

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-068

**JEFFREY BOWSER,
Claimant–Respondent,**

v.

**CLARK CONSTRUCTION GROUP, LLC,
Self-Insured Employer—Petitioner**

Appeal from a Compensation Order by
Administrative Law Judge Heather C. Leslie
AHD No. 11-046, OWC No. 669729

Justin M. Beall, Esquire, for the Claimant-Respondent
Jeffrey W. Ochsman, Esquire, for the Employer-Petitioner

Before: HENRY W. MCCOY, LAWRENCE D. TARR, and JEFFREY P. RUSSELL¹, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

JURISDICTION

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

¹ Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

OVERVIEW

This case is before the CRB on the request for review filed by Employer of the June 24, 2011 Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication section of the Office of Hearings and Adjudication (OHA) of the Department of Employment Services (DOES). In that CO, the ALJ granted Claimant's request for temporary total disability benefits from February 3, 2011 to the present and continuing, causally related medical expenses and authorization for pain management.

BACKGROUND FACTS OF RECORD

While working as a pile driver for Employer on April 28, 2010, Claimant fell backwards causing him to experience pain in his head, neck, and left shoulder. Claimant received initial treatment the same day at the Corporate Health Center where he was diagnosed with a cervical strain and contusion.

On May 10, 2010, Claimant came under the care of Dr. Neil Green, of Phillips and Green, with continuing complaints of cervical pain radiating into the left shoulder and arm, lumbar pain, headaches, dizziness, and difficulty sleeping. Secondary to Claimant's work injuries, Dr. Green diagnosed acute cervical, dorsal and lumbar strain; sacrococcygeal injury; and, posttraumatic headaches, dizziness, and difficulty sleeping, and prescribed medication, an MRI of the pelvis, and physical therapy. Dr. Green deemed Claimant unfit to work.

Dr. Green referred Claimant to Dr. V. Sharma for an evaluation of his headaches and to Dr. Matthew Ammerman for a neurological consultation.

Claimant saw Dr. Sharma on May 27, 2010 for his complaints of constant headaches and was diagnosed with posttraumatic headaches, dizziness, anxiety and posttraumatic cervical, thoracic, lumbar sacral strain syndrome. The doctor recommended physical therapy, home exercise and medication. Dr. Sharma also determined that Claimant was not able to return to work and recommended a pain management evaluation.

Claimant was evaluated by Dr. Ammerman on September 30, 2010 for complaints of headaches, neck and back pain. After an examination, he opined Claimant had myofascial axial tenderness and cervical radiculitis that were directly related to the work incident. He also recommended a pain consultation.

Employer had Claimant seen by two independent medical evaluators (IME). Dr. Louis Levitt saw Claimant initially on July 13, 2010 and deemed him to have reached maximum medical improvement and able to return to full duty immediately. In a second IME on February 1, 2011, Dr. Levitt was of the same opinion but also indicated any assessment of Claimant's headaches was beyond his expertise.

In April 2011, Dr. Green, after reviewing Dr. Sharma's evaluation, opined that Claimant could return to light duty work with an increase in his activities based upon his ability.

Dr. Gary London saw Claimant for an IME on May 2, 2011 and opined that he had no continuing injury that was causally related to the work injury, that he needed no further medical care, and could return to his pre-injury job without restriction.

As to Claimant's request for pain management, Employer sent his medical records for utilization review. In a May 18, 2011 report, the recommended treatment by Dr. Ammerman was denied.

Deeming Claimant to be a credible witness, the ALJ found he continued to have pain and discomfort in his neck, left shoulder, left upper extremity, and headaches; while his back condition had resolved. The ALJ further found Employer was unable to accommodate Claimant's light duty work restriction. The ALJ also found Claimant's current left shoulder, upper left extremity, neck pain and headaches prevented him from gainful employment and his current disability was related to his work injury. Accordingly, Claimant's claim for relief was granted.² Employer has timely appealed, with Claimant filing in opposition.

On appeal, Employer argues that the ALJ's determination that Claimant's current medical complaints are causally related to the work injury is not supported by substantial evidence and that the ALJ erred in finding that those complaints prevent him from working. Claimant argues to the contrary and that the Compensation Order (CO) should be affirmed.

DISCUSSION AND ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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, § 32-1501 *et seq.*, 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 International v. D.C. Dept. of Employment Services*, 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 if the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review, Employer argues that while the ALJ used the reports of Claimant's treating physicians Green and Sharma to conclude that his neck, left arm, left upper extremity, and head conditions were related to the work injury, the physical examinations and objective tests by those physicians do not support a finding of causal relationship.

There is no dispute between the parties that Claimant properly invoked the presumption of compensability that his current disabling condition is medically causally related to the April 28, 2010 work injury and that Employer properly rebutted the presumption with the IME reports of Drs. Levitt and London. It is with the weighing of the conflicting medical opinions that Employer takes issue.

In weighing the medical evidence without the benefit of the presumption, the ALJ stated

² *Bowser v. Clark Construction Group*, AHD No. 11-046, OWC No. 669729 (June 24, 2011).

“I find that the Claimant has proven his current condition was caused by his work injury. I find his credible testimony, coupled with the reports of his treating physicians at Phillips and Green, Dr. Sharma, and Dr. Ammerman, show that his work injury is what is causing his current neck, shoulder, left upper extremity condition, and most notably to the Undersigned, his headaches. The Claimant has consistently complained of headaches since his injury to all his physicians as well as to Employer’s IME physicians. Dr. Levitt went as far as to recommend an MRI of the brain because of the continued complaints. The Claimant credibly testified, and relayed to the multiple physicians he has seen, that he never experienced headaches to such a degree prior to the injury. Dr. Sharma diagnosed the Claimant with post traumatic headaches after the injury, a condition the Undersigned finds the Claimant still suffers from and still requires treatment for.”

CO at 7.

After affording the preference to Claimant’s treating physicians³, the ALJ discounted the opinions of the IME physicians and further reasoned:

“I credit the opinion of the Claimant’s treating physicians at Phillips and Green, and of Dr. Sharma and Dr. Ammerman in particular when it relates to the Claimant’s current neck, left shoulder, left upper extremity and head condition. Dr. Sharma has seen the Claimant multiple times over a several month period and is in a better position to assess the Claimant’s overall condition and recommend treatment. Dr. Ammerman and Dr. Green’s opinions are all consistent with each other and based upon multiple examinations, review of the objective testing, and understanding of the Claimant’s complaints and response to treatment. Thus, I find and conclude the Claimant’s current neck, left shoulder, left upper extremity and head conditions are still causally related to the work injury.”

CO at 8.

In assessing whether Claimant’s current disabling complaints are medically causally related to his work injury, the ALJ used the totality of the opinions of his treating physicians to find and conclude that they are. Employer, in pressing its argument, has selected out specific diagnostic reports and selected examinations by Drs. Green and Sharma. Employer is asking that we re-weigh the evidence in its favor, something that we are prohibited from doing. As there is substantial evidence in the record to support the findings and conclusions of the ALJ on the issue of causal relationship, we have no basis upon which to disturb those determinations.

Employer also challenges the ALJ’s determination that Claimant’s disabling condition prevents him from returning to any gainful employment. Employer asserts that insofar as Claimant has been released to light duty and is willing to work, his disabling complaints of pain do not prohibit him from returning to any gainful employment, notwithstanding that Employer currently does not have a position available for him. We find no merit in this argument.

³ *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

The issue before the ALJ was nature and extent of Claimant's disability with the concomitant request for temporary total disability benefits from February 3, 2011 to the present and continuing. The ALJ found that Claimant proved by a preponderance of the evidence that he was disabled from returning to his pre-injury job due to his headaches, neck and left upper extremity condition and pain. CO at 9. The ALJ further determined that while Claimant had been released to light duty with a weight lifting restriction that Employer has failed to show that it has offered or demonstrated the availability of jobs within his ability. This conclusion by the ALJ is in keeping with the D.C. Court of Appeals' seminal case on this issue.⁴

CONCLUSION AND ORDER

The ALJ's determinations that Claimant's current disabling condition is medically causally related to his work injury and that he has proven entitlement to temporary total disability benefits are supported by substantial evidence in the record. Accordingly, the Compensation Order of June 24, 2011 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

February 22, 2012
DATE

⁴ See *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).