

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
INTERIM DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB 13-119**

**TIMOTHY HOEPFL,  
Claimant-Respondent,**

**v.**

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY  
and ABERCROMBIE, SIMMONS & GILLETTE, INC.  
Self-Insured Employer and Third Party Administrator-Respondent.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 APR 7 PM 12 01

Appeal from an August 29, 2013, Compensation Order  
By Administrative Law Judge Leslie A. Meek  
AHD No. 05-512B, OWC No. 634406

Donna J. Henderson, for the Petitioner  
Kasey K. Murray, Justin M. Beall and David M. Schloss, for the Respondent  
Allen J. Lowe and Benjamin E. Douglas, *amicus curie*

Before: LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, with HENRY W. MCCOY and  
HEATHER C. LESLIE, *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, for the Compensation Review Board.

**DECISION AND REMAND ORDER**

This case is before the Compensation Review Board (CRB) on the appeal filed by the employer, Washington Metropolitan Area Transit Authority (WMATA) challenging the August 29, 2013 Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES).

In the CO, the ALJ awarded Timothy Hoepfl's (Claimant) schedule permanent partial disability benefits for the 18% disability to his right leg and for the 12% disability to his left leg.

## BACKGROUND AND FACTS OF RECORD

Claimant has worked for Employer as an elevator and escalator technician since 1966. His duties, as found by the ALJ, were:

As an elevator/escalator technician, he is required to repair elevators and escalators when they have shut down or when entrapments occur in the elevators. In regards to the repair of escalators, Claimant must remove and install escalator steps, and install escalator handrails that can weigh 200 to 1,000 pounds. The installation of escalator handrails require Claimant to stretch the heavy handrail and balance on axles during such installation as there are no steps upon which to stand. His position with Employer requires climbing, standing, stooping, bending, and lifting. (TR p. 36)

CO at 2.

On November 28, 2006, Claimant twisted his left knee while walking through a gate at one of Employer's work sites. He first sought treatment from his family physician and then with Dr. John Byrne, an orthopedist.

In April 2007, Dr. Byrne surgically repaired Claimant's left knee (medial meniscectomy and ACL reconstruction) and prescribed physical therapy. While riding a recumbent bike during physical therapy, Claimant felt a strong tearing pain in his right groin area. After he returned home from physical therapy, Claimant fell while climbing the front steps and was taken by ambulance to a local hospital's emergency room.

Claimant underwent a right inguinal repair on May 25, 2007.<sup>1</sup> Claimant previously had a hernia in this area for which he underwent surgery in 2005.

Claimant eventually was able to return to full duty but on February 19, 2010, he slipped and fell from a ladder, reinjuring his left knee.<sup>2</sup> Dr. Byrne also treated Claimant for this injury and performed a second surgical repair to Claimant's left knee.

Employer had Claimant examined by Dr. Louis Levitt for IMEs on January 16, 2007, August 14, 2007, October 16, 2012 and January 22, 2013. Dr. Levitt's *de bene esse* deposition was part of the evidence submitted at the hearing. Employer also submitted reports from Dr. David Johnson, who examined Claimant on June 19, 2008, and Dr. Michael Greenberg, who examined Claimant on October 27, 2008 and June 19, 2009.

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<sup>1</sup> We note that on page 2 the ALJ incorrectly identified the date of the hernia surgery as February 27, 2007. This is clearly a typographical error as elsewhere in the CO the ALJ correctly identified the surgery date as May 25, 2007.

<sup>2</sup> The CO incorrectly identified the date of this accident as February 10, 2010. This also is a typographical error because the ALJ's December 4, 2012 Order denying Employer's Motion to Consolidate correctly stated the date of this accident.

Claimant submitted several reports from Dr. Byrne to support his claim. Dr. Byrne reported in 2011 that as a result of the November 28, 2006 injury when Claimant twisted his left knee, Claimant had a 23% permanent partial disability to his left lower extremity. Dr. Byrne also rated Claimant as having a 15% permanent partial disability to “his lower extremity” for injury to lateral femoral cutaneous nerve, ilioinguinal nerve, and genitofemoral nerve. Dr. Byrne concluded “This equates to an additional 15% impairment to his lower extremity.”

Dr. Johnson rated Claimant as having a 9% permanent impairment to his left leg caused by the 2006 injury. Dr. Johnson stated this rating was for the 2% impairment from the medial meniscus tear debridement and 7% to the ACL reconstruction.

Dr. Levitt opined that Claimant had 15% left lower extremity impairment caused by the 2006 injury that would be increased by an additional 2% resulting from the 2010 injury.

Claimant filed two claims: one for the November 28, 2006 injury and the other for the February 19, 2010 injury. Prior to the hearing, Employer moved to consolidate the two cases. Although Claimant consented to the consolidation, the ALJ denied the motion.

At the hearing, Claimant clarified that he was seeking an award for the 23% permanent partial impairment to his left lower extremity and for the 15% permanent partial impairment to his right lower extremity. Employer moved to continue the case because it did not have adequate notice that Claimant was making a claim for permanent partial disability to the right leg. The ALJ denied this motion.

In the CO, the ALJ held Employer failed to rebut the presumption with respect to both legs and concluded Claimant’s current medical conditions are causally related to the 2006 work incident. The ALJ also determined Claimant had an 18% disability to his right leg and a 12% disability to his left leg. Employer timely appealed.

### **DISCUSSION AND ANALYSIS**

On review Employer asserts the ALJ erred in in five ways:

1. The ALJ’s denial of the unopposed motion to consolidate the two claims was error;
2. The ALJs abused her discretion when she denied its motion to postpone the formal hearing so it could do discovery on the right leg claim;
3. The ALJ improperly admitted hearsay at the formal hearing;
4. The ALJ improperly awarded permanent partial disability for pain and suffering; and
5. The ALJ erred in finding Employer failed to rebut the presumption of causation regarding the right leg claim.

We shall discuss each assignment of error in this order.

THE ALJ'S DENIAL OF THE UNOPPOSED  
MOTION TO CONSOLIDATE CLAIMANT'S TWO CLAIMS

On October 26, 2012, Employer filed with AHD a Motion To Consolidate, seeking to join the present case involving the 2006 accident with a second claim that had been filed by Claimant regarding the 2010 accident. That claim, OHA No. 13-044, had been assigned to a different ALJ.

Employer alleged that since the two claims involved the same body parts, the same parties and the same treating doctor, consolidation would not prejudice either party and would be in the interest of judicial economy. Claimant did not oppose Employer's Motion to Consolidate.

On December 4, 2012, the ALJ issued an Order denying Employer's motion. The ALJ, citing Superior Court Civil Rule 42,<sup>3</sup> denied the motion because

The two cases the Employer seeks to have consolidated do not involve common issues of fact, as they involve separate accidental work injuries one involving Claimant's slip while he was transversing through a gate, and a second that involved Claimant's fall from a ladder. The two cases do not grow out of the same event or transaction as the two injuries occurred on dates that are over three years apart. The two cases do not involve common and unique issues of law which appear to be of first impression as the cases involve frequently litigated and much considered issues regarding the nature and extent of Claimant's disability.

Our standard of review for an order of this kind is that the CRB must affirm the order unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See, 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, §51.93 (2001).

When judged against this standard we AFFIRM the Order.

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<sup>3</sup> Super. Ct. Civ. R. 42 states in part

(a) Consolidation. -- When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. Any motion to consolidate two or more civil actions shall be decided by the judge on whose calendar appears the oldest assigned case covered by the motion. If the motion is granted, all the consolidated cases shall be placed on the calendar of the judge who granted the motion.

\* \* \*

(c) Related cases. (1) Civil cases are deemed related when the earliest is still pending on the merits in the Superior Court and they (i) involve common property; or (ii) involve common issues of fact; or, (iii) grow out of the same event or transaction; or, (iv) involve common and unique issues of law which appear to be of first impression in this jurisdiction.

The ALJ identified several reasons why she did not believe the two cases should be consolidated and we find her decision is a valid exercise of the discretion granted an ALJ in conducting the formal hearing.

THE ALJ'S DECISION TO DENY EMPLOYER'S MOTION TO POSTPONE  
THE FORMAL HEARING SO IT COULD DO DISCOVERY ON THE RIGHT LEG CLAIM.

In this case, Employer filed the claim that resulted in the hearing. The claim, filed after an informal conference, identified as the "facts of the claim":

Claimant alleges that he slipped while going through a gate and strained left knee. WMATA contends that there is no causal relationship.

Several months before the formal hearing, the parties filed an endorsed Joint Pre-Hearing Statement (JPHS) on October 24, 2013. In the section titled "Statement of the facts as claimed by the parties" Claimant wrote

Claimant sustained injuries at work to his left knee on November 28, 2006 when he slipped while walking through a fare gate. Claimant has been rated by his treating physician and assigned a 38% PPD rating to his left lower extremity as a result of the 2006 injury.

In this section, Employer wrote:

Claimant has a 9% permanent partial disability to his left lower extremity.

As "Contested issues of Fact and Law" the parties wrote

Claimant: 1) PPD to Left Lower Extremity from 2006 accident  
Employer/Carrier: Extent of permanent partial disability

At the formal hearing, Employer moved to dismiss the claim to Claimant's right leg or to postpone the formal hearing because it did not have notice of the claim.<sup>4</sup> Employer's primary objection was that Claimant was now seeking an award for a different body part than what had been identified before the hearing. The ALJ denied Employer's motion because Employer had received the medical record exhibits prior to the hearing where there is mention of right extremity problems.

Although there were several exchanges between employer's counsel and the ALJ, this exchange from the hearing is a fair representation of the ALJ's reason for denying Employer's motion:

Q. (By ALJ) What I just asked you is what was your objection based upon. You stated to me that your objection was based upon notice.

A. (By Employer's counsel) That's right.

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<sup>4</sup> After the formal hearing, Employer renewed its motion. It does not appear that the ALJ ruled on that motion.

Q. So my question to you is when did you receive the exhibit, and you said a while ago. So you have had notice. Your objection is overruled.

HT at 25.

In his opposition, Claimant similarly argues that Employer's motion was properly denied because Employer had "actual notice" since Employer had Dr. Byrne's permanent partial disability rating in its possession in excess of one (1) year, because at Dr. Levitt's *de bene esse* deposition Employer "fully investigated the issues of the right lower extremity rating and because it was discussed during Dr. Levitt's cross examination at the deposition. Claimant's Opposition at 8-11.

We agree with the Employer and find the ALJ erred.

Although administrative hearings are not pleading-driven, the parties before AHD have a right to rely on the Joint Pre-Hearing Statement (JPHS) for the issues that will be raised at the formal hearing.

Claimant, who only identified a left leg claim in the JPHS, did not amend the JPHS or otherwise notify opposing counsel that he also was claiming schedule benefits for a separate and independent body part until shortly before the start of the formal hearing. It is of no moment that injury to the other body part might have been identified in a medical report or a doctor's deposition as those reports are not claims.

Employer did not have adequate notice or a reasonable opportunity to defend against the new claim for permanent partial disability to the right leg.

#### THE ALJ'S PERMITTED HEARSAY AT THE FORMAL HEARING.

The employer also asserts that the ALJ erred by permitting Claimant, over objection, to testify as to what several doctors told him about his medical condition. A review of the transcript shows that at least five times during the hearing, the ALJ overruled employer's objection to this hearsay testimony by admonishing counsel that hearsay evidence is admissible in administrative hearings.

Employer acknowledges that D.C. Code § 1-623.24 (b) (2) states that an ALJ "is not bound by common law or statutory rules of evidence, or by technical or formal rules of procedure" and that an ALJ has authority to "receive such relevant evidence as the claimant adduces and such other evidence as he or she determines necessary or useful in evaluating the claim."

Nevertheless, Employer relies on the decision in *Tomlin v. D.C. Public Schools*, CRB 13-064, AHD No. PBL 12-013, DCP No. 30080945683 (August 22, 2013), wherein the CRB held

However, while an ALJ has great discretion with respect to receiving medical evidence at a formal hearing, he does not have unrestricted discretion. All actions of an ALJ must be consistent with due process and fairness to both parties.

Employer argues that the ALJ abused her discretion because

Claimant testified not only about what his knee surgeon told him but also what his neurologist and the surgeon who performed his herniorrhaphy told him. The ALJ relied on these descriptions of the medical diagnoses and treatment throughout the Compensation Order. Denial of WMATA's hearsay objections was error. Employer's memorandum at 7.

We disagree with Employer.

In *Tomlin*, counsel for Tomlin sought to introduce an exhibit that was an internal document from counsel's law firm that purportedly memorialized a conversation between a staff member and an adjuster in which the adjuster told the staff member that claimant's benefits would not be reinstated even if claimant attended a previously cancelled IME. The ALJ did not rule on the admissibility of the exhibit at the hearing but stated he was taking employer's objection under advisement.

In the CO, the ALJ not only admitted the exhibit but relied on the statements in the exhibit in his decision. The CRB held the ALJ erred but this error was harmless error:

Here, even if we overlook the fact that claimant's counsel failed to lay any foundation for the exhibit, we cannot overlook the fact that the ALJ erred by accepting the document for the truth of what was said in the document without giving the employer any opportunity to cross-examine the author of the document or to challenge the statements made in the document.

Although the ALJ erred by admitting Exhibit 3, his decision was not in any way based on the contents of that exhibit. Whether the claimant did or did not offer to do a make-up AME would be relevant to whether and when the claimant cured her refusal. Since the ALJ found the claimant did not obstruct Dr. Levitt's AME, curing was not an issue that was decided by the LJ. Therefore, the ALJ's decision to admit the exhibit, while erroneous, constitutes a harmless error.

*Tomlin* at 6. (Footnote omitted).

As this passage shows, the mere fact that the ALJ relied on hearsay evidence does not require remand. Rather, the CRB looks to the use of the hearsay evidence with respect to the ALJ's decision.

We find the ALJ did not abuse her discretion with respect to hearsay evidence in her CO. Although there are references in the CO where the ALJ recited what Claimant testified his doctors told him, on the key decisional points regarding her presumption analyses and her schedule permanent partial disability determination, the ALJ did not solely rely on hearsay testimony.

THE ALJ'S AWARD OF PERMANENT PARTIAL DISABILITY.

Employer also asserts the ALJ's awarding permanent partial disability benefits was improper because she awarded benefits for pain and suffering. This assignment of error calls into question the basis of the ALJ's award.

In the CO, the ALJ recounted Claimant's testimony as to his limitations with respect to his left knee:<sup>5</sup>

In regards to his left knee, Claimant still experiences pain and instability issues. He states his leg "gives out" sometimes when he is just walking. He has no feeling at the incision area from the front of his leg to his knee, and he still feels soreness in the other parts of the knee. (TR p. 62). He states his knee aches when the weather is cold, (TR p. 63), and he walks with a limp that becomes more pronounced as the day progresses. (TR p. 94).

CO at 4.0

The ALJ determined Claimant had a 12% permanent partial disability to his left leg:

Regarding his left knee, Claimant testified he continues to experience pain and instability. He states his leg moves more than it is supposed to, and at times will "give out." He has no feeling at the place of the ACL surgery incision and his knee aches when the weather is cold. ..

Medical reports show Claimant continues to experience pain in his left knee and leg...

\* \* \*

No weight has been given to Dr. Byrne's assessment of a 10% schedule rating for his diagnosis of chondromalacia/arthritis. This determination is rejected as the existence of said malady has not been mentioned before in any of Dr. Byrne's treatment records that span four years. Also, Dr. Byrne's medical report fails to offer any substantiation or medical explanation regarding the existence of chondromalacia/arthritis in Claimant's left knee.

Based upon the evidence of record, the pain, weakness, loss of endurance and loss of function warrant a schedule award of... 12% to his left leg...

\* \* \*

Regarding his left leg, three percent is attributed to Claimant's pain, six percent is attributed to his weakness, and three percent is attributed to his loss of function.

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<sup>5</sup> In view of our decision that the ALJ should not have decided the right leg claim, we shall only relate the ALJ's findings regarding the left leg in this passage.

CO at 10.

We find we must remand this case so that the ALJ can provide a more detailed explanation as to the rationale for her calculation of disability given the two separate and distinct injuries to Claimant's left leg.

In *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012), the Court reaffirmed that the reasons for the ALJ's decision must be stated with specific specificity:

The court is charged, by statute, "to hold unlawful and set aside" an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." D.C. Code § 2-510 (a) (3) (A). That determination cannot be made unless the court has a basis for evaluating the agency's exercise of discretion, and we require that it be provided, for otherwise, we risk "'invit[ing] the exercise of [administrative] impressionism. Discretion there may be, but 'methodized by analogy, disciplined by system.' CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 139, 141 (1921). Discretion without a criteria for its exercise is authorization of arbitrariness.'" (*James) Johnson v. United States*, 398 A.2d 354, 366 (D.C. 1979) (quoting *Brown v. Allen*, 344 U.S. 443, 496, 73 S. Ct. 397, 97 L. Ed. 469 (1953)).

Here, because the ALJ did not explain her reasoning in arriving at a disability award of 7%, we are unable to meaningfully review the decision to determine whether it is based on substantial evidence, applying proper legal principles.

*Jones*, supra, at 1221.

As noted earlier, Claimant sustained another injury at work on February 19, 2010 for which Dr. Byrne performed another surgery to repair an additional medical meniscus tear, the same surgery that was done after the 2006 accident. We have carefully scrutinized the ALJ's CO and cannot find where the ALJ has distinguishing disability between the two accidents. Therefore, the CO has not met the *Jones* standard and we are unable to meaningfully review the CO to determine whether it is supported by substantial evidence and in accordance with the law.<sup>6</sup>

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<sup>6</sup> It might be argued that the ALJ's finding that Claimant's present condition is causally related to the 2006 can be interpreted as finding that all of the disability is caused by the 2006 accident. However to do so would be to find that there was no permanent disability caused by a second significant event and a second significant, and identical surgery four years later. While that may be the case, the CRB is not permitted to "fill in the blanks" and will not speculate as to the basis of the disability rating without a clearer, more specific finding by the ALJ.

Since the ALJ chose not to consolidate the claim for the 2010 work injury with the present claim, the ALJ was required to identify how much, if any, of the 12% disability was due to the only claim before her, the 2006 accident, and how much, if any, was due to the 2010 accident that was not before the ALJ.

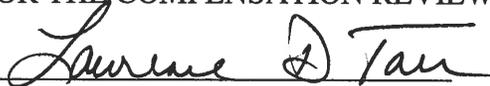
THE ALJ'S DETERMINATION EMPLOYER FAILED TO REBUT  
THE PRESUMPTION OF CAUSATION REGARDING THE RIGHT LEG CLAIM.

Because we previously decided that the award for permanent partial disability to Claimant's right leg must be vacated, we shall not discuss this assignment of error.

CONCLUSION AND ORDER

The August 29, 2013 CO is not based on substantial evidence and in accordance with the law and the Award in the CO is VACATED. This case is remanded to the ALJ so that she may reopen the record for additional evidence including additional IME's and testimony, regarding the nature and extent, if any, of permanent partial disability to Claimant's right leg and for whatever other actions she deems appropriate to comply with the CRB's decision and to issue a new decision that is consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:



LAWRENCE D. TARR

*Chief Administrative Appeals Judge*

April 7, 2014

DATE