

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-161

**ATIBA SHROPSHIRE,
Claimant-Respondent,**

v.

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

Appeal from a November 27, 2013 Compensation Order by
Administrative Law Judge Leslie A. Meek
AHD No. 13-120, OWC No. 645042

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

Before: HENRY W. MCCOY, MELISSA LIN JONES, 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, who worked as a jet vac operator, injured his back at work on November 21, 2007. Claimant received physical therapy and returned to work in April 2008. Claimant continued to experience back pain, with it becoming debilitating enough on occasions that he had to stop working. Claimant's latest period of debilitating back pain commenced in August 2012 and he has not returned to work.

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Claimant filed a claim seeking temporary total disability benefits from August 29, 2012 to the present and continuing, causally related medical benefits and authorization for pain management treatment. Following a March 26, 2013 formal hearing, an administrative law judge (ALJ) in the Administrative Hearings Division, determined that Claimant's current debilitating back pain was causally related and that he was entitled to wage loss benefits.¹ Employer filed a timely appeal with Claimant filing in opposition.

On appeal, Employer argues that the ALJ's finding that Claimant's back condition is causally related to the November 21, 2007 work incident is not "fully" supported by substantial evidence in the record and erred in determining that Claimant was disabled from performing his job for the periods November 6, 2012 to November 19, 2012, and from March 19, 2013 to the present and continuing. 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.² *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), 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.

It is now well accepted that pursuant to § 32-1521(1) of the Act³, 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."⁴ 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.⁵ Further, the presumption of compensability applies not only to the work-related injury but also

¹ *Shropshire v. D.C. Water and Sewer Authority*, AHD No. 13-120, OWC No. 645042 (November 27, 2013).

² "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).

³ 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."

⁴ *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000).

⁵ *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

extends to the medical causal relationship between any alleged disabling condition and the work injury.⁶

In determining that Claimant had invoked the presumption of compensability, the ALJ relied solely on Claimant's documentary evidence stating: "Claimant's documentary evidence is enough to trigger the presumption in this matter."⁷ Claimant submitted and the ALJ reviewed and assessed the medical records of Drs. McGovern, Torres, and Charles in determining whether the presumption had been invoked.

It was Dr. McGovern's April 25, 2012 responses to a form letter that speak specifically to causal relationship where in response to the question "What is your diagnosis?", he stated in part: "lumbar radiculopathy with aggravation of injury of 2007" and answered in the affirmative that this condition was "caused, contributed to or aggravated, even in part, by the above-referenced incident".⁸ The above-referenced incident was a "Date of incident: 9/7/2010".⁹

Employer argues on appeal:

While Dr. McGovern does indicate in his March 18, 2013 report that Claimant suffers from a chronic strain with disc herniation and radiculopathy, nowhere in the report does it reference a November 21, 2007 incident. More importantly, the ALJ is incorrect in her determination that Dr. McGovern related Claimant's status to that accident date. Dr. McGovern's April 16, 2012 handwritten response on a form ChasenBoscolo letter, relates Claimant's period of disability from 7/20/11 to 4/16/12 to a **9/7/10 date of accident**. Thus, the ALJ's reliance on that record to trigger the presumption is simply in error. (CE3 at 21, 23) (Emphasis is original).

The medical evidence suggests that Claimant experienced either an intervening new injury or an aggravation of his original November 21, 2007 work injury on September 7, 2010.¹⁰ When Dr. McGovern first treats Claimant, it is for the evaluation of an injury sustained to the low back on September 7, 2010. The diagnosis is lumbar strain as a result of Claimant's injury on September 7, 2010. Evidence in the record shows that starting with the November 17, 2010 office visit, Dr. McGovern's diagnosis changes to lumbar strain as a result of Claimant's

⁶ See *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995).

⁷ CO, unnumbered p. 4.

⁸ CE 3, p. 23.

⁹ *Id.*

¹⁰ Although a yellow marker is used to high-light the September 7, 2010 date of incident on the April 16, 2012 ChasenBoscolo form letter (CE 3, p. 23) and Dr. McGovern first sees Claimant on September 15, 2010 "for evaluation of injury sustained to his low back on September 7, 2010" (CE 3, p. 49), there are no findings of fact or conclusions regarding this incident.

November 21, 2007 injury.¹¹ It is not until he responds to the April 16, 2012 form letter from ChasenBoscolo that Dr. McGovern specifically connects the September 7, 2010 incident with the original work injury. In his April 25, 2012 handwritten responses, Dr. McGovern relates the current condition of Claimant's back to the original work injury with an aggravation on September 7, 2010. We therefore find no error in the ALJ's determination that the presumption was triggered.¹²

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.¹³ 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.¹⁴

Employer argues here that the ALJ erred in her determination that the presumption was not rebutted. In making its argument, Employer repeatedly makes the point that none of the medical reports establish a causal relationship between Claimant being out of work due to the injury to his back that occurred on November 21, 2007. Employer cites to Dr. Scheer's April 1, 2013 IME to support its argument that Claimant was out of work due to an injury to his wrists and not from his back injury. Employer also references Dr. McGovern's August 29, 2012 report where he states Claimant reports that he is off work for an injury to his wrist. We find no merit in this argument as Employer has conflated the issues of medical causal relationship and nature and extent.

The ALJ noted that Employer was relying upon the medical reports of Drs. Collins, Scheer, Joseph Layug, and McGovern to rebut the presumption of a causal relationship between Claimant's current back condition and the 2007 work injury. However, while the ALJ discussed the opinions of Drs. Collins and Scheer, she failed to address the opinions of Drs. Layug and McGovern when determining whether the presumption had been rebutted. Employer argues this was error. We disagree.

Drs. Collins and Scheer both rendered opinions that Claimant's back condition was causally related to the 2007 work injury with an aggravation on September 7, 2010. To the extent either doctor referenced the reason Claimant was out of work at any given point in time, it went

¹¹ Dr. McGovern referred Claimant to Dr. Mark Matsunaga for epidural injections. In a November 10, 2011 report, Dr. Matsunaga assessment of Claimant's condition was: "The patient is a 36-year-old gentleman status post epidural injection #1 for the treatment of his low back pain with left leg radiculopathy associated with neurological symptoms, all stemming from a work-related injury on November 21, 2007.

¹² While not used as evidence by Claimant to invoke the presumption, we note that other evidence in the record is supportive of causal relationship, specifically Employer's independent medical examiner (IME), Dr. Mark Scheer, where Claimant's current condition is causally related to the 2007 work injury with an aggravation on September 7, 2010. See EE 3.

¹³ See *Stewart v. DOES*, 606 A.2d 1350 (D.C. App. 1992).

¹⁴ *Washington Post v. DOES*, 852 A.2d 909 (D.C. 2004).

to the nature and extent of Claimant's disability and not to the causal relationship between his current back condition and the original work injury.

With regard to Dr. Layug, the last medical report of his seeing Claimant is dated July 8, 2008. While he noted Claimant was having "some recurrent discomfort", Dr. Layug's final assessment was "[T]here is no restriction in his activity."¹⁵ As to Dr. McGovern, his August 29, 2012 does note that Claimant "reports he is currently off work for an injury to his wrist", but also notes Claimant "continues to complain of pain in his back and pain radiating into his left leg" and these symptoms are confirmed in the physical examination.¹⁶ As Dr. Layug's report does not account for the 2010 aggravation to Claimant's back and Dr. McGovern's report does account for Claimant's continuing back pain with radiculopathy, neither report provides an unambiguous opinion that the work injury did not contribute to the disability. Therefore, the ALJ's failure to address the reports from either doctor is considered harmless.

Having upheld the ALJ's determination that Claimant's current back condition is causally related to his 2007 work injury, we now turn to Employer's argument, presented in the alternative, that Claimant failed to show by a preponderance of the evidence that he is entitled to the requested periods of wage loss benefits. Specifically, Employer asserts that the ALJ erred in determining that Claimant was disabled from performing his pre-injury job from November 6, 2012 to November 19, 2012, and from March 18, 2013 to the present and continuing. We agree.

After stating that Claimant is not entitled to a presumption as to the nature and extent of his disability and that he must prove his entitlement by a preponderance of the evidence¹⁷ and citing the treating physician preference¹⁸, the ALJ stated

On March 18, 2013, Claimant's treating physician determined Claimant's current back condition rendered Claimant unable to work at that point in time. Dr. Torres determined Claimant's current back condition rendered him unable to work for six weeks from October 8, 2012 to November 19, 2012. The record evidence shows, on September 6, 2012, Claimant filed for family medical leave for the period of September 17, 2012 to November 5, 2012. Said leave was approved on September 21, 2012 and Claimant received wages during this period. Because Claimant did not suffer wage loss for the period of September 17, 2012 to November 5, 2012, Claimant is not entitled to wage loss benefits for this period.¹⁹

¹⁵ EE 6, p. 77.

¹⁶ EE 8, p. 104.

¹⁷ *Golding-Alleyne v. DOES*, 980 A.2d 1209 (D.C. 2009).

¹⁸ *Short v. DOES*, 723 A.2d 845 (D.C. 1988).

¹⁹ CO, unnumbered p. 5.

Employer is correct in its argument that when Claimant is seen by his treating orthopedist on August 22, 2012, Dr. McGovern gives the work status as Claimant is to continue working and in a follow-up report on August 29, 2012 states that Claimant is expected to return to full duty on September 19, 2012. Apart from being confusing, these dates do not impact the period for which wage loss has been requested. As the ALJ relates, it is Claimant's pain management specialist, Dr. Torres, who places Claimant in an off work status for the six week period October 8, 2012 to November 19, 2012 following an examination on October 8, 2012. We find no fault in the ALJ's determination that Claimant is entitled to wage loss benefits from November 6, 2012 to November 19, 2012.²⁰

It is the ALJ's reliance on Dr. McGovern's March 18, 2013 report to award wage loss benefits from that date to the present and continuing that we find problematic. The problem arises in the ALJ's assessment that Dr. McGovern determined it was Claimant's current back condition that rendered him unable to work at that point in time (CE 3, p. 21). Dr. McGovern states "[Claimant] reports he has been off work through the pain management doctor." In his "Plan" for Claimant, Dr. McGovern states at #4 that "He is off work for now."

The problem presented is in reviewing the "DC Water Workers' Compensation Treatment Form" also signed by Dr. McGovern on March 18, 2013 and admitted into evidence as part of CE 6, at p. 54. There, the date of injury is given as "11-21-07", the diagnosis: chronic lumbar strain; treatment: Medication, off work status for 1 month; and for work status, both: "Patient now totally disabled for work.", and "Patient expected to return to full duty on April 15, 2013.", are checked. In addition, using his office disability status form also dated March 18, 2013, Dr. McGovern placed Claimant in an off work status until "Monday April 15, 2013, then full duty." CE 5, p. 52.

Although the ALJ stated she was giving Dr. McGovern's opinions as the treating physician greater weight, she does not take into account all of his opinions on the issue of the nature and extent of Claimant's disability as he is releasing Claimant to return to full duty. We are constrained to vacate the award of temporary total disability and to return this matter to allow the ALJ to reconsider the evidence on the nature and extent of Claimant's disability, if any.

CONCLUSION AND ORDER

The ALJ's determinations that Claimant's current back condition is medically causally related to the work incident on November 21, 2007 and that he was disabled from performing his pre-injury job for the period November 6, 2012 to November 19, 2012 are supported by substantial evidence and in accordance with the law and are AFFIRMED. The ALJ determination that Claimant was disabled from his performing his pre-injury job from March 18, 2013 to the present and continuing is not supported by substantial evidence in the record and is VACATED.

²⁰ Claimant's claim for relief was for temporary total disability benefits from August 29, 2012 through the present and continuing. Claimant argued in its reply brief that a *prima facie* showing of total disability had been established for that period pursuant to *Logan v. DOES*, 805 A.2d 237, 242 (D.C. 2002). Claimant, however, has not cross-appealed the ALJ's awarding his claim in part, but rather concludes its brief with the argument that substantial evidence supports the ALJ determination.

Accordingly, the November 27, 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

March 26, 2014
DATE