Office of Hearings and Adjudication
Administrative Hearings Division

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In the Matter of,	)	
	)	
EDUARDO R. SOLOMON,	)	
	)	
Claimant,	)	
	)	
v.	)	AHD NO. 05- 366
	)	OWC NO. 602695
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,	)	
	)	
Self-Insured Employer.	)	

Appearances:

MARK L. SCHAFFER, ESQUIRE
For the Claimant

SARAH O. ROLLMAN, ESQUIRE
For the Self-Insured Employer

Before:

ANAND K. VERMA
Administrative Law Judge

COMPENSATION ORDER

STATEMENT OF THE CASE

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §§32-1501 *et seq.*, (hereinafter, the Act).

After timely notice, a full evidentiary hearing was held on September 27, 2005, before Anand K. Verma, Administrative Law Judge. Eduardo R. Solomon, appeared in person and through counsel (hereinafter, claimant). Washington Metropolitan Area Transit Authority (hereinafter, employer) appeared by counsel. Claimant testified on his own behalf. No testimony was adduced on behalf of employer. Claimant Exhibit (hereinafter, CE) No.1-3 and Employer Exhibit (hereinafter, EE) Nos. 1- 5, described in the Hearing Transcript (hereinafter, HT) were admitted into evidence. The record closed upon the receipt of an official copy of HT on October 7, 2005.

BACKGROUND

Claimant, a 39 years old elevator mechanic injured his cervical spine while loosening a floor plate with crow bar on May 16, 2004. After his initial treatment at Kaiser Permanente, claimant came under the care of James H. Graeter, M.D. and Peter A. Moskovitz, M.D., orthopaedic surgeons. Following a conservative treatment with medication, including physical therapy and home exercise, claimant underwent a cervical spine surgery to decompress his right C5-6 and fuse C5-6 and C6-7 on July 16, 2004. On September 3, 2004, claimant had an automobile accident which delayed his return to light-medium duty from September 21, 2004 as recommended by Dr. Moskovitz. After a brief return to the light duty work, claimant was again ordered off work from January 19, 2005 because of symptoms attributable to the automobile accident. Claimant has not returned to work since that time.

CLAIM FOR RELIEF

Claimant seeks an award under the Act of continued temporary total disability benefits from March 5, 2005, as well as authorization for recommended surgery.

ISSUES

1. Whether claimant's disc herniation at C3-4 is medically causally related to the work injury of May 16, 2004.[1]
2. The nature and extent of claimant's disability, if any.

FINDINGS OF FACT

The parties have stipulated, and I accordingly so find, an employer/employee relationship is present under the Act; jurisdiction is vested in the District of Columbia; claimant sustained an accidental cervical injury on May 16, 2004 that arose out of and in the course of employment; claimant provided timely notice of the injury; the claim was timely filed; claimant's average weekly wage is $1,242.85; and employer has voluntarily made payments of temporary total disability benefits from May 21, 2004 to March 4, 2005.

Based on the review of the record as a whole, I make the following findings:

I find claimant worked for employer as an elevator mechanic and, while at work on May 16, 2006, he suffered an acute herniated cervical disc when he attempted to loosen a floor plate with a crow bar. I find claimant first saw Dr. Graeter on May 25, 2004 who placed him on Medrol Dospak and ordered a cervical spine MRI. I find the June 10, 2004 cervical spine MRI disclosed a herniated disc at C5-6 and spondylosis at C6-7. I find claimant followed up with Dr. Moskovitz on July 6, 2004 with the complaint of persistent neck and right arm pains. I find since Medrol did not ameliorate claimant's pain, Dr. Moskovitz recommended surgery to C5-6 and C6-7.

I find, accordingly, claimant underwent the recommended surgery on July 16, 2004. In a post-surgery follow up, claimant's posture and motor control of the upper extremity were notably improved and he was placed in a Philadelphia collar. I find claimant was continually unable to return to his regular

[1]The undersigned is mindful that this issue was not raised for resolution at the hearing, however, in light of the intervening automobile collision, the causality of claimant's symptoms stemming therefrom needs to be addressed before any discussion of the nature and extent of his injury.

employment. I find, noting improvement in claimant's symptoms on August 5, 2004, albeit with dysphasia[2] and cervical swelling, Dr. Moskovitz dispensed soft collar to him replacing the Philadelphia collar and continued his off-work status.

I find, in the September 2, 2004 follow up, claimant's left arm pain had almost completely resolved and he was improving satisfactorily. I find on September 3, 2004, claimant had a rear end automobile collision. On September 8, 2004, feeling increased neck and interscapular pains, claimant returned to Dr. Moskovitz, who opined claimant had a cervical sprain superimposed on post-operative healing of C5-6 and C6-7 and recommended isometrics and shoulder rolls with gentle ROM. I find on September 21, 2004, Dr. Moskovitz released claimant to light-medium duty work[3] and continued isometrics and shoulder rolls with gentle ROM. I find the October 14, 2004 and November 24, 2004 follow ups noted claimant's continued improvement from his July 16, 2004 C5-6 and C6-7 surgery.

I find, on January 19, 2005, Dr. Moskovitz noted a recurrence of neck pain after a satisfactory post-operative healing of the C5-6 and C6-7 surgery and, recommending a short course of formal physical therapy, he ordered a new MRI scan of the cervical spine. I find, on February 1, 2005, as Dr. Moskovitz assessed, claimant manifested a reappearance of neck pain, even though he had satisfactorily healed from his July 16, 2004, C5-6 and C6-7 surgery. I find claimant's symptoms pertinent to the work-related C5-6 and C6-7 injury remitted after February 1, 2005.

I find claimant submitted to Robert O. Gordon, M.D., an orthopaedic surgeon, for an independent medical evaluation (IME) on February 10, 2005. I find Dr. Gordon opined claimant had sustained a cervical strain superimposed on his pre-existing degenerative disc disease at the C5-6 and C6-7 levels. In an addendum, dated March 3, 2005, to said IME, Dr. Gordon noted, *inter alia*, that claimant had a right sided C3-4 disc herniation, which was not present previously and was unrelated to the May 16, 2004 work incident.[4]

I find the February 14, 2005 MRI of the cervical spine revealed a right sided disc herniation at C3-4 level, and on February 15, 2005, Dr. Moskovitz referred claimant to Warren D. Yu, M.D., an orthopaedic surgeon, for consultation regarding a complex cervical spine reconstruction. I find, upon examining claimant on February 25, 2005, Dr. Yu opined claimant manifested severe symptoms in that he had weakness of the right deltoid coupled with significant pain, and therefore, he recommended surgical fusion of

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[2]Impairment of speech, consisting in lack of coordination and failure to arrange words in their proper order due to a central lesion. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29th Edition (2000) p. 556.

[3]Claimant's light duty restrictions included maximum lifting of 30 lbs., carrying objects weighing up to 20 lbs., standing, walking and sitting for 3 to 5 hours in an eight hour day, and occasional bending, squatting, climbing, twisting, reaching, kneeling, and pushing/pulling. In addition, claimant could use his hands for simple grasping, fine manipulation, as well as pushing and pulling.(EE 5).

[4]Dr. Gordon further noted:

The MRI scan (of February 14, 2005) "showed something new that was not present on the previous MRI scan of June 10, 2004 and which was not in any way related to the injury of May 16, 2004. I presume it is related to the subsequent motor vehicle accident that occurred . . . . If, indeed, the only significant trauma he has sustained subsequent to that was a motor vehicle accident, I presume it was related to that." (EE2).

C3-4, as well as C4-5, which already showed degeneration.

I find in a supplemental medical report dated June 16, 2005, Dr. Moskovitz reflected that the disc herniation existing before the July 16, 2004 surgery was not causing symptoms. The herniation of C3-4, demonstrated on the February 14, 2005 MRI, was a neuro-mechanically distinct lesion and "a new event." He further clarified that the C3-4 lesion did not exist in its disabling form on June 10, 2004 (the first cervical spine MRI).

I find, at the behest of employer, Marc B. Danziger, M.D., an orthopaedic surgeon reviewed claimant's prior medical records on September 20, 2005. I find Dr. Danziger believed that claimant's C3-4 disc herniation, unrelated to the original work injury, solely resulted from the September 3, 2004 automobile collision.

I find claimant's disc herniation of C3-4 was precipitated by the automobile collision of September 3, 2004.

DISCUSSION

I have reviewed the arguments of counsel with respect to the issue presented herein. To the extent an argument is consistent with the findings and conclusions, it is accepted; to the extent an argument is inconsistent therewith, it is rejected.

Whether claimant's disc herniation at C3-4 is medically causally related to the work injury of May 16, 2004.

In the District of Columbia, there is a presumption of compensability under the Act. D.C. Code §32-1521(1); *Ferreira v. District of Columbia Department of Employment Services*, 531 A. 2d 655 (D.C. 1987). Its purpose is to advance the humanitarian goal of the statute to provide compensation to employees for work-related disabilities reasonably expeditiously, even in arguable cases. 531 A. 2d at 654-655. To come within the presumption, a claimant must make an initial showing of some evidence of "a death or disability and a work-related event, activity, or requirement which has the *potential* of resulting in or contributing to the death or disability." *Id.* Once that showing has been made, "the presumption then operates to establish a causal connection between the disability and the work-related event, activity, or requirement." *Id.* Claimant must provide some evidence that the disability is connected with the employment before the burden of production is shifted to the employer. *Id.* at n.5. Once shifted, the employer has the burden of producing "substantial evidence" establishing that the disability did not arise out of and in the course of employment. *Id.* at 655.

In this case, claimant's medical record demonstrates that he suffered disc herniations at at C5-6 and C6-7 levels in the May 16, 2004 work injury for which he underwent surgery and was making a satisfactory recovery. Then, subsequently, on September 3, 2004, claimant was involved in an rear end automobile collision which impacted his cervical spine at C3-4 level in the form of disc herniation.

Claimant's treating physician, Dr. Moskovitz who treated him from July 6, 2004 through March 7, 2005 noted in the September 8, 2004 follow up that because "[h]e was thrown against the steering wheel" in the September 3, 2004 automobile accident, he had "increased neck and interscapular pain"and his cervical spine and shoulder posture were more asymmetrical than at his visit on September 2, 2004. He

recommended that "[b]ut for the recent sprain, he would be capable of light duty, . . ." (EE 5). Further, observing claimant's continued progress from the July 16, 2004 cervical spine surgery, Dr. Moskovitz noted in his October 14, 2004 follow up that the motor vehicle accident exacerbated claimant's "cervical spine and interscapular symptoms" which were "resolved as one might expect." (CE 1).

As reflected in the November 24, 2004 follow up, with only mild asymmetry in his posture, claimant continued his progress in recovering from the July 16, 2004 cervical spine surgery. Later, because of claimant's persistent right neck pain six months after C5-6 and C6-7 surgery, Dr. Moskovitz ordered another MRI of the cervical spine on January 19, 2005. Noting a recurrence of neck pain following a satisfactory healing from the July 16, 2004 surgery of C5-6 and C6-7 in his follow up of February 1, 2005, Dr. Moskovitz continued claimant's isometrics along with shoulder rolls and gentle ROMS and his off-work status. The magnetic images of claimant's cervical spine taken on February 14, 2005 revealed an abnormal soft tissue density causing an extrinsic impression along the right side of the thecal sac at C3-4 level, which Dr. Moskovitz characterized as a transition phenomenon in his February 15 and March 7, 2005 follow ups. Elaborating further in his supplemental medical report dated June 16, 2005, Dr. Moskovitz specifically noted the disc herniation at C3-4 was a neuro-mechanically distinct lesion whose occurrence was predisposed by prior herniation. In his opinion, the lesion discovered by the February 14, 2005 MRI was "a new event," which was not symptomatic at the time of the first MRI of the cervical spine on June 10, 2004. In other words, but for the automobile collision, claimant's disc herniation at C3-4 would not have been symptomatic.

Employer proffered Dr. Gordon's February 10, 2005 IME and an addendum of March 3, 2005 wherein, predicated on his review of the June 10 2004 and February 14, 2005 MRI scans of the cervical spine, he opined claimant had a right-sided C3-4 disc herniation, unrelated to the May 16, 2004 injury.

Before the burden of production is shifted to employer, claimant must provide some evidence that the C3-4 disc herniation is connected with his original employment injury of May 16, 2004. However, even without recourse to employer's evidence, the entirety of claimant's medical evidence, points to only one conclusion that the C3-4 disc herniation did not directly and naturally result from the original work injury of May 16, 2004; rather, it resulted from an intervening event thereafter. It is also unarguable that claimant's driving of automobile on September 3, 2004 was, in any way, connected to his employment. Hence, the injuries resulting from the automobile collision would be considered an independent intervening cause, unrelated to the employment. In *Marriott Int'l v. District of Columbia Department of Employment Services*, 834 A. 2d 882 (D.C. 2003), the Court upheld the Administrative Law Judge's finding that claimant's current medical condition involving the neck and lower back was not causally related to his work-related injury. Rather, claimant sustained a neck and lower back injuries in a subsequent automobile accident, unrelated to his employment.

Where the question of intervening cause has arisen involving operation of an automobile, injuries sustained in the collision were held non-compensable, on the ground that claimant's own act of driving with knowledge of his condition supervened to break the chain of causation between the original work injury and the automobile collision. See 1 ARTHUR LARSON,

LARSON'S WORKERS' COMPENSATION LAW §10.06[3], at 10-17 (2002).

Accordingly, the undersigned is not persuaded that claimant has met his burden under the Act by demonstrating that the complained of symptoms at C3-4 are connected with the employment in order to benefit from the presumption of compensability. Absent such initial showing, the burden of production does not shift to employer. Therefore, the discussion of the nature and extent of claimant's disability is rendered moot.

CONCLUSION OF LAW

Based upon a review of the record evidence as a whole, I find and conclude claimant has not made an initial demonstration under the Act that his symptoms at C3-4, manifested on February 15, 2005, are related to the original employment injury of May 16, 2004.

ORDER

It is **ORDERED** claimant's claim for relief be, and hereby is **DENIED.**

Anand K. Verma

ANAND K. VERMA
Administrative Law Judge

February 13, 2007
Date

RE: ***EDUARDO R. SOLOMON V. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY***
AHD No. 05-366, OWC No. 602695.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this 13th day of February, 2007 to the following:

Charles L. Green, Assistant Director
Labor Standards/DOES
64 New York Avenue, N.E., Suite 3923
Washington, D.C. 20002 — **Hand Delivered**

Associate Director
Department of Employment Services
64 New York Avenue, N.E., Second Floor
Washington, D.C. 20002 — **Hand Delivered**

Mark L. Schaffer, Esquire
Suite 400
2000 L Street, N.W.
Washington, D.C. 20036 — **Certified**

Sarah O. Rollman, Esquire
WMATA
600 Fifth Street
Washington, D.C. 20001 — **Certified**

Eduardo L. Solomon
Suite 201
8485 Greenbelt Road
Greenbelt, MD 20770 — **Certified**

for
TERRI THOMPSON-MALLETT, CHIEF ALJ
ADMINISTRATIVE HEARINGS DIVISION

RE: *EDUARDO R. SOLOMON V. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY*
AHD NO. 05-366, OWC NO. 602695.

APPEAL RIGHTS

This order is effective upon filing with the Mayor pursuant to §21 of the Act, D.C. Code, as amended, §32-1520. 7 DCMR §230.12; §23a of the Act, D.C. Code, as amended, 2001, §32-1522a. Any party aggrieved by this Order may file an application for review with the Chief Judge Compensation Order Review Board, Labor Standards Bureau, Department of Employment Services.

Send Application for Review to:

Chief Judge, Compensation Order Review Board
Department of Employment Services
Labor Standards Bureau
64 New York Ave., N.E.
Third Floor
Washington, D.C. 20011

The Application for Review must be filed within 30 days of the date of the filing of this Order with the Mayor as provided in §23a(a) of the Act, D.C. Code, as amended, §32-1522a(a). An Application for Review is perfected by filing with the Chief Judge, Compensation Order Review Board, Labor Standards Bureau two (2) copies of an Application for Review, two (2) copies of a memorandum of points and authorities in support of the application and certification that copies of the application and memorandum have been served, by mail or delivery, upon the opposing party(ies) and. 7 DCMR §§230.1, 230.2; §23a of the Act, D.C. Code, 2001, §32-1522a.

closed upon the receipt of an official copy of HT on October 7, 2005.

BACKGROUND

Claimant, a 39 years old elevator mechanic, injured his cervical spine while loosening a floor plate with crow bar on May 16, 2004. After his initial treatment at Kaiser Permanente, claimant came under the care of James H. Graeter, M.D. and Peter A. Moskovitz, M.D., orthopaedic surgeons. Following conservative treatment with medication, including physical therapy and home exercise, claimant underwent a cervical spine surgery to decompress his right C5-6 and fuse C5-6 and C6-7 on July 16, 2004. On September 3, 2004, claimant had an automobile accident which delayed his return to light-medium duty from September 21, 2004 as recommended by Dr. Moskovitz. After a brief return to the light duty work, claimant was again ordered off work from January 19, 2005 because of symptoms attributable to the automobile accident. Claimant has not returned to work since that time.

PROCEDURAL HISTORY

Following a Compensation Order issued on February 17, 2007, claimant filed an Application for Review with the Compensation Order Review Board (CRB) which remanded the case to the Administrative Hearings Division (AHD) on April 24, 2007 to re-consider whether claimant invoked the statutory presumption of compensability. Thereafter, a Compensation Order on Remand was issued on May 10, 2007 and employer filed an Application for Review of that Order with the CRB on June 8, 2007, which remanded the case to the AHD on November 6, 2007.

CLAIM FOR RELIEF

Claimant seeks an award under the Act of continued temporary total disability benefits from March 5, 2005, as well as authorization for recommended surgery.

ISSUES

1. Whether claimant's disc herniation[1] at C3-4 is medically causally related to the work injury of May 16, 2004.[2]

2. The nature and extent of claimant's disability, if any.

FINDINGS OF FACT

The parties have stipulated, and I accordingly so find, an employer/employee relationship is present under the Act; jurisdiction is vested in the District of Columbia; claimant sustained an accidental cervical injury on May 16, 2004 that arose out of and in the course of employment; claimant provided timely notice of the injury; the claim was timely filed; claimant's average weekly wage is $1,242.85; and employer has voluntarily paid temporary total disability benefits from May 21, 2004 to

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[1]The abnormal protrusion of an organ or other body structure through a defect or natural opening in a covering, membrane, muscle, or bone. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29th Edition, p. 814 (2000).

[2]The undersigned is mindful that this issue was not raised for resolution at the hearing, however, in light of the intervening automobile collision, the causality of claimant's symptoms stemming therefrom needs to be addressed before any discussion of the nature and extent of his injury.

March 4, 2005.

Based on the review of the record as a whole, I make the following findings:

I find claimant underwent a cervical MRI scan on June 10, 2004 which pertinently disclosed a small disc herniation at C3-4 causing mild mass effect upon the anterior aspect of the spinal cord. I find a subsequent MRI of February 14, 2005 again reflected a disc herniation at C3-4 with associated narrowing of the right lateral recess.

I find claimant submitted to Robert O. Gordon, M.D., an orthopaedic surgeon, for an independent medical evaluation (IME) on February 10, 2005. I find Dr. Gordon felt claimant sustained a cervical strain superimposed on his preexisting degenerative disc disease, including the discs at C5-6 and C6-7 levels. I find in an addendum to the IME, dated March 3, 2005, Dr. Gordon, contrary to the findings on the June 10, 2004 MRI, noted that claimant's right sided disc herniation at C3-4 was not present previously (on June 10, 2004 MRI scan). I find on that basis, Dr. Gordon felt C3-4 disc herniation was a new injury, unrelated to the May 16, 2004 injury.

I find claimant's February 14, 2005 MRI of the cervical spine revealed a right sided disc herniation at C3-4 level. I find, on February 15, 2005, Dr. Moskovitz referred claimant to Warren D. Yu, M.D., an orthopaedic surgeon, for consultation regarding a complex cervical spine reconstruction. I find, upon examining claimant on February 25, 2005, Dr. Yu opined claimant manifested severe symptoms in that he had weakness of the right deltoid coupled with significant pain, and therefore, he recommended surgical fusion of C3-4, as well as C4-5.

I find, at the behest of employer, Marc B. Danziger, M.D., an orthopaedic surgeon reviewed claimant's prior medical records on September 20, 2005 without ever physically examining him.

I find claimant's C3-4 herniation pre-existed the July 16, 2004 cervical spine surgery. I also find claimant is unable to return to his pre-injury employment and employer has identified no available modified duty job, he could perform.

DISCUSSION

I have reviewed the arguments of counsel with respect to the issue presented herein. To the extent an argument is consistent with the findings and conclusions, it is accepted; to the extent an argument is inconsistent therewith, it is rejected.

Whether claimant's disc herniation at C3-4 is medically causally related to the work injury of May 16, 2004.

On remand, the CRB instructs the undersigned to consider all of employer's evidence in assessing whether it cumulatively rebutted the presumption of compensability.

In the District of Columbia, there is a presumption of compensability under the Act. D.C. Code §32-1521(1); *Ferreira v. District of Columbia Department of Employment Services*, 531 A. 2d 655 (D.C. 1987). Its purpose is to advance the humanitarian goal of the statute to provide compensation to employees for work-related disabilities reasonably expeditiously, even in arguable cases. 531 A. 2d at 654-655. To come within

the presumption, a claimant must make an initial showing of some evidence of "a death or disability and a work-related event, activity, or requirement which has the *potential* of resulting in or contributing to the death or disability." *Id*. Once that showing has been made, "the presumption then operates to establish a causal connection between the disability and the work-related event, activity, or requirement." *Id*. Claimant must provide some evidence that the disability is connected with the employment before the burden of production is shifted to the employer. *Id*. at n.5. Once shifted, the employer has the burden of producing "substantial evidence" establishing that the disability did not arise out of and in the course of employment. *Id*. at 655.

In this case, claimant's medical record demonstrates that he suffered disc herniations at C5-6 and C6-7 levels in the May 16, 2004 work injury for which he underwent surgical decompression and fusion and satisfactorily recovered thereafter. On September 3, 2004, claimant was involved in a rear end automobile collision which exacerbated his cervical spine at C3-4 level.

Dr. Moskovitz, who treated claimant from July 6, 2004 through March 7, 2005, noted in the September 8, 2004 follow up that because "[h]e was thrown against the steering wheel" in the September 3, 2004 automobile accident, he had "increased neck and interscapular pain"and his cervical spine and shoulder posture were more asymmetrical than at his visit on September 2, 2004. He opined that "[b]ut for the recent sprain, he would be capable of light duty, . . ." (EE 5). Further, observing claimant's continued progress from the July 16, 2004 cervical spine surgery, in his October 14, 2004 follow up, Dr. Moskovitz noted that the motor vehicle accident exacerbated claimant's "cervical spine and interscapular symptoms" which were "resolved as one might expect." (CE 1).

Employer primarily relies on the February 10, 2005 IME of Dr. Gordon, wherein he noted, *inter alia*, claimant had a pre-existing degenerative condition and "it is certainly possible that with that type of pre-existing condition that some symptoms could develop, including radicular symptoms in the incident as described." (EE 2). In his subsequent addendum dated March 3, 2005, after reviewing the findings of claimant's February 14, 2005 cervical MRI, Dr. Gordon noted, among other things, that the MRI scan reflected "a significant right-sided soft disc herniation at the C3-4 level, which was not present previously." (EE 2). Dr. Gordon's finding clashes sharply with the findings of claimant's previous cervical MRI scan of June 10, 2004 which disclosed multi level cervical disc disease extending from C3 through C7, albeit most significant at C5-6. In his finding pertinent to C3-4 disc disease, the radiologist, Vivek David, M.D. noted "[t]here is a small central disc herniation causing mild mass effect upon the anterior aspect of the cord." (EE 3). Thus, because of the inherent inconsistency in Dr. Gordon's addendum of March 3, 2005, the undersigned is not convinced employer's evidence is comprehensive enough to sever the causal connection between claimant's complained of symptomatic disc at C3-4 and the original injury.

Employer also submits Dr. Danziger's record review of September 20, 2005, including treatment notes of Dr. Moskovitz from May 25, 2004 through October 14, 2004, cervical MRI scans of June 10, 2004 and February 14,

2005, as well as Dr. Gordon's IME of February 10, 2005 coupled with the March 3, 2005 addendum thereto. Reflecting on his assessment, Dr. Danziger noted, in pertinent part:

> What is noted through Dr. Moskovitz's note is that patient was gradually and progressively recovering from the C5-6 and C6-7 injuries and was then involved in a motor vehicle accident in 9/04. I do believe this was the sole cause of the progression of the C3-4 disc herniation that was seen on the previous MRI (February 14, 2005 cervical MRI)(emphasis supplied).

In his narrative following claimant's record review, Dr. Danziger, unambiguously acknowledging the presence of C3-4 disc herniation as disclosed by the June 10, 2004 cervical MRI, noted that the motor vehicle accident of September 3, 2004 became the catalyst of its progression. In other words, Dr. Danziger never opined claimant suffered a new trauma altogether unrelated to the May 16, 2004 work injury; rather, he held that the subsequent motor vehicle accident rendered his pre-existing disc disease at C3-4 more symptomatic. Thus, it is unfathomable how claimant's subsequent cervical symptoms could be attributed to a new injury and not related to the original May 16, 2004 injury.

Given the traditional preference for the opinion of treating physician in this jurisdiction, the undersigned does not accord any significant weight to the opinions of the IME physicians, Dr. Danziger and Dr. Gordon, especially in light of the internal inconsistencies in Dr. Gordon's findings as reflected in the March 3, 2005 addendum. See *Upchurch v. District of Columbia Department of Employment Services*, 783 A. 2d 623 (D.C. 2001).

In a supplemental medical report of March 14, 2005, commenting upon Dr. Gordon's March 9, 2005 IME with respect to claimant's C3-4 cervical disc herniation, Dr. Moskovitz pertinently noted that "(claimant's) disability and his need for surgical care are related to . . . work related injury." (EE 5). This alone without recourse to claimant's additional medical evidence meets his burden of making an initial demonstration that the May 16, 2004 injury had the *potential* of resulting in or contributing to his present disability. Accordingly, claimant benefits from the statutory presumption of compensability, which employer may rebut by presenting specific and comprehensive evidence.

Therefore, a careful consideration of the entirety of employer's evidence, it is held that employer's evidence in insubstantial and peripheral to sever the causal connection between claimant's C3-4 pathology and the May 16, 2004 work injury. Phrased differently, employer's evidence is not relevant evidence which a reasonable mind might accept as adequate to support a conclusion. See *Washington Hospital Center v. District of Columbia Department of Employment Services*, 746 A. 2d 278 (D.C. 2000). Accordingly, the presumption of compensability stands unrebutted. Now claimant bears the ultimate burden of proving the nature of his disability.

The nature and extent of claimant's disability, if any.

The Workers' Compensation Act does not afford claimant with a presumption regarding the nature and extent of his disability; rather claimant maintains the burden of proving by a preponderance of the evidence the nature and extent of his disability. *Landesberg v. District of Columbia Department of Employment Services*, 794 A. 2d 607 (D.C. 2002).

Claimant's evidence primarily consists of the medical reports from Dr. Moskovitz who treated him from May 24, 2004 to March 14, 2005. As part of his treatment, Dr. Moskovitz prescribed Motrin and Hydrocodone 5/500 for pain relief and placed him in Philadelphia collar, ordered MRI scans of his cervical spine, surgically decompressed his right cervical spine at C5-6, and fused C5-6 and C6-7. Post-operatively, Dr. Moskovitz prescribed physical therapy, including isometrics and shoulder rolls. However, despite conservative treatment, claimant remained symptomatic in C3-4 area, which Dr. Moskovitz characterized as a transition phenomenon. In his opinion, regardless of the single event, such as the motor vehicle accident that exacerbated the C3-4 disc leading to claimant's disability, it was the presence of two level fusion that was a predisposing factor. Phrased differently, claimant's C3-4 infirmity, although rendered symptomatic by the automobile collision, was primarily attributable to the C5-6 and C6-7 fusion that was necessitated by the May 16, 2004 injury.

In refuting the findings of Dr. Moskovitz, employer relies on the IME physician, Dr. Gordon who evaluated claimant on February 10, 2005 without any recourse to claimant's cervical MRI of June 10, 2004. After reviewing claimant's February 14, 2005 cervical MRI, Dr. Gordon noted the C3-4 disc herniation visualized on the scan was non-existent previously, and therefore he felt that it was unrelated to the May 16, 2004 work incident.

It is well settled in the District of Columbia that treating physicians are ordinarily preferred as witnesses to those doctors who have been retained to examine claimant solely for the purposes of litigation. An Administrative Law Judge may, however, reject the testimony of treating physicians with a proper explanation for doing so. See *Mexicano v. District of Columbia Department of Employment Services*, 806 A. 2d 198, 205 (D.C. 2002). The rationale for this preference for the testimony of treating physicians seems to be two-fold, in part because the treating physician was not involved solely for the purposes of litigation and thus perhaps is less apt, even if subconsciously, to be biased in making a diagnosis, and in part because of the typically greater amount of time the doctor has worked with the patient. See *Lincoln Hockey, LLC v. District of Columbia Department of Employment Services*, 831 A. 2d 913 (D.C. 2003).

Consistent with the well established preference for the opinion of the treating physician, I see no reason here to depart from that preference. While both doctors, Dr. Moskovitz and Dr. Gordon are board certified orthopaedic surgeons, Dr. Moskovitz provided much more extensive palliative treatment to claimant when compared with Dr. Gordon, who examined claimant only once on February 10, 2005 without a complete review of his June 10, 2004 cervical MRI scan for the sole purpose of defending employer against

the disability claim. Conversely, predicated on his prolonged treatment of claimant, Dr. Moskovitz acquired a greater and more reliable insight into claimant's condition. Hence, his opinion is deservedly more significant and is entitled to a greater weight.

CONCLUSIONS OF LAW

Based upon a reconsideration of the record evidence as a whole, I find and conclude claimant has made an initial demonstration under the Act that his symptoms at C3-4, manifested on February 15, 2005, are related to the original employment injury of May 16, 2004. I further find and conclude that claimant has met his burden under the Act supporting his entitlement to continued temporary total disability benefits from March 5, 2005, including authorization for the recommended discectomy[3] and fusion at C3-4.

[3]Excision of an intervertebral disk. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29th Edition, p. 526 (2000).

ORDER

It is **ORDERED** claimant's claim for relief be, and hereby is **GRANTED.**

ANAND K. VERMA
Administrative Law Judge

November 15, 2007
Date

In the Matter of,	)	
	)	
EDUARDO R. SOLOMON,	)	
	)	
Claimant,	)	
	)	
v.	)	AHD NO. 05- 366
	)	OWC NO. 602695
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,	)	
	)	
Self-Insured Employer.	)	

Appearances:

MARK L. SCHAFFER, ESQUIRE
For the Claimant

SARAH O. ROLLMAN, ESQUIRE
For the Self-Insured Employer

Before:

ANAND K. VERMA
Administrative Law Judge

COMPENSATION ORDER ON REMAND

STATEMENT OF THE CASE

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §§32-1501 *et seq*., (hereinafter, the Act).

After timely notice, a full evidentiary hearing was held on September 27, 2005, before Anand K. Verma, Administrative Law Judge. Eduardo R. Solomon, appeared in person and through counsel (hereinafter, claimant). Washington Metropolitan Area Transit Authority (hereinafter, employer) appeared by counsel. Claimant testified on his own behalf. No testimony was adduced on behalf of employer.

Claimant Exhibit (hereinafter, CE) No.1-3 and Employer Exhibit (hereinafter, EE) Nos. 1- 5, described in the Hearing Transcript (hereinafter, HT) were admitted into evidence. The record closed upon the receipt of an official copy of HT on October 7, 2005.

BACKGROUND

Claimant, a 39 years old elevator mechanic injured his cervical spine while loosening a floor plate with crow bar on May 16, 2004. After his initial treatment at Kaiser Permanente, claimant came under the care of James H. Graeter, M.D. and Peter A. Moskovitz, M.D., orthopaedic surgeons. Following a conservative treatment with medication, including physical therapy and home exercise, claimant underwent a cervical spine surgery to decompress his right C5-6 and fuse C5-6 and C6-7 on July 16, 2004. On September 3, 2004, claimant had an automobile accident which delayed his return to light-medium duty from September 21, 2004 as recommended by Dr. Moskovitz. After a brief return to the light duty work, claimant was again ordered off work from January 19, 2005 because of symptoms attributable to the automobile accident. Claimant has not returned to work since that time.

PROCEDURAL HISTORY

Following a Compensation Order issued on February 17, 2007, claimant filed an Application for Review with the Compensation Order Review Board (CRB) which remanded the case to the Administrative Hearings Division (AHD) on April 24, 2007 to re-consider whether claimant invoked the statutory presumption of compensability.

CLAIM FOR RELIEF

Claimant seeks an award under the Act of continued temporary total disability benefits from March 5, 2005, as well as authorization for recommended surgery.

ISSUES

1. Whether claimant's disc herniation at C3-4 is medically causally related to the work injury of May 16, 2004.[4]

2. The nature and extent of claimant's disability, if any.

FINDINGS OF FACT

The parties have stipulated, and I accordingly so find, an employer/employee relationship is present under the Act; jurisdiction is vested in the District of Columbia; claimant sustained an accidental cervical injury on May 16, 2004 that arose out of and in the course of employment; claimant provided timely notice of the injury; the claim was timely filed; claimant's average weekly wage is $1,242.85; and employer has voluntarily made payments of temporary total disability benefits from May 21, 2004 to March 4, 2005.

Based on the review of the record as a whole,

[4]The undersigned is mindful that this issue was not raised for resolution at the hearing, however, in light of the intervening automobile collision, the causality of claimant's symptoms stemming therefrom needs to be addressed before any discussion of the nature and extent of his injury.

I make the following findings:

I find claimant's February 14, 2005 MRI of the cervical spine revealed a right sided disc herniation at C3-4 level. I find, on February 15, 2005, Dr. Moskovitz referred claimant to Warren D. Yu, M.D., an orthopaedic surgeon, for consultation regarding a complex cervical spine reconstruction. I find, upon examining claimant on February 25, 2005, Dr. Yu opined claimant manifested severe symptoms in that he had weakness of the right deltoid coupled with significant pain, and therefore, he recommended surgical fusion of C3-4, as well as C4-5.

I find in a supplemental medical report dated June 16, 2005, Dr. Moskovitz reflected that the disc herniation existing before the July 16, 2004 surgery was not causing any problems. The herniation of C3-4, demonstrated on the February 14, 2005 MRI, was a neuro-mechanically distinct lesion and was symptomatic. He further clarified that the C3-4 lesion did not exist in its disabling form on June 10, 2004 (the first cervical spine MRI).

I find, at the behest of employer, Marc B. Danziger, M.D., an orthopaedic surgeon reviewed claimant's prior medical records on September 20, 2005 without ever physically examining claimant. I find Dr. Danziger believed that claimant's C3-4 disc herniation, unrelated to the original work injury, solely resulted from the September 3, 2004 automobile collision.

Predicated on the entirety of medical evidence, I find claimant's C3-4 herniation was a transition phenomenon secondary to surgical decompression and fusion at C5-6 and C6-7. I find claimant requires surgical fusion of the herniated disc at C3-4. I find claimant is unable to return to his pre-injury employment and employer has no modified duty job available that he could perform.

DISCUSSION

I have reviewed the arguments of counsel with respect to the issue presented herein. To the extent an argument is consistent with the findings and conclusions, it is accepted; to the extent an argument is inconsistent therewith, it is rejected.

Whether claimant's disc herniation at C3-4 is medically causally related to the work injury of May 16, 2004.

In the District of Columbia, there is a presumption of compensability under the Act. D.C. Code §32-1521(1); *Ferreira v. District of Columbia Department of Employment Services*, 531 A. 2d 655 (D.C. 1987). Its purpose is to advance the humanitarian goal of the statute to provide compensation to employees for work-related disabilities reasonably expeditiously, even in arguable cases. 531 A. 2d at 654-655. To come within the presumption, a claimant must make an initial showing of some evidence of "a death or disability and a work-related event, activity, or requirement which has the *potential* of resulting in or contributing to the death or disability." *Id*. Once that showing has been made, "the presumption then operates to establish a causal connection between the disability and the work-related event, activity, or requirement." *Id*. Claimant must provide some evidence that the disability is connected with the employment before the burden of production is shifted to the employer. *Id*. at n.5. Once shifted, the employer has the burden of producing "substantial evidence" establishing that the disability did not arise out

of and in the course of employment. *Id.* at 655.

In this case, claimant's medical record demonstrates that he suffered disc herniations at C5-6 and C6-7 levels in the May 16, 2004 work injury for which he underwent surgical decompression and fusion and satisfactorily recovered thereafter. On September 3, 2004, claimant was involved in a rear end automobile collision which exacerbated his cervical spine at C3-4 level.

Dr. Moskovitz, who treated claimant from July 6, 2004 through March 7, 2005, noted in the September 8, 2004 follow up that because "[h]e was thrown against the steering wheel" in the September 3, 2004 automobile accident, he had "increased neck and interscapular pain"and his cervical spine and shoulder posture were more asymmetrical than at his visit on September 2, 2004. He opined that "[b]ut for the recent sprain, he would be capable of light duty, . . ." (EE 5). Further, observing claimant's continued progress from the July 16, 2004 cervical spine surgery, in his October 14, 2004 follow up, Dr. Moskovitz noted that the motor vehicle accident exacerbated claimant's "cervical spine and interscapular symptoms" which were "resolved as one might expect." (CE 1).

In a supplemental medical report of March 14, 2005, commenting upon Dr. Gordon's March 9, 2005 IME with respect to claimant's C3-4 cervical disc herniation, Dr. Moskovitz pertinently noted that "(claimant's) disability and his need for surgical care are related to . . . work related injury." (EE 5). This alone without recourse to claimant's additional medical evidence meets his burden of making an initial demonstration that the May 16, 2004 injury had the *potential* of resulting in or contributing to his present disability. Accordingly, claimant benefits from the statutory presumption of compensability, which employer may rebut by presenting specific and comprehensive evidence.

In an addendum dated March 3, 2005 to his February 10, 2005 IME, Dr. Gordon reflected that based on the February 14, 2005 cervical spine MRI, claimant had a right-sided C3-4 disc herniation which was not visualized in the June 10, 2004 MRI and thus was unrelated to the May 16, 2004 incident. (EE 2). Dr. Gordon's narrative that the September 3, 2004 automobile collision singularly caused claimant's C3-4 disc herniation is not convincing and, thus, incomprehensive enough to sever the causal connection between claimant's C3-4 pathology and the May 16, 2004 work injury. Accordingly, absent a reliable evidence in rebuttal, the presumption of compensability stands unrebutted, and claimant bears the ultimate burden of proving the nature of his disability.

The nature and extent of claimant's disability, if any.

The Workers' Compensation Act does not afford claimant with a presumption regarding the nature and extent of his disability; rather claimant maintains the burden of proving by a preponderance of the evidence the nature and extent of his disability. *Landesberg v. District of Columbia Department of Employment Services*, 794 A. 2d 607 (D.C. 2002).

Claimant's evidence primarily consists of the medical reports from Dr. Moskovitz who treated him from May 24, 2004 to March 14, 2005. As part of his treatment, Dr. Moskovitz prescribed Motrin and Hydrocodone 5/500 for pain relief and placed him in Philadelphia

collar, ordered MRI scans of his cervical spine, surgically decompressed his right cervical spine at C5-6, and fused C5-6 and C6-7. Post-operatively, Dr. Moskovitz prescribed physical therapy, including isometrics and shoulder rolls. However, despite conservative treatment, claimant remained symptomatic in C3-4 area, which Dr. Moskovitz characterized as a transition phenomenon. In his opinion, regardless of the single event, such as the motor vehicle accident that exacerbated the C3-4 disc leading to claimant's disability, it was the presence of two level fusion that was a predisposing factor. Phrased differently, claimant's C3-4 infirmity, although rendered symptomatic by the automobile collision, was primarily attributable to the C5-6 and C6-7 fusion that was necessitated by the May 16, 2004 injury.

In refuting the findings of Dr. Moskovitz, employer relies on the IME physician, Dr. Gordon who evaluated claimant on February 10, 2005 without any recourse to claimant's cervical MRI of June 10, 2004. After reviewing claimant's February 14, 2005 cervical MRI, Dr. Gordon noted the C3-4 disc herniation visualized on the scan was non-existent previously, and therefore he felt that it was unrelated to the May 16, 2004 work incident.

It is well settled in the District of Columbia that treating physicians are ordinarily preferred as witnesses to those doctors who have been retained to examine claimant solely for the purposes of litigation. An Administrative Law Judge may, however, reject the testimony of treating physicians with a proper explanation for doing so. See *Mexicano v. District of Columbia Department of Employment Services*, 806 A. 2d 198, 205 (D.C. 2002). The rationale for this preference for the testimony of treating physicians seems to be two-fold, in part because the treating physician was not involved solely for the purposes of litigation and thus perhaps is less apt, even if subconsciously, to be biased in making a diagnosis, and in part because of the typically greater amount of time the doctor has worked with the patient. See *Lincoln Hockey, LLC v. District of Columbia Department of Employment Services*, 831 A. 2d 913 (D.C. 2003).

Consistent with the well established preference for the opinion of the treating physician, I see no reason here to depart from that preference. While both doctors, Dr. Moskovitz and Dr. Gordon are board certified orthopaedic surgeons, Dr. Moskovitz provided much more extensive palliative treatment to claimant when compared with Dr. Gordon, who examined claimant only once on February 10, 2005 without a complete review of his June 10, 2004 cervical MRI scan for the sole purpose of defending employer against the disability claim. Conversely, predicated on his prolonged treatment of claimant, Dr. Moskovitz acquired a greater and more reliable insight into claimant's condition. Hence, his opinion is deservedly more significant and is entitled to a greater weight.

CONCLUSIONS OF LAW

Based upon a reconsideration of the record evidence as a whole, I find and conclude claimant has made an initial demonstration under the Act that his symptoms at C3-4, manifested on February 15, 2005, are related to the original employment injury of May 16, 2004. I further find and conclude that claimant has met his burden under the Act supporting his entitlement to continued

temporary total disability benefits from March 5, 2005, including authorization for the recommended discectomy and fusion at C3-4.

ORDER

It is **ORDERED** claimant's claim for relief be, and hereby is **GRANTED.**

ANAND K. VERMA
Administrative Law Judge

May 10, 2007
Date

In the Matter of,	)	
	)	
EDUARDO R. SOLOMON,	)	
	)	
Claimant,	)	
	)	
v.	)	AHD NO. 05- 366
	)	OWC NO. 602695
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,	)	
	)	
Self-Insured Employer.	)	

Appearances:

MARK L. SCHAFFER, ESQUIRE
For the Claimant

SARAH O. ROLLMAN, ESQUIRE
For the Self-Insured Employer

Before:

ANAND K. VERMA
Administrative Law Judge

COMPENSATION ORDER

STATEMENT OF THE CASE

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to

the provisions of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §§32-1501 *et seq*., (hereinafter, the Act).

After timely notice, a full evidentiary hearing was held on September 27, 2005, before Anand K. Verma, Administrative Law Judge. Eduardo R. Solomon, appeared in person and through counsel (hereinafter, claimant). Washington Metropolitan Area Transit Authority (hereinafter, employer) appeared by counsel. Claimant testified on his own behalf. No testimony was adduced on behalf of employer. Claimant Exhibit (hereinafter, CE) No.1-3 and Employer Exhibit (hereinafter, EE) Nos. 1- 5, described in the Hearing Transcript (hereinafter, HT) were admitted into evidence. The record closed upon the receipt of an official copy of HT on October 7, 2005.

BACKGROUND

Claimant, a 39 years old elevator mechanic injured his cervical spine while loosening a floor plate with crow bar on May 16, 2004. After his initial treatment at Kaiser Permanente, claimant came under the care of James H. Graeter, M.D. and Peter A. Moskovitz, M.D., orthopaedic surgeons. Following a conservative treatment with medication, including physical therapy and home exercise, claimant underwent a cervical spine surgery to decompress his right C5-6 and fuse C5-6 and C6-7 on July 16, 2004. On September 3, 2004, claimant had an automobile accident which delayed his return to light-medium duty from September 21, 2004 as recommended by Dr. Moskovitz. After a brief return to the light duty work, claimant was again ordered off work from January 19, 2005 because of symptoms attributable to the automobile accident. Claimant has not returned to work since that time.

CLAIM FOR RELIEF

Claimant seeks an award under the Act of continued temporary total disability benefits from March 5, 2005, as well as authorization for recommended surgery.

ISSUES

1. Whether claimant's disc herniation at C3-4 is medically causally related to the work injury of May 16, 2004.[5]

2. The nature and extent of claimant's disability, if any.

FINDINGS OF FACT

The parties have stipulated, and I accordingly so find, an employer/employee relationship is present under the Act; jurisdiction is vested in the District of Columbia; claimant sustained an accidental cervical injury on May 16, 2004 that arose out of and in the course of employment; claimant provided timely notice of the injury; the claim was timely filed; claimant's average weekly wage is $1,242.85; and employer has voluntarily made payments of temporary total disability benefits from May 21, 2004 to March 4, 2005.

Based on the review of the record as a whole, I make the following findings:

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[5]The undersigned is mindful that this issue was not raised for resolution at the hearing, however, in light of the intervening automobile collision, the causality of claimant's symptoms stemming therefrom needs to be addressed before any discussion of the nature and extent of his injury.

I find claimant worked for employer as an elevator mechanic and, while at work on May 16, 2006, he suffered an acute herniated cervical disc when he attempted to loosen a floor plate with a crow bar. I find claimant first saw Dr. Graeter on May 25, 2004 who placed him on Medrol Dospak and ordered a cervical spine MRI. I find the June 10, 2004 cervical spine MRI disclosed a herniated disc at C5-6 and spondylosis at C6-7. I find claimant followed up with Dr. Moskovitz on July 6, 2004 with the complaint of persistent neck and right arm pains. I find since Medrol did not ameliorate claimant's pain, Dr. Moskovitz recommended surgery to C5-6 and C6-7.

I find, accordingly, claimant underwent the recommended surgery on July 16, 2004. In a post-surg follow up, claimant's posture and motor control of the upper extremity were notably improved and he was placed in Philadelphia collar. I find claimant was continually unable to return to his regular employment. I find, noting improvement in claimant's symptoms on August 5, 2004, albeit with dysphasia[6] and cervical swelling, Dr. Moskovitz dispensed soft collar to him replacing the Philadelphia collar and continued his off -work status.

I find, in the September 2, 2004 follow up, claimant's left arm pain had almost completely resolved and he was improving satisfactorily. I find on September 3, 2004, claimant had a rear end automobile collision. On September 8, 2004, feeling increased neck and interscapular pains, claimant returned to Dr. Moskovitz, who opined claimant had a cervical sprain superimposed on post-operative healing of C5-6 and C6-7 and recommended isometrics and shoulder rolls with gentle ROM. I find on September 21, 2004, Dr. Moskovitz released claimant to light-medium duty work[7] and continued isometrics and shoulder rolls with gentle ROM. I find the October 14, 2004 and November 24, 2004 follow ups noted claimant's continued improvement from his July 16, 2004 C5-6 and C6-7 surgery.

I find, on January 19, 2005, Dr. Moskovitz noted a recurrence of neck pain after a satisfactory post-operative healing of the C5-6 and C6-7 surgery and, recommending a short course of formal physical therapy, he ordered a new MRI scan of the cervical spine. I find, on February 1, 2005, as Dr. Moskovitz assessed, claimant manifested a reappearance of neck pain, even though he had satisfactorily healed from his July 16, 2004, C5-6 and C6-7 surgery. I find claimant's symptoms pertinent to the work-related C5-6 and C6-7 injury remitted after February 1, 2005.

I find claimant submitted to Robert O. Gordon, M.D., an orthopaedic surgeon, for an independent medical evaluation (IME) on February 10, 2005. I find Dr. Gordon opined claimant had sustained a cervical strain superimposed on his pre-existing degenerative disc disease at the C5-6 and C6-7 levels. In an addendum, dated March 3, 2005, to said IME, Dr. Gordon noted, *inter alia*, that claimant had a right sided C3-4 disc herniation, which was not

[6]Impairment of speech, consisting in lack of coordination and failure to arrange words in their proper order due to a central lesion. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 29th Edition (2000) p. 556.

[7]Claimant's light duty restrictions included maximum lifting of 30 lbs., carrying objects weighing up to 20 lbs., standing, walking and sitting for 3 to 5 hours in an eight hour day, and occasional bending, squatting, climbing, twisting, reaching, kneeling, and pushing/pulling. In addition, claimant could use his hands for simple grasping, fine manipulation , as well as pushing and pulling.(EE 5).

present previously and was unrelated to the May 16, 2004 work incident.[8]

I find the February 14, 2005 MRI of the cervical spine revealed a right sided disc herniation at C3-4 level, and on February 15, 2005, Dr. Moskovitz referred claimant to Warren D. Yu, M.D., an orthopaedic surgeon, for consultation regarding a complex cervical spine reconstruction. I find, upon examining claimant on February 25, 2005, Dr. Yu opined claimant manifested severe symptoms in that he had weakness of the right deltoid coupled with significant pain, and therefore, he recommended surgical fusion of C3-4, as well as C4-5, which already showed degeneration.

I find in a supplemental medical report dated June 16, 2005, Dr. Moskovitz reflected that the disc herniation existing before the July 16, 2004 surgery was not causing symptoms. The herniation of C3-4, demonstrated on the February 14, 2005 MRI, was a neuro-mechanically distinct lesion and "a new event." He further clarified that the C3-4 lesion did not exist in its disabling form on June 10, 2004 (the first cervical spine MRI).

I find, at the behest of employer, Marc B. Danziger, M.D., an orthopaedic surgeon reviewed claimant's prior medical records on September 20, 2005. I find Dr. Danziger believed that claimant's C3-4 disc herniation, unrelated to the original work injury, solely resulted from the September 3, 2004 automobile collision.

I find claimant's asymptomatic disc herniation of C3-4 was rendered symptomatic following the automobile collision of September 3, 2004.

DISCUSSION

I have reviewed the arguments of counsel with respect to the issue presented herein. To the extent an argument is consistent with the findings and conclusions, it is accepted; to the extent an argument is inconsistent therewith, it is rejected.

Whether claimant's disc herniation at C3-4 is medically causally related to the work injury of May 16, 2004.

In the District of Columbia, there is a presumption of compensability under the Act. D.C. Code §32-1521(1); *Ferreira v. District of Columbia Department of Employment Services*, 531 A. 2d 655 (D.C. 1987). Its purpose is to advance the humanitarian goal of the statute to provide compensation to employees for work-related disabilities reasonably expeditiously, even in arguable cases. 531 A. 2d at 654-655. To come within the presumption, a claimant must make an initial showing of some evidence of "a death or disability and a work-related event, activity, or requirement which has the *potential* of resulting in or contributing to the death or disability." *Id*. Once that showing has been made, "the presumption then operates to establish a causal connection between the disability and the work-related event, activity, or requirement." *Id*. Claimant must provide some evidence that the disability is connected with the employment before the burden of production is shifted to the employer. *Id*. at n.5. Once shifted, the employer

[8]Dr. Gordon further noted:

The MRI scan (of February 14, 2005) "showed something new that was not present on the previous MRI scan of June 10, 2004 and which was not in any way related to the injury of May 16, 2004. I presume it is related to the subsequent motor vehicle accident that occurred . . . . If, indeed, the only significant trauma he has sustained subsequent to that was a motor vehicle accident, I presume it was related to that." (EE2).

has the burden of producing "substantial evidence" establishing that the disability did not arise out of and in the course of employment. *Id.* at 655.

In this case, claimant's medical record demonstrates that he suffered disc herniations at at C5-6 and C6-7 levels in the May 16, 2004 work injury for which he underwent surgery and was making a satisfactory recovery. Then, subsequently, on September 3, 2004, claimant was involved in an rear end automobile collision which impacted his cervical spine at C3-4 level in the form of disc herniation.

Claimant's treating physician, Dr. Moskovitz who treated him from July 6, 2004 through March 7, 2005 noted in the September 8, 2004 follow up that because "[h]e was thrown against the steering wheel" in the September 3, 2004 automobile accident, he had "increased neck and interscapular pain"and his cervical spine and shoulder posture were more asymmetrical than at his visit on September 2, 2004. He recommended that "[b]ut for the recent sprain, he would be capable of light duty, . . ." (EE 5). Further, observing claimant's continued progress from the July 16, 2004 cervical spine surgery, Dr. Moskovitz noted in his October 14, 2004 follow up that the motor vehicle accident exacerbated claimant's "cervical spine and interscapular symptoms" which were "resolved as one might expect." (CE 1).

As reflected in the November 24, 2004 follow up, with only mild asymmetry in his posture, claimant continued his progress in recovering from the July 16, 2004 cervical spine surgery. Later, because of claimant's persistent right neck pain six months after C5-6 and C6-7 surgery, Dr. Moskovitz ordered another MRI of the cervical spine on January 19, 2005. Noting a recurrence of neck pain following a satisfactory healing from the July 16, 2004 surgery of C5-6 and C6-7 in his follow up of February 1, 2005, Dr. Moskovitz continued claimant's isometrics along with shoulder rolls and gentle ROMS and his off-work status. The magnetic images of claimant's cervical spine taken on February 14, 2005 revealed an abnormal soft tissue density causing an extrinsic impression along the right side of the thecal sac at C3-4 level, which Dr. Moskovitz characterized as a transition phenomenon in his February 15 and March 7, 2005 follow ups. Elaborating further in his supplemental medical report dated June 16, 2005, Dr. Moskovitz specifically noted the disc herniation at C3-4 was a neuro-mechanically distinct lesion whose occurrence was predisposed by prior herniation. In his opinion, the lesion discovered by the February 14, 2005 MRI was "a new event," which was not symptomatic at the time of the first MRI of the cervical spine on June 10, 2004. In other words, but for the automobile collision, claimant's disc herniation at C3-4 would not have been symptomatic.

Employer proffered Dr. Gordon's February 10, 2005 IME and an addendum of March 3, 2005 wherein, predicated on his review of the June 10 2004 and February 14, 2005 MRI scans of the cervical spine, he opined claimant had a right-sided C3-4 disc herniation, unrelated to the May 16, 2004 injury.

Before the burden of production is shifted to employer, claimant must provide some evidence that the C3-4 disc herniation is connected with his original employment injury of May 16, 2004. However, even without recourse to employer's evidence, the entirety of claimant's medical evidence, points to only one conclusion that the C3-4 disc herniation did not directly and naturally result from the original work injury of May 16, 2004; rather, it resulted from an

intervening event thereafter. It is also unarguable that claimant's driving of automobile on September 3, 2004 was, in any way, connected to his employment. Hence, the injuries resulting from the automobile collision would be considered an independent intervening cause, unrelated to the employment. In *Marriott Int'l v. District of Columbia Department of Employment Services*, 834 A. 2d 882 (D.C. 2003), the Court upheld the Administrative Law Judge's finding that claimant's current medical condition involving the neck and lower back was not causally related to his work-related injury. Rather, claimant sustained a neck and lower back injuries in a subsequent automobile accident, unrelated to his employment.

Where the question of intervening cause has arisen involving operation of an automobile, injuries sustained in the collision were held non- compensable, on the ground that claimant's own act of driving with knowledge of his condition supervened to break the chain of causation between the original work injury and the automobile collision. See 1 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW §10.06[3], at 10-17 (2002).

Accordingly, the undersigned is not persuaded that claimant has met his burden under the Act by demonstrating that the complained of symptoms at C3-4 are connected with the employment in order to benefit from the presumption of compensability. Absent such initial showing, the burden of production does not shift to employer. Therefore, the discussion of the nature and extent of claimant's disability is rendered moot.

CONCLUSION OF LAW

Based upon a reconsideration of the record evidence as a whole, I find and conclude claimant has not made an initial demonstration under the Act that his symptoms at C3-4, manifested on February 15, 2005, are related to the original employment injury of May 16, 2004.

ORDER

It is **ORDERED** claimant's claim for relief be, and hereby is **DENIED.**

ANAND K. VERMA
Administrative Law Judge

February 13, 2007
Date