

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services



MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-204

**JOHN MOORE,
Claimant-Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Employer-Respondent.**

Appeal from a November 30, 2015 Compensation Order
by Administrative Law Judge Gennet Purcell
AHD No. 15-344, OWC No. 727014

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
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Sarah O. Rollman for the Employer
David M. Snyder for the Claimant

Before HEATHER C. LESLIE, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE, for the Compensation Review Board

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant is a bus driver for the employer. As described in the Compensation Order (CO):

On February 25, 2015, Claimant was working the midday shift for Employer, driving an Employer bus along his assigned bus route when at approximately 5:02 pm, upon approaching an intersection and coming to a stop at a bus stop, a male passenger boarded the bus and physically threatened to punch Claimant in the face for allegedly failing to pick up his kids at a bus stop, earlier along the route. HT at 25. Claimant then turned his head to face forward, in an attempt to disengage the assailant, and avoid an altercation. HT at 25. The assailant then turned to leave the bus, but before doing so, the assailant turned back around toward the Claimant and spat in and around Claimant's mouth and face. HT at 27. The assailant then got off of the bus. Claimant then removed his seatbelt and went after the assailant, following him off of the bus. HT at 25. Claimant grabbed the assailant and wrestled him to the ground where they fought and

wrestled for one minute and fifteen seconds. EE 2 at 6. As a result of the fighting and wrestling, Claimant sustained injuries to his right shoulder. HT at 29.

CO at 3 (footnotes omitted).

Claimant reported the incident to Employer. Thereafter, Claimant sought medical treatment, coming under the care of Dr. Tasneem Malik and Dr. Joseph Crowe. After undergoing an MRI, Claimant was diagnosed with a complete tear of the supraspinous tendon in his right shoulder.

Claimant has not returned to work due to his shoulder injury.

A full evidentiary hearing occurred on October 6, 2015. Claimant's claim for relief was for an award of temporary total disability benefits from February 25, 2015 to the present and continuing, payment of causally related medical bills, and authorization for medical treatment. The sole issue to be adjudicated was whether Claimant's February 25, 2015 injury arose out of and in the course of his employment. A CO was issued on November 30, 2015 which concluded Claimant's injury did not arise out of and in the scope of his employment and denied Claimant's claim for relief.

Claimant appealed. Claimant argues his injury did in fact arise out of and in the scope of his employment as he did not willfully intend to injure or kill himself or another and because his actions were consistent with his obligations as a bus operator.

Employer opposes Claimant's appeal, arguing that the CO is supported by the substantial evidence in the record and in accordance with the law.

ANALYSIS¹

For purposes of our review, we note that Claimant does not dispute the facts of the altercation as set out by the ALJ in the CO, as quoted above. Claimant's rendition of the facts of the altercation refer to the CO. Specifically:

On February 25, 2015, Mr. Moore was driving the bus on his assigned route. At approximately 5:20 PM, and unidentified male, with whom Mr. Moore had no prior relationship or knowledge, boarded the bus and physically threatened to punch Mr. Moore. CO at 3. Mr. Moore turned his head toward the front of the bus and away from the man, in an attempt to avoid a further confrontation. *Id.* The man then began to exit the bus, but suddenly turned back and spat on Mr.

¹ The scope of review by the CRB is generally limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the Compensation Review Board (CRB) and this review panel must affirm a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where this panel might have reached a contrary conclusion. *Id.*, at 885.

Moore's face and mouth. *Id.* The man exited the bus and, within a span of seconds, Mr. Moore removed his seatbelt and followed the man off the bus and wrestled him to the ground. *Id.* During the course of this altercation, Mr. Moore injured his right shoulder. *Id.*; *see also* Claimant's Exhibit (hereinafter "CE") #1.

Claimant's argument at 2-3.

Turning to the Claimant's argument, Claimant argues that as the Claimant did not willfully intend to injure or kill himself or another, and that his actions were consistent with his obligations as a bus operator for the Employer, his injury arose out of and in the course of his employment. Specifically, Claimant argues:

Here, the CO rejected Mr. Moore's claim because "he was under no work obligation, constraint or requirement to follow the assailant off the bus for a fight." CO at 5. While this is technically true it does not mean that the specific act of doing so automatically removed Mr. Moore's actions from the course or scope of his employment.

Claimant's argument at 7.

Claimant further argues that as he had a duty to keep his passengers safe from harm, he believed exiting the bus and pursuing the assailant negated any further possibility of harm. In opposition to Claimant's appeal, Employer argues the conditions and obligations of Claimant's employment did not place him outside of his bus, fighting with the passenger.

In addressing whether Claimant suffered a work related injury, which arose out of and in the course of Claimant's employment, the ALJ relied upon *Grayson v. DOES*, 516 A.2d 909 (D.C. 1986) and outlined the analysis to be undertaken. The ALJ determined Claimant's injury did not fit the *Grayson* analysis and that Claimant's injury did not arise out of and did not occur in the course of Claimant's employment. We agree, albeit under a different analysis.

When determining whether an injury arose out of and in the course of Claimant's employment, D.C. Code § 32-1503(d) states,

Liability for compensation shall not apply where injury ^[2] to the employee was occasioned solely by his *intoxication or by his willful intention* to injure or kill himself or another. (Emphasis added.)

Commonly called the "aggressor defense," a Claimant is not entitled to benefits under the Act

² D.C. Code § 32-1501(12) defines an "injury" in the following manner:

Accidental injury or death arising out of an in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of third persons directed against an employee because of his employment.

when his or her injury is a result of an altercation where the Claimant is the aggressor. In the case of *Bird v. Advance Security, supra*, it was held that to be compensable in cases where there was an altercation which lead to the Claimant's disability, two conditions must be met: (1) the nature of the employment requires regular contact between employees or individuals, which is likely to cause a strain on temperaments, and emotions, and increased likelihood of friction; and (2) the injured party was not the aggressor. *H&AS No. 84-69, OWC No. 0015644* (June 7, 1985)(*Bird*).³

In *Bird*, the Director cited as precedent *Hartford Accident & Indemnity Co. v. Cardillo*, 112 F.2d 11 (D.C. App. 1940), in reaching a determination whether a claim brought by the claimant was barred for injuries arising from a workplace fight between co-workers. *Hartford Accident Co.* involved similar facts of an injury arising from an altercation at work between co-workers.

Quoting *Hartford*, the Director noted,

In language laden with dicta, Judge Rutledge sets forth what Professor Larson refers to as the "friction-and-strain" doctrine. See, 1 A. Larson, *the Law of Workmen's Compensation*, §11.16(a). According to Judge Rutledge, regardless of the nature of a fight among co-workers, whether personal or work-connected, injuries to a *non-aggressor* participant in a dispute between co-workers is compensable if, essentially, the fight occurs at work. Work, after all, "places men under strains and fatigues from human and mechanical impacts creating frictions."

Hartford Accident, 112 F.2d at 17. (Emphasis added.)

In the case of *Graber v. Sequoia Restaurant Group*, CRB No. 11-045 (June 25, 2011) (*Graber*), the CRB affirmed the finding that the Claimant in that case, as the aggressor, was not entitled to workers compensation benefits. The CRB noted:

The ALJ, however, considered the evidence in the record as a whole pursuant to the *Bird* test and determined:

[I]t is clear to the Undersigned that the Claimant was the aggressor on August 9, 2009. Under the *Bird* analysis, the Undersigned does find that the nature of the Claimant's employment does require regular contact with his co-workers, including Mr. Brewer which can cause a strain on emotions increasing workplace friction. However, the Claimant fails the second prong of the *Bird* test.

The surveillance footage the Undersigned reviewed (as well as the corroborating witness testimony) shows Mr. Brewer walking away

³ See *Williams v. Upperman Plumbing Corp.*, Dir. Dkt. No. 88-07, H&AS No. 86-716, OWC No. 103221 (November 23, 1988) (adopting the test set forth for altercation cases in *Bird v. Advance Security*, H&AS No. 84-69, 015644 (June 7, 1985) to the effect that in cases involving workplace altercations, aggressors may not recover compensation benefits under the Act.)

from the Claimant when the altercation occurred. Indeed, in the instant before the Claimant pushed or struck the back of Mr. Brewer's head, Mr. Brewer was clearly walking away from the Claimant and had his back fully towards the Claimant. The Claimant chose to come from behind Mr. Brewer while he was walking away and physically attack Mr. Brewer. As such, the Claimant can clearly be labeled the aggressor.

This finding is also supported by the testimony of the Claimant's credible co-workers who were present at the restaurant on the date of the injury. Although the exact verbage [*sic*] used between the Claimant and Mr. Brewer in the moments before the actual physical altercation is unclear, all witnesses agreed that they had begun to separate and walk in different directions. Their testimony is consistent with the surveillance video which reveals that Mr. Brewer was, in fact, walking away. The Claimant chose to follow Mr. Brewer and strike him in the back of the head. As the Claimant has no memory of the incident, he was unable to recall the exact events and refute any of the testimony of the witnesses or to give a clear picture of the substance of the communication right before the physical altercation.

There is substantial evidence in the record to support the finding that the work-related altercation was over: Mr. Graber and Mr. Brewer walked in different directions, physically had separated, and had resumed their respective duties when Mr. Graber struck Mr. Brewer in the back of his head from behind. At the risk of being redundant, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. Because the ruling that Mr. Graber was the aggressor is supported by substantial evidence, this tribunal simply cannot review and reweigh evidence anew as Mr. Graber would prefer.

Id at 4-5 (footnotes omitted).

While the ALJ did not specifically mention the *Bird* analysis and only briefly mentioned D.C. Code § 32-1503(d) in a footnote, we need not remand this case for any further analysis under *Bird* as the ALJ determined:

Claimant had every opportunity to prevent any further threat or assault upon himself by closing the bus doors. Moreover, to the extent any passengers on the bus were also in danger, closing the door would have appropriately protected them as well. Based on the record testimony and supporting medical reports, Claimant has not presented evidence of the basic facts required to invoke the presumption of relationship between an injury, and a work related event which

contributed to the injury. Claimant's decision to pursue the assailant, off of the bus and to then fight with the assailant severed the work-related relationship of the interaction and does not pass the "positional risk standard." Claimant's subsequent injuries did not arise out of and in the course of his employment, and as such, are non-compensable under the Act.

CO at 7.

Claimant argues Claimant went out of the bus to protect the passengers from the assailant, however, as the ALJ noted, this Claimant could have done by simply closing the doors. We also decline to follow Claimant's rationale that a bus driver is similar to a security or police officer. As Claimant states, "security and police officers are charged with maintaining order and control and detaining persons who may have committed a crime." Claimant's argument at 7. Claimant, as a bus officer, is not required to perform such functions.

Similar to the *Graber* case quoted above, while the passenger was the initial assailant by spitting in Claimant's face, the altercation had ceased when the passenger left the bus. Claimant then became the aggressor when he pursued that individual and wrestled him down to the ground. Claimant was the aggressor and as such, as the ALJ determined, Claimant's injury did not arise out of and in the course of his employment. We affirm.

CONCLUSION AND ORDER

The November 30, 2015 Compensation Order is supported by the substantial evidence in the record and in accordance with the law. It is **AFFIRMED**.

So ordered.