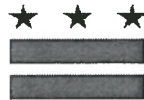


**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 16-073**

**DONALD MURRAY,  
Claimant–Petitioner,**

**v.**

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

Appeal of a May 2, 2016 Compensation Order on Remand by  
Administrative Law Judge Lilian Shepherd  
AHD No. 15-224, OWC No. 724884

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 OCT 11 PM 1 30

(Issued October 11, 2016)

Kasey K. Murray for Claimant  
Mark H. Dho for Employer

Before HEATHER C. LESLIE, GENNET PURCELL, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

In a prior Decision and Order, the Compensation Review Board (“CRB”) outlined Claimant’s injury, treatment, and the procedural history of Claimant’s claim as such:

On January 6, 2015, Claimant was employed by the Employer as a double A high voltage power tech. Claimant’s duties included traveling to different locations on the WMATA system to repair problems. Claimant was required to report to the Rhode Island Avenue location and sign in. On that day, the road conditions were less than optimal as weather conditions caused ice and snow to be present. As an essential employee, Claimant was expected to work on that day.

Claimant testified he drove his vehicle to his work location and turned into the driveway. Because of the snow and ice, Claimant’s vehicle could not make it up the driveway which

had an incline. Claimant called his supervisor, Clee Lucas, to inform him of his difficulties in making it up the driveway and that he would park somewhere else. Mr. Lucas indicated he would call Claimant back. Claimant proceeded to park in the Big Lots parking lot awaiting a phone call from Mr. Lucas.

After approximately 45 minutes, Claimant testified he called Mr. Lucas to tell him he would be walking into the office. Mr. Lucas testified Claimant never indicated he was going to walk to the office, and would have told him not to walk as the driveway had been cleared and he could drive.

Claimant indicated he made it halfway up the driveway before he slipped and fell on ice, injuring his right leg. Claimant proceeded back to his car and telephoned Mr. Lucas to let him know he injured his right leg.

A full evidentiary hearing occurred on July 25, 2015. Claimant sought an award of temporary total disability benefits from January 7, 2015 through the present and continuing, a credit for sick and vacation time used, and payment of causally related medical benefits. On September 30, 2015, a Compensation Order (CO) was issued which denied Claimant's claim for relief, finding the injury did not arise out of or in the course of Claimant's employment.

Claimant timely appealed the decision. Claimant argues:

The question presented in this Application for Review is whether Judge Shepherd's determination that Mr. Murray did not establish entitlement to temporary total disability benefits from January 7, 2015 to the present and continuing was in accordance with the law and supported by substantial evidence when 1) Judge Shepherd failed to apply the presumption of compensability even though Mr. Murray presented evidence of a disability and a workplace event that has the potential of causing or contributing to his disability; and 2) Judge Shepherd erred by failing to require the Employer (WMATA) to demonstrate by substantial evidence that Mr. Murray's disability did not arise out of and in the course of his employment with WMATA.

Claimant's argument at 4.

Employer opposes Claimant's Application for Review, arguing the CO is supported by the substantial evidence and in accordance with the law.

*Murray v. WMATA*, CRB No. 15-173 (March 18, 2016)("DRO").

After considering the parties arguments, the CRB determined the Administrative Law Judge ("ALJ") had erred in not invoking the presumption based on the testimony of Claimant. The CRB found the reasons for not invoking the presumption to not be in accordance with the law, and was dissimilar to our decision in *Storey v. Catholic University*, CRB No. 15-024 (July 9, 2015). Instead

the CRB pointed out the cautionary language in *LaPlant v. Tradesman International, Inc.*, CRB No. 15-129 (December 31, 2015):

In some instances, such as *Storey*, a total lack of credibility may be sufficient to deny invocation of the presumption. However, in most cases, such as the present case, where a credibility determination must be made on inconsistent or conflicting evidence, the presumption should be invoked, and the effect of the inconsistent evidence comprising the complex and nuanced credibility analysis is to be considered at the evidentiary-weighting third step.

*LaPlant* at 7.

The CRB found Claimant's testimony satisfied Claimant's burden of showing a disability and a work-related event which had the potential of resulting in or contributing to Claimant's disability. The CRB remanded the case with the following instructions:

As we determine it was an error for the ALJ to conclude Claimant had not invoked the presumption, we remand for further consideration of whether the presumption has been rebutted by substantial evidence (including direct testimony, cross-examination and the ALJ's credibility assessment) that Claimant's disability did not arise out of and in the course of employment. If so, the ALJ must determine whether Claimant, without the benefit of the presumption, has satisfied his burden to produce preponderance of the evidence that his injury arose out of and in the course of employment.

DRO at 6-7.

A Compensation Order on Remand ("COR") was issued on May 2, 2016. In that COR, the ALJ concluded Claimant had not invoked the presumption of compensability contrary to the DRO instructions, and denied the claim.

Claimant timely appealed. Claimant argues first the COR fails to follow the remand instructions. Second, Claimant argues the ALJ erred in not affording Claimant the statutory presumption of compensability, and finally, that the ALJ erred in failing to shift the burden to Employer to rebut the presumption of compensability.

Employer opposes the appeal. Employer argues the COR is supported by the substantial evidence in the record and is in accordance with the law.

## ANALYSIS<sup>1</sup>

As defined by Black's Law Dictionary, Ninth Edition, an appeal is:

A proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal.

Thus, orders from the Administrative Hearings Division ("AHD") are appealed to the CRB, a higher authority. If a party does not agree with a final decision of the CRB, that decision can be appealed to the District of Columbia Court of Appeals.

When this process is ignored, significant issues arise. As Claimant correctly points out, in *Coleman v. Community Alliance, Inc.*, CRB 08-023 (February 19, 2008), the CRB addressed this very problem stating:

As we have noted previously, while the CRB may well be in error, claims relating to such errors having occurred are for the District of Columbia Court of Appeals to decide. See, *Rovinski v. American Combustion Industries*, CRB No. 07-091, AHD 06-341, OWC No. 576295 (June 5, 2007). While an ALJ may be entirely justified in disputing the ultimate correctness of a CRB decision, allowing an ALJ to disregard the instructions of the CRB produces an untenable, unworkable and potentially dysfunctional system of adjudication, which will result in delays in resolution of disputed claims, including the correction of any error that may be committed by the CRB, and in the payment of appropriate benefits. The CRB having determined the law of the case, the ALJ is not free to disregard that determination, and to do so is reversible error, a point which we have been called upon to reiterate in *Munson v. Hardy & Son Trucking*, CRB No. 07-017, AHD No. 96-176B, OWC No. 029805 (February 5, 2007).

While an ALJ in AHD is free to state disagreement with a CRB decision, the ALJ is not free to ignore, disregard, or refuse to follow the specific instructions of the CRB in connection with remands to AHD. This is so because (1) as a matter of policy as discussed above relating to the need for an orderly and efficient system of adjudicatory functioning, permitting the ALJ to ignore the CRB directive is deleterious to the adjudicatory functioning of the agency, the law of the case is subject to determination by the CRB as discussed in *Munson, supra*, and is not subject to reversal by the ALJ, (3) the powers of the Director, who is the ultimate superior authority within the agency over the ministerial actions of the OHA,

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<sup>1</sup> 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.

including both AHD and CRB, have been delegated to the CRB under the directive issued as Administrative Policy Issuance No. 05-01, dated February 5, 2005, referred to in footnote 1, *ante*, and (4) because the Court of Appeals has held that the CRB may not issue compensation orders itself, but can, may, and in appropriate instances, must remand to the ALJ with *instructions* as to how to proceed, where the CRB detects error in the actions of the ALJ; see, *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services and Juni Browne, Intervenor*, 926 A.2d 140 (D.C. 2007).

The COR under review fails to follow the instructions of the CRB in affording the Claimant the presumption of compensability, an action not within the ALJ's authority. *Munson, supra*. Accordingly, the matter is again remanded with the same instructions as before:

As we determine it was an error for the ALJ to conclude Claimant had not invoked the presumption, we remand for further consideration of whether the presumption has been rebutted by substantial evidence (including direct testimony, cross-examination and the ALJ's credibility assessment) that Claimant's disability did not arise out of and in the course of employment. If so, the ALJ must determine whether Claimant, without the benefit of the presumption, has satisfied his burden to produce preponderance of the evidence that his injury arose out of and in the course of employment.

DRO at 6-7.

#### **CONCLUSION AND ORDER**

The May 2, 2016 Compensation Order on Remand is not supported by the substantial evidence in the record and is not accordance with the law. It is VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

*So ordered.*