

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GREY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-044

JOHN E. BENGOUGH,
Claimant–Petitioner,

v.

AMERICAN CONVENTION EXHIBITORS and SEDGWICK CMS,
Employer/Insurer–Respondent.

Appeal from a Compensation Order by
The Honorable Karen R. Calmeise
AHD No. 08-370B, OWC No. 641521

Matthew Peffer, Esquire for the Petitioner
Mary Weidner, Esquire for the Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and HENRY W. MCCOY, *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (“CRB”) pursuant to D.C. Code §§32-1521.01 and 32-1522 (2004), 7 DCMR §250, *et seq.*, and the Department of Employment Services Director’s Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

On July 2, 2007, Mr. John E. Bengough, an exhibit technician/installer for American Convention Exhibitors (“Employer”), allegedly sustained multiple injuries in an on-the-job accident. Mr. Bengough treated primarily with Dr. Roy Bands; Mr. Bengough was familiar with Dr. Bands because he previously had treated Mr. Bengough for a herniated disk in September of 2002.

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On January 25, 2011, a formal hearing convened to address the following issues:

1. Is Claimant's low back condition medically causally related to the work injury?
2. Is Claimant's right shoulder condition medically causally related to the work injury?¹

An administrative law judge ("ALJ") issued a Compensation Order dated April 11, 2011. The ALJ denied Mr. Bengough's request for an award of compensation for medical treatment for his low back injury because the injury was deemed not causally related to the on-the-job accident. The ALJ granted Mr. Bengough's request for an award of medical treatment for his right shoulder injury.²

On appeal, Mr. Bengough asserts that the ALJ improperly evaluated the evidence in the record. Specifically, he argues that the ALJ's determination that he did not demonstrate his low back condition was medically causally related to his work-related injury is based on a "flawed inference," rather than substantial evidence. Moreover, he asserts that the ALJ incorrectly applied the preference for the opinion of his treating physician, Dr. Bands.

Employer, on the other hand, argues that the Compensation Order denying an award to Mr. Bengough for his low back injury is supported by substantial evidence. Further, Employer asserts that the ALJ was correct to question the reliability of Dr. Bands' opinion and reject Dr. Bands' opinion in light of the treating physician preference.

ISSUES ON APPEAL

1. Was the treating physician preference properly applied?
2. Is the April 11, 2011 Compensation Order supported by substantial evidence?

ANALYSIS

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 evidence³ in the record

¹ *Bengough v. American Convention Exhibitors*, AHD No. 08-370B, OWC No. 641521 (April 11, 2011).

² *Bengough, supra*, at 9. At the formal hearing, the parties conceded that if Mr. Bengough's right shoulder injury is causally related to his on-the-job accident, surgery was reasonable and necessary. (Hearing Transcript, p.11). On appeal, neither party has contested the ALJ's ruling that Mr. Bengough's right shoulder injury is causally related to his on-the-job accident.

³ "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *See Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

and whether the legal conclusions drawn from those facts are in accordance with applicable law.⁴ Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion, and even if the CRB might have reached a contrary conclusion.⁵ The CRB does not have authority to consider evidence in the record anew.⁶

Pursuant to §32-1521(1) of the Act, a claimant is entitled to a presumption of compensability (“Presumption”).⁷ In order to benefit from the Presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.⁸ “[O]nce an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act.”⁹ There is no dispute the ALJ appropriately ruled that the Presumption properly had been invoked.

Once the Presumption was invoked, it was Employer’s burden to come forth with substantial evidence “specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event.”¹⁰ Only upon a successful showing of substantial evidence by Employer did the burden return to Mr. Bengough to prove by a preponderance of the evidence, without the benefit of the Presumption, his ongoing injuries arose out of and in the course of employment.¹¹ Neither party disputes the Presumption properly was rebutted.

Mr. Bengough contends that when weighing the evidence, the ALJ’s reliance on a “two year delay” during which complaints of back pain were not reported as support for the position that his low back injury was not causally related to his work accident is unfounded in light of Mr. Bengough’s testimony and his medical records; however, Mr. Bengough’s testimony that he

⁴ Section 32-1521.01(d)(2)(A) of the District of Columbia Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* (“Act”).

⁵ *Marriott, supra.*

⁶ See *Murray v. Paul Brothers Oldsmobile*, CRB No. 10-088, AHD No. 04-361B, OWC No. 264867 (October 25, 2010) p.3

⁷ §32-1521(1) of the Act states, “In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter.”

⁸ *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

⁹ *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000).

¹⁰ *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

¹¹ See *Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003).

experienced low back pain at the first reporting of the accident contradicts his medical records. The ALJ found that following the date of Mr. Bengough's work accident on July 2, 2007:

Claimant did not have medical documentation of his low back complaints to the treating surgeon until October [sic] 2009.^[12] Prior to this date, the medical reports contained no reference or treatment for Claimant's low back complaints. (CE 1) It was not until the August 2010 medical examination and report that the treating surgeon definitively correlated Claimant's low back pain, leg pain, numbness and tingling to the herniated cervical spine disk. (CE 1)^[13]

Moreover, Dr. Bands' testimony that Mr. Bengough's low back condition was caused by the work accident is inconsistent with Mr. Bengough's medical records, and with Dr. Bands' own subsequent testimony. Dr. Bands testified to the following regarding Mr. Bengough's first reporting of the accident: "Could he [Mr. Bengough] have mentioned something about his lower back that I didn't document? It's very possible. But I don't think those – that was his biggest concern during those visits."¹⁴

However, in testimony regarding Mr. Bengough's intake report at the initial post-injury visit, Dr. Bands contradicted his previous statements. Dr. Bands recognized that Mr. Bengough did not "check off his back as being a problem," and affirmed that "If Mr. Bengough had had an acute aggravation of his back complaints in July of 2007," it would have been reflected in his reports.¹⁵

The lack of medical evidence reporting Mr. Bengough's low back injury prior to June of 2009 was further clarified by the July 20, 2009 report of Dr. Paul Davies, Mr. Bengough's pain specialist. Dr. Davies reported: "He [Mr. Bengough] is seen today with regard to a separated [sic] problem that he has pain in his low back radiating down his right leg. This pain has been present for the last six weeks."¹⁶

The ALJ's ruling that Mr. Bengough did not meet his burden of proof that his low back injury is medically causally related to his July 2, 2007 on-the-job accident by a preponderance of the evidence is supported by substantial evidence. From the date of the work accident to June of 2009, Mr. Bengough did not seek medical treatment for his low back, and Dr. Bands' testimony failed to explain why Mr. Bengough's low back complaints were not documented prior to June of 2009. Therefore, the ALJ's factual findings that "The first medical notation by Dr. Bands, which occurred in June 2009, is too remote from the 2007 work accident to permit a reasonable

¹² We note that the ALJ made a typographical error in the "Discussion, Low Back" section of the Compensation Order in stating October as the month that Mr. Bengough's low back complaints were first reported; however, the ALJ stated the correct month of June in the conclusion. See *Bengough, supra*, at 5-6.

¹³ *Bengough, supra*, at 5 (Emphasis added.)

¹⁴ *Bengough, supra*, at 5 (quoting CE 4, p.41).

¹⁵ *Bengough, supra*, at 5-6 (quoting CE 4, p.49).

¹⁶ *Bengough, supra*, at 6 (quoting CE 7) (Emphasis in original.)

2009, Mr. Bengough did not seek medical treatment for his low back, and Dr. Bands' testimony failed to explain why Mr. Bengough's low back complaints were not documented prior to June of 2009. Therefore, the ALJ's factual findings that "The first medical notation by Dr. Bands, which occurred in June 2009, is too remote from the 2007 work accident to permit a reasonable inference that the low back condition resulted from the work accident," is supported by the record, and we have no authority to overturn the ruling.¹⁷

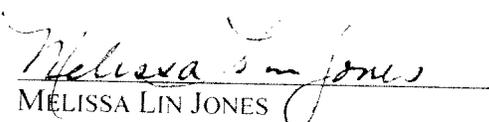
In addition, Mr. Bengough argues that when weighing the evidence, the ALJ lacked a sufficient basis for rejecting the opinion of his treating physician, Dr. Bands; however, the preference for the opinion of a treating physician is just that, a preference. The preference is not absolute, and when there are specific reasons for rejecting the opinion of the treating physician, the opinion of another physician may be given greater weight.¹⁸

Dr. Bands called his own opinion into question when he made inconsistent statements as to the accuracy of his medical records in documenting Mr. Bengough's low back injury.¹⁹ In contrast, Dr. Davies' did not attribute Mr. Bengough's low back pain to his 2007 on-the-job accident; Dr. Davies' medical report specifically indicated that Mr. Bengough "had the low back pain for only six (6) weeks prior to the July 2009 medical examination."²⁰ Having so stated, the ALJ provided clear reasons for rejecting Dr. Bands' opinion, and any remaining argument regarding the weight to be afforded to Dr. Bands' or Dr. Davies' opinions is beyond the scope of our authority.²¹

CONCLUSION AND ORDER

The ALJ's findings and conclusions denying that Mr. Bengough's low back injury was medically causally related to his July 2, 2007 work accident and rejecting the opinion of Mr. Bengough's treating physician are supported by substantial evidence in the record. The Compensation Order of April 11, 2011 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:


MELISSA LIN JONES
Administrative Appeals Judge

July 25, 2011

¹⁷ *Marriott, supra*.

¹⁸ See *Butler v. Boatman & Magnani*, H&AS No. 84-348, OWC No. 044699 (Remand Order December 31, 1986) (citing *Murray v. Heckler*, 624 F. Supp. 1156 (D.C. 1986)).

¹⁹ *Bengough, supra*, at 5-6.

²⁰ *Bengough, supra*, at 6.

²¹ *Marriott, supra*.