GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-014

LETISHA P. DIXON,
Claimant–Petitioner,

v.

SAFEWAY STORES, INC. and SAFEWAY WORKERS' COMPENSATION DEPARTMENT,
Employer/Insurer–Respondent.

Appeal from a Compensation Order on Remand by
The Honorable Joan E. Knight
AHD No. 10-026, OWC No. 623121

Michael J. Kitzman, Esquire for the Petitioner
William H. Schladt, Esquire, for the Respondent

Before MELISSA LIN JONES, JEFFREY P. RUSSELL,[1] and HEATHER C. LESLIE,[2] *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to D.C. Code §§32-1521.01 and 32-1522 (2004), 7 DCMR §250, *et seq*., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

On December 15, 2005, Ms. Letisha P. Dixon injured her back while making a grocery delivery to a customer. Following conservative medical treatment for low back pain and spasms, Ms. Dixon

[1] Judge Russell has been appointed a temporary CRB member pursuant to the Department of Employment Services' Director's Administrative Policy Issuance No. 12-01 (June 20, 2012).

[2] Judge Leslie has been appointed by the Director of the DOES as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

returned to light duty work for her pre-injury employer, Safeway Stores, Inc. ("Safeway") on or about December 19, 2005. Four days later, her treating physician discharged her from care and released her to her pre-injury work duties.

Ms. Dixon left Safeway's employ in June 2007. She did not have any back problems while working in her subsequent employment for a non-profit food bank.

From December 23, 2005 to June 8, 2009, Ms. Dixon did not pursue any treatment for any back problems. On June 9, 2009, Ms. Dixon was treated at the Doctors Community Hospital emergency room for low back pain. She was unemployed at that time.

Ms. Dixon treated with Phillips and Green, M.D. from June 24, 2009 through September 3, 2009. At her first visit, based upon the history provided by Ms. Dixon, her lumbar strain and radiculopathy was diagnosed as secondary to injuries sustained on June 9, 2009 when delivering groceries.

Phillips and Green, M.D. continuously related Ms. Dixon's back problems to an event on June 9, 2009. Even after receiving information from Ms. Dixon that the date of her original injury was December 15, 2005, Phillips and Green, M.D. continued to relate Ms. Dixon's injuries to an event on June 9, 2009.

The parties proceeded to a formal hearing, and on May 4, 2010, an administrative law judge ("ALJ") issued a Compensation Order denying Ms. Dixon's request for medical treatment. The ALJ found Ms. Dixon's testimony was internally inconsistent, incongruous with treatment records, and not credible. The ALJ did not find the history of a June 9, 2009 injury attributable to delivering groceries to be credible because Ms. Dixon had separated from her employment with Safeway by that time,[3] and the ALJ ruled that Ms. Dixon had not met her burden to invoke the presumption of compensability.

An appeal ensued, and on September 7, 2010, the CRB remanded the case for a determination of whether Safeway had presented sufficient evidence to rebut the presumption of compensability. Neither party appealed the ALJ's ruling that Ms. Dixon's testimony was not credible.

A Compensation Order on Remand issued on January 12, 2012. The ALJ ruled that when weighing the evidence without the benefit of the presumption of compensability (which had been rebutted by Safeway), Ms. Dixon had not met her burden of proof. The ALJ denied Ms. Dixon's claim for relief because her current back condition is not causally related to her December 15, 2005 accident.

Now, Ms. Dixon asserts the Compensation Order on Remand is not based on substantial evidence because no evidence of a subsequent injury was presented. Ms. Dixon also asserts Safeway's evidence is not sufficient to rebut the presumption of compensability because Safeway relied upon the medical reports of Ms. Dixon's treating physicians which reference a 2009 slip and fall while

[3] *Dixon v. Safeway Stores, Inc.*, AHD No. 10-026, OWC No. 623121 (May 4, 2010), p. 4.

delivering groceries even though Ms. Dixon was not employed delivering groceries at that time.[4] Assuming Safeway did present sufficient evidence to rebut the presumption of compensability, Ms. Dixon argues the determination that her current complaints are not causally related to her work-related accident is not supported by substantial evidence because her current complaints must be related to her 2005 accident. Finally, Ms. Dixon disagrees with the ALJ's determination that she has reached maximum medical improvement because that finding is not supported by any evidence in the record. Ms. Dixon requests we vacate, reverse, and remand the Compensation Order on Remand.

Safeway contends the ALJ's ruling that the presumption of compensability was rebutted by the cumulative effect of all the evidence is supported by substantial evidence. Safeway also contends Ms. Dixon has requested the evidence be reweighed in her favor, but the CRB does not have the authority to do so. Finally, Safeway contends the ALJ's reference to Ms. Dixon reaching maximum medical improvement is harmless dicta. Consequently, Safeway requests we affirm the Compensation Order on Remand.

ISSUES ON APPEAL

1. Did Safeway present sufficient evidence to rebut the presumption of compensability?

2. Does substantial evidence in the record support the ruling that Ms. Dixon's current back complaints are not causally related to her 2005 accident?

3. Did the ALJ err in finding Ms. Dixon reached maximum medical improvement in December 2005?

ANALYSIS[5]

Pursuant to §32-1521(1) of the Act, a claimant may be entitled to a presumption of compensability ("Presumption").[6] In order to benefit from the Presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.[7] "[O]nce an employee offers evidence

[4] Ms. Dixon argues, "The Compensation Order erred in determining that the evidence presented was not sufficient to invoke the presumption in this matter." Memorandum of Points and Authorities in Support of Application for Review, p. 3. The presumption of compensability, however, was invoked by the ALJ, and Safeway does not appeal that ruling.

[5] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the Act. Consistent with this standard of review, 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. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[6] The District of Columbia Workers' Compensation Act of 1979, , as amended, D..C. Code §32-1501 *et seq*., (the "Act") at §32-1521(1) states, "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter."

[7] *Ferreira v. DOES,* 531 A.2d 651 (D.C. 1987).

demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act."[8] There is no dispute the ALJ appropriately ruled the Presumption properly had been invoked.

Once the Presumption was invoked, it was Safeway's burden to come forth with substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."[9] To rebut the Presumption that Ms. Dixon's current back condition is compensable, Safeway relied upon the cumulative effect of the evidence. To that end, Safeway depended upon the 5 exhibits it offered into evidence including the medical records of Washington Occupational Health Associates, Inc., Phillips and Green, M.D., Dr. Kim Herman, Doctors Community Hospital, and Providence Hospital, its interpretation of those exhibits, and the negative evidence of Ms. Dixon's gap in medical treatment of more than three years. Upon review of those exhibits (some of which also were offered into evidence by Ms. Dixon), the ALJ determined:

> Treatment records reflect the Claimant underwent a course of treatment with Dr. Scott for the December 15, 2005, work injury over a period of approximately two weeks. Dr. Scott's treatment report dated December 23, 2005, stated the Claimant's pain had subsided and she was doing well. Dr. Scott released the Claimant to return to work full duty as a delivery driver without restrictions. (CE 2) Presumably, Claimant had reached maximum medical improvement. Thereafter, the medical evidence reflects a significant gap in treatment of three and a half years. The evidentiary record showed that it was not until June 10, 2009, the Claimant sought emergency room treatment at Doctors [*sic*] Hospital for a diagnosed back strain. (EE 4) She then underwent follow-up care with the orthopedic practice of Phillips and Green, M.D, from June 24, 2009 through September 9, 2009. On June 24, 2009, Dr. Jeffery Phillips diagnosed the Claimant with acute lumbar strain, moderate, with lumbar radiculopathy and prescribed a regime of physical therapy. Dr. Phillips' report stated the diagnosis was secondary to injuries sustained on June 9, 2009. (EE 2) In a September 3, 2009 Progress Note, Dr. Meyer indicated that all services and treatment rendered were a result of the injuries sustained on June 9, 2009.[10]

All of these findings support the conclusion that Safeway produced evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."[11] There is no basis for overturning this ruling on appeal.

With the Presumption rebutted, the burden returned to Ms. Dixon to prove by a preponderance of the evidence, without the benefit of the Presumption, her current injuries arise out of and in the

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[8] *Washington Hospital Center v. DOES,* 744 A.2d 992, 996 (D.C. 2000).

[9] *Waugh v. DOES,* 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

[10] *Dixon v. Safeway Stores, Inc.*, AHD No. 10-026, OWC No. 623121(January 12, 2012), p. 4.

[11] *Waugh*, *supra*.

course of employment.[12] To do so, Ms. Dixon relied upon her own testimony and the medical opinions of her treating physician.

Regarding Ms. Dixon's testimony, in the May 4, 2010 Compensation Order the ALJ found Ms. Dixon's testimony is not credible. Neither party appealed that ruling.

Regarding the medical evidence, the ALJ determined it does not support a ruling in Ms. Dixon's favor. Dr. Scott discharged Ms. Dixon from care and released her to full-duty work in December 2005. Following a gap in treatment of more than three years in length, Ms. Dixon began follow-up care with Phillips and Green, M.D. for lumbar complaints "secondary to injuries sustained on June 9, 2009."[13] In fact, based upon the medical evidence, the ALJ found

> Doctors Phillips and Green examined Claimant on July 8, 27, and August 13, 2009. All of the reports from that office state an accident date of June 9, 2009. The August 13, 2009, report, written by Dr. Neil A. Green, reported June 9, 2009, as the accident date but also stated, "I now received information that the date of the original injury of December 15, 2005, though the patient states they never went for medical evaluation or care." Dr. Green further noted that he had no records describing a 2005 injury. On September 3, 2009, Dr. Meyer at Phillips & Green wrote, "Unless otherwise indicated, all services and treatment rendered in this office are a result of the injuries sustained on June 9, 2009."[14]

Although Ms. Dixon argues the diagnosis in the medical records created by Philips and Green, M.D. must refer to her 2005 accident because she was not employed by Safeway on June 9, 2009, it was Ms. Dixon's burden to clarify any confusion created by a purportedly inaccurate history in her medical records. Premised in no small part upon the ALJ's determination that Ms. Dixon is not a credible witness as well as Ms. Dixon's discharge by Dr. Scott and her considerable gap in treatment, the ALJ was not convinced that the treatment rendered by Phillips and Green, M.D. was for an injury causally related to an event in 2005 as opposed to a June 9, 2009 event. Again, there is no basis for overturning this ruling on appeal.

Finally, Ms. Dixon takes exception to the ALJ finding she "presumably" had reached maximum medical improvement in 2005 when she was discharged by Dr. Scott. Maximum medical improvement refers to "[t]he point at which an injured person's condition stabilizes, and no further recovery or improvement is expected, even with additional medical intervention. BLACK'S LAW DICTIONARY 1000 (8th ed. 2004)."[15] At the risk of repetition, Ms. Dixon was discharged from medical care by Dr. Scott in December 2005; returned to work full duty in December 2005; and stopped treating in December 2005 until June 2009. An ALJ is permitted to draw reasonable

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[12] See *Washington Hospital Center v. DOES,* 821 A.2d 898 (D.C. 2003).

[13] *Dixon v. Safeway Stores, Inc.*, AHD No. 10-026, OWC No. 623121(January 12, 2012), p. 4.

[14] *Id*. at p. 2-3.

[15] *Nixon v. DOES*, 954 A.2d 1016, 1020 (D.C. 2008).

inferences from the evidence,[16] and based upon the evidence in this case, an inference that Ms. Dixon had reached maximum medical improvement in December 2005 is reasonable.

CONCLUSION AND ORDER

There is substantial evidence to support the rulings that Safeway presented sufficient evidence to rebut the presumption of compensability and that Ms. Dixon's current back complaints are not causally related to her work-related accident. In addition, the ALJ did not err in finding Ms. Dixon reached maximum medical improvement in December 2005. The January 12, 2012 Compensation Order on Remand is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

September 19, 2012
DATE

[16] See *George Hyman Construction Co. v. DOES*, 498 A.2d 563, 566 (D.C. 1985).