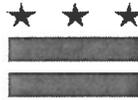


**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-144

**RAHEL DEMISSIE,**  
**Claimant-Petitioner,**

v.

**STARBUCKS COFFEE COMPANY and**  
**GALLAGHER BASSETT SERVICES,**  
**Employer/Third-Party Administrator-Respondent.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 FEB 4 PM 12:29

Appeal from an August 7, 2015 Compensation Order  
by Administrative Law Judge Nata K. Brown  
AHD No. 14-240, OWC No. 672968

(Decided February 4, 2016)

Benjamin E. Douglas for Claimant  
Jennifer L. Ward for Employer

Before LINDA F. JORY, HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

**DECISION AND REMAND ORDER**

FACTS OF RECORD AND PROCEDURAL HISTORY

Rahel Demissie (Claimant) worked for Starbucks (Employer) as a barista. On August 8, 2010, while washing dishes in a back room, three boxes of soy milk containers fell onto Claimant's back and right shoulder causing Claimant's abdomen to be pushed into the sink. After being treated at an emergency room, Claimant sought treatment from Perry Family Medical Center. She was released to return to work on September 13, 2010.

Claimant eventually returned to work for Employer. Claimant was provided assistance with certain job duties and she no longer performed duties such as lifting floor mats and taking out trash. Employer arranged for Claimant to be examined by Dr. Louis Levitt, orthopedic surgeon, for an independent medical examination (IME) on November 28, 2011. Dr. Levitt opined that Claimant had the capacity to work on a full-time basis without limitations.

On August 16, 2013, Claimant sought treatment for back pain from Mary's Center. She reported a work injury 3 years before with residual pain aggravated by lifting a heavy object.

In September, 2013, Claimant's new manager at work asked Claimant for documentation from a physician that Claimant had physical restrictions. Claimant did not return to work for Employer thereafter.

Employer arranged for Claimant to be re-examined by Dr. Levitt on September 23, 2013. Dr. Levitt opined that Claimant's current complaints are not related to the August 2010 injury. On October 10, 2013, a nurse at Mary's Center completed an Excuse Slip which stated Claimant should continue with lifting restriction of not more than 10% of her body weight.

Claimant sought treatment for back pain from Dr. Joseph O'Brien, orthopedic surgeon, on November 5, 2013 and advised him that she was injured at work while working at Starbucks. Dr. O'Brien referred Claimant to physical therapy. Dr. O'Brien filled out a disability slip on January 14, 2014.

A full evidentiary hearing occurred on June 12, 2014. Claimant sought an award of temporary total disability benefits from September 18, 2013 to the present and continuing.

An administrative law judge (ALJ) issued a Compensation Order (CO) on August 7, 2015. The ALJ concluded Claimant did not meet her burden of demonstrating that her current complaints are causally related to her August 2010 work accident.

Claimant timely appealed. Claimant asserts the ALJ's conclusion that her condition is not causally related to her 2010 work injury is not supported by substantial evidence and not in accordance with the Act.

Employer contends that the CO should be affirmed as it is supported by substantial evidence.

#### ISSUE ON APPEAL

Is the August 7, 2015 Compensation Order supported by substantial evidence and in accordance with the law.

## ANALYSIS<sup>1</sup>

At the outset, we note that all of Claimant's allegations of error involve the ALJ's characterization of the evidence after the ALJ found Employer successfully rebutted the presumption of compensability. Claimant does not assert that the ALJ erred in not setting forth the test currently used in this jurisdiction when IME reports are relied upon to rebut the presumption, as outlined in *Washington Post v. DOES and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004) (*Reynolds*) in her rebuttal analysis. Nor does Claimant assert that Dr. Levitt's reports do not equate to an unambiguous opinion that the work accident did not cause the Claimant's current alleged disability. Claimant's contentions on appeals are as follows:

1. The Compensation Order must be reversed because it inaccurately describes the treating orthopedist Dr. O'Brien's reports.
2. The Compensation Order must be reversed because it inaccurately describes the primary care doctor's reports.
3. The Compensation Order must be reversed because its finding of no causal relationship is contradicted by its other findings of fact.
4. The Compensation Order must be reversed because it improperly credits a contradictory report by Dr. Levitt.
5. The Compensation Order must be reversed because it admitted a late-submitted utilization review report and denied the treating physician an opportunity to respond to it.
6. The Compensation Order must be reversed because it fails to address the contested issues.

With regard to her first allegation, Claimant quotes the CO:

Dr. O'Brien first opined that Claimant was in no distress, neurologically intact, and that the MRI did not show neurologic compression or any explanation for etiology of her pain. Six months later, he opines that Claimant's low back pain is directly related to her work injury, and that [she] was prevented from working without light duty Dr. O'Brien gives no explanation for [how] Claimant's medical

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<sup>1</sup> The Compensation Review Board's (CRB) scope of review, established by the District of Columbia Workers' Compensation Act (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. 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). Consistent with this scope of review, the CRB is 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 reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

status changed during the six months between November 2013 and May 2014. I reject the opinions of Dr. O'Brien.

Claimant's Brief at 4.

While we do not agree with Claimant that "A comparison of Dr. O'Brien's November 5, 2013 report (EE 1) with his May 12, 2014 report (CE 1) reveals that this description bears little relationship to the record", we do agree the ALJ failed to provide sufficient specific reasons for rejecting the May 12, 2014 report of Dr. O'Brien in favor of the opinion of IME physician, Dr. Levitt.

In *Canlas v. DOES*, 723 A.2d 1210 (D.C. January 14, 1995), the DCCA reasoned:

Further, while the law of the District of Columbia embodies "a preference for the testimony of treating physicians over doctors retained for litigation purposes," the hearing examiner nonetheless "may choose to credit the testimony of a non-treating physician over a treating physician." *Short v. District of Columbia Dep't of Employment Servs.*, 723 A.2d 845, 1998 D.C. App. LEXIS 221, (D.C. 1998). Particularly is that so if "the contradicting medical evidence from the employer was from a doctor who . . . examined" the claimant, *King v. W.C.A.B. (Wendell H. Stone Co.)*, 132 Pa. Commw. 292, 572 A.2d 845, 846 (Pa. Commw. Ct. 1990) (cited in *Stewart v. District of Columbia Dep't of Employment Servs.*, 606 A.2d 1350, 1353 (D.C. 1992)), and, in any case, the hearing examiner must explain his decision to credit the one opinion over the other. *See Short*, 1998 D.C. App. LEXIS 221, \*16-17 (recognizing examiner's right to discredit treating physician's opinion but remanding for explanation where examiner did not mention opinions of those physicians). Although an agency as finder of fact generally "need not explain why it favored the evidence on one side over that of the other," *McKinley v. District of Columbia Dep't of Employment Servs.*, 696 A.2d 1377, 1386 (D.C. 1997) (citation omitted), there would be little force to the preference in favor of a treating doctor's opinion if the agency could ignore that opinion without explanation. The parties do not dispute that DOES itself requires such an explanation. *See Br. for Pet. at 20* (quoting, for example, *Estella Whitaker v. Washington Metro. Transit Auth.*, Dir. Dkt. No. 91-12) (If hearing examiner rejects treating physician's opinion, "specific reasons for doing so must be elaborated upon in his or her findings.").

As we are remanding this matter to the ALJ to afford Dr. O'Brien's opinion the treating physician preference upon weighing the evidence to determine if there is a causal relationship between her alleged disability and the work injury, we need not address numbers two through four of Claimant's assertions on appeal.

With regard to Claimant's fifth argument that the ALJ erred in admitting a late-submitted utilization review report (UR) and denied the treating physician an opportunity to respond to it, we note that the admitted utilization review report in question is dated June 11, 2014 or one day prior to the formal hearing of June 12, 2014. We note that the ALJ did not request a proffer from

Counsel for Employer as to why the report should be admitted past the date listed in the scheduling order for exhibits to be exchanged. We further note Counsel for Employer offered to have the record kept open post-hearing in order to allow Dr. O'Brien the opportunity to comment on the late utilization report. We shall refrain from quoting the ALJ's reasons for not keeping the record open except that she summarized her decision with "I don't see a reason to hold things up or not to admit the UR. It's just another opinion". HT at 14,15.

As Claimant correctly asserts:

The ALJ admitted a utilization review report that was submitted late. EE 5, HT 10-13). According to D.C. Code Sec. 32-1507(C):

If the medical care provider disagrees with the opinion of the utilization review organization or individual, the medical care provider shall have the right to request reconsideration of the opinion of the utilization review organization or individual 60 calendar days from receipt of the utilization review report. The request for reconsideration shall be written and contain reasonable medical justification for the reconsideration.

7 DCMR 222.5 states that "requests for continuances of dates set in the Scheduling Order shall not be granted except for good cause shown". In this case both of these provisions were disregarded by the ALJ, who admitted the exhibit even though defense counsel admitted that the utilization review report was acquired and submitted late, and did not show any good cause.

Claimant's Brief at 9.

In *McCormick v. Children's National Medical Center*, CRB No. 09-016, (January 2, 2009) (*McCormick*), we discussed § 32-1507(C) and held:

...We therefore view the subsection as giving the physician the right to request reconsideration if he/she wants to advocate for the patient, or if he/she wants to assist in getting a Compensation Order in order to receive payment for a procedure already undertaken, if he/she wishes to assist in getting authorization for a procedure before undertaking to perform it so as to not risk performing it and not getting paid, or for some other purpose. The statutory "right to request reconsideration" is solely a right belonging under the Act to the physician (a right that he/she would not otherwise have, given that the UR process is a statutory creation in a workers' compensation adjudication system to which the physician is not a direct party).

We are mindful that we also said in *McCormick*:

While we continue to maintain that the statutory process of UR must be completed insofar as the parties (that is, the claimant and the employer) are

concerned, before the matter may be heard at a formal hearing, we should and do hereby clarify that the final step outlined in the statutory process insofar as the parties are concerned is the UR report.

While an ALJ has great discretion with respect to receiving evidence at a formal hearing, she does not have unrestricted discretion. All actions of an ALJ must be consistent with due process and fairness to both parties. *See Tomlin v. D C Public Schools*, CRB No. 13-064, DCP No. 30080945683(August 22, 2013). As this case is being remanded, as a matter of fundamental fairness, the ALJ shall reopen the matter to allow Claimant the opportunity to present the UR report to Dr. O'Brien and, if applicable, submit his response or his request for reconsideration. *See generally Woodfork v. WMATA*, CRB No. 09-033, (April 13, 2009).

The ALJ shall consider the remaining issues if, after reweighing the evidence with the treating physician preference, the ALJ concludes Claimant has met her burden of establishing her alleged disability is causally related to the 2010 work-related injury.

#### CONCLUSION AND ORDER

The ALJ's conclusion that Claimant's current complaints are not causally related to her 2010 injury is not supported by substantial evidence and not in accordance with the law and is **VACATED**. The matter is **REMANDED** for further findings of fact and conclusion of law consistent with this Decision and Remand Order.

*So ordered.*