GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
INTERIM DIRECTOR

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 APR 1 PM 12 00

COMPENSATION REVIEW BOARD

CRB No. 14-001

ATIBA SHROPSHIRE,
Claimant–Respondent,

v.

D.C. WATER AND SEWER AUTHORITY and PMA MANAGEMENT CORPORATION,
Employer/Carrier-Petitioners.

Appeal from a December 4, 2013 Compensation Order by
Administrative Law Judge Leslie A. Meek
AHD No. 13-161, OWC No. 695623

David M. Snyder, for the Respondent
Douglas A. Datt, for the Petitioners

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

HENRY W. MCCOY, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was working for Employer as a sewer service worker when he injured both of his wrists on August 21, 2012 while in the process of using a hook pole to clean sewers and a pick to lift manhole covers. Claimant commenced treatment with the orthopedic practice of Mininberg and Fechter, primarily seeing Dr. Joel Fechter, who diagnosed bilateral wrist strain and began treating him with wrist splints, physical therapy, and recommended home exercises.

From August 27, 2012, the date of initial treatment, to the time of the formal hearing in this matter, Claimant has been off work due to this work injury and has not been released by Dr. Fechter to return to work.[1]

Claimant filed a claim seeking temporary total disability benefits from August 21, 2012 to the present and continuing, causally related medical benefits and authorization for medical treatment. Also at issue was whether Employer had timely controverted Claimant's claim Following a May 28, 2013 formal hearing, an administrative law judge (ALJ) in the Administrative Hearings Division, determined that Claimant's bilateral wrist condition was causally related and that he was entitled to wage loss benefits, causally related medical expenses, and treatment for both wrists.[2] The ALJ also determined that Employer failed to timely controvert the claim and awarded Claimant an additional payment pursuant to D.C. Code § 32-1515(e). Employer filed a timely appeal with Claimant filing in opposition.

On appeal, Employer argues the ALJ erred in concluding Claimant's bilateral wrist condition is causally related to the work incident, that Claimant is temporarily and totally disabled from performing his pre-injury job duties, and that the claim was not timely controverted. In opposition, Claimant asserts that the Compensation Order (CO) is supported by substantial evidence and is in accordance with the law and should be affirmed.

STANDARD OF REVIEW

The scope of review by the CRB, 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.[3] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545, at § 32-1521.01(d)(2)(A). 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 where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

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[1] We note for the record that Claimant is pursuing separately a claim for temporary total disability benefits for a work-related injury to his back resulting from work activities that also occurred on or about August 21, 2012. Claimant's back injury was adjudicated with disability benefits awarded on November 27, 2013, *Shropshire v. D.C. Water and Sewer Authority*, AHD No. 13, 120; OWC No. 645042. That CO was affirmed in part, reversed in part and remanded by the CRB on March 26, 2014 in CRB No. 13-161.

[2] *Shropshire v. D.C. Water and Sewer Authority*, AHD No. 13-120, OWC No. 645042 (November 27, 2013).

[3] "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. DOES,* 834 A.2d 882 (D.C. 2003).

It is now well accepted that pursuant to § 32-1521(1) of the Act[4], a claimant is entitled to a presumption of compensability, "once 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."[5] The threshold for invoking the presumption is 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.[6] Further, the presumption of compensability applies not only to the work-related injury but also extends to the medical causal relationship between any alleged disabling condition and the work injury.[7]

In determining that Claimant had invoked the presumption of compensability, the ALJ relied primarily on Claimant's documentary evidence stating: "Claimant's documentary evidence is enough to trigger the presumption in this matter."[8] Specifically referencing the treating physician's reports, the ALJ stated:

> Claimant's evidence shows he treated with the practice of Minnenberg [sic] and Fechter for his bilateral wrist ailment since August 27, 2012. Claimant initially presented for treatment with complaints of numbness and tingling bilaterally in his wrists and hands. His complaints remained unchanged for the time he treated with Dr. Fechter. Dr. Fechter diagnosed Claimant with bilateral wrist strain and surmised he could be suffering from carpal tunnel syndrome but would require an EMG nerve conduction study to make that determination. Throughout his treatment of Claimant, the doctor repeatedly noted the need for an EMG. (CE 1). The doctor related Claimant's current bilateral wrist condition to the August 21, 2012 work incident. (CE 1). Dr. Fechter's treatment of Claimant included wrist splints, home exercise and physical therapy. The doctor directed Claimant to remain off from work and he continues to remain off from work. (CE 9).[9]

In this appeal, Employer argues that the ALJ's finding that Claimant's current wrist condition is causally related to the work incident on August 21, 2012 is not supported by substantial evidence in the record. In its extensive review of the treating physicians' reports, Employer is under the impression that there is no support in these reports that Claimant suffers from carpal tunnel syndrome and to the extent Claimant's bilateral wrist sprains are the result of

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[4] Section 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."

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

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

[7] See *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995).

[8] CO, p. 4.

[9] *Id.*, p. 3.

overuse, his condition should have improved with the passage of time since he has been in an off work status from the date of the incident. We find no merit in either argument.

When Claimant is first seen by Dr. Mininberg on August 27, 2012 following the August 21, 2012 work incident, the diagnosis is "Bilateral wrist strain; secondary to his work related injury of 8-21-12." (CE 1, p. 18). When Dr. Fechter takes over Claimant's treatment, the statement of the history of present illness observes: "Associated with his work activities of using the hook pole as well as at the pick and lifting manhole covers at work he developed pain, numbness, and tingling in his bilateral wrists and hands since mid-August of 2012." Dr. Fechter further states in part on November 21, 2012:

> The patient's diagnosis is bilateral wrist strain injuries; rule out carpal tunnel syndrome bilaterally. The patient is awaiting electrodiagnostic studies. The symptoms the patient is experiencing are consistent with the diagnosis and findings. I do believe that the repetitive work activities that he described to me are causally related to the patient's current bilateral wrist symptoms.[10]

On March 13, 2013, Dr. Fechter repeats this diagnosis of bilateral wrist strain injuries and relates it to work activities. There is no diagnosis of carpal tunnel syndrome; rather a standing request for diagnostic testing. We therefore find no error in the ALJ's determination that the presumption was triggered.

With the presumption invoked, the burden shifted to Employer to come forward with evidence specific and comprehensive enough to sever the potential connection between the work injury and the current disabling condition.[11] Employer can meet this burden by proffering the opinion of 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.[12]

Employer argues here that the ALJ erred in her determination that the presumption was not rebutted. Employer relies upon the opinions of Dr. David Dorin, who conducted independent medical evaluations (IME) of Claimant on September 25, 2012, with an addendum report on April 19, 2013. Dr. Dorin opined initially in 2012 and reaffirmed in 2013:

> I believe this patient suffered a sprain in consideration of the activities he was doing at the time of injury on August 21, 2012. I believe he received satisfactory treatment by the orthopaedic [sic] doctor. He had a number of therapy treatments that aggravated his symptoms. There is no objective explanation for the patient's symptoms at the present time about the pain

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[10] CE 1, p. 8.

[11] See *Stewart v. DOES*, 606 A.2d 1350 (D.C. App. 1992).

[12] *Washington Post v. DOES*, 852 A.2d 909 (D.C. 2004).

> in the wrist in the presence of normal soft tissues, normal range of motion, no instability, absence of any positive compressive peripheral neuropathy, and the fact that he has good range of motion of the fingers, good strength and no atrophy of the small muscles of the hand.
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> * * * *
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> At the present time it is my opinion that the original sprains to the right and left wrists in connection to the injury date of August 21, 2012, have healed. . . . I do believe there was a causal relationship of the patient's symptoms as clearly stated the activities he was doing on August 21, 2012, and eventually those symptoms were treated well by his orthopaedic [sic] surgeons.
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> * * * *
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> At the present time, based on review of the documents, my examination of the patient and the x-rays taken, I believe the wrist sprains to both wrists healed a long time ago.[13]

Although she quotes from Dr. Dorin's September 25, 2012 opinion that there was no objective explanation for Claimant's current symptoms and that the original sprains had healed, the ALJ concludes that Employer has failed to rebut the presumption that Claimant's current bilateral wrist condition is causally related to the work incident of August 21, 2012. The ALJ's conclusion is in error and is not supported by the evidence.

The thrust of Dr. Dorin's opinion is that while Claimant sustained a work injury on August 21, 2012 that consisted of sprains to both wrists and the symptoms he exhibited were causally related, as of September 25, 2012 the sprains had healed, along with the related symptoms. Dr. Dorin clearly stated there was no "objective explanation" for Claimant's current symptoms as both of Claimant's wrists were normal upon examination.

While Dr. Dorin acknowledged there previously was a causal relationship between Claimant's symptoms and the work injury, he is now of the opinion that the wrist sprains to both wrists have healed "a long time ago", and Claimant's current symptoms are not related to the work injury. As Dr. Dorin has presented an opinion that is specific and comprehensive enough to sever the potential connection between the work injury and the current disabling condition, it was error for the ALJ to find otherwise. This matter will be return for the ALJ to weigh the medical evidence without the benefit of the presumption in order to determine whether Claimant has proven medical causal relationship by a preponderance of the evidence.

Employer next argues that the ALJ erred in determining that Claimant was disabled from performing his pre-injury job from August 21, 2012 to the present and continuing. With there being no presumption when assessing the nature and extent of disability and Claimant having the burden of proving entitlement to disability benefits by a preponderance of the evidence, Employer argues there has been no weighing to the competing medical evidence and the ALJ's conclusion does not rationally flow from the findings of fact. We disagree.

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[13] EE 1, p. 6.

In making her determination that Claimant has essentially proven entitlement to the requested disability benefits for the requested period, the ALJ accorded greater weight to the medical opinions of the treating physician and found Claimant to be temporarily and totally disabled at the present time due to his bilateral wrist condition. The finding was further predicated on the ALJ's assessment that the treating physician had determined that Claimant's current condition had rendered him unable to work from August 21, 2012 to the present and continuing.

A review of Claimant's treating physician, Dr. Fechter, and initially Dr. Mininberg of the same medical practice, medical reports show that at no time from the commencement of his treatment has he released Claimant to return to work. And, to address Employer's argument of no documentation on Claimant's work status from the date of injury, August 21, 2012, to August 27, 2012, Dr. Fechter stated in his March 18, 2013 report that "[Claimant] is unable to work at this time and has been since 8-21-12." While we appreciate Employer's concern regarding the lack of reasoning that would ostensibly come with weighing the medical evidence, the ALJ's determination as to the nature and extent of Claimant's disability is supported by substantial evidence in the record. Thus, no error is found.

We next turn to the ALJ's determination that Employer failed to timely controvert Claimant's claim. After quoting the text of D.C. Code § 32-1515 (d)[14] and (e)[15], the ALJ stated:

> Regarding the issue of timely controversion, the parties have stipulated Claimant suffered a work injury on August 21, 2012. Employer's Notice of Controversion notes that the report of Claimant's accident was received by Employer on August 20, 2012. The form also notes the date of accident in this matter to July 27, 2012. Based upon the stipulations of the parties and the record evidence, it is apparent the information contained in the Employer's Notice of Controversion is incorrect. As Employer's Notice of Controversion controverts a July 27, 2012 incident, Employer could not, and did not provide notice of its controversion of Claimant's claim regarding the August 21, 2012 work injury.
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> It is important to note, the Notice of Controversion Employer submitted in this matter is the same Notice of Controversion Employer has submitted as evidence of controversion of a prior claim made by Claimant in

[14] D.C. Code § 32-1515 (d) states: If the employer controverts the right to compensation he shall file with the Mayor, on or before the 14th day after he has knowledge of the alleged injury or death and its relationship to the employment, a notice in accordance with a form prescribed by the May stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death and the grounds upon which the right to compensation is controverted.

[15] D.C. Code § 32-1515 (e) states: If any installment of compensation payable without an award is not paid within 14 days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid installment an amount equal to 10% thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the Mayor after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

> *Shropshire, AHD No.: 13-120, Id.*. This fact further evidences the unreliable nature of Employer's Notice of Controversion.[16]

In accordance with subsection (d) of D.C. Code § 32-1515, an employer must controvert a claimant's right to compensation within 14 days of it obtaining knowledge of the alleged injury. In the above quoted passage, the ALJ based her determination of timely controversion on Employer's Notice of Controversion, which is EE 9 in the record. Although the ALJ did not make a specific finding as such, the form carries a date of August 27, 2012. The ALJ did note that the parties stipulated to an injury date of August 21, 2012 and that the form states Employer received knowledge of the injury on August 20, 2012, a day earlier than stipulated to by the parties. As the determinative date in the statute is when Employer had knowledge of the alleged injury and not the date of the injury, EE 9, dated August 27, 2012 would tend to support the proposition that the notice was timely filed as that is within 14 days after August 20, 2012.

In her analysis, the ALJ appears to focus her attention on the July 27, 2012 as the date of injury and her declaration that that date and August 20, 2012 date on the form are incorrect given other evidence in the record. In addition, the ALJ is under the mistaken understanding that because Employer is controverting a date of injury different from the one stipulated to, the notice is not timely. By focusing on the date of injury instead of the date Employer has knowledge of the injury, the ALJ has applied the statute incorrectly to the limited facts found. Accordingly, this issue must be returned for appropriate findings of fact as to when Employer's Notice of Controversion was filed and the correct application of the statute to those facts.

In addition, Claimant requested that the ALJ take "judicial notice"[17] of the "fact" that EE 9 is the same Notice of Controversion that was submitted as a notice of controversion to a prior and different claim filed by Claimant.[18] In response, the ALJ stated: "But you've just asked me to take judicial notice of something that I can't take judicial notice of." HT, p. 204. However, in the CO, the ALJ executed a complete reversal of her statement at the formal hearing and proceeds to use this "fact" to further discredit EE 9 as being "unreliable". In taking notice of a document filed in another proceeding, the ALJ has countermanded her own ruling and taken judicial notice of something that is in dispute and therefore not subject to judicial notice. This was error. The reference document was introduced as an exhibit in another case, but not made a part of the instant record. To rely upon a document not presently before her to discredit a document under review in this case, was improper. On remand, the ALJ shall not reference any document not admitted into the record of this case that is before her.

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[16] CO, p. 6.

[17] "Judicial Notice" is the authority of the court to accept a fact that is not reasonably disputable, without the introduction of supporting evidence. It is typically a well know or notorious proven fact.

[18] HT at p. 202. The case in question is *Shropshire v. D.C. Water and Sewer Authority*, AHD No. 13-120, OWC No. 645042 (November 27, 2013)..

CONCLUSION AND ORDER

The ALJ's determinations that Claimant's current bilateral wrist condition is medically causally related to the work incident on August 21, 2012 and that he was disabled from performing his pre-injury from the date of injury to the present and continuing is supported by substantial evidence in the record and is AFFIRMED. The ALJ's determination that Employer did not timely controvert Claimant's claim is not supported by substantial evidence and is not in accordance with the law and is REVERSED and REMANDED. Accordingly, the December 4, 2013 Compensation Order is AFFIRMED IN PART and REMANDED IN PART for further consideration consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

April 1, 2014
DATE