**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**Department of Employment Services**

**VINCENT C. GRAY**
**MAYOR**

**LISA M. MALLORY**
**DIRECTOR**

**COMPENSATION REVIEW BOARD**

**CRB No. 12-012**

**BERNIE L. FORD,**
**Claimant–Respondent,**

**v.**

**GEORGETOWN UNIVERSITY and GALLAGHER BASSETT SERVICES, INC.,**
**Employer/Carrier-Petitioner**.

Appeal from a Compensation Order on Remand by
The Honorable Amelia G. Govan
AHD No. 07-117, OWC No. 616617

Jeffrey W. Ochsman, Esquire for the Petitioner
Michael J. Kitzman, Esquire for the Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and JEFFREY P. RUSSELL,[1] *Administrative Appeals Judges*.

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

## DECISION AND REMAND ORDER

### JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*., ("Act"), 7 DCMR 250, *et seq*., and the Department of Employment Services Director's Administrative Policy Issuance 05-01 (February 5, 2005).

### FACTS OF RECORD AND PROCEDURAL HISTORY

Before August 7, 2005, Mr. Bernie L. Ford had low back and left knee problems. On August 7, 2005, Mr. Ford, a campus police officer, fell at work.

[1] Judge Russell has been appointed by the Director of the DOES as a Compensation Review Board ("CRB") member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

At a formal hearing on April 11, 2007, Mr. Ford asserted his left knee and low back symptoms arise out of and in the course of employment. His employer, Georgetown University, asserted his left knee and low back symptoms are the result of an idiopathic fall.

In a Compensation Order dated August 31, 2007, an administrative law judge ("ALJ") awarded Mr. Ford temporary total disability benefits from February 4, 2006 to February 19, 2006 and medical benefits including a spinal CT myelogram. Without determining the precise cause of Mr. Ford's fall, the ALJ ruled Mr. Ford had slipped and had fallen on his way to his duty station.

The CRB affirmed the August 31, 2007 Compensation Order. The D. C. Court of Appeals, however, vacated that Compensation Order and remanded the matter for further proceedings; the Court was unable to ascertain the basis for the grant of benefits:

> Considering the CRB's compensation order together with the ALJ's decision, the former can be read to adopt either of two bases for awarding benefits. In her findings of fact, the ALJ found that Ford "slipped and fell on his way back to his duty station after visiting the restroom at work." Then, in addressing whether Ford had invoked the presumption of compensability, she concluded he had done so in part because Ford testified that he "slipp[ed] on water at work." Yet, in the next sentence, the ALJ stated that "[e]ven if [Ford] did not slip on water," the presumption applied because he was engaged in work duties at the time of the accident (i.e., walking or standing). The CRB incorporated the ALJ's factual findings and analysis into its compensation order, affirming both.
>
> The ALJ's finding that Ford slipped can be read as an implied rejection of Georgetown's contention that Ford's knee gave out. [Footnote omitted.] Thus, we are unsure what the ALJ meant in the next section when she stated that Ford's fall arose out his work duties "[e]ven if he did not slip on water." The statement might mean either that (I) consistent with her findings of fact, Ford slipped on the floor or on some substance other than water, or more likely, that (ii) whether he slipped, or whether his knee gave out on account of a pre-existing knee condition, the fact that he was walking or standing at the time (and thus performing the work duties of a campus police officer) requires the conclusion that his fall arose out of and in the course of his employment. The CRB failed to clarify the compensation order, reiterating instead the ALJ's less-than-clear analysis.
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> "The orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *Long v. District of Columbia Dep't of Employment Servs.,* 570 A.2d 301,305 (D.C. 1990) (internal quotation marks omitted). We cannot be sure if we are being asked to evaluate the propriety of an agency's determination that Ford experienced a slip and fall on the job that was a compensable workplace injury, or instead, the quite different conclusion that Ford's fall, however caused and even if partially -- or even wholly -- idiopathic in origin, arose from his work duties. We cannot perform our appellate

> review function where we are unable to ascertain confidently the basis for the agency's order. *Id.*[2]

In addition, because the CRB had not discussed the analytic framework that would have led to that result, the Court also declined to afford any deference to the position that an idiopathic fall could be compensable. Finally, the Court expressed concern that the burden-shifting scheme of the presumption of compensability may not have been applied properly in that it was unclear that when weighing the evidence the burden to prove compensability by a preponderance of the evidence had been placed on Mr. Ford.

In response, the CRB remanded the matter to the Department of Employment Services' Office of Hearings and Adjudication, Administrative Hearings Division,[3] and on December 30, 2011 the ALJ issued a Compensation Order on Remand.[4] The ALJ, again, concluded Mr. Ford's left knee and low back symptoms are causally related to his employment and granted his claim for relief.

Georgetown University does not dispute that Mr. Ford fell. In this appeal, it continues to contend that Mr. Ford's injuries were caused by an idiopathic fall which is not compensable under the Act and that the ALJ failed to make a specific finding as to the cause of Mr. Ford's fall. Georgetown University also asserts it was error for the ALJ to consider voluntary payments of compensation when assessing the causal relationship between Mr. Ford's fall and his employment.

Mr. Ford argues the Compensation Order must be affirmed. Mr. Ford asserts that even assuming the presumption of compensability was rebutted by the opinions of Georgetown University's independent medical examination physician, the finding that his fall was not idiopathic is supported by substantial evidence including his testimony.

## ISSUE ON APPEAL

1. Is the December 30, 2011 Compensation Order on Remand supported by substantial evidence and in accordance with the law?

## ANALYSIS[5]

[2] *Georgetown University v. DOES*, 971 A.2d 909, 916-917 (D.C. 2009).

[3] As of February 2011, the Administrative Hearings Division's name changed to Hearings and Adjudication.

[4] The Certificate of Service attached to the Compensation Order on Remand indicates that although the Compensation Order on Remand was signed by the ALJ on December 29, 2011, it was not mailed until December 30, 2011.

[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 on Remand 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 on Remand 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).

Pursuant to §32-1521(1) of the Act, a claimant is 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 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 that the Presumption properly was invoked.

Once the Presumption was invoked, it was Georgetown University'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] On Georgetown University's behalf, Mr. Ford was examined by Dr. Marc Danziger who opined Mr. Ford's injuries were the result not of a fall but instead were related to a giving way episode completely unrelated to Mr. Ford's work status. Thus, the burden returned to Mr. Ford to prove by a preponderance of the evidence, without the benefit of the Presumption, his injuries arise out of and in the course of employment.[10]

After summarizing Mr. Ford's medical evidence and Georgetown University's medical evidence, the ALJ ruled

> [s]ince the presumption has been invoked and rebutted, Claimant's evidence must now be examined to see if it proves, by a preponderance of the evidence, that his left knee and back injuries arose out of his employment. The weight of the evidence supports such a finding.[11]

As the Court specifically noted previously,

> the ALJ found that Georgetown had rebutted 'the statutory presumption,' and re-weighed the evidence as to the existence of a medical causal relationship between Ford's symptoms and the accident, but did not re-weigh the evidence as to whether his injury *arose out of* and in the course of his employment.[12]

The Compensation Order on Remand perpetuates this error.

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[6] Section 32-1521(1) of the Act 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).

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

[11] *Ford v. Georgetown University*, AHD No. 07-117, OWC No. 616617 (December 30, 2011), p. 9.

[12] *Georgetown University*, *supra*, at 921.

In the Compensation Order on Remand, the ALJ failed to explain how or why the evidence in the record supports her ultimately finding that Mr. Ford's fall arose out of his employment and has not identified the facts of record that support a finding on the question for which the case was remanded-- whether Mr. Ford's fall was idiopathic or was caused by slipping in water. Without a clear statement of the evidence that supports her finding, the CRB is unable to perform an appellate review. Thus, we are constrained to remand this matter.[13]

Finally, the ALJ considered Georgetown University's voluntary payments of compensation when assessing the compensability of Mr. Ford's injuries:

> The foregoing discussion, coupled with the fact that Employer paid Claimant temporary total disability benefits from the date of the injury to February 3, 2006, suggests, and I conclude, that Claimant's left knee and low back symptoms are causally related to his employment. I further conclude that Claimant's wage loss, during the two weeks at issue, is a function of his work injury and is compensable. Finally, I conclude Claimant is in need of a CT myelogram, for any residual low back impairment related to the August 7, 2005 work injury.[14]

The District of Columbia is a voluntary-payment jurisdiction. As such, voluntary payments are encouraged, and making voluntary payments is neither a concession of liability nor evidence of compensability.

## CONCLUSION AND ORDER

The December 30, 2011 Compensation Order on Remand is VACATED IN PART. The rulings that the presumption of compensability was invoked and was rebutted were not appealed and constitute the law of the case. This matter is remanded for the ALJ to provide a thorough analysis of the weighing of the evidence on the issue of the cause of Mr. Ford's fall (without reference to voluntary payments of compensation). If the ALJ determines the preponderance of the evidence demonstrates Mr. Ford's accident falls within the Act, appropriate findings of fact and conclusions of law regarding the nature and extent of his disability, if any, may be necessary.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

June 1, 2012
DATE

[13] See *Jones v. DOES*, ___ A.3d ___ (D.C. 2012).

[14] *Ford*, *supra*, at 10. (Emphasis added.)