

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**

**VINCENT C. GRAY**  
**MAYOR**



**LISA M. MALLORY**  
**DIRECTOR**

**CRB No. 11-125**

**ERIC GUNN,**

**Claimant–Respondent,**

**v.**

**DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,**

**Employer–Petitioner.**

Appeal from a Compensation Order Administrative Law Judge Nata K. Brown  
AHD No. PBL 09-076A, DCP No. 30100527985-001

Justin Zimmerman, Esquire, for the Petitioner

Coleen Archer, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,<sup>1</sup> MELISSA LIN JONES and HEATHER LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

**DECISION AND REMAND ORDER**

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the District of Columbia Department of Corrections (DOC) for review of the Compensation Order of October 7, 2011 (the CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In the CO, the ALJ granted Eric Gunn’s request for an award of disability compensation benefits for a medical condition known as methicillin-resistant *Staphylococcus aureus* (MRSA), which benefits had been denied by the Office of Risk Management (ORM)<sup>2</sup>, the government agency charged with

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<sup>1</sup> Judges Russell and Leslie are appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuances No. 11-01 and 11-02 (June 13, 2011).

<sup>2</sup> Although the procedural history of this claim is not entirely clear from the CO or the available administrative file, Mr. Gunn’s claim was denied without his ever having received benefits under the Act. It appears from the transcript of a

administering the Disability Compensation Program (DCP) covering work related injuries suffered by District of Columbia employees under the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, (CMPA, or the Act). In so doing, the ALJ determined that Mr. Gunn’s MRSA was causally related to his employment as a prison guard.

On November 7, 2011, DOC filed an Application for Review (AFR) challenging the award, which AFR Mr. Gunn opposed, seeking either dismissal of the AFR as being untimely, or affirmance of the CO as being supported by substantial evidence and being in accordance with the Act.

#### PRELIMINARY MATTERS

Regarding Mr. Gunn’s request for dismissal of the AFR on grounds of untimeliness, the request must be denied. Although in order to be timely an AFR is to be filed within 30 days of the issuance of a CO, in this case, the thirtieth day following the issuance of the CO fell on a Sunday. Under such circumstances, the AFR can be filed the next day that the CRB is open for business. See, *McManus v. District of Columbia Department of Corrections*, CRB No., 09-003 (May 23, 2006); *Huhges-Smith v. District of Columbia Fire and Emergency Services*, Dir. Dkt. 1-04 (March 23, 2004).

#### BACKGROUND

Mr. Gunn has worked as a correctional officer for several years. The ALJ found that in the course of his career, Mr. Gunn worked in a correctional facility in which a portion of the inmate population are infected with MRSA, which the ALJ found is transmissible through direct physical contact with an infected individual, or with surfaces that have come into contact with an infected individual. The ALJ found that Mr. Gunn came into regular contact with inmates who told him or other correctional officers that they had staph infections; she also found that Mr. Gunn’s girlfriend contracted MRSA in June 2009 and in August or September 2009. The ALJ found that Mr. Gunn experienced a series of symptoms beginning in June 2009 that were ultimately diagnosed in October 2009<sup>3</sup> as MRSA in his blood.

The ALJ also made findings concerning problems with cleanliness and the availability of cleaning supplies in the cellblock where Mr. Gunn was assigned, that 12 inmates were diagnosed with MRSA in October 2009, that Mr. Gunn had been working overtime throughout the correctional

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pre-hearing conference that the claim was at one point denied based upon an erroneous determination by ORM that Mr. Gunn had abandoned his claim, and that that denial was withdrawn when Mr. Gunn’s counsel provided documentation that there had been no such abandonment. See, Transcript of Prehearing Conference of November 10, 2010 (PHC HT) at 8 – 19. In footnote 1 of the CO, reference is made to the fact that “Claimant’s claim was accepted on December 2, 2010” but that “On January 4, his claim was denied, and Claimant filed an Application for Formal Hearing”. We can not ascertain whether the ALJ’s statement that the claim had been “accepted” is a reference to the withdrawal of the denial discussed in the PHC HT; however, the date of the “Notice of Determination Regarding Original Claim for Compensation”, denying the claim based upon the opinion of Dr. Ross Myerson to the effect that Mr. Gunn’s MRSA is likely the result of exposure to his infected girlfriend and is not causally related to his employment, is January 4, 2011. EE 8.

<sup>3</sup> In the CO, the ALJ erroneously identifies the year of the visits to Potomac Hospital and the Virginia Hospital Center as being 2011. Reference to Mr. Gunn’s exhibits confirms that the year is 2009. See, EE 2 and EE 6 – 12.

facility, and that two of the correctional officers over whom Mr. Gunn had supervisory responsibility contracted MRSA between 2008 and 2010.

The ALJ also noted in the CO that the record contained the medical opinions of three physicians, one of whom, Dr. Nader Marzvan, also testified at the formal hearing. The ALJ noted that none of the physicians expressed the opinion that Mr. Gunn's condition was caused by his employment, that two of them either failed to express an opinion on causation (treating physician Dr. Abisuga) or stated that they could not state to a reasonable degree of certainty that the condition was or was not caused by the employment (a second treating physician, Dr. Rosenthal), and that one, the Additional Medical Evaluator (AME) Dr. Ross Myerson, opined that (1) Mr. Gunn's MRSA was caused by exposure to his infected girlfriend and (2) not by workplace conditions.

The ALJ found that Mr. Gunn's MRSA disabled him from employment from October 22, 2009 through March 1, 2010, and that he contracted the condition "while in the performance of his job duties". CO, page 4.

#### STANDARD OF REVIEW

The scope of review by the CRB, is generally 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, (the Act), at § 1-623.28 (a), and *Marriott International v. D.C. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel are constrained to affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

#### DISCUSSION AND ANALYSIS

In opening her discussion concerning the sole issue presented in this case, whether or not Mr. Gunn's MRSA is medically causally related to his employment, the ALJ wrote as follows:

It is well settled that an injured worker under the public sector Act is not entitled to a presumption that there exists a causal relationship between his/her condition and the injury. *Whittaker v. District of Columbia Dept. of Employment Services*, 688 A.2d 844; *Davis-Dodson v. District of Columbia Dept. of Employment Services*, 697 A.2d 1214 (D.C. 1997).

Pursuant to the prevailing case law in this jurisdiction, the burden lies with Claimant to set forth substantial evidence showing that the disability is work-related by providing specific and comprehensive evidence to bridge the potential connection between Claimant's injury and the job-related event. *Wills-Rice v. District of Columbia Dep't of Employment Servs.* ECAB No. 88-37 (May 31, 1991). Substantial evidence is defined as relevant evidence, which a reasonable mind, considering the

record as a whole, might accept as adequate to support a conclusion that the asserted matter is true. *See Wills-Rice, supra*.

CO, page 4.

The statement in the first paragraph is correct<sup>4</sup>. However, the statement contained in the first sentence of the second paragraph misstates a claimant's burden. A claimant under the public sector act has the burden of proving compensability of the claim by a preponderance of the evidence. *McCamey v. DOES*, 947 A.2d 1191 (2008), at 1199, ftnt. 6. As the DCCA has held, it is error to misstate the burden in this fashion. *See, Washington Metropolitan Area Transit Authority v. DOES and Hughey Payne, Intervenor* 992 A.2d 1276 (2010), at 1282.

In any event, after reciting summaries of the testimony of several of Mr. Gunn's witnesses, as well as describing the contents of certain of his medical exhibits, the ALJ wrote that "Claimant has presented substantial evidence that his disabling condition is causally related to his work injury". CO, page 5. The ALJ then recited summaries of DOC's evidence, including the testimony of Dr. Marzvan, Captain Walter Koeling, Reena Chakarbotry, and the reports of Drs. Myerson and Rosenthal, and wrote:

Claimant has set forth substantial evidence showing that his disability was work-related, by providing specific and comprehensive evidence to bridge the potential connection between Claimant's injury and the performance of his job duties. Taking into account the totality of the unrefuted testimonial and documentary body of evidence, on balance, and more likely than not, Claimant contracted MRSA while performing his duties in the crowded institutional environment where he worked.

CO, page 7 – 8.

This paragraph is problematic in several ways. First, although it may be alluding to the preponderance standard, it repeats the reference to substantial evidence, giving rise to a concern about whether there is some misapprehension as to what the required standard of proof is. Second, and perhaps more pointedly, it refers to the "unrefuted testimonial and documentary body of evidence" as being the basis of the decision. The central issue in this case is medical; there are two distinct medical opinions in evidence.

One, that of Dr. Rosenthal, is that it is impossible to say to a reasonable degree of medical certainty whether, on the facts of this case, Mr. Gunn's MRSA was caused by work place exposures. Since the generally accepted threshold for the admissibility of expert opinion is that the opinion be held "to a reasonable degree of [expert] certainty", a statement that such a threshold can not be met "refutes" a proposition that in this case is central to the case which it is Mr. Gunn's burden to prove.

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<sup>4</sup> However, neither of the cited cases supports the proposition that there are no presumptions under the public sector act. Rather, both *Whittaker* and *Davis-Dobson* are private sector Act cases which deal with the presumption found in D.C. Code § 32-1521, but they have nothing to do with the public sector act.

The other medical opinion, that of Dr. Myerson, is a clear, unequivocal statement that Mr. Gunn's MRSA was caused by exposure to his infected girlfriend and was not caused by work place exposures.

DOC argues in this appeal that the ALJ essentially evaluated the evidence by giving Mr. Gunn the benefit of the presumption, which it argues is reversible error. We are not prepared to go so far. What we must do, however, is point out that it is not possible for us to tell what standard the ALJ employed in evaluating the evidence, and we have no discussion or understanding of how it is she evaluated the medical evidence. We are struck by the fact that there is *no* medical opinion from any physician that Mr. Gunn's MRSA *was* caused by work place exposure, and that the medical evidence in this case is that it is either impossible to tell, or that it was not so caused.

In order for an assessment to be made as to whether an ALJ has applied the proper standard, we must be able to discern what standard was employed, something which is at least ambiguous. Further, we do not understand how the ALJ can characterize Mr. Gunn's evidence of a medical causal relationship as being "unrefuted", when the only medical opinion evidence in the record on this medical question is contrary to Mr. Gunn's assertion of there being such a relationship. A remand is needed so that the ALJ can apply the preponderance of the evidence standard, and so that she can explain what evidence she relies upon to overcome the only medical evidence in the record on the sole question presented, whether there is a medical causal relationship between Mr. Gunn's MRSA and his work.

#### CONCLUSION

The underlying basis for the ALJ's conclusion that the evidence is of a causal relationship between Mr. Gunn's condition and his employment is "unrefuted" is not supported by substantial evidence, and the failure to identify the applicable burden of proof, coupled with the statement that a claimant's burden is one of producing "substantial evidence" in support of a claim, renders the conclusion that medical causal relationship has been established contrary to law.

**ORDER**

The award of compensation and medical benefits is vacated and the matter is remanded for further consideration in a manner consistent with foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
Administrative Appeals Judge

April 5, 2012  
DATE