

P. Green - awc

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

Office of Hearings and Adjudication
Administrative Hearings Division



(202) 671-2233-Voice
(202) 673-6938-Fax

In the Matter of:)	
)	
RODNEY CARSON,)	
)	
Claimant,)	AHD No. 05-429
)	OWC No. 606465
v.)	
)	
PEPCO,)	
)	
Self-Insured Employer.)	

Appearances:

E. SCOTT FRISON, ESQUIRE
For the Claimant

WILLIAM T. KENNARD, ESQUIRE
For the Self-Insured Employer

Before:

HENRY W. MCCOY
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 March 22, 2006, before Henry W. McCoy, Administrative Law Judge. Rodney Carson (hereinafter, Claimant) appeared in person and by counsel. Pepco (hereinafter,

Employer) appeared by counsel. Claimant testified on his own behalf, with Dr. Patrick Sheehan, Wayne Josey, and Mrs Sandra Robinson-Carson also testifying on his behalf. Gregory Johnson and Kenneth Payne testified at the hearing on behalf of Employer. Drs. Brian Schulman and Bruce Smoller testified for Employer via *de bene esse* depositions. Claimant Exhibit (hereinafter, CE) Nos. 2 and 15, and Employer Exhibit (hereinafter, EE) Nos. 1 - 4 described in the Hearing Transcript (hereinafter,

HT) were admitted into evidence.¹ The hearing transcript was received on April 13, 2006. However, the hearing record was left open until April 28, 2006 to allow the parties to submit post-hearing briefs. Both parties submitted their post-hearing briefs on April 28, 2006, whereupon the hearing record in this matter closed.²

BACKGROUND

Claimant alleges that while working for Employer he sustained a stress-induced work-related injury, a Major Depressive Disorder, due to harassment from a fellow Pepco employee. Claimant also claims that his

emotional injury was due to having been discriminated against as he was unfairly passed over for promotion to a permanent crew leader position. Claimant claims that his work-related stress caused him to stop work on November 17, 2003 and to seek psychiatric treatment. Employer questions jurisdiction for Claimant's discrimination claim and contends that Claimant did not sustain an accidental injury that is causally related to his employment.

CLAIM FOR RELIEF

Claimant seeks an award under the Act of temporary total disability from November 17, 2003 to the present and continuing, causally related medicals, and interest on accrued benefits.

ISSUES³

1. Whether there is jurisdiction for the claim under the Act, D.C. Official Code § 32-1503, as amended?
2. Whether Claimant sustained an accidental injury on November 17, 2003?
3. Whether Claimant's injury arose out of and in the course of his employment?

¹ Employer's objection to the admission of Claimant's exhibit #1 was sustained insofar as it was an affidavit from one of Claimant's witnesses whose testimony would be the same as the contents of the affidavit and thereof unnecessarily duplicious.

² On May 9, 2006, Claimant filed a "Motion to Set Aside Employment Termination" claiming that Employer in a retaliatory action terminated Claimant from his employment in violation of the Act and seeking reinstatement. On May 16, 2006, Employer filed in opposition stating not only that Claimant had not shown that Employer exhibited the requisite retaliatory animus, but more importantly, insofar as Claimant is asserting retaliatory discharge pursuant to D.C. Official Code § 32-1542, it requires a separate claim to be filed so Claimant can satisfy his burden of proof at an evidentiary hearing and that the issue is not amenable to resolution by motion. The issue of retaliatory discharge did not arise until the hearing record in the instant matter had closed and thus was not available for adjudication at the March 22, 2006 formal hearing. Therefore, after due consideration of the motion and the arguments presented, including Claimant's reply filed on May 22, 2006, the undersigned concludes that the issue of retaliatory discharge must be the subject of a new claim by Claimant to be resolved after an evidentiary hearing is held. Accordingly, Claimant's Motion to Set Aside Employment Termination is hereby denied.

³ At the formal hearing, the parties submitted a revised version of the Stipulation Form initially submitted by Employer. The issues to be litigated were reviewed as noted in the HT at pages 5-6. Therein, the issue of "penalties/timely controversion" was noted as "no contest." However, Claimant's counsel misstates this as an issue for resolution in his unauthorized supplemental post-hearing brief filed on May 22, 2006 and in an October 4, 2006 letter to the undersigned. Claimant's counsel is on record at the formal hearing as being in agreement that failure to timely controvert the claim was not a contested issue. Accordingly, that issue is not addressed herein.

4. Whether Claimant's disability is medically causally related to his employment?
5. Whether Claimant provided timely notice of injury pursuant to § 32-1511?
6. Whether Claimant filed a timely claim for benefits pursuant to § 32-1514?
7. The nature and extent of Claimant's disability, if any?

FINDINGS OF FACT

The parties have stipulated, and I accordingly find, that an employer/employee relationship exists; Employer timely controverted the claim; there was not retaliatory discharge as of the formal hearing; no issue as to voluntary limitation of income or failure to cooperate; and, Claimant's average weekly wage was \$1,268.03.

Based on the evidence of record, I make the following additional findings of fact:

I find that Claimant was employed by Employer for fifteen (15) years starting as an entry-level electrical conduit installer Grade C. After approximately eight months, Claimant was promoted to installer Grade B, and subsequently to installer Grade A. I find that Claimant attended and completed all appropriate and required training courses necessary to achieve these promotions.

I find that Claimant was temporarily promoted to Grade 15 crew leader where he had to supervise a work crew and set-up work sites. Claimant served as a Grade 15 for two (2)

years. I find that in and around 2001 while he was a temporary Grade 15 crew leader Claimant applied for a permanent promotion to that grade level but was not selected. At the time, Claimant was a permanent Grade 13 and had been with Employer for twelve years. Although he was not promoted, Claimant continued to work at the temporary Grade 15 level.

Claimant was subsequently temporarily promoted to a temporary Grade 17 lead mechanic where he assumed more responsibility and stayed at that level for almost a year. I find that in the Spring of 2003 Claimant applied again for a permanent promotion to Grade 15, when two slots were open for conduit crew leader. Claimant again was not selected. An African-American male and a Caucasian male were selected.

I find that Claimant was emotionally devastated at not being selected, which caused a drop in his mood, he experienced trouble sleeping, and he would come home from work angry. I find that Claimant's second denial of promotion had a major effect on how he performed his job as he thought he was being treated differently. I find that this second time being denied promotion was the precipitating event that triggered Claimant's initial onset of depression and insomnia. I find that Claimant went to Gregory Johnson, his immediate supervisor, and received permission to speak to Kenneth Payne, who conducted the interview, to ascertain why he was not selected. I find that Claimant was told that he did not interview well and that he needed to be more expansive in his responses to questions posed in the interview to show that he had the requisite training and experience.

I find that both times Claimant applied for promotion to Grade 15 crew leader he was first on the seniority list. I find that Claimant was of

the firm belief that seniority was the sole determining factor in whether someone was promoted or not. I find that Claimant believed that as the person with the most seniority applying for the crew leader position he should have been guaranteed the promotion. I find that individuals qualified for promotion first on the basis of seniority but then had to demonstrate their qualifications and ability to do the job during an interview.

I find that after Claimant had been working for Employer for two years he met Gregory Johnson in and around 1991. At the time, Mr. Johnson held the position of crew leader. Over the next twelve (12) years Claimant and Mr. Johnson worked together and maintained a good working relationship with no expressions, of animosity, verbal or otherwise, between them. I find that Claimant did not experience any problems with Mr. Johnson until Mr. Johnson assumed the position of foreman in May of 2003.

I find that after Mr. Johnson became foreman Claimant was told by two co-workers that he was being targeted by his supervisors. I find that Claimant become overly cautious making sure everything was in place and that his work was done correctly. Claimant began to fear that he was being set up to be fired or harmed in some way. I find there were no objective manifestations that such actions were being taken against Claimant; such as verbal or written reprimands, disciplinary actions, negative performance evaluations, or on-the-job accidents.

I find that in 1999, Claimant worked on a job site on Rhode Island Avenue where Mr. Johnson was the crew leader. During the course of the job, concrete was improperly poured, which resulted in the job not being done

correctly and it having to be re-done. I find that Claimant firmly believed that because he would not take the blame for the job being done improperly Mr. Johnson was assigned blame and as a result has harbored a grudge against Claimant that manifested itself in a change in attitude toward Claimant. I find that there is no record of anyone being assigned blame or reprimanded for the improperly poured concrete on the Rhode Island Avenue job.

I find that in the summer of 2003, Claimant was crew leader for a work detail assigned to install a utility manhole on Florida Avenue, NW near the intersection of 7th Street. Gregory Johnson was the foreman with supervisory responsibility over the job site. During the course of the job, Mr. Johnson had occasion to question Claimant regarding the location of the saw cut in the road due to the proximity of a storm drain, the manner in which the traffic pattern was set up, the amount of work performed each day, and the cleanliness of the job site. I find these job-related issues concerning the way the job was being completed, the progress of the job, and safety and cleanliness were part of Mr. Johnson's responsibilities as foreman. Mr. Johnson did not discipline or reprimand Claimant for any of the concerns he identified on the Florida Avenue job site nor were any of them put into writing and submitted to management.

I find that Claimant never confronted Mr. Johnson with the allegation that Johnson was trying to get him fired. I find that while Claimant was never able to verify this allegation, he believed it to be true. I find that Claimant was never threatened with bodily harm or that an accident would befall him while at work. I find that throughout the course of his career with Employer Claimant never received a letter of reprimand, a bad performance evaluation, nor did he ever receive counseling on how he could

improve his performance.

I find that due to the stress associated with the perceived harassment from Gregory Johnson related to his job performance on the Florida Avenue job Claimant did not see the job to completion. I find that Claimant was reassigned and worked as a crew leader doing smaller jobs. CE 15, p. 68. I find that as a result of the criticism Claimant received from Gregory Johnson regarding his performance on the Florida Avenue job, Claimant became emotionally distressed. I find that on November 18, 2003 Claimant called in sick to work and has not returned to work.

I find that after leaving work Claimant sought professional help on November 19, 2003 from Dr. Carl Douthitt, a clinical psychologist, who diagnosed a major depressive disorder, single episode and saw Claimant regularly for therapy. Dr. Douthitt ascribed Claimant's condition to work related issues of being passed over for promotions for which he felt he was qualified and harassment. Claimant also saw a psychiatrist who prescribed anti-depressants, Lexapro and Trazadone.⁴

Claimant subsequently presented himself, at his counsel's request, to psychiatrist Dr. Patrick Sheehan for an independent psychiatric evaluation on August 1, 2005. Dr. Sheehan catalogued a long history of harassment from Gregory Johnson going back to the late 1990s and being passed over for promotions as the proximate cause of Claimant's major depressive disorder.

⁴ It is believed, based upon Dr. Shulman's report, that the psychiatrist was Dr. Shakuntala S. Dhir; although Claimant made mention of treatment by this doctor and no treatment records were submitted for the hearing record.

Claimant presented himself to Dr. Bruce Smoller, at Employer's request, for an independent psychiatric evaluation in October 2004. Taking note of Claimant's complaints of being "treated differently" by his supervisors and feelings of being set up to be fired by management on both racial and "part grudge" grounds, Dr. Smoller found no evidence of a major depressive episode, but did find evidence of dysthymia⁵, although it was not disabling in his opinion.

At Employer's request, Claimant was also seen by Dr. Brian Shulman on January 16, 2006 for a comprehensive psychiatric evaluation. After reviewing Claimant's medical and employment history and a psychiatric examination, Dr. Shulman concluded Claimant had evidence of a depressive disorder the cause of which was multifactorial, related to genetic, biological, and psychological factors, but was not caused by a job related injury or a condition of his employment.

DISCUSSION

I have reviewed the evidence and arguments of counsel with respect to the issues presented herein.⁶ To the extent that an argument is consistent with my findings and conclusions, it is accepted; and, to the extent that an argument is inconsistent therewith, it is rejected.

⁵ Dysthymia: A disorder of the mood, less severe than a major depression, marked by a loss of interest in activities previously enjoyed, described by the patient as a feeling of being in the dumps, and lasting more than two years. J. E. Schmidt, *Attorneys' Dictionary of Medicine and Word Finder* (hereinafter, *Schmidt*), Vol. 2, November 2004, p. D-247.

⁶ While each of the parties' exhibits is not specifically referenced in this discussion, each was reviewed, considered, and weighed during the course of this deliberation.

Initially, Employer raises the issue of jurisdiction insofar as Claimant alleges that he sustained an emotional injury due in part from being racially discriminated against by being passed over twice for promotions. Under current case law, this aspect of Claimant's claim for benefits based on allegations of racial discrimination as a cause of his emotional injury falls outside the jurisdiction of the Act and must be denied for lack of jurisdiction

The Compensation Order Review Board (the Board) dealt with the issue of racial discrimination in *Wright v. Potomac Electric Power Company*, CRB No. 05-24, AHD No. 02-424, OWC No. 576756 (July 20, 2005). Therein, the Board, adopting the rationale set forth in *Estate of Underwood v. National Credit Union Administration*, 665 A.2d 621 (D.C. 1995), determined that "racial harassment is not a risk involved in, or incidental to, employment not merely because a statute – the Human Rights Act – forbids such harassment during day-to-day workplace interaction but, also because such harassment is altogether unrelated to any work task." The Board went on to state there are specific legislatively created tribunals to remedy such behavior. Thus, while the evidence will show that Claimant's failure to be promoted exacted a toll on his mental state, the extent to which he sustained an emotional or psychology injury must be assessed based upon his allegations of workplace harassment regarding his job performance.

Thus we turn to whether Claimant sustained an accidental injury, an emotional injury due to harassment, on November 17, 2003 that arose out of and in the course of his employment and is also medically causally related to his current disability.

Under the Act, Claimant is entitled to a rebuttable presumption that he sustained a work related injury as alleged and that his alleged disability is also related to that injury upon his showing of a disability and a work-related event which had the potential to cause such a disability. See *Spartin v. D.C. Dept. of Employment Services*, 584 A.2d 564 (D.C. 1990); *Ferreira v. D.C. Dept. of Employment Services*, 531 A.2d 651 (D.C. App.1987); *Whittaker v. D.C. Dept. of Employment Services*, 668 A.2 844 (D.C. 1995), citing *Ferreira, supra*. This presumption exists "to effectuate the humanitarian purposes of the statute," and evidences "a strong legislative policy favoring awards in close or arguable cases." *Parodi v. D.C. Dept. of Employment Services*, 560 A.2d 524, 525-26 (D.C. 1989)(quoting *Ferreira, supra*. at 655). Further, in appropriate circumstances, an emotional injury, such as Claimant is alleging herein, may be compensable under the statute. *Gary v. D.C. Dept. of Employment Services*, 723 A.2d 1205 (D.C. 1998) citing *Charles P. Young, Co. v. D.C. Dept. of Employment Services*, 681 A.2d 451, 458 (D.C. 1996).

As the Court of Appeals reiterated in *Gary*, the special standard for determining when an employee may recover for an emotional injury that arose out of the mental stress of employment was pronounced by the Director of DOES in 1988 and later adopted by the Court:

In order for a claimant to establish that an emotional injury arises out of the mental stress or mental stimulus of employment, the claimant must show that actual conditions of employment, as determined by an objective standard and not merely the claimant's subjective perception of his

working conditions, were the cause of his emotional injury. The objective standard is satisfied where the claimant shows that the actual working conditions could have caused similar emotional injury in a person who was not significantly predisposed to such injury.

Spartin, supra, at 568 (quoting *Dailey v. 3M Company and Northwest National Insurance Co.*, OWC No. 0066512, H&AS No. 85-259 (May 19, 1988) (hereinafter *Dailey*). Once Claimant satisfies the threshold requirement needed to invoke the presumption that his actual working conditions could have caused him emotional injury, pursuant to *Ferreira*, he must present evidence that the injury inducing stressors are a function of the actual working conditions of his employment, such that said conditions could have caused similar emotional injury in persons of ordinary sensibilities.

In the instant case, Claimant has testified that he became depressed and was emotionally injured due to the harassment he experienced on the job from Gregory Johnson and that the constant negativity and perceived threats of being fired or harmed on the job culminated on November 17, 2003 in his being unable to return to work the following day. In addition, Claimant submitted the medical records of Dr. Douthitt and Dr. Sheehan that he was suffering from a major depressive disorder. Thus, Claimant satisfies the first evidentiary prong, pursuant to *Ferreira*, of establishing "some evidence" of a compensable disability. Thus, Claimant's evidence is sufficient to establish a work-related event which has the potential of causing an emotional injury. *Id.* at 656. Claimant must now show "that the actual

working conditions could have caused similar emotional injury in an individual who was not significantly predisposed to such injury." *Spartin, supra*, at 568. Claimant's claim for emotional injuries under the Act must be evaluated under the objective test established in *Dailey*.

The evidence in the record on the application of the objective standard required by *Dailey*, comes from Claimant's own testimony, the testimony and medical report of his independent psychiatric evaluator, and the medical report of his treating psychologist. Claimant testified that his emotional condition was brought about by racial discrimination against him in being passed over for promotions twice and on-the-job harassment, principally by Gregory Johnson. We deal here only with the on-the-job harassment, while being mindful that failing to be promoted twice had a significant adverse psychological impact on Claimant.

According to Claimant, he and Gregory Johnson had enjoy an amicable working relationship from 1991 to 2003 and that the on-the-job harassment started after Johnson become foreman in May of 2003. It was at this time that Claimant alleges that less experienced workers were assigned to his crew; Johnson would come on the job-site trying to find something wrong; and, there were rumors that Johnson was trying to enlist other workers in trying to get Claimant fired. Claimant believed that Johnson had been holding a grudge against him since he failed to take blame for concrete being improperly poured on a job site in 1999. The actual implementation of this grudge was viewed by Claimant to have occurred with the specific perceived harassment on the Florida Avenue job site where Johnson questioned the placement of the saw cut, the traffic pattern set up around the site, the amount of work completed during the day, and the cleanliness of the site.

After Claimant stopped working, he started treating with Carl Douthitt, Ph.D. on November 19, 2003. Dr. Douthitt noted in a January 3, 2004 letter that Claimant related job related issues of being passed over for positions which he felt he was qualified for and harassment. Claimant also expressed concerns regarding endangerment to his personal safety if he were to return to work. According to Dr. Douthitt, Claimant exhibited a depressed mood, diminished interest or pleasure in most activities, insomnia, diminished ability to think or concentrate, and loss of energy. Dr. Douthitt determined that Claimant reported symptoms which met the diagnostic criteria for Major Depressive Disorder, Single Episode.⁷

On August 1, 2005, after reviewing Claimant's medical history and a psychiatric examination, Dr. Sheehan opined that the proximate cause of Claimant's Major Depressive Disorder was the long-term harassment on his job and being passed over for promotions. In addition, he added that he would expect the average individual in a similar situation to develop a Major Depressive Disorder or worse.

Under the Act and the case law arising under it, a claimant may recover for a disabling work-related mental or emotional injury upon a showing of actual work conditions, as viewed not by claimant's subjective perception, but as seen from an objective point of view, that are so stressful that an "average employee", one who does not have a pre-existing disposition to suffer similar emotional injury, might reasonably be expected to have suffered similar

mental or emotional injury. *Dailey, supra.*; *Spartin, supra.* at 568-569; *Gary, supra.*

The evidence in the record is not deemed sufficient enough to establish that the workplace stressors Claimant complained of are a function of the conditions or circumstances of the working environment of a conduit crew leader but rather merely Claimant's subjective perception of common workplace supervision. What Claimant has testified to is workplace supervision that he perceived as overly negative and "nitpicking". At the same time, Claimant acknowledged it was Mr. Johnson's job as foreman to supervise the work he was doing, which included how the job was being performed, its progress, and the safety and cleanliness of the job site. CE 15 at 73. Further, it was only due to Claimant's perception, and his admitted paranoia, that he felt that Mr. Johnson had a personal dislike for him; that Mr. Johnson was harboring a grudge against him; and, that other workers were being enlisted to help get him fired.

The evidence in the record makes it clear that Claimant's Major Depressive Disorder is bound up equally with two stressors: (1) being passed over for promotions, which he deemed racially motivated and (2) perceived harassment on the job. Drs. Douthitt and Sheehan each attribute Claimant's depression to both. While a claim based on racial discrimination is not compensable under the Act, the record is also clear that Claimant's perception of being discriminated against and being treated differently had a major psychological impact on him and how he perceived other work-related events that were standard operating procedures.

Claimant's testimony allows for the finding that his depression and associated insomnia commenced in the Spring of 2003 when he was "passed over" and denied a promotion to conduit

⁷ Claimant submitted no treatment records from any therapy sessions he had with Dr. Douthitt. There is no indication in the summary report submitted for the record what constituted the "single episode" in Dr. Douthitt's diagnosis.

crew leader for the second time. Claimant's wife also testified to the marked change in his disposition with him coming home from work angry. Thus, Claimant was already in a fragile state of mind when a few months later Mr. Johnson began exercising his standard supervisory responsibilities regarding Claimant's work performance on a job site, which Claimant perceived as harassment to the point that it became emotionally debilitating culminating with Claimant being unable to continue working.

Even assuming *arguendo* that Claimant meets the second part of the test under *Dailey* to invoke the presumption, the presumption is rebutted by Employer's independent psychiatric evaluators, Drs. Smoller and Shulman, who are deemed more persuasive, especially Dr. Shulman, after accounting for the treating physician preference.⁸ After a thorough and exhaustive review of Claimant's medical and occupational history, Dr. Shulman provides a thoughtful and well-reasoned analysis of Claimant's allegations of harassment and claimed emotional injury. Dr. Shulman reasons in particular that Claimant's allegations of harassment and discrimination "are based upon his particular perception of events, and are not necessarily influenced or altered by facts that may contradict the accuracy of his allegations." EE 1 at 15. In this regard, Dr. Shulman notes that while Claimant believed that Mr. Johnson was out to get him, there was no record of Claimant ever being

⁸ Claimant's only treating physician of record is Dr. Douthitt, a clinical psychologist, for which the record consists of only one summary report. Psychiatrist Dr. Sheehan, who saw Claimant at her own behest, was an independent medical evaluator similar to Employer's independent evaluators Drs. Smoller and Shulman, and thus not entitled to the treating physician preference.

formally or informally reprimanded or disciplined for deficient job performance following Mr. Johnson's promotion to foreman.

Dr. Shulman further expounded in his report:

According to Mr. Carson, his performance evaluations, remuneration, and access to benefits were not changed. His complaints about understaffing (sic) of his crews, coworker's deficient skills (he claims he was assigned inexperienced workers to handle complex jobs) and Mr. Johnson's comments on the rate of job progression are usual and customary work problems that are typically discussed among workers and their supervisors. Whereas Mr. Carson may perceive this to be "nitpicking", such comments are not necessarily examples of deliberate harassment and are not what is typically characterized as exemplary of a hostile workplace." EE 1 at 15.

Claimant testified that he never had a problem with Mr. Johnson from 1991 until Johnson was promoted to foreman in May of 2003, although he further testified that it was not until Mr. Johnson's criticism of his job performance on the Florida Avenue job that he actually suffered his emotional injury. See HT at 80. This calls into question Dr. Sheehan's evaluation of Claimant wherein he states that Claimant suffered from depression due to a long history of on-the-job harassment. The record does not support an assessment of a long history of harassment.

Based upon his deposition and his testimony at

the hearing, Claimant's depression grew out of the interrelated stressors of being passed over for promotions and perceived job performance harassment, with an additional element of feeling that he was being treated differently from the white employees in his department. CE 15 at 28. In his deposition, Claimant stated that he started feeling depressed when he was passed over for promotions, especially the last time in 2003. The last time Claimant was passed over was shortly before Mr. Johnson was promoted to foreman. Claimant was already depressed at the time he started hearing rumors that Mr. Johnson trying to get him fired or he developed the impression that Mr. Johnson was holding a long standing grudge against him. As the record shows, none of these allegations or rumors were born out by the actions of either Mr. Johnson or any other Pepco employee.

To the extent Claimant has presented any objective evidence of how the average person would have reacted in his situation, it has been rebutted and upon weighing all the record evidence, it does not support Claimant's contention that a reasonable person, not previously disposed, would have reacted as he did. The evidence presented is such that the stress that Claimant experienced in the workplace was initially generated by his impression that he was being discriminated against when he was twice passed over for promotions that he felt he was qualified for and where he was the person with the most seniority. Already depressed and suffering bouts of anger and insomnia, Claimant then experienced in the workplace ordinary interactions with supervisory personnel

regarding his job performance. There is no evidence that the criticism of his performance on the Florida Avenue job was unusually harass, or unreasonably critical. In fact, Claimant characterized it as "nitpicking"; hardly psychologically traumatic enough to cause an emotional injury.

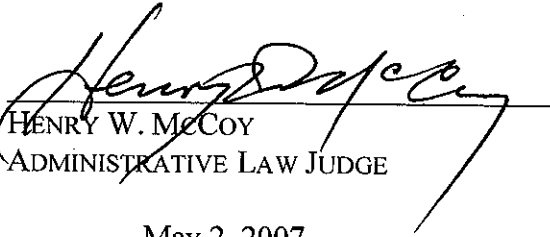
For the foregoing reasons, I find that Claimant has failed to satisfy the Dailey test requirement of a showing of actual work conditions, as seen from an objective point of view, that are so stressful that the average, non-predisposed, conduit crew leader might reasonably be expected to suffer similar mental or emotional injury as that experienced by Claimant. Claimant has thus failed to met his initial burden of proof with respect to his claim sufficient to invoke its presumption of compensability under the Act. Accordingly, his claim must be denied. In light of the foregoing disposition, I do not reach the other issues raised.

CONCLUSIONS OF LAW

Based upon a review of the record evidence as a whole, I find and conclude that while Claimant may have sustained an emotional injury on November 17, 2003, Claimant has not met the second prong of the compensability test under *Dailey* to invoke the presumption that said injury arose out of and in the course of her employment and thus also is not medically causally related to that employment.

ORDER

It is hereby **ORDERED** that Claimant's claim for relief is **DENIED**.



HENRY W. MCCOY
ADMINISTRATIVE LAW JUDGE

May 2, 2007

Date

RE: **RODNEY CARSON V. POTOMAC ELECTRIC POWER COMPANY, OWC No. 606465, AHD No. 05-429.**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this May day of 21st, 2007 to the following:

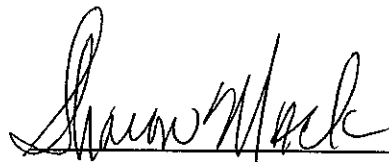
Mohammad R. Sheikh, Acting Assistant Director **Hand Delivery**
Labor Standards/DOES
64 New York Ave., N.E., Suite 3923
Washington, D.C. 20002

Charles L. Green, Associate Director **Hand Delivery**
Department of Employment Services
64 New York Ave., N.E., Second Floor
Washington, D.C. 20002

F. Scott Frison, Jr., Esq. **Certified**
Law Office of F. Scott Frison, Jr.
1629 K Street, N.W., Suite 300
Washington, D.C. 20036

William T. Kennard, Esq. **Certified**
O'Connell, O'Connell & Sarsfield
401 East Jefferson Street, Suite 204
Rockville, Maryland 20850

Rodney Carson **Certified**
1208 Minnesota Way
Upper Marlboro, Maryland 20774



TERRI THOMPSON MALLETT
INTERIM CHIEF ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE HEARINGS DIVISION

RE: **RODNEY CARSON V. POTOMAC ELECTRIC POWER COMPANY, OWC No. 606465, AHD No. 05-429.**

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:

**Compensation Order Review Board/Chief Judge
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.