

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

CRB 12-045

DORIS SUBER,  
CLAIMANT-RESPONDENT,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY AND CAMBRIDGE INTEGRATED  
SERVICES,  
SELF-INSURED EMPLOYER AND THIRD-PARTY ADMINISTER-RESPONDENTS.

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2012 JUN 20 AM 10:23

Appeal from a Compensation Order on Remand by  
Chief Administrative Law Judge George W. Crawford  
AHD No. 09-466, OWC No. 644084

Charles Krikawa, IV, Esquire, for the Claimant  
Donna J. Henderson, Esquire, for the Self-Insured Employer

Before Lawrence D. Tarr, Melissa Lin Jones, and Henry W. McCoy, *Administrative Appeals Judges*

Lawrence D. Tarr, *Administrative Law Judge* for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**OVERVIEW**

This case is before the Compensation Review Board on the request for review filed by the self-insured employer, Washington Area Transit Authority (WMATA) of the March 14, 2012, Compensation Order on Remand (COR) issued by the Chief Administrative Law Judge (CALJ). For the reasons stated, we vacate the COR and remand this case.

**BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY**

Doris Suber was employed by WMATA as a bus operator. On November 12, 2007, the claimant was injured at work when the bus she was operating was struck by a taxicab. After emergency room care at The Washington Hospital Center on the day of the accident, the claimant began treating with Dr. Jeffrey H. Phillips on November 13, 2007. Dr. Phillips' associates, Dr. Meyer, Dr. Green, and Dr. Salter, also have treated the claimant. These doctors released the claimant to light-duty work in March 2008, and full duty on July 17, 2008. At the request of the employer, Dr. David C. Johnson examined the claimant on February 14, 2008, and July 3, 2008, and Dr. Ira Fisch examined her on July 15, 2008.

On June 1, 2009, Dr. Salter reported that the claimant had a 15% permanent partial impairment of her left upper extremity caused by the work accident. Dr. Fisch had reported in July 2008, that the claimant had a 2% permanent impairment of her left shoulder but that this impairment was not related to the 2007 accident at work.

When the employer would not accept her claim, on November 10, 2009, Administrative Law Judge Sandra M. McNair, held an evidentiary hearing to consider the claimant's request for permanent partial disability benefits for the 15% disability to her left arm pursuant to the schedule in D.C. Code §32-1508. The employer defended the claim on the grounds that the claimant's left shoulder condition was not medically causally related to the 2007 accident at work.

In her March 5, 2010, Compensation Order, the ALJ found that the claimant was entitled to the presumption of compensability and that the employer's evidence was not sufficient to rebut the presumption. The ALJ held there was a causal relationship between the claimant's left shoulder condition and the accident at work and awarded the claimant benefits for the 10% permanent disability to her left arm.

The employer appealed this decision. By Decision and Remand Order dated August 16, 2011, the CRB held the ALJ erred by finding the employer had not rebutted the presumption, vacated the ALJ's award and remanded the case:

The ALJ erred in ruling that WMATA had not rebutted the presumption of compensability. On remand, the ALJ must weigh all of the evidence to make a determination as to whether or not Ms. Suber's current shoulder condition is causally related to her November 12, 2007 accident. Until a determination of causal relationship properly has been made, there can be no ruling as to Ms. Suber's permanent disability. Thus, the Compensation Order of March 5, 2010 is VACATED, and this matter is REMANDED for further proceedings consistent with this Decision and Remand Order.

Because ALJ McNair was on extended leave at the time of the remand, the case was assigned to Chief Administrative Law Judge (CALJ) George W. Crawford.<sup>1</sup> On March 14, 2012, Chief Judge Crawford issued a Compensation Order on Remand in which he found that the employer had not rebutted the presumption of compensability and awarded the claimant benefits for the 10% disability to her left arm. The employer timely appealed this decision.

#### THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed CO are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and §32-1521.01(d) (2) (A) of Act.

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<sup>1</sup> The record is unclear as to whether the parties were advised of the change in judges and given the option to accept the change or request a hearing before the CALJ, See, *Swanson v. D.C. Department of Corrections*, CRB No. 12-011 (2), AHD No. PBL 11-024, DCP No. 761032-0001-20000-005 (May 3, 2012).

Consistent with this standard of review, the CRB is constrained to uphold a CO that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott, supra*.

#### DISCUSSION

On review, the employer first argues that the CALJ erred in finding that it failed to rebut the presumption of compensability. We agree.

The CRB vacated ALJ McNair's Compensation Order because she held the employer had not rebutted the presumption. The CRB stated on page 4 of its opinion:

Contrary to the analysis in the Compensation Order, maximum medical improvement does not address the issue of causation, but Dr. Fisch's opinion that Ms. Suber's current shoulder injury is not related to the on-the-job accident is sufficient to rebut the presumption.

The CRB restated this determination in the Conclusion and Order section of the August 16, 2011, Decision and Remand Order:

The ALJ erred in ruling that WMATA had not rebutted the presumption of compensability.

Despite this determination, the CALJ held that the employer has not rebutted the presumption:

As a result, the Employer did not rebut the presumption that Claimant's injury is causally related to the November 12, 2007 work-related traffic accident.

COR at 15.

The determination by the CRB that the employer rebutted the presumption is the law of the case. The law of the case doctrine recognizes that "once the court has decided a point in a case, that point becomes and remains settled unless it is reversed or modified by a higher court." *Kritsidimas v. Sheskin*, 411 A.2d 370, 371 (D.C. 1980).

Therefore, the determination that the employer did not rebut the presumption is not in accordance with the law and we must remand this case with the same instructions that were stated in our previous decision; to weigh all the evidence without the presumption and determine whether the claimant has proven by a preponderance of the evidence that her shoulder condition is causally related to the 2007 accident at work. If the CALJ finds the requisite causal connection, then he can decide the claim for permanent partial disability benefits pursuant to the schedule.

CONCLUSION AND ORDER

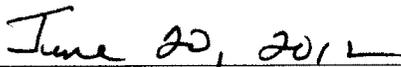
The March 14, 2010, Compensation Order on Remand is not in accordance with the law. The Compensation Order on Remand is VACATED, and this matter is remanded for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



LAWRENCE D. TARR

*Administrative Appeals Judge*



DATE