GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

CRB No. 15-077

RICHARD L. WARWICK,
Claimant–Petitioner/Cross-Appellant,

v.

HOWARD UNIVERSITY and SEDGWICK CLAIMS MANAGEMENT SERVICES,
Self-Insured Employer/Third-Party Administrator-Respondent/Cross-Petitioner.

Appeal from an April 9, 2015 Compensation Order by
Administrative Law Judge Gerald D. Roberson
AHD No. 12-440A, OWC No. 691925

(Decided September 14, 2015)

Michael J. Kitzman for Claimant
William H. Schladt for Employer

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges,* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge.*

HEATHER C. LESLIE for the Compensation Review Panel.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked in the employer's television station for over 30 years. His job duties primarily included carrying equipment, such as cameras, lights and cables. Claimant began receiving treatment for his back in 2007. His primary care physician, Dr. Ricardo Caldera, recommended an MRI of the lumbar spine. The MRI revealed degenerative disc disease. Dr. Caldera put Claimant on a strict diet due to lose weight and indicated his concern about Claimant's consumption of alcohol. Claimant voluntarily retired on December 13, 2011 without notifying employer of his back condition. On April 16, 2012, claimant underwent an anterior lumbar interbody fusion L4-5 and L5-S1. Claimant also came under the care and treatment of pain management specialist, Dr. Patrick Fasusi.

A full evidentiary hearing occurred on August 4, 2014. Claimant sought an award of temporary total disability benefits from December 13, 2011 to the present and continuing as well as causally related medical expenses. Following a formal hearing before an administrative law judge (ALJ), a Compensation Order (CO) issued on August 28, 2014. The ALJ concluded the claimant failed to prove he sustained an accidental injury or aggravation on December 1, 2008 and claimant's claim for relief was denied.

Claimant appealed, arguing the CO's findings that an accidental injury did not occur was not supported by substantial evidence. A Decision and Remand Order issued on February 10, 2015 wherein the CRB concluded:

> The ALJ erred in not applying the presumption analysis to the facts and evidence of record once claimant established an accidental injury under the Act. The Compensation Order is therefore not in accordance with the law and is vacated. The matter is remanded to the Administrative Hearings Division to determine if Claimant is able to invoke the presumption of compensability that he has sustained a work related injury, and if so whether employer has submitted sufficient rebuttal evidence. If the ALJ determines the accidental injury did arise out of and in the course of employment, the ALJ must address the remaining issues raised at the formal hearing.

Warwick v. Howard University, CRB No. 14-112, AHD No. 12-440A, 5 (February 10, 2015).

A Compensation Order on Remand (COR) issued on April 9, 2015. The COR denied Claimant's claim for relief, concluding:

> Claimant established he sustained an injury to his low back which arose out of and in the course of the employment. Claimant has not established that the need for surgery and subsequent disability are medically causally related to the identified employment factors. The record establishes Claimant failed to provide timely notice under § 32-1513 (a) of the Act.

Warwick v. Howard University, AHD No. 12-044A, OWC No. 691925, p. 9 (April 9, 2015).

Claimant has timely appealed the COR. Claimant argues that the ALJ erred when concluding that Claimant's medical conditions were not medically casually related to the injury and that Claimant failed to provide timely notice. Employer opposes, arguing the ALJ correctly determined that Claimant did not provide timely notice and that his medical conditions were not medically causally related to the work injury.

Employer also filed a cross-appeal, arguing the ALJ's conclusion that Claimant did suffer an injury to his low back which arose out of and in the course of the employment is legally incorrect and not supported by the substantial evidence in the record.

STANDARD OF REVIEW

The scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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. 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. DOES* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this panel are 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.

ANALYSIS

First, Claimant argues the COR's conclusion that the Claimant's condition is not medically causally related to the work injury is in error. Specifically, Claimant argues Employer failed to rebut the presumption of compensability and the COR "does not reference substantial evidence to support the denial of the claim for relief." Claimant's argument unnumbered, at 5-6.

Addressing Claimant's first point, the ALJ correctly noted that after Claimant invokes the presumption of compensability, Employer must bring forth evidence substantial evidence to rebut the presumption. *Ferreira v. D.C. Department of Employment Services,* 531 A.2d 651, 655 (D.C. 1987). The Court has held that an employer has met its burden to rebut the presumption of causation when it has proffered a qualified independent medical expert who, having examined the employee and reviewed the employee's medical records, renders an unambiguous opinion that the work injury did not contribute to the disability. *Washington Post v. D.C. Department of Employment Services and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004) (*Reynolds*).

In analyzing the Employer's evidence to determine if it rebutted the presumption that Claimant's current back condition is medically casually related to the work injury, the ALJ stated:

> To challenge medical causal relationship and rebut the presumption, Employer maintained Dr. Fasusi never addressed the question of medical causal relationship in any of his reports or deposition. Employer argued Dr. Fasusi testified "I remember telling him, you know, that could be one of the reasons why he was probably having the pain." HT p. 51. Employer contends Claimant's orthopedic surgeon and the IME doctor agree that this is a degenerative condition that has occurred as a result of a number of things including his obesity, and Claimant needs to lose weight in order not to have these problems with his back improve. HT pp. 53-54. Employer relied primarily on the IME from Dr. Riederman. Dr. Riederman reviewed the necessary diagnostic evidence and medical records, and stated the radiology report of April 14, 2011 reflect slight progression that would be consistent the natural process of degenerative disease. Dr. Riederman further remarked "No objective abnormalities have been identified that would be causally

> related to an injury sustained on December 1, 2008." While Dr. Riederman imposed a 20 pound lifting limitation, he stated there were no work restrictions that would be causally related to the injury sustained on December 1, 2008. BE 6, p. 4.

COR at 6.

A review of the evidence supports the ALJ's conclusion that the Employer rebutted the presumption of compensability, specifically that Dr. Reiderman, Employer's IME, opined Claimant's current low back condition is not medically casually related to the work injury. Claimant attacks the opinion of Dr. Reiderman by stating the ALJ, when analyzing whether an injury arose out of and in the course of Claimant's employment, noted Dr. Reiderman did not comment on whether Claimants employment could have aggravated his underlying back condition. These are two separate issues and while the lack of any discussion of whether or not Claimant's employment aggravated his underlying back condition was found in Claimant's favor on the first issue, Dr. Reiderman's unabmigous statement that Claimant's condition is not medically causally related to the work injury is sufficient to rebut the presumption of compensability. We affirm the COR's conclusion that the Employer rebutted the presumption of compensability.

After the presumption was rebutted, the ALJ then weighed the evidence to determine whether Claimant's back condition is medically casually related to the work injury. As to Claimant's assertion the COR does not refer to any substantial evidence to deny the claim for relief, we note this passage:

> In this case, the evidence does not medically causally relate Claimant's back surgery and subsequent disability to the alleged employment factors. Claimant has not provided sufficient medical rationale from the treating physician or the orthopedic surgeon to address the issue. On February 28, 2012, Dr. O'Brien recommended surgical intervention, stating he would perform anterior lumbar interbody fusion to stabilize the affected segment, restore the neuroforaminal height and provide indirect spinal decompression. CE 1, p. 14. Dr. O'Brien performed the surgery in April 2012, and Claimant had follow-up treatment with Dr. O'Brien and pain management. Dr. O'Brien failed to address the issue of medical causal relationship. The record does not include a rationalized medical opinion from Dr. O'Brien or any other medical provider which medically causally relates Claimant's surgery and subsequent disability to his employment. Claimant relied on the opinion of Dr. Fasusi to establish medical causal relationship. During his deposition, Dr. Fasusi did not offer any supporting medical rationale. With regard whether the chronic pain was related to the surgery, Dr. Fasusi responded "I believe he's had - he's had the pain before, before the surgery." CE 6, Depo at 12. Dr. Fasusi remarked Claimant had the pain after the surgery, indicating the surgery did not make a difference in the level of pain he had in his back. CE 6, Depo at 12. While Dr. Riederman may have tailored his opinion to the alleged incident of December 1, 2008, the record establishes Claimant performed similar duties prior to December 1, 2008, and no physician has medically causally related

> Claimant's surgery and subsequent disability to the identified employment factors. As such, Claimant has not established that the need for surgery and subsequent disability are medically causally related to the identified employment factors.

COR at 7.

Contrary to Claimant's argument, the ALJ did reference substantial evidence to support his conclusion. As we stated above, 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. Such is the case here. The conclusion reached is supported by the substantial evidence in the record and we will not disturb it.

Claimants second argument is that the COR erred when determining Claimant did not provide timely notice, relying on *Keith v. Unity Construction Co. of D.C.*, Dir. Dkt. 89-58, H&AS No. 89-202, OWC No. 500412 (July 12, 1990)(hereinafter *Keith*). Claimant argues, in part:

> While the claimant may have not stated the correct supervisor, it is clear he spoke with someone. In 2011, Mr. Warwick retired and the only reasonable conclusion is that he discussed the retirement with someone at the employer, either within human resources or his supervisor. Regardless, Mr. Warwick had made his employer aware of his low back complaints, as well as the complaints in his legs.

Claimant's argument unnumbered at 6.

After acknowledging each parties arguments regarding notice, the ALJ stated:

> To satisfy his obligations under the Act, Claimant testified he reported the problems he was having to his supervisor, indicating Ms. Beckford. The undersigned address the pertinent elements of notice in the August 28, 2014 Compensation Order. In relevant part, the CO provided the following findings:
>
> > Claimant did not report his injury to Employer prior to his retirement on December 13, 2011. Claimant did not report his problems to Ms. Cassandra Beckford, his supervisor, in 2007, as alleged. HT p. 33. Claimant alleged he told Ms. Beckford the other things they wanted him to do were too strenuous when he retired in December 2011, which is not consistent with the record. HT p. 39. Claimant testified Ms. Beckford was the only supervisor he notified regarding his injury. The record establishes Ms. Beckford retired from her position with Employer in 2005, and therefore, Claimant did not provide notice of the injury to Ms. Beckford or Employer. Claimant never gave a written report to anybody regarding the problems he was having with his back. HT p. 34.
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> CO at 3.

Claimant provided the following testimony regarding his notice to Employer:

> Despite Claimant's admission he does not know when his symptoms began, he testified he told his supervisor about his problems in 2007 and 2011. During the hearing, Claimant's attorney referenced the date of January 2007, and asked Claimant was it about that time you reported to your supervisor you were having problems with your back. HT p. 32. Claimant responded "I complained not just to her but my co-workers and everything because it was a strange feeling of numbness." HT p. 32. With respect to his inability to perform his job duties at the time of his December 13, 2011 retirement, Claimant responded "Ms. Beckford, Cassandra" to the question do you remember who, specifically you told. HT p. 39.
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> CO at 5.

The ALJ concluded Claimant did not provide timely notice. We affirm this conclusion for the following reasons:

First, Claimant's reliance on *Keith* is misplaced. In *Keith*, timely notice was found to have been given, in part because at the time of the injury, an Employer representative witnessed the event, a fall from a tree. Such is not the case here where Claimant was injured performing his duties of moving and handling equipment during his employment.

As the ALJ summarized above, the supervisor Claimant allegedly informed of his work related injury retired some years before. Moreover, a review of the hearing transcript reveals that while testifying to his medical condition to several co-workers and supervisor, his testimony does not indicate he informed anyone that his medical condition was in fact work related.

> Q: And when you say that you expressed that to your supervisors, who specifically did you tell about that numbness in your feet?
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> A: My co-workers as well as Ms. Beckford.
>
> Q: Ms. Beckford was – what was her position?
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> A: She was my boss. She was my supervisor. She was Director, maybe, of Technical Operations. I think that was her correct title.
>
> Q: Okay. And when you were telling people about these problems, what specifically were you telling Ms. Beckford and other supervisors about the problems?

A: I said, you know, like when you feel numbness you think it's like, you know, just slept in the wrong position or whatever but it didn't go away and I kept sharing with people that this wasn't going away. So then I was advised to get an MRI.

Hearing transcript at 22.

In *Tagoe v. DOES*, 960 A.2d 603, 608-609 (D.C. 2008), the District of Columbia Court of Appeals reasoned:

> The CRB reasoned that because the Workers' Compensation Act defines a compensable "injury" as an "accidental injury or death arising out of *and* in the course of employment," the notice exception in D.C. Code § 32-1513 (d)(1) requires an employer's knowledge to encompass both components of the definition. In addition, relying on an earlier decision by the Director, the CRB rejected a "should have known" standard and concluded that subsection (d)(1) requires an employer to have "actual knowledge." Thus, the CRB concluded, "[i]n order for [D.C. Code] § 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." While the CRB's interpretation of subsection (d)(1) may not be compelled by the statutory language, it comports with the general rule throughout the United States and is not foreclosed by any prior decisions of this court. It is a reasonable construction; since subsection (d)(1) allows the employer's knowledge to substitute for timely written notification of the cause of the injury, it is logical that the employer must have actual knowledge of the cause for the subsection to be satisfied. Deferring to the CRB, we accept its answers to our questions as binding. [Footnotes omitted.]

While Claimant did testify that he informed his co-workers and supervisors of his condition, nowhere did he testify his condition was work related. We reject Claimant's argument that it is reasonable to presume that Claimant spoke to someone with the Employer when retiring, such a statement is speculative at best. Even if true, speaking to a representative about Claimant's medical condition does not impute upon the Employer knowledge that a medical condition is caused by a work related injury. Employer did not have actual knowledge of a work related injury until several months after his retirement. The COR's conclusion that Claimant did not provide timely notice of a work related injury is affirmed.

Next, we turn to Employer's cross application. Employer argues there is not substantial evidence in the record that supports the COR's conclusion that Claimant sustained a work related injury. Specifically, Employer argues that Claimant's testimony that he could not remember when he started to have back problems, the lack of any medical reports where a work related injury is mentioned, and the IME's opinion that the Claimant's low back complaints are degenerative in nature is substantial evidence to conclude Claimant did not suffer a work related injury.

After concluding Employer had rebutted the presumption of causal relationship, the ALJ then weighed the evidence and determined Claimant did suffer a compensable injury. The ALJ noted

that there is a treating physician preference in the District of Columbia, referencing *Short v. DOES*, 723 A.2d 845 (D.C. 1998) and *Stewart v. DOES*, 606 A.2d 1350, 1353 n.5 (D.C. 1992). The ALJ then stated:

> In this case, Claimant has demonstrated his injury arose out of a risk created by his employment. Claimant testified he worked for Employer for 30 years and his job duties were mostly production which included carrying equipment, relocating different positions and external remotes. HT p. 18. Claimant stated the equipment included cameras, lights, and cables. Claimant recalled his last position was a technical operations supervisor, and he continued to be responsible for set up and tear down. HT p. 19. Claimant testified he stopped working for Employer on December 12, 2011 due to physical reasons indicating his doctor told him he needed to find something else to do. HT p. 20. Claimant remarked lifting and transporting heavy equipment caused problems with his back. Claimant explained he was experiencing numbness in his legs and feet and a MRI revealed a herniated disc that was pinching the nerves. Claimant testified he performed a strike, taking down all the equipment, before he first noticed numbness in his legs and feet. HT p. 21. As a result of these employment factors, Claimant sought medical treatment from Dr. Fasusi. The treating physician documented Claimant's low back problems, and attributed his symptoms to the identified employment factors. A subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. *Forrest D. Pulliam v. Potomac Personnel Services*, H&AS No. 86-558, OWC No. 88281 (12/18/87); *Joseph B. Ryan v. Dodd Electric Company*, H&AS No. 87-815, OWC No. 87786 (June 7, 1998); *Vaughn v. Hadley Memorial Hospital*, H&AS No. 86-204, OWC No. 48011 (July 28, 1986).
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> While Dr. Riederman stated Claimant's condition was not causally related to an incident on December 1, 2008, Dr. Riederman does not really address whether employment factors could have aggravated the underlying condition. He primarily stated Claimant did not suffer an injury on December 1, 2008, and challenged whether Claimant was symptomatic prior to December 1, 2008. Dr. Riederman stated Claimant could not recall whether he had back problems prior to December 1, 2008, and Dr. Riederman correctly pointed out Claimant received treatment and the diagnostic evidence of 2007 revealed Claimant experienced back pain prior to December 1, 2008. EE 6, p. 4. During his deposition, Dr. Fasusi acknowledged Claimant had back symptoms prior to December 1, 2008. Dr. Fasusi stated his dictation dated May 9, 2007 indicated Claimant presented April 24, 2007 with stiffness in his back and numbness in both feet and legs, which started about January 2007. CE 6, Depo at 21-22. Dr. Fasusi testified the record from April 25, 2007 indicated that this was probably secondary to lifting that this patient has been doing at his job. CE 6, Depo at 23. Dr. Fasusi stated he actually discussed with Claimant his job could be causing his symptoms on April 24, 2007, and he told him lifting at work was causing his problems with his back. CE 6, Depo at 23-24. Dr. Fasusi stated heavy lifting was probably one of the reasons he was having back problems. CE 6, Depo at 24. Given Claimant's testimony and the

> medical evidence, the record establishes the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability. Therefore, Claimant has established his low back condition arose out of and in the course of the employment.

COR at 5.

The ALJ took into consideration Claimant's testimony and the deposition testimony of Claimant's treating physician, Dr. Fasusi who opined the lifting Claimant was required to do was causing Claimant back problems. A review of the evidence and testimony supports the ALJ's conclusion which we affirm. What the Employer is asking us to do is to reweigh the evidence in Employer's favor, a task we cannot do.

CONCLUSION AND ORDER

The April 9, 2015 Compensation Order on Remand is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

SO ORDERED.