

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-048 (R)

ISAAC EBENEZER,
Claimant- Petitioner,

v.

U.S. SECURITY ASSOCIATES,

and

ZURICH AMERICAN INSURANCE CO.

Employer/Carrier - Respondents.

UPON REMAND FROM THE D.C. COURT OF APPEALS, DCCA No. 11-AA-1261

Appeal from a Compensation Order of
Administrative Law Judge Gerald Roberson
OHA No. 10-485, OWC No. 666531

Benjamin T. Boscolo, Esquire, for the Claimant
Charles J. O'Hara, Esquire, for the Employer

Before HEATHER C. LESLIE¹, MELISSA LIN JONES, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Review Panel:

DECISION AND REMAND ORDER

INTRODUCTION

This case is before the Compensation Review Board (CRB) on the December 11, 2012, decision by the District of Columbia Court of Appeals (DCCA), *Ebenezer v. DOES*, No. 11-AA-1261, vacating and remanding the CRB's Decision and Order, *Ebenezer v. U.S. Security Associates*, CRB 11-048, AHD No. 10-485, OWC No. 666531 (September 8, 2011). The CRB's decision had affirmed the April 14, 2011, Compensation Order of an Administrative Law Judge (ALJ) in

¹Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

the Hearings and Adjudication Section, Office of Hearings and Adjudication, Department of Employment Services.

BACKGROUND FACTS AND PROCEDURAL HISTORY

The Claimant worked as a Security Officer for the Employer. Before November 2, 2009, the Claimant sought treatment for back pain related to pre-existing tuberculosis. On November 2, 2009, the Claimant slipped and fell while at work. The Claimant sought medical treatment for a cut on his head. Subsequently, the Claimant followed up with Dr. David Perim on November 14, 2009 for treatment to his back. The Claimant underwent surgery to his back to address a possible tumor and fracture at T6 and T7. The Claimant was disabled from his regular job as a result of his back condition and surgery. The Employer denied that the back condition was causally related to the November 2, 2009 slip and fall.

A full evidentiary hearing was held on April 4, 2011. The medical reports of Dr. Perim as well as his deposition were presented by both parties in their cases in chief. In a Compensation Order dated April 14, 2011, the ALJ denied the requested benefits, finding that the Claimant's back condition was not medically causally related to the work injury. The CRB affirmed.

The DCCA vacated the CRB's decision and order affirming the Compensation Order. The DCCA found that the ALJ's conclusions that 1) the Claimant did not have a significant fall; 2) the Claimant had experienced increasing pain prior to the fall; 3) the infiltrative process had begun prior to the fall; and 4) Dr. Perim performed the kyphoplasty² because he suspected the Claimant had a tumor or infection were all supported by the substantial evidence in the record.

However, the DCCA held that with respect to the Claimant's compression fracture, the Employer had failed to rebut the presumption of compensability. Thus, the DCCA found and concluded that the compression fracture was causally related to the work injury. The DCCA further held:

Due to the narrow scope of the ALJ's conclusion, the other issues contested by the parties should be considered on remand, including: the extent to which the compression fracture caused petitioner to suffer a disability within the meaning of D.C. Code § 32-1501 (8) (2001); whether the disability caused by the compression fracture entitled petitioner to temporary total disability benefits from November 2, 2009, to the present and continuing (or, potentially, during the period between the fall and petitioner's corpectomy); and authorization for medical care related to the compression fracture. Even in light of the presumption that the fall did cause the compression fracture, the duration that the compression fracture caused physical incapacity that resulted in the loss of wages is an issue of material fact, which must be addressed on remand.³

² As noted by the DCCA, the Claimant at the Formal Hearing stipulated that the second surgery, the corpectomy, was not causally related to his work injury.

³On remand, petitioner will have the burden of proving the nature and extent of his disability caused by the compression fracture because "[o]n the question of the nature and extent of [her] disability...the claimant is not entitled to any presumptions." *Washington Metro. Area Transit Auth., supra*, 926 A.2d at 149; *see also Dunston v. DOES*, 509 A.2d 109, 111 (D.C. 1986) (Petitioner is entitled to a presumption that his claim is compensable, i.e., that his injury 'arises out of' his employment. He is not entitled to a presumption that his injury has left him totally and permanently disabled.").

Therefore, consistent with the DCCA's decision, we must remand this case to the Hearings and Adjudication Section for further findings of fact and conclusions of law relating to the Claimant's compression fracture, as outlined above.

ORDER

This case is remanded to the Office of Hearings and Adjudication for such further proceedings that are consistent with the decision of the DCCA.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

February 19, 2013
DATE