GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-125

RAHEL DEMISSIE,
Claimant–Respondent and Cross-Petitioner,

v.

STARBUCKS COFFEE COMPANY and
GALLAGHER BASSETT SERVICES,
Employer/Third-Party Administrator-Petitioner and Cross-Respondent.
Appeal from an August 24, 2016 Compensation Order on Remand
by Administrative Law Judge Nata K. Brown
AHD No. 14-240, OWC No. 672968

(Decided January 19, 2017)

Benjamin E. Douglas for Claimant
Joseph Tarpine for Employer

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

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This matter is an appeal from a Compensation Order on Remand ("COR") issued August 24, 2016 by an Administrative Law Judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Office of Hearings and Adjudications ("OHA") in the District of Columbia Department of Employment Services ("DOES"). The COR was issued following a Decision and Remand Order ("DRO") issued by the Compensation Review Board ("CRB") on February 4, 2016. The following background information is taken from the DRO:

> 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.

DRO at 1 – 2.

The CRB analyzed the CO, and determined that the ALJ had improperly failed to accord a preference to the opinion of Claimant's treating physician without providing a sufficient explanation for its rejection, and remanded the matter for further consideration of the claim, taking the treating physician preference into account.

A second issue relating to the reasonableness and necessity of certain past and recommended medical care had also been presented for resolution at the formal hearing but was not reached by the ALJ in the CO because the claim was denied on medical causation grounds.

A Utilization Review ("UR") report had been obtained the day prior to the formal hearing and was submitted by Employer on this issue. The ALJ declined at the time of the formal hearing to keep the record open to allow the treating physician, Dr. O'Brien, an opportunity to review and respond to the UR report, in contravention of the UR statute.

On this issue the CRB held the ALJ erred:

> 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.

DRO at 4 – 6.

On August 24, 2016, the ALJ issued the COR which is now before us.[1] In it, the ALJ determined that Claimant had adduced sufficient evidence to invoke the presumption that the complained of injury is causally related to the work injury, and that Employer had adduced sufficient evidence to overcome that presumption. Having so found, the ALJ then reweighed the evidence with

[1] The COR makes no mention of the DRO, the specific mandates contained therein, or any other aspect of the procedural history of the case.

Claimant having the burden of proving causal relationship by a preponderance of the evidence but taking into account the treating physician preference. The ALJ concluded:

> The September 23, 2013 opinion of Dr. Levitt [Employer's independent medical evaluator ("IME")] states that he does not believe the current complaints are causally related in any way to the original injury she had three years ago, and that her aches and pains relate to just performing her job in a deconditioned state, and not any residual for a simple soft tissue contusion that occurred at work in 2010. Dr. Levitt, however, does not give an explanation why Claimant's current back pain is not from any other source other than the original injury.[2]
>
> Dr. O'Brien, her primary care physician, who has examined Claimant on four occasions since November 5, 2013, has had the opportunity to see her progression for six months. In his last report, dated May 12, 2016, he wrote a robust narrative regarding Claimant's progress from November 5, 2013 through the end of 2014. He examined her four times, and placed her in an extended course of physical therapy. On May 12, 2014, Dr. O'Brien diagnosed Claimant with low back injury with chronically greater than four months in duration, and he opined that her low back is directly related to her work injury.[3]
>
> After her injury, Claimant saw Dr. Levitt only one time, on September 23, 2013. I credit the opinion of Dr. O'Brien, the attending physician, as he followed Claimant's condition for six months.

COR at 6.

The ALJ thereupon proceeded to consider the claim for temporary total disability, using the paradigm set forth in *Logan v. DOES*, 805 A.2d 237 (D.C. 2002). The ALJ determined that Claimant had demonstrated the inability to perform her pre-injury job, through her testimony and the May 12, 2014 report of Dr. O'Brien in which he "recommended Claimant was to remain off work and proceed with nonsurgical treatment and consideration for interventional pain management" and in which he "opined that her low back pain is currently preventing her from working without light duty" COR at 7.

The ALJ concluded that:

> Although Claimant was able to work at Starbuck's and complete LPN [Licensed Practical Nurse] training in 2012, her current condition was known to Mary's Center [a health care facility from which Claimant received medical care, in addition the care received from Dr. O'Brien] on August 16, 2013, and to Dr.

[2] This sentence is somewhat awkwardly composed. We assume that the ALJ meant to convey that Dr. Levitt gave no alternative explanation for the source of Claimant's ongoing back pain, other than her work injury.

[3] This sentence too is somewhat awkward. We assume that the ALJ meant to convey that "On May 2, 2014 Dr. O'Brien diagnosed Claimant with a low back injury that has been chronic for four months and is directly related to her work injury."

> O'Brien on November 5, 2013. On April 4, 2014, Dr. O'Brien took Claimant off work due to her low back pain which is directly related to her work injury and currently preventing her from working without light duty. Employer has not presented a contravening opinion to establish that there are any other jobs that Claimant could perform. Claimant is temporarily totally disabled.

COR at 7.

The ALJ then proceeded to consider whether Claimant's physical therapy was reasonable and necessary. The ALJ first considered the UR report, which concluded that in the absence of "clear evidence of musculoskeletal impairment" physical therapy beyond two or three sessions "to instruct the woman in home exercises and monitor performance" is not reasonable and necessary. COR at 8.

As directed by the CRB in the DRO, the ALJ also considered the response to the UR report submitted by Dr. O'Brien. Summarizing Dr. O'Brien's comments, the ALJ wrote:

> On July 8, 2016, Dr. O'Brien read the utilization report. He disagreed with the June 11, 2014 utilization review. As her treating physician, Dr. O'Brien saw Claimant and examined her after injury. She complained of back and leg pain at that time, and he prescribed physical therapy. It is reasonable and customary to prescribe physical therapy to patients who have sustained work injuries and complain of back pain. I see no reason why a physician's opinion who has not examined Claimant should be applied to her work injury or her need for physical therapy.
>
> Further, Dr. O'Brien stated that, as her treating physician, the recommendation when he saw her and treated her after her work injury was very reasonable to have physical therapy and not outside of the normal requests for a patient who has been injured at work with a low back complaint. Partly the reason why we prescribed physical therapy is to strengthen the back and help prevent further injuries down the road after a work related accident. [4]

COR at 9.

Immediately following this passage, the ALJ found the medical services were reasonable and necessary, relying on the treating physician preference. The ALJ wrote:

> In assessing the weight of competing medical testimony in workers' compensation cases, attending physicians are ordinarily preferred as witnesses

[4] Despite the lack of clarity as to whose "voice" this passage in the COR is intended to represent, (there are no quotation marks or other indicia of who is meant by "I" and "we", for example), we conclude that this is the ALJ's summary of Dr. O'Brien's comments, and does not purport to be conclusions drawn or rationale employed by the ALJ. We reach this conclusion after reviewing Claimant's Supplemental Exhibit 10 (CE 10), Dr. O'Brien's undated note submitted by Claimant's counsel on July 21, 2016, identified in counsel's forwarding letter as having been prepared July 18, 2016. CE 10 employs "I" and "we", and the phrases "As her treating physician" twice, paralleling the language of the COR.

> rather than those doctors who have been retained to examine injured workers solely for purposes of litigation. *Stewart v. D.C. Department of Employment Services*, 606 A.2d 1350 (D.C. 1992).
>
> The weight of the evidence presented by Claimant is more persuasive than that of Employer. Dr. Bachman [the UR reviewer] based his opinion on medical records, and had never examined Claimant. In contrast, Dr. O'Brien treated Claimant in his office for five months, from November 2013 through April 2014, and followed the progression of her injury. He opined that, within a reasonable degree of medical certainty, that Claimant's low back pain is directly related to her work injury and currently is preventing her from working without light duty. Dr. O'Brien recommended that Claimant remain off work and proceed with nonsurgical treatment and consideration for interventional pain management.
>
> Employer is responsible for medical services that are reasonable and necessary, and directly related to the disabling injury. Claimant has demonstrated that the claimed medical care needed to treat the causally related on-the-job injury, nonsurgical treatment and consideration for interventional pain management, is reasonable and necessary.

COR at 9 – 10.

The ALJ then proceeded to address the voluntary limitation of income issue. After quoting D.C. Code § 32-1508 (3)(V)(iii), the ALJ, without any analysis, wrote:

> Claimant is temporarily totally disabled pursuant to the Act. Employer cannot support its claim that Claimant is voluntarily limiting her income.

COR at 10.

Finally, the ALJ addressed Claimant's claim for bad faith penalties. After citing *Bivens v. Chem Ed/Roto Rooter Plumbing Services*, CRB No. 05-215 (April 28, 2005), *Gonzalez v. Asylum Construction*, CRB No. 11-126 (September 6, 2012), and *Blue v. Conway Construction*, CRB No. 13-065 (September 23, 2013), the ALJ concluded:

> In the instant case, Claimant has shown, through the medical evidence and testimony adduced her entitlement to the benefits which were never given to Claimant, and Employer's knowledge of her claim to that entitlement. It is also clear from the record that Employer did not pay those benefits at all. Employer has failed to show a good faith basis for not paying the benefits.
>
> Here, unlike the situation in *Gonzalez, supra,* well-settled law clearly requires ongoing payment of benefits when the worker cannot return to her usual employment and Employer has not shown the availability of suitable alternative employment. Claimant's symptoms were disabling, and she could not go back to work. There is no valid explanation and no legal basis for Employer to withhold

benefits. Claimant is entitled to a penalty for bad faith delay in payment of benefits during the period of September 18, 2013 to the present.

COR at 11.

On September 1, 2016, Employer filed Motion for Reconsideration/Motion to Stay Compensation Order on Remand in AHD.

On September 12, 2016, the ALJ issued an Order Vacating Bad Faith Penalties, stating "Therefore, the 'Costs in Proceeding Brought Without Reasonable Grounds/Penalty for Unreasonable Delay in Payment of Compensation' issue is vacated."

On September 22, 2016, Employer filed Employer and Insurer's Application for Review "seeking review of the Compensation Order of August 24, 2016" and Employer/Insurer's Memorandum of Points and Authorities in Support of Partial Application for Review ("Employer's Brief"). Employer seeks reversal of the COR.[5]

On October 4, 2016, Claimant filed Claimant's Cross-Petition for Review of Compensation Order and Claimant's Memorandum of Points and Authorities in Support of Cross-Appeal ("Claimant's Cross-Petition").

The only matter raised in Claimant's Cross-Petition is Claimant's assertion that the Order (vacating the award of bad faith penalties) Order Vacating Bad Faith Penalties is defective in that it fails to state any basis for the order other than that the CRB had vacated the original Compensation Order. Claimant seeks re-imposition of the bad faith penalties contained in the COR.

Lastly, on October 4, 2014, Claimant filed Claimant's Response in Opposition to Employer and Insurer's Application for Review and Claimant's Memorandum of Points and Authorities in Support of Response in Opposition to Employer and Insurer's Application for Review ("Claimant's Brief"), seeking affirmance of the COR in all respects (noting in a footnote that Claimant has filed what is termed a Cross-Appeal seeking reversal of the Order).

ANALYSIS

The Order Vacating the Imposition of Bad Faith Penalties

Claimant asks that the Order be vacated and reversed. Although Claimant argues that we review the order under a "substantial evidence" standard, inasmuch as the Order was issued without

[5] On that same date Employer also filed a Motion to Stay Compensation Order on Remand Dated August 24, 2016 ("Employer's Motion"). The basis of the Employer's Motion is that Employer contends that it has, subsequent to the issuance of the COR, discovered that "Claimant was working as an LPN through August of 2016" for Holladay Corporation, and that Claimant has filed a workers' compensation claim against Holladay Corporation for an injury alleged to have occurred August 2, 2016. Employer also alleges that "Claimant has worked and received wages from the following employers", listing LSA Veteran Consulting, Professionals for Non-Profits, and Community Multi-Services. Employer also alleges that Claimant has been receiving unemployment benefits. Prior to the matter being assigned to a panel for review, the Chief Administrative Law Judge denied the motion.

reference to an evidentiary record, our obligation is to determine whether the ALJ's decision was arbitrary, capricious or an abuse of discretion. *See* 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW § 51.03 (2001).

Claimant argues that the Order should be reversed for numerous reasons, among them "the 9/12 Order Vacating Bad Faith Penalties does not state its reasoning…." Claimant's Petition at 4.

Employer has not filed a response to Claimant's Petition, raising either substantive or procedural issues.

We have reviewed the Order and agree that it fails to identify any explanation for vacating the bad faith penalty award. It is therefore incapable of being assessed for arbitrariness, caprice, or abuse of discretion.

While we do not reverse it *per se*, it is legally deficient for these reasons and for the reasons discussed below, and is vacated.

Medical Causal Relationship and Nature and Extent of Disability

Employer's argument begins by expounding upon the general rules regarding a claimant's entitlement to the presumption of compensability and, once invoked, an employer's obligation to adduce substantial evidence in opposition to the presumption, and the resulting burden of proof being placed upon a claimant to prove compensability by a preponderance of the evidence. None of this is in dispute in this case.

Employer then argues:

> Here, the ALJ erred by accepting the opinion of Dr. O'Brien, who had only seen the Claimant on four occasions over a six month period, over the opinions of Dr. Levitt, who had seen the Claimant in 2010 and again in 2013. Dr. O'Brien gave no explanation for the change in Claimant's medical status during the six months between November 2013, Claimant's first examination, and May 2014. Dr. O'Brien first opined Claimant was in no distress, [was] neurologically intact, and that the MRI did not show neurologic compression or any etiology of her pain. … Six months later, he opines Claimant's low back pain is directly related to her work injury and she that [sic] she was prevented from working without light duty restrictions, but there is no explanation for this change.
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> * * *
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> Conversely, the opinions of Dr. Levitt show an ability to view Claimant's history from 2010 to 2013 and understand the progression of her medical condition during this time.

Employer's Brief at 7.

Employer continues in a similar vein, highlighting reasons why Employer believes that Dr. Levitt's opinions are more cogent that Dr. O'Brien's.

It is evident that Employer's argument is nothing more than a difference of opinion regarding the relative merits of the competing medical evidence, and that Employer seeks that the CRB substitute its judgment for that of the ALJ on this question.

This, of course, is something we cannot do. Our role is limited to determining whether the ALJ's decision is supported by substantial evidence, and we are not empowered to independently review the evidence and come to our own conclusions *de novo*. *Marriott Int'l. v. DOES*, 834 A.2d 882 (D.C. 2003).

The ALJ relied upon the opinion of Dr. O'Brien, a treating physician, which is within the ALJ's discretion and is in accordance with the law. The finding concerning medical causation is therefore affirmed.

Regarding the award of temporary total disability, after expounding upon the lack of any presumptions where the issue is nature and extent of disability and discussing *Logan v. DOES*, 805 A.2d 237 (D.C. 2007) and other cases, Employer argues:

> [I]n order to establish a claim for temporary total disability benefits, the Claimant must show that she is unable to return to work or earn wages as a result of the accident and she must establish the nature and extent of his [sic] disability, whether partial or total, and she also has an affirmative duty to present substantial and credible evidence of the level of benefits sought. See Logan, 805 A [sic] at 109; Dunston [*DOES*, 309 A.2d 109 (D.C. 1986)] at 109.
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> * * *
>
> Here, the Claimant cannot meet her burden and show entitlement to temporary total disability benefits because her evidence simply does not support a claim that she remains unable to work and the Administrative Law Judge erred in finding that the Claimant could meet her burden. Indeed, the Claimant cannot show that the nature of her injury wholly prevents her from returning to gainful employment because the opinions of her treating physicians are unsupported by the medical evidence.

Employer's Brief at 9 – 10.

We repeat that our obligation with respect to limiting our review of a Compensation Order is to determine whether the ALJ's decision is supported by substantial evidence, not whether we might have found otherwise on the same record.

Further, Employer's argument represents a fundamental misunderstanding of the burden shifting scheme enunciated by the DCCA in *Logan.* As we have stated in the past in language appearing in many cases:

> Under *Logan v. DOES* …, once a claimant has demonstrated the inability to perform his/her usual job, a *prima facie* case of total disability is established, which the employer may seek to rebut by establishing the availability of other jobs which the claimant could perform. *Id*. at 240. Where the employer meets this evidentiary burden, claimant, in order to sustain a disability finding, must either successfully challenge the legitimacy of employer's evidence of available employment, or demonstrate diligence, but lack of success, in obtaining other employment. *Id*. at 243.

Morales v. Dean Avenue Cleaners, CRB No. 16-005 (May 27, 2016) at 2.

Employer does not contest that Claimant's medical evidence, if accepted, supports the finding that Claimant is unable to return to her pre-injury job without some modifications. The ALJ accepted that evidence. Employer did not adduce evidence that it offered Claimant a modified light duty position, or that it adduced any evidence of other suitable alternative employment within Claimant's physical capacity.

Accordingly, the determination concerning Claimant's temporary total disability is supported by substantial evidence and is in accordance with the law.

Reasonableness and Necessity of Medical Care

Employer raises two complaints concerning the ALJ's determination that the medical care recommended by Dr. O'Brien, being physical therapy and "consideration" of interventional pain management, is reasonable and necessary. One complaint is procedural, the other substantive.

The procedural complaint is that the ALJ considered a July 18, 2016 report from Dr. O'Brien, after the close of the record. "The Administrative Law Judge erred because she should not have considered any new evidence since the issuance of her original Compensation Order. The report of July 18, 2016, is clearly new evidence provided by Claimant well after the close of the record in the Formal Hearing." Employer's Brief at 13.

What this argument ignores is that the ALJ acted in conformance with the direct instruction of the CRB in the DRO, quoted above and reiterated here:

> 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).

DRO at 4.

As the CRB noted in the DRO, the UR report was obtained the day prior to the formal hearing. The statutory provision allowing a physician recommending disputed medical care to respond to a UR report could not be accomplished under this unusual circumstance. Thus, the CRB ordered that on remand, should the claim be found to be compensable, the ALJ was to consider the other unresolved issues, among them being the reasonableness and necessity of the medical care recommended by Dr. O'Brien. Such a direction to reopen the record is within the authority of the CRB. *See* 7 District of Columbia Municipal Regulations 264. We reject this argument. As the DCCA held:

> We observe that the Board's interpretation would in some cases permit a claimant or employer to proceed to a formal hearing contesting the UR report before the sixty-day window in which the medical provider may seek reconsideration has closed. Indeed, that is what happened here -- the UR report was issued on September 19, and the formal hearing took place on October 2. We see nothing in the statute that precludes this result. If the medical provider seeks reconsideration, however, it would be important for the ALJ to consider the results of that process. The Board has sensibly remarked (in dictum) that if a medical care provider requests reconsideration within the sixty-day period, an ALJ should hold a formal hearing in abeyance "pending the results of that reconsideration." *Yates v. The Washington Times*, CRB No. 08-195, at 4, n.5 (Jan. 30, 2009).

Children's National Medical Center v. DOES, 992 A.2d 403 (D.C. 2010) at 412, n. 14.

The second complaint of error is that the ALJ placed improper weight on the opinion of Dr. O'Brien when assessing the relative merits of his opinion on the one hand and the views expressed in the UR report on the other. We agree.

As noted above, in considering the issue, the ALJ stated that her consideration of the competing opinions should take the treating physician opinion preference into account. COR at 9 – 10. This is error. As Employer points out, the DCCA has ruled that where UR is involved, reasons for rejecting a medical conclusion contained in a UR report must, like rejection of treating physician opinion, be fully articulated. *Placido v. DOES*, 92 A.3d 323 (D.C. 2014). And, as the DCCA has noted:

> The Board has held that at a formal agency hearing on the necessity or sufficiency of care, as opposed to causation, there is no preference for the opinion of either the medical care provider or the utilization reviewer. *Haregewoin* [*v. Loews National Hotel*, CRB No. 08-068 (February 19, 2008 ("[W]e view [§ 32-1507(b)(6)] as placing an obligation upon the ALJ to weigh the competing opinions based upon the record as a whole, and to explain why the ALJ chose one opinion and not the other, but [the statute] does not require that either opinion be given an initial preference."); *see also Green v. Washington Hosp. Ctr.*, CRB No. 08-208, at 3 (June 17, 2009) ("On the question of reasonableness and necessity, the UR is not 'dispositive,' but rather . . . stands on equal 'preferential' footing with an opinion of a treating physician.").

Children's National Medical Center, supra, at 410, n. 10.

And, from *Haregewoin v. Loews National Hotel*, *supra*:

> While the issue presented in this matter has never been squarely addressed, the District of Columbia Court of Appeals (DCCA) has discussed its view of the weight to be attached to medical opinion as contained in UR reports obtained under the Act. In *Sibley Memorial Hospital v. District of Columbia Department of Employment Services and Ann Garrett, Intervenor, 711 A.2d 105 (D.C. 1998),* the Court reversed an agency decision in which the opinion of a treating physician recommending a surgical procedure was accepted despite the contrary opinion in a statutorily obtained UR. Although the Court nowhere suggested that a UR opinion should be given preference to treating physician opinion, the Court did hold as follows:
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> > The hearing examiner [now, ALJ] failed to explain clearly why the utilization review report rendered pursuant to the statute was not decisive in making her determination. [The UR provider] in its report thoroughly reviewed Claimant's six-year medical history. It focused on the inconsistent clinical findings of six different doctors who had examined Claimant in the ten months prior to her third surgery and on the results of the neurodiagnostic tests performed most recently before the surgery. [The UR report] then concluded that the submitted records in its opinion did not support the necessity or timeliness of the third surgical procedure. Even after it had reconsidered its decision at the request of Drs. Goald and Azer [the treating physicians], [the UR provider] concluded the surgery was unnecessary.
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> *Sibley, supra, at 107.* The Court remanded the matter for further consideration, with the instructions that the fact finder reconsider the matter "within the context of all the other evidence, and explain why the conclusion of the supplemental utilization review report is not dispositive and must be rejected". *Id, at 109.*
>
> This language mirrors closely the obligations imposed upon an ALJ who rejects a treating physician's opinion to explain the reasons for that rejection. See, e.g., *Short v. District of Columbia Department of Employment Services, 723 A.2d 849 (D.C. 1998).* It appears to us that this framework set forth by the court in *Sibley* is substantially identical to that espoused by the court in the treating physician cases, and we view it as the appropriate manner to treat UR opinion under the Act.
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> While it can be argued that the Act could be viewed so as to grant an even higher preference to UR opinion over treating physician opinion, we note that the processes envisioned by the statutory UR provisions call for consideration of treating physician opinion and UR opinion, without specifying any preference for one or the other by virtue of its being treating physician opinion on the one hand, and UR opinion on the other. Accordingly, we view the statute as placing an

> obligation upon the ALJ to weigh the competing opinions based upon the record as a whole, and to explain why the ALJ chose one opinion and not the other, but does not require that either opinion be given an initial preference.

Id. at 6 – 9.

Accordingly, the determination by the ALJ concerning reasonableness and necessity of medical care must be remanded to the ALJ for further consideration consistent with above stated standards. On remand the ALJ shall give equal initial evidentiary weight to the UR opinion and the treating doctor's opinion and explain why she is more persuaded by one over the opinion of the other.

Bad Faith Penalties

In *Bivens v. Chemed/Roto Rooter Plumbing Services*, CRB No. 05-215, AHD No. 01-002B (April 28, 2005) (*Bivens*), the CRB adopted the three-prong test utilized in *Robinson v. Brooks Hair Design*, OWC No. 220370, OHA No. 92-481 (March 2, 1994), to establish a *prima facie* showing of bad faith in contravention of the § 32-1528 of the Act. Pursuant to that test, a claimant must show:

> (1) entitlement to a benefit;
>
> (2) knowledge by the employer of a claim to the entitlement; and
>
> (3) failure to provide the benefit or to controvert the claimed entitlement within a reasonable time.

Once the claimant makes this showing, the burden shifts to the employer to produce evidence indicating a good faith basis for not paying the benefits. *Gonzales v. Asylum Co*., CRB No. 08-077 (Aug. 22, 2008) at 10, affirmed in *Asylum Co. v. DOES*, 10 A.3d 619, 634-45 (D.C. 2010). "Upon such production by the employer, the injured worker has the additional burden of proving the said evidence is pretextual." *Id*.

In its Cross-Petition, Claimant asserts:

> The ALJ accurately cited and applied [*Gillis v. Superior Concrete Materials* AHD No. 13-301 (April 29, 2014), citing *Bivens*] these legal standards in the August 24th Order (CO 10-11), but failed to state or follow this reasoning in the September 12th supplemental Order. All three prongs of the bad faith test are met. First, Claimant was and remains entitled to the benefit of temporary total disability. (CO 6-7). Second, the Employer was aware of Ms. Demissie's entitlement to the benefit, as they had been accommodating the restrictions of the treating doctor for three years at the time in 2013 when the decided to cease doing so. (CO 10-11; CE 3; CE 6; CE 7; HT 29-35, 48; HT 54-60). Although Employer appealed to a report of Dr. Levitt in supposed justification, the ignoring of a

> previous, functionally equivalent report from three years earlier demonstrates that this was pretextual. (EE , p. 48; EE 3, p. 57; CO 3).

Cross-Petition at 3 – 4.

We note first that the Claimant's argument does not resemble the ALJ's analysis. There is no reference in the COR's discussion of penalties to any three-year period of accommodation; merely deciding not to make further accommodations, if that is in fact what Employer did, does not equate to "knowledge of entitlement to the benefit" of temporary total disability, and the ALJ did not state that it did and it is not cited by the ALJ as a basis for the award. Similarly there is no mention of Dr. Levitt's report in the COR. None of the reasons Claimant presents as supporting the award are present in the ALJ's discussion of that award.

The second and most important noteworthy matter is related to the lack of reference in the COR to Dr. Levitt's 2013 report. There is no acknowledgment, as conceded by Claimant in the above-quoted passage from her Cross-Petition, that Employer relied upon that report as evidencing a good faith basis not to pay Claimant temporary total disability benefits.

This is the entire analysis of the bad faith issue contained in the COR:

> In the instant case, Claimant has shown, through medical evidence and testimony adduced her entitlement to the benefits which were never given to Claimant, and Employer's knowledge of her claim to that entitlement. It is also clear from the record that Employer did not pay those benefits at all. Employer has failed to show a good faith basis for not paying the benefits.

COR at 11.

None of these conclusory statements is supported by reference to any record evidence in the discussion of the penalty claim. We are left to speculate as to what medical evidence and testimony the ALJ is referring, particularly regarding "Employer's knowledge of her claim to entitlement" to temporary total disability benefits.

Even if we were to accept that the COR's *Bivens* analysis was supported by substantial evidence cited by the ALJ (which we do not because no such evidence is cited or identified), the required analysis in bad faith cases doesn't stop at *Bivens*. The ALJ must then consider Employer's evidence of a good faith basis for not paying a claim. *Gonzales v. Asylum Co., supra.* The COR is devoid of any such analysis or discussion.

Accordingly the bad faith penalty award is not supported by substantial evidence and is not in accordance with the law, and is vacated. On remand, the ALJ shall consider the issue of bad faith penalties by utilizing the analyses of *Bivens* and *Gonzales*.

CONCLUSION AND ORDER

The award of temporary total disability is supported by substantial evidence, is in accordance with the law and is AFFIRMED. The assessment and award of bad faith penalties is not in accordance with the law, and is VACATED. The determination by the ALJ concerning reasonableness and necessity of medical care is VACATED and the matter is REMANDED to the ALJ for further consideration consistent with above identified evidentiary weighing of competing medical opinion being applied.

So ordered.