp. 5-6.* The Petitioner having sustained her burden, the burden then shifted to the Respondent to show the availability of suitable alternative employment within the restrictions imposed by Dr. Fechter.

Substantial evidence is relevant evidence that a reasonable person would consider adequate to support a conclusion. *Dell v. D.C. Department of Employment Services*, 499 A.2d 102, 108 (D.C. 1985). After reviewing the record, the Panel determines that the ALJ's finding that the Petitioner failed to accept suitable alternative employment is not supported by substantial evidence. The Respondent failed to sustain its burden in this case.

To an effort to sustain its burden, the Respondent presented the testimony of Ms. Eng, general manager. Ms. Eng testified that the Respondent made accommodations for the Petitioner because of her knee complaints. She testified that the accommodation, or light duty, consisted of the Petitioner working in the laundry for a time and afterwards having the number of rooms she was required to clean reduced along with the number of hours she worked. Ms. Eng also testified that she did not speak to the Petitioner about the work she performed upon her return, but spoke with the Petitioner's supervisor. Transcript (TR) at pp. 72-74. She also testified that when anyone gets behind in his/her work, as a matter of routine another person is sent to help. TR at p. 72. On cross-examination, Ms. Eng admitted that she did not personally observe the Petitioner performing the duties assigned to her upon her return to work. TR at pp. 73-74, 76-77.

As earlier stated herein, the Respondent failed to sustain its burden for the following reasons. First and foremost, the Respondent's evidence did not contradict or rebut the Petitioner's testimony or the testimony of the Petitioner's witnesses. The Petitioner, a housekeeper, testified that her regular duties required her to change sheets on beds, lift heavy bedspreads, lift vacuum cleaners, vacuum floors, push cleaning carts weighing approximately 50 lbs., dump trash, carry linen, look under beds and dust fifteen (15) hotel rooms. TR at p. 18-21. After she sustained her work injury, Dr. Fechter released the Petitioner to light duty work with "no repetitive bending, stooping or lifting and no lifting over 20 lbs." Claimant Exhibit No. 2. The Petitioner testified that she gave her restrictions to her supervisor. She indicated that thereafter she worked in the laundry for two (2) weeks and then was returned to her regular duties. She indicated that, upon her return to work, the houseman would put her cleaning cart on the floor for her and some people would do work that she was unable to do. TR at pp. 30-33.

Additionally, the Petitioner presented Mr. Lumoneka, houseman, Ms. Battle, co-worker, who both corroborated the Petitioner's testimony. Mr. Lumoneka testified that when the Petitioner returned to work, she worked in the laundry for awhile then returned to her regular housekeeping duties. He also testified that he helped the Petitioner to push her cleaning cart. TR at pp. 58-60, 64-65. Ms. Battle also testified that when the Petitioner returned to work, she worked in the laundry for awhile then returned to her regular housekeeping duties. She also testified that the Petitioner got behind in her work "a couple of times" because of leg complaints and that she asked if she could help the Petitioner. TR at pp. 66-67.

Second, the testimony of Ms. Eng about the Petitioner's work upon her return was, as the Petitioner asserts, "inherently unreliable" as it was not based upon her personal knowledge. Ms. Eng did not personally know what duties the Petitioner was performing upon her return to work. All of her knowledge was based upon what she was told by the Petitioner's supervisor, or in other words, it was based upon hearsay. The Panel is aware that hearsay evidence is admissible in administrative proceedings unless it is irrelevant, immaterial, or unduly repetitious. *James v. D.C. Department of Employment Services*, 632 A.2d 395, 398 (D.C. 1993). Also, in this jurisdiction hearsay found to be reliable and credible may constitute substantial evidence, "where the evidence is uncontradicted," but without extrinsic corroboration (proof *aliunde*) such evidence will be "scrutinized" carefully. *James* 632 A.2d at 398. Nevertheless, without extrinsic corroboration, an administrative agency may, and in many instances should, accord less weight to hearsay evidence than to the sworn, first-hand testimony of witnesses. *Id.* Therefore, less weight should be accorded to Ms. Eng's testimony about the work the Petitioner performed

when she returned to work than that accorded to Mr. Lumoneka and Ms. Battle who worked with the Petitioner and witnessed the duties she was performing.²

Finally, the Respondent failed to present any evidence showing that the physical requirements of the duties the Petitioner was performing upon her return to work were within the restrictions set by Dr. Fechter. The Petitioner testified that she worked in the laundry and then returned to her regular housekeeping duties albeit at less hours. The Respondent maintains that light duty work was provided via the laundry work and reduced hours. However, the Respondent did not present any evidence that established that the physical requirements of work in the laundry, let alone her subsequent duties, were consistent with Dr. Fechter's restrictions. Other than showing that the Petitioner's hours were reduced, the Respondent did not present evidence showing a change in the physical requirements of the Petitioner's regular housekeeping duties which were consistent with Dr. Fechter's restrictions. While Ms. Eng testified that when the Petitioner complained, after she had stopped working, about not getting light duty work and that she informed the Petitioner that work was available to her through either reduced hours or work in the laundry, which was the same work she had performed, Ms. Eng did not indicate how this offer of employment was within the light duty restrictions imposed by Dr. Fechter.

As the Respondent did not carry its burden of demonstrating the availability of suitable alternative employment, the finding that the Petitioner failed to accept suitable alternative employment is reversed.

CONCLUSION

The Compensation Order of October 13, 2006 is not supported by substantial evidence and is not in accordance with the law.

ORDER

The Compensation Order of October 13, 2006 is hereby REVERSED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

February 6, 2007
DATE

² The Panel is aware that credibility findings of an ALJ are entitled to great weight and that an appellate body may not disregard them unless not supported by substantial evidence. *See George Hyman Construction Co. v. D.C. Department of Employment Services*, 498 A.2d 563 (D.C. 1985). However, the Panel is not interfering with any credibility findings that the ALJ made vis-à-vis Ms. Eng. Rather, the Panel is saying that while Ms. Eng's testimony may be credible, it is not as reliable as the eyewitness testimony that was introduced into evidence.