GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB No. 03-24

LARRY E. WARD,

Claimant–Petitioner,

v.

D. C. WATER AND SEWER AUTHORITY AND LIBERTY MUTUAL INSURANCE CO.,

Employer/Carrier–Respondent

Appeal from a Compensation Order of
Administrative Law Judge Reva M. Brown.
AHD No. 03-355, OWC No. 563614

Matthew Peffer, Esquire, for the Petitioner

Curtis B. Hane, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY and FLOYD LEWIS, *Administrative Appeals Judges*.

LINDA F. JORY, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[1]

[1] Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on October 24, 2003, the Administrative Law Judge (ALJ) found Petitioner's emotional injuries were not causally related to his employment; granted Petitioner's claim for permanent partial disability benefits based upon a 43% permanent partial impairment rating; denied Petitioner's claim for temporary total disability benefits and ordered that employer be given a credit of $50,000 toward any sums it conveys. Petitioner now seeks review of that Compensation Order, asserting as grounds for this appeal that the ALJ's denial of wage loss benefits is not supported by substantial evidence in the record and not in accordance with the law.

Respondent asserts the ALJ correctly applied the appropriate legal standard in denying wage-loss benefits for Petitioner's alleged psychological injuries and properly applied the Court of Appeals decision in *Morrison v. Dist. of Columbia Dep't. of Employment Servs*., 736 A.2d 223 (D.C. 1999) to deny Petitioner's wage loss claim after awarding permanent partial disability benefits.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003). 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.

Turning to the case under review herein, Petitioner's argues the ALJ applied a legally non-existent standard in her determination of whether Petitioner is entitled to a presumption that his emotional injury is causally related to his employment pursuant to the standard set forth in *Sturgis v. D.C. Dep't of Employment Servs*., 584 A.2d 564 (D.C. 1990) (*Sturgis*). Specifically, Petitioner asserts that the ALJ "reworded" the *Sturgis* test by substituting "would" for "could" in determining if an injured worker presents evidence to establish that the actual working conditions "could" have caused similar emotional injury in a person who was not significantly predisposed to such injury. As a result of the substitution, Petitioner argues that he was faced with a higher standard to meet. Petitioner asserts that the use of the word "would" creates a higher standard of "probability" rather than "possibility" which is the current objective standard in *Sturgis*.

Although the Compensation Order issued in October 2003 and the appeal filed shortly thereafter, neither party acknowledges that the Court of Appeals has agreed with the objective standard set forth by the agency in cases of alleged emotional injury caused by job stress in *Dailey v. 3 M Co.*, H&AS No. 85-259, OWC No. 066512 (May 19, 1988)(*Dailey*) which the Panel acknowledges does utilize the word "could" instead of "would":

> In order for a claimant to establish that an emotional injury arises out of the mental stress or mental stress or mental stimulus of employment, the claimant must so that actual conditions of employment as determined by an objective standard and not merely the claimant's objective standard is satisfied where the claimant shows that the actually working conditions could have caused similar emotional injury in a person who was not significantly predisposed to such injury.

Dailey, 1988 DC Wrk Comp. LEXIS 1, at 7-8, n7.

The Panel is mindful that, *Dailey* dealt strictly with mental stress of the employment as opposed to an emotional injury resulting from physical trauma, such as the facts of the instant matter, in the first post-*Dailey* case to come before the Director and the Court of Appeals, in which a claimant asserted the compensability of an emotional injury claimed to have resulted from work-place physical trauma the Court noted that the *Dailey* test was appropriate.[2] *See Collis Porter v. George Washington Hospital*, Dir.Dkt. No. 88-37, H&AS No. 86-515, 1992 DC Wrk. Comp. LEXIS 42 (Feb. 13, 1992), *aff'd sub nom. Porter v. D.C. Dept. of Employment Services*, 625 A.2d 886 (D.C. 1993). In *Porter*, the claimant had been struck by a gurney while performing her duties as a nursing assistant, which resulted in physical injury that was successfully treated and resolved. The Director affirmed the Hearing Examiner's determination, based on the medical evidence presented, that the claimant's psychological condition pre-existed her physical injury and was not work-related. The Court noted that while neither the Hearing Examiner nor the Director expressly applied the *Dailey* test to ascertain whether the gurney incident would have similarly affected an individual not predisposed to the claimant's depressive condition, in essence the test was applied. "Both the examiner and the Director concluded . . . that the gurney accident ***would*** not have caused a person lacking petitioner's subjective, pre-existing personality disorder to suffer the disability she now experienced." *Porter*, 625 A.2d at 889 (emphasis added).

Thus it appears as both the Director and the Court of Appeals have substituted the word "would" for "could", and that in the panel's view, doing so has little consequence on the outcome. The Panel further notes the usage of "would" instead of "could" in the Courts most recent application of *Dailey* in *Charlene McCamey v. D.C. Dept. of Employment Services*, 886 A.2d 543 (D.C. 2005),

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[2] The Compensation Review Board addressed the question of whether a psychological condition claimed to be the consequence or medical sequelae of a physical injury arising out of and in the course of employment, rather than the result of workplace stress, must meet the same standard for invoking the presumption of compensability under the Act as a psychological injury alleged to have resulted from workplace stress without a physical injury in *Roberta West v. Washington Hospital Center*, CRB No. 99-97, OHA No. 99-276 (August 5, 2005)(*West)*. The Board concluded "Applying the objective Dailey standard for involving the statutory presumption of compensability to consequential emotional and psychological injury claims as with stress related emotional/psychological claims, adheres to and is consistent with the fundamental statutory requirement that the injury arise out of an in the course of employment". *West, supra* at 9.

wherein the Court acknowledged that CRB's decision in *Roberta West* was consistent with the Courts application of *Dailey* in general and *Dailey* should be applied in public sector cases as well.

Notwithstanding the usage of the word "would" instead of "could" or vice versa, the panel agrees that the ALJ applied a *Dailey* test in the instant matter although she cites to the Court of Appeals' decision in *Sturgis* instead, correctly acknowledging that an employee predisposed to psychic injury can recover if he is exposed to work conditions so stressful that a normal employee might have suffered similar injury. The ALJ further found "By virtue of Dr. Briley's unequivocal testimony it is apparent herein that claimant's sensibilities predisposed him to the depression he underwent and that an average worker would not have sustained a similar emotional injury from the same stressors". The Panel finds the ALJ's conclusion is supported by substantial evidence and shall not be disturbed.

The next issue on appeal is ALJ's conclusion Petitioner is not entitled to temporary total disability benefits for his shoulder injury, because it is the same impairment for which he is being awarded the scheduled award. In support of his appeal of this issue Petitioner assert that despite language in the Compensation Order that Petitioner's right shoulder disability was the "situs" of the right arm disability and Petitioner was entitled to an award of permanent partial disability benefits for the right arm, but was not entitled to temporary total disability benefits for the right shoulder disability. In what appears to be the ALJ's attempt to distinguish the facts of the instant matter from those in *Morrison v. District of Columbia Department of Employment Servs.*, 736 A.2d 223 (D.C. 1999),[3] the ALJ determined that the award of schedule loss benefit premised on Petitioner's right shoulder injury, the same situs that now forms the basis for his claim for TTD, he cannot now receive TTD for the same period. In summarizing the report of Petitioner's treating physician, Dr. Levine, the ALJ reports only that "Dr. Levine considered several of the Maryland factors, such as pain, weakness, loss of function . . . before arriving at his disability rating" of 43%. CO at 9. Upon review of Dr. Levine's disability evaluation the Panel notes after detailing Petitioner's various deficiencies pursuant to the AMA guidelines and Tables, Dr. Levine found pursuant to Table 18, the glenohumeral joint function contributes 60% of arm function which when multiplied by 72% (the total of the disability ratings) results in a 43% disability of the upper extremity.

The CRB has discussed the problems that are presented by the less than total compatibility between the concepts of termination of further benefits upon the award of a schedule disability as established in *Smith v. District of Columbia Department of Employment Services*, 548 A.2d 95 (D.C. 1988) with the principal enunciated in *Kovac v. Avis Leasing Corp.*, OHA No. 84-177, OWC No. 000792 (July 17,1986), that a disability experienced in a schedule member is compensable despite the fact that the anatomical situs of the injury is in a non-schedule body part (e.g., the neck, back, shoulder) and the third principal established in *Morrison, supra,* to the effect that concurrent benefits for schedule and non-schedule injuries are allowed under the Act. This discussion is contained in *Sullivan v. Boatman & Magnani*, et al, CRB No. (Dir. Dkt.) No. 03-74, OHA No. 90-597E, OWC No. 088187. That decision, decided subsequent to the instant Compensation Order, contained the following holding:

[3] In *Morrison* the Court ruled that a claimant is not barred, as a matter of law, from receiving both a schedule award and a permanent partial disability award thereafter based on diminution of wages, even where there is but one injury and that injury has as its' situs a non-schedule body part.

> For these reasons, we will read *Morrison* as permitting a schedule disability award and a concurrent wage loss partial or total disability award, but only where the partial or total wage loss disability is based upon the wage loss being due to the anatomically non-schedule body part, and there is also a distinct, separable and identifiable functional impact upon the schedule body part sufficient to sustain an award under *Kovac*. That is, where the effect upon the injured worker is twofold (the non-schedule injury causes or contributes to the awarded wage loss, independently of the dysfunction associated with the anatomically injured body part), both a schedule and non-schedule award are allowable. For example, where a non-schedule injury (such as an injury to the neck) results in a functional incapacity to a schedule body part (say, the left arm), a claimant (who for example, is a truck driver) may, under *Kovac*, recover for the left arm even without an ongoing age loss. However, if for reasons unrelated to and independent of the lost left arm function, the claimant also experiences a wage loss (such as, in our example, where due to the injury to the neck and its own loss of range of motion, the claimant is unable to return to work as a truck driver, since he can no longer turn his head sufficiently to permit him to drive), he can also recover for the wage loss attributable to the non-schedule anatomical work injury.

Sullivan, supra, at page 7 – 8**.**

Accordingly, the Panel concludes that a determination as to whether Petitioner's functional limitation is limited to the right extremity or if his limitation is limited solely to the right shoulder, needs to be made by the ALJ pursuant to *Sullivan*. Thus, a remand for further proceedings is required to make findings of fact concerning what, if any, part of Petitioner's wage loss is attributable to his right shoulder vs. his right arm.

CONCLUSION

The ALJ's finding that Petitioner's psychological injuries did not arise out of and in the course of nor are they causally related to his employment, is supported by substantial evidence; in accordance with the law, and is affirmed. It is further concluded that the ALJ's finding that Petitioner is not entitled to temporary total disability benefits because it is the same impairment for which he was awarded a schedule award was reached without consideration of the rule established in *Sullivan, supra*., and must therefore be reconsidered in light thereof**.**

ORDER

The Compensation Order of October 24, 2003 is AFFIRMED IN PART and REVERSED AND REMANDED IN PART with instructions that the claim for schedule loss benefits be reconsidered in light of *Sullivan, supra.*

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

April 14, 2006

DATE