GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

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DIRECTOR

COMPENSATION REVIEW BOARD

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2016 APR 7 PM 12 58

CRB No. 15-180

ALFREDO VALDEZ CRUZ,
Claimant– Respondent,

v.

THE PARK PLACE, INC., and
ERIE INSURANCE GROUP,
Employer/Insurer–Petitioner.

Appeal from an October 23, 2015 Compensation Order on Remand by
Administrative Law Judge Douglas A. Seymour
AHD No. 14-480, OWC No. 712919

(Decided April 7, 2015)

Carlos A. Espinosa for Claimant
Zachary I. Shapiro for Employer

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

The underlying facts of the injury and treatment are described by the CRB in a prior Decision and Remand Order (DRO),

> Alfredo Valdez Cruz (Claimant) testified that he was an undocumented worker employed as a dishwasher for The Park Place (Employer). On July 27, 2013, Claimant was involved in an incident at work which resulted in Claimant falling onto the floor and sustaining a left tibial fracture. Claimant was taken to Sibley Memorial Hospital and later transferred to the Washington Hospital Center. On

August 5, 2013, Dr. James N. Debritz performed an open reduction, internal fixation left bicondylar tibial plateau. Claimant was discharged on August 8, 2013. Claimant did not follow up post-surgically with Dr. Debritz and did not undergo any physical therapy.

Claimant came under the care of Dr. Charles Mess of the Catholic Charities, Archdiocese of Washington on November 8, 2013. Dr. Mess ordered x-rays of the left knee and physical therapy. On August 4, 2014, Dr. Andrew J. Siekanowicz, board certified orthopedic surgeon examined claimant and diagnosed post-acute bicondylar plateau fracture and recommended more physical therapy after Claimant addressed his non-work related multiple medical issues.

Dr. Siekanowicz released Claimant to light duty work with a lifting restriction of 20 pounds and no repetitive stooping, bending, twisting, prolonged sitting and standing. An IME physician selected by Employer found Claimant able to work in a sedentary position as of June 13, 2014.

Claimant secured part-time employment as a security guard for Megamart in Hyattsville, MD in September 2014. Claimant was paid $150 a week for working on Saturday and Sunday. He was terminated from that position in October 2014. As of March 4, 2015, Dr. Siekanowicz was of the opinion that Claimant could return to medium demand work that corresponds to Claimant's prior work level and Claimant was discharged from his care.

A full evidentiary hearing occurred on January 29, 2015. Claimant sought temporary total disability benefits from July 28, 2013 to September 2, 2014, temporary partial disability benefits from September 3, 2014 to October 14, 2014 and temporary total disability benefits from October 15, 2014 to the present and continuing and payment of causally related medical expenses.

An administrative law judge (ALJ) of the Administrative Hearings Division (AHD) issued a Compensation Order (CO) on April 20, 2015. The ALJ concluded Claimant's injuries arose out of and in the course of his employment on July 27, 2013; that Claimant met his burden of establishing entitlement to temporary total disability from July 28, 2013 to September 2, 2014; temporary partial disability from September 3, 2014 to October 14, 2014; temporary total disability from October 15, 2014 to March 3, 2015 as well as causally related medical expenses.

Employer timely appealed. Employer asserts the ALJ erred in finding Claimant's injuries arose out of and in the course of his employment and that the ALJ erred in finding Claimant was entitled to temporary total disability without addressing Claimant's immigration status.

Claimant has responded asserting the CO should be affirmed as it is supported by substantial evidence.

Cruz v. The Park Place, CRB No. 15-082 (September 14, 2015).

After considering the parties arguments, the DRO affirmed the conclusion that Claimant's injuries arose out of and in the course of his employment. The DRO remanded the case, however, for further analysis of the nature and extent of Claimant's disability, taking into account Claimant's undocumented status and the CRB's decision *in Gonzales v. Asylum Co.*, CRB No. 08-077 (August 22, 2008)(*Gonzales*).

On October 23, 2015, a Compensation Order on Remand (COR) was issued ordering:

> It is ORDERED Claimant's claim for relief be, and hereby is, GRANTED in part, and DENIED in part. Employer is ORDERED to pay claimant temporary total disability benefits from July 28, 2013 to September 2, 2014, temporary partial disability benefits from September 3, 2014 to October 14, 2014, based upon claimant's post-injury, part-time employment at Megamart and, temporary total disability benefits from October 15, 2014 to the March 3, 2015, based on an average weekly wage of $ 537.13. It is also ORDERED that employer pay claimant's casually related medical expenses.

COR at 7.

Employer timely appealed. Employer argues the "Compensation Order is not supported by substantial evidence and the Administrative Law Judge committed legal error by finding the Claimant's injuries were arising out of and in the course of employment." Employer's argument at 5. Employer did not appeal the COR's conclusion regarding the nature and extent of Claimant's disability, thus it will not be addressed by the panel.

Claimant opposes the appeal, arguing the appeal must be dismissed as the prior DRO affirmed the ALJ's determination that Claimant sustained an injury that arose out of and in the course of his employment to his left leg.

ANALYSIS[1]

Employer's sole argument on appeal is the ALJ committed legal error in concluding Claimant's left leg injury arose out of and in the course of his employment, putting forth many of the same arguments the CRB addressed in the prior DRO. We point Employer to the following language:

[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 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.

We further find that the two-part test for altercation cases adopted by the Director of this agency in *William v. Upperman Plumbing Corp*, Dir., Dkt. No. 88-07, H&AS No. 86-716 (November 23, 1988) (citing *Bird v. Advance Security*, H&AS No. 84069, OWC No.. 015644 (June 7, 1985) is still precedent in this jurisdiction. *Graber v. Sequoia Restaurant*, CRB No. 11-045, AHD No. 10-063 (July 25, 2011).

Although the ALJ cited only to the *Bird* decision at the AHD level, he correctly stated:

> For cases involving fights or assaults in the workplace, it has been held those claims are compensable only when: (1) the nature of the employment requires regular contact between the participants which increases the likelihood of friction; and (2) the injured party is not the aggressor. *Bird v. Advance Security*, OHA No. 84-69, OWC No. 0015644 (Director's Proposed Compensation Order, June 7, 1985) . . .

The ALJ applied the two-part test and stated:

> In this case, the video of the incident of July 27, 2013 established that the altercation was directly related to claimant's employment duties. The video established that claimant and Tovar were working in extremely close proximity, working back to back, performing their duties as dishwashers. Claimant testified that he and Tovar had worked together for four to six months prior to the altercation, The testimony from all the witnesses, including claimant, was that there was no prior history of fighting or altercations between claimant and Tovar. The testimony and the video established that Tovar repeatedly initiated the touching or stroking of the claimant on the day of question, despite claimant's requests that he stop doing so. Accordingly, I find that the first prong of the test has been met.
>
> With respect to the second prong, the video establishes that the co-employee, Tovar, initiated touching claimant, in a variety of manners, on three separate occasions between the 36th second mark of the video and 1 minute, 31st second mark of the video. After the third touching of claimant by Tovar, the situation escalated into a shoving match. At the 1 minute 40th second of the video, Tovar is seen grabbing claimant, putting a leg out to trip him, and then throwing claimant to the floor. JE 1.
>
> Based on the video, and testimony of claimant and Antonio Tino, I find Tovar and not claimant, was the aggressor in this altercation. In view of my finding that Tovar, and not claimant was the

> aggressor, I reject employer's argument as being without merit and the presumption is not rebutted.

CO at 7.

Employer's argument was addressed in our prior DRO. We reiterate our reasoning and conclusions outlined in our DRO, and partially quoted above.

> Having reviewed the video, we accept that it supports the ALJ's interpretation of the incident, and reject Employer's argument that it was Claimant's violently striking Tovar after the third non-violent touching which is the precise reason the situation escalated". Employer' Brief at 7.
>
> We further conclude the ALJ properly applied the two-prong test and his conclusion that Claimant and Tovar worked in extremely close proximity and Claimant was not the aggressor is supported by the record. The ALJ's conclusion that Claimant's injuries arose out of and in the course of his employment is accordingly affirmed.

DRO at 3-4.

We also address Claimant's contention that Employer's Application for Review should be dismissed as the issue of arising out of and in the course of employment has already been decided in the DRO. Claimant argues that if Employer was unsatisfied with the prior DRO, Employer could have appealed the DRO to the District of Columbia Court of Appeals.

As the CRB in the prior DRO remanded the case to the ALJ for further analysis on the nature and extent of Claimant's disability, the case was not ripe for appeal to the District of Columbia Court of Appeals (DCCA) because the DRO was a non-final order. D.C. Code § 32-1522(b)(3) applies to those parties who are "adversely affected or aggrieved by a *final* decision rendered after review of a compensation order…" (Emphasis added.) Only until all issues are addressed on appeal to the CRB, including those after remand, can a decision considered final for purposes of appeal to the DCCA.

CONCLUSION AND ORDER

The October 23, 2015 Compensation Order on Remand is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

So ordered.