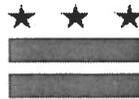


**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**CRB No. 15-091**

**ABREHAM ZEMEDAGEGEHU,  
Claimant-Petitioner,**

v.

**FEDEx and SEDGWICK CLAIMS MANAGEMENT SERVICES,  
Self-Insured Employer/Third-Party Administrator-Respondent.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 SEP 22 AM 10 50

Appeal from an April 30, 2015 Compensation Order by  
Administrative Law Judge Amelia G. Govan  
AHD No. 13-402, OWC No. 693761

(Decided September 22, 2015)

Michael J. Kitzman for Claimant  
Jason A. Heller for Employer

Before HEATHER C. LESLIE, LINDA F. JORY, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Panel; LAWRENCE D. TARR, *dissenting*.

**DECISION AND ORDER**

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked as a package handler for Employer. His job duties required him to lift, move, and carry packages at Employer's distribution center. Claimant alleges he hurt his back on October 31, 2008 while moving a box. A notice of injury was filed with the Office of Workers Compensation on November 27, 2012.

Claimant sought treatment with Dr. Bonita Coe at George Washington University Hospital on October 12, 2011. Claimant was prescribed medication and physical therapy.

Claimant was seen by Dr. Louis Levitt on August 26, 2013 for an independent medical evaluation at the request of Employer. Dr. Levitt took a history of the injury, medical treatment, and performed a physical examination. Dr. Levitt opined Claimant suffered "overexertional

lifting event” and Claimant’s condition should have resolved within a short period of time after the injury. Employer’s exhibit 1.

A full evidentiary hearing occurred on February 19, 2015. Claimant sought an award of temporary total disability benefits from August 27, 2010 to the present and continuing, interest, and payment of causally related medical expenses. The issues to be adjudicated were:

1. Did Claimant sustain an accidental injury, arising out of and in the course of his employment, on or about October 31, 2008?
2. Is there a medical causal relationship between any current impairment and an October 31, 2008 work accident?
3. Did Claimant give Employer timely notice that he sustained an October 31, 2008 work injury pursuant to § 32-1513?
4. Did Claimant timely file a claim for benefits related to an October 31, 2008 work injury?
5. What is the nature and extent of any disability?

Compensation Order at 2.

Following a formal hearing before an Administrative Law Judge (ALJ), a Compensation Order (CO) issued on April 30, 2015 denying Claimant’s claim for relief. The ALJ concluded the Claimant failed to prove he sustained an accidental injury which arose out of and in the course of Claimant’s employment on October 31, 2008.

Claimant appealed, arguing the ALJ’s conclusion that the Claimant did not invoke the presumption of compensability is not supported by the substantial evidence in the record and is not in accordance with the law. Employer opposes the application for review.

#### STANDARD OF REVIEW

The scope of review by the Compensation Review Board (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, DC Code § 32-1501 *et seq.*, (the Act) at § 32-1521.01(d)(2)(A).

“Substantial evidence”, as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int’l. v. DOES* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this panel are bound to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

## ANALYSIS

Claimant's primary argument is that the ALJ erred in not affording Claimant the presumption that his injury arose out of and in the course of his employment. We disagree.

The ALJ correctly noted Claimants are accorded a presumption of compensability after having made an "initial demonstration" of "both an injury and a relationship between that injury and employment." CO at 5, quoting *Ferreira v. DOES*, 531 A.2d 651, (D.C. 1987)(*Ferreira*). *Ferreira* states:

In order to benefit from the presumption, a claimant needs to make some "initial demonstration" of the employment-connection to the disability.

\* \* \*

The initial demonstration consists in providing "some evidence" of the existence of two basic "facts": 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.

\* \* \*

The presumption then operates to establish a causal connection between the disability and the work-related event, activity or requirement.

*Id.*, at 655 (citations omitted, emphasis in original).

The ALJ then went on to discuss the evidence submitted and the testimony presented.

Claimant testified as follows. On August 31, 2008 he lifted a heavy box, felt a pop in his low back and fell backwards. He stopped working and asked co-workers to get the supervisor and/or assistant and an interpreter. A supervisor, "Jim", told him to fill out a report, and a translator was called to interpret Claimant's report of injury and fill out a computer form. HT 16-18. Claimant was seen at a small clinic on New York Avenue where he was given medication and told to rest and not work. Claimant complained about heavy lifting and asked a supervisor for light duty because he was hurting. He continued to perform his usual work duties for Employer until August 27, 2010. HT 20-21.

Claimant's testimony was not credible. I did not credit his version of the events which allegedly occurred on October 31, 2008, and thereafter, in that there is no contemporaneous documentary evidence, credible testimony, or medical report, to substantiate his story. Any reference to the alleged October 2008 work injury, in the record medical reports, is based only on Claimant's unvalidated statements to the medical providers. The repetition of that history, in any medical report, is not credited for purposes of this decision.

The presumption operates to establish a causal connection between the disability

and the work-related event, activity, or requirement. *Clark v. District of Columbia Dep't of Employment Services*, 743 A.2d 722, 728 (D.C. 2000). The statute creates a two-pronged presumption that (i) the event causing (or contributing to) the disability arose out of and in the course of employment, and (ii) that a medical causal relationship exists between the claimed disability and a work-related event. *McCamey v. District of Columbia Dep't of Employment Services*, 947 A.2d 1191, 1197 n.3, 1199 (D.C. 2008) (en banc).

Claimant has made an initial showing of the existence of a work-related activity, or requirement (repetitive lifting) which had the potential to cause or to contribute to his back impairment; however, he has not provided credible evidence that a back injury arose out of and in the course of his employment. Due to the omissions and discrepancies in the testimony and physicians' reports, the record evidence is not sufficient to invoke the statutory presumption. There is a significant break in the chain of causation linking Claimant's self-described 2008 back injury, his subsequent medical testing, diagnosis and treatment, and his period of wage loss.

Claimant has failed to invoke the statutory presumption, and cannot prevail on his claim for relief. Accordingly, no other issues will be addressed.

CO at 5-6.

Claimant first argues that Claimant's testimony that he injured himself while lifting a package along with the treating physician's opinion that the pain was a result of an injury, Claimant established "a work related event that has the potential of resulting in or contributing to an injury." Claimant's argument at 3. We disagree.

As the ALJ stated, Claimant's testimony was not credible and his version of the event was not credited. Credibility determinations are to be given great deference, due to an ALJ's opportunity to observe the nature and character of a witness's demeanor. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985). Claimant has not appealed the ALJ's credibility findings. . Any argument that Claimant's un rebutted testimony is enough to invoke the presumption lacks merit as the testimony was deemed incredible. Credibility determinations can impact whether the presumption is invoked. *Storey v. Catholic University of America*, CRB No. 15-024 AHD No. 12-306A (July 9, 2015)(Jones, M., dissenting).

The ALJ also took issue with the medical reports presented, based not only on Claimant's statements to the medical providers which was deemed to be incredible, but based also on a significant break in medical treatment, as well as "omissions and discrepancies in the testimony and physicians reports." CO at 6. As the ALJ found,

There are no medical records in evidence to indicate that Claimant sought or received any medical treatment for low back symptoms between March of 2007 and October 12, 2011, when he returned to GWU. There, he was seen by Dr.

Bonita Coe, for complaints related to abdominal pain, alcohol abuse in remission, hot flashes, sciatica, and vaccination issues. He was provided Flexeril, physical therapy and a flu shot. By November 28, 2011, he had stopped taking the Flexeril prescription and had not attended the scheduled physical therapy. He told Dr. Coe that he wanted to play sports but could not because of back pain. ex 1, p. 41-44, 55-61.

\* \* \*

No record medical report, prior to the year 2011, sets forth any specific restriction from performing the usual work duties of Claimant's job. CX 1-4.

CO at 3-4.

In argument, Claimant does not argue or point out to any error in the ALJ's findings, including the assessment of the medical reports, as well as the lack of treatment for a significant period of time after the alleged injury. In essence, what Claimant is asking us to do is to reweigh the evidence in Claimant's favor and find the presumption invoked, a task we cannot do. As we stated above, the CRB is bound to uphold 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. Such is the case here and while Claimant may disagree with the ALJ's analysis, the conclusion reached is supported by the substantial evidence in the record and we will not disturb it.

Briefly addressing our colleague's dissent, not only do we rely upon our decision in *Storey*, but also point to the following language:

We also note even if the ALJ afforded Claimant the presumption, and the Employer rebutted the presumption through the IME's submitted into evidence, the credibility finding would still prove lethal to Claimant's case, as in *McCord, supra*. A remand, as urged by the dissent, would be wholly unnecessary even if the ALJ erred in not affording Claimant the presumption at the initial stage, as only but one outcome would occur when the evidence was weighed without the benefit of the presumption, that of a denial of Claimant's claim. As the DCCA stated, we are not required to "remand in futility" as the credibility finding ultimately would prove fatal to Claimant's claim. See *Washington Metropolitan Area Transit Authority v. DOES*, 992 A.2d 1276, n 13 (D.C. 2010).

*Storey*, at 7-8.

#### CONCLUSION AND ORDER

The April 30, 2015 Compensation Order is supported by the substantial evidence in the record

and is in accordance with the law. It is AFFIRMED.

*SO ORDERED.*

LAWRENCE D. TARR, *dissenting*:

I respectfully dissent from that part of the majority's decision that affirmed the ALJ's determination that the claimant was not entitled to the presumption of compensability because he was not a credible witness.

As the Court of Appeals made clear in *Ferreira* and many later cases, to benefit from the presumption a claimant need only make an initial demonstration of disability and a work-related event, activity, or requirement that has the potential of contributing to his disability.

There is nothing in *Ferreira* that adds the requirement that claimant's initial demonstration must be established by credible testimony. To the contrary, in *Ferreira* the ALJ denied the claim because the ALJ found that claimant's testimony was not credible. The Court of Appeals reversed and remanded the ALJ's decision despite the ALJ's credibility finding, because *Ferreira* had offered:

more than enough evidence of the existence of the two basic facts necessary to trigger the presumption. First, petitioner indisputably suffered a severe disability. Second, the manifestation of petitioner's disability occurred in the course of her employment at B&B, and petitioner presented sufficient testimonial evidence of the lifting requirements of her work to generate a potential connection between the work-related activity and the disability.

*Id.* at 656.

Here, the claimant testified that he hurt his back at work while moving a box. Treating physician, Dr. Bonita Coe reported that based on that history, claimant's low back pain was caused by his employment.

Ms. Ferreira, an incredible witness, proved entitlement to the presumption. Mr. Zemedagegehu, also an incredible witness, also proved entitlement to the presumption.