

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 11-065**

**GLORIA N. GREEN,  
Claimant—Respondent,**

v.

**PALOMAR HOTEL AND GALLAGHER BASSETT SERVICES, INC.,  
Employer/Insurer—Petitioner .**

Appeal from a Compensation Order by  
Administrative Law Judge Karen R. Calmeise  
AHD No. 10-582, OWC Nos. 673571 and 673273

Michael J. Kitzman, Esquire, for the Respondent  
Joseph C. Tarpine, Esquire<sup>1</sup>, for the Petitioner

Before: HENRY W. MCCOY, LAWRENCE D. TARR, and Jeffrey P. Russell<sup>2</sup>, *Administrative Appeals Judges.*

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

**DECISION AND REMAND ORDER**

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

<sup>1</sup> At the Formal Hearing, Employer/Insurer was represented by Scott Massengill, an attorney in the same firm as Mr. Tarpine.

<sup>2</sup> Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

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## Overview

This case is before the CRB on the request for review filed by the Employer of the June 22, 2011 Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication section<sup>3</sup> of the Office of Hearings and Adjudication (OHA) of the Department of Employment Services (DOES). In that CO, the ALJ awarded Claimant temporary total disability benefits from July 17, 2010 to November 29, 2010, and causally related reasonable and necessary medical care.

### BACKGROUND FACTS OF RECORD

Claimant was working in the laundry department for Employer during the second week of January 2010 pulling sheets from a washer when she felt pain along the left side of her neck. Claimant continued working that day and for the rest of the week<sup>4</sup> and eventually sought treatment on January 22, 2010 at Prince George's Kaiser Permanente. Claimant verbally reported this incident to Victoria Lujan within 30 days of the onset of her neck pain.

Claimant had an MRI performed on January 23, 2010 that revealed a reversal of the lordotic curvature of the cervical spine with two discs in her neck out of alignment. Claimant was treated with pain medication upon return to her treating physician at Kaiser.

In July 2010, Claimant started experiencing pain in her right shoulder radiating down into her right arm. Following company procedure, Claimant reported this to the security office on July 17, 2010 and was off work from July 17<sup>th</sup> to July 19<sup>th</sup>. Claimant returned to work on July 20<sup>th</sup> and later that month received her first shoulder injection but continued to experience pain in her neck.

On August 18, 2010, Employer filed a Notice of Controversion for the January 2010 injury asserting improper notice as it was not reported until July.

In September 2010, Claimant's treating physician recommended that she stay off work for two weeks due to pain.<sup>5</sup> The treating physician referred Claimant to an orthopedist in October who provided her with a letter restricting her from heavy duty work from October 2010 to February 2011 and also restricting her from working more than 15 continuous minutes per hour. Upon giving this letter to Employer, Claimant was sent home and was not called back to work until November 30, 2010 after receiving another letter from the orthopedist that Claimant could return to work.

Claimant was seen by Dr. Robert Gordon for an independent medical evaluation (IME) on February 9, 2011 where he opined that the prognosis of Claimant's neck and shoulder injuries was excellent as they were only soft tissue in nature and that she could immediately return to work.

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<sup>3</sup> This office was formerly known as the Administrative Hearings Division (AHD).

<sup>4</sup> The hearing record does not make clear which date of the week this incident occurred.

<sup>5</sup> In making this finding, the ALJ does not distinguish whether the situs of the pain is the neck or the right shoulder.

At the formal hearing, Claimant sought temporary total disability (TTD) benefits from July 12, 2010<sup>6</sup> to November 29, 2010 and authorization for medical treatment and causally related medical care. The ALJ granted the claim for TTD from July 17, 2010 to November 29, 2010 and ordered Employer to provide causally related reasonable and necessary medical care for the work injury. Employer timely appealed.

On appeal, Employer argues that the ALJ's conclusions that Claimant sustained an accidental injury, that her current disability is causally related to that injury, that she provided timely notice of injury, and is entitled to wage loss and medical benefits are not supported by substantial evidence. In a filed opposition, Claimant argues to the contrary.

#### STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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, § 32-1501 *et seq.*, 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 International v. D.C. Dept. of Employment Services*, 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 if the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

#### DISCUSSION AND ANALYSIS

The ALJ identified the first two issues as (1) whether the Claimant sustained an accidental injury on January 22, 2010; and (2) whether Claimant's disability was causally related to Claimant's employment. Insofar as the ALJ later stated that the issues of accidental injury and injury arising out of and in the course of employment are inextricably intertwined, we interpret and correct her statement of the second issue to be what is commonly referred to as "legal causation", whether the injury arose out of and in the course of employment.

In thus joining the issues of accidental injury and legal causation, the ALJ used what she found to be Claimant's credible testimony of her job duties and the onset of neck pain during the second week of January 2010 coupled with contemporaneous medical records to invoke the presumption that Claimant sustained an accidental injury on January 22, 2010 that arose out of and in the course of her employment. With the presumption invoked, the ALJ determined that Employer's independent medical evaluation (IME) report by Dr. Robert Gordon did not rebut the presumption as he opined "Claimant suffered soft tissue injury from her work duties." CO at 5.

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<sup>6</sup> It is possible that this is a typographical error and is meant to be July 17, 2010.

Employer initially argues when the ALJ concluded that Claimant had invoked the presumption of an accidental injury to her neck incurred while in the performance of her duties and that Employer failed to submit sufficient evidence in rebuttal, this was error because the conclusion was not supported by substantial evidence in the record. Employer contends the record evidence demonstrates that Claimant has a “long-standing history of back and neck problems and when she began treatment in January of 2010, she specifically stated that there was no injury involved.”<sup>7</sup> In essence, Employer argues there is sufficient evidence in the record that is comprehensive enough to rebut that presumption. We find merit in this argument.

While the ALJ was correct in her assessment that Dr. Gordon’s opinion did not rise to the level of severing the connection between the alleged injury and it having occurred while in the course of employment, there is other record evidence that calls into question the occurrence of an accidental injury in January 2010. And, while there is no general requirement for an ALJ to inventory the evidence used in resolving an issue, there is a requirement to acknowledge and address evidence presented in direct opposition to an assert claim.

Employer specifically points to a July 26, 2010 examination by Dr. Thomas Krisztinic, who, after noting Claimant questioned whether her work could have contributed her shoulder pain, did not answer the question but stated, after an examination, that Claimant’s loss of cervical lordosis was most likely based on degenerative changes. In addition, in supplemental exhibits<sup>8</sup> submitted for the record, Claimant had circled “No” as to having been injured on the January 23, 2010 MRI screening sheet for the diagnostic test to assess her neck pain. In addition, Employer points to medical reports from Claimant’s treating physician at Kaiser chronicling neck pain dating back to late December 2009 and a referral an MRI of the neck as early as January 7, 2010.

The ALJ referenced only one document to determine that the presumption had not been rebutted. While this IME report by itself ostensibly did not rise to the level of rebutting the presumption, there exists other evidence in the record that ostensibly if given consideration could be determined to be comprehensive enough to rebut the presumption that Claimant sustained an accidental injury that arose out of and in the course of her employment. On remand, the ALJ shall review and make anew a determination as to whether the presumption has been rebutted. And, if found to be rebutted, to weigh the evidence without the benefit of the presumption.

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<sup>7</sup> *Employer/Insurer’s Memorandum of Points and Authorities in Support of Application for Review*, p. 5.

<sup>8</sup> At the formal hearing, the ALJ had a set of Claimant’s medical records for treatment prior to January 22, 2010 marked for identification as Employer’s Exhibit 4 (HT 41). At the close of the hearing (HT 81), the ALJ left the record open to receive a copy of this exhibit, which was date-stamped as received by the Hearings and Adjudication section on April 29, 2011, before the hearing record closed on May 10, 2011. While the record was left open and the identified document was received in time, the ALJ made no mention of this additional Employer exhibit in the CO when listing the parties’ exhibits and thus there is no affirmation by the ALJ that this exhibit was admitted into the record while it appears it was clearly her intent to do so. In addition, there is no indication in the CO that this additional documentary evidence was given its appropriate consideration in the deliberative process of reaching a decision in this matter. Given the clear intent expressed at the hearing, we deem the supplemental exhibit to be part of the hearing record and available to the ALJ in making her decisions on the issues presented.

In its next argument on appeal, Employer argues that the ALJ conclusion of a medical causal relationship it is not supported by substantial evidence in the record as there is no statement of such a causal relationship by the treating physician, but rather a statement by Dr. Krisztinicz that her complaints are due to degenerative changes. On this issue, the ALJ determined that Employer had “failed to provide ‘substantial evidence’ of a non-employment related basis to sever the potential medical causal relationship that Claimant has demonstrated.” CO at 5. In addition, the ALJ footnoted that aggravation of a pre-existing condition is compensable under the Act.<sup>9</sup> Again, we find merit in Employer’s arguments.

The ALJ states without attribution from the record that Claimant is entitled to the statutory presumption of there being a medical causal relationship between her work injury and her present condition. This begs the question as to which work injury is being referenced and what is her present condition. The ALJ found that on or about January 22, 2010 Claimant injured the left side of her neck and on or about July 12, 2010 Claimant felt pain in her right shoulder radiating down her right arm that caused her to be off work from July 17<sup>th</sup> to the 19<sup>th</sup>, and returning to work on the 20<sup>th</sup>.

If it is accepted, in keeping with the ALJ’s statement of the initial issue to be resolved was whether there was an accidental injury on January 22, 2010, then we are speaking of a work injury to the neck. As argued by Employer, there is no statement by any of Claimant’s treating physicians at Kaiser that any disability is medically related to the injury to her neck. Dr. Mina Son reports on August 13, 2010 that Claimant complained that her neck pain resulted from pulling wet clothes of the laundry machines but the doctor made no independent assessment to that effect. In addition, when presented directly with that question, Dr. Krisztinicz stated the complaints were due to degenerative changes.

There is also the problem whereby in stating that Employer has not presented evidence of a non-employment related basis to sever that potential medical causal relation, the ALJ has confused the issues of medical causal relationship with legal causation, or arising out of and in the course of employment to which evidence of a non-employment related basis would be directed to sever the relationship between any accidental injury and the employment.

It appears that the ALJ accepted Claimant’s testimony that her current disability is medically causally related to her neck injury because this injury arose out of in the course of her employment and thus invoked the presumption. The burden then shifted to Employer to offer evidence to sever that presumed medical relationship. In rebuttal, Employer argued that Claimant’s own physician opined that the work injury did not contribute to the disability.<sup>10</sup> However, the ALJ looked to evidence of a non-employment related basis to sever the presumption as opposed to the medical evidence offered by Employer. This was error. On remand, the ALJ shall start anew to determine whether Claimant has presented the threshold

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<sup>9</sup> Citing, *Ferreira v. Dept. of Employment Services*, 531 A.2d 651 (D.C. App. 1987).

<sup>10</sup> See *The Washington Post v. D.C. Dept. of Employment Services and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004) (employer meets its burden to rebut the presumption of causation when it proffers a medical expert who, having examined the employee and reviewed his medical records, renders an unambiguous opinion that the work injury did not contribute to the disability).

evidence sufficient to invoke the presumption of medical causal relationship, and if found, determine whether Employer's evidence rebuts that presumption; and, if so, weigh the evidence with benefit of the presumption.

Finally, Employer challenges the ALJ's decision that Claimant provided timely notice of the alleged January 22, 2010 injury. Employer contends the person Claimant reported the injury to, Victoria Lujan, was not a "proper supervisor" but a co-worker and that Claimant did not properly report the injury to the security office until July 17, 2010, thus making the notice untimely.

The ALJ determined that while Claimant did not provide written notice of the January 2010 work-related injury to her neck, she did provide timely verbal notice to the lead laundry attendant who the ALJ determined was operating in a supervisory capacity. The ALJ found that insofar as Ms. Lujan exercised the functions of a "supervisor", although without the actual title, Claimant had provided timely actual notice to Employer.

The Act requires an injured employee give the employer notice of a work injury within 30 days of its occurrence and that notice must be in writing.<sup>11</sup> However, the Act provides an exception to the written notice requirement if the employer or his agent in charge of the business place where the injury occurred has [actual] knowledge of the injury and its relationship to the employment and the employer has not been prejudiced by the failure to give written notice.<sup>12</sup> In interpreting this exception, the CRB has held that in order for § 32-1513(d)(1) to be satisfied, an employer must know that the injury arose out of the employment and that the injury occurred in the course of the employment, and an employer must have actual knowledge of the injury and its relationship to the employment.<sup>13</sup>

In finding that Employer had timely actual notice of the work injury, the ALJ basically found, after listing the responsibilities carried out by Ms. Lujan, that she was the employer's agent in charge of the business place where the injury occurred and thus Employer had knowledge of the injury and its relationship to the employment. In addition, Employer points to nothing in the record that they presented to support any prejudice arising from the failure to give the written notice containing the details set forth in the Act; and, our review of the record revealed no such evidence. Accordingly, the ALJ's determination on this issue is affirmed.

#### CONCLUSION AND ORDER

The ALJ's finding that Claimant gave actual notice of her work injury to comply with § 32-1513(d)(1) is AFFIRMED.

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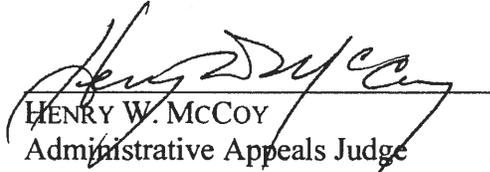
<sup>11</sup> D.C. Official Code § 32-1513 (a) and (b).

<sup>12</sup> D.C. Official Code § 32-1513 (d)(1).

<sup>13</sup> *Tagoe v. Howard University Hospital*, CRB (Dir. Dkt.) No. 03-119, OHA No. 03-287, OWC No. 568310 (September 27, 2006).

The ALJ's finding that Employer did not rebut the presumption that Claimant sustained an accidental injury that arose out of and in the course of her employment and the finding that Claimant invoked the presumption of a medical causal relationship of her disability to the work injury are REVERSED as not being supported by substantial evidence in the record. Accordingly, this matter is remanded for further consideration of these issues consistent with the foregoing discussion.

FOR THE COMPENSATION REVIEW BOARD:

  
HENRY W. MCCOY  
Administrative Appeals Judge

November 10, 2011

DATE