

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-159

**FRANCES LEE,
Claimant–Petitioner,**

v.

**MARRIOTT CORPORATION and
MARRIOTT CLAIMS SERVICES,
Self-Insured Employer-Respondent.**

Appeal from a August 27, 2015 Compensation Order by
Administrative Law Judge Donna J. Henderson
AHD No. 14-099, OWC No. 695616

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 APR 18 PM 12 30

(Decided April 18, 2016)

David J. Kapson for Claimant
Zachary I. Shapiro for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*

LINDA F. JORY 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, *Frances Lee v. Marriott Corporation*, CRB No. 15-072 (August 5, 2015) (DRO).

Claimant is a barista at a Starbucks owned and operated by the Marriott Corporation (Employer). On May 26, 2011, Claimant allegedly injured her left wrist, left arm, and left hand. On June 1, 2011, Claimant alleges she hurt her right arm, right wrist, and right hand which she had been using more since the May 26, 2011 injury. Claimant sought treatment with Kaiser Permanente.

Claimant attended an independent medical evaluation (IME) with Dr. Joel Fechter on August 21, 2013. Dr. Fechter took a history of Claimant's injuries, treatment, and current complaints. Dr. Fechter then performed a physical exam and obtained radiographs of Claimant's right wrist and hand. Dr. Fechter opined Claimant suffered from a 15% permanent impairment to her right upper extremity as a result of the June 1, 2011 injury.

Employer sent Claimant for an IME with Dr. Richard Barth on November 4, 2013. Dr. Barth took a history of Claimant's injury, treatment, and performed a physical examination. Dr. Barth also took radiographs. Dr. Barth opined Claimant suffered from a right thumb sprain, secondary to the injury of June 1, 2011. Dr. Barth also opined Claimant was at maximum medical improvement and opined Claimant suffered from 0% impairment as a result of the injury of June 1, 2011.

A full evidentiary hearing occurred on February 9, 2015¹. Claimant sought an award of 15% permanent partial disability to the right arm. The issues presented for resolution were the following:

1. Did Claimant sustain an accidental injury on June 1, 2011?
2. Did Claimant's injury on June 1, 2011 arise out of and in the course of Claimant's employment?
3. Is Claimant's right thumb pain medically causally related to Claimant's alleged work-related injury on June 1, 2011?
4. Is Claimant's right wrist and forearm pain causally related to Claimant's alleged work-related injury on June 1, 2011?
5. Did Claimant give Employer timely notice of her alleged work-related injury on June 1, 2011?
6. What is the nature and extent of Claimant's permanent disability to her right upper extremity, or any necessarily included part thereof, if any?

A CO was issued on March 31, 2015. In that CO, the ALJ concluded that:

Claimant has failed to bear her burden to "establish that the work event or condition at issue was the cause of the claimed injury," that is, that the injury is in fact work related. *Reynolds [v. DOES, 852 A.2d 909]* at 911 (2004). For this reason, all other issues are moot.

Compensation Order (CO) at 6.

The CO denied Claimant's claim for relief.

¹The matter was previously heard by an Administrative Law Judge (ALJ) who left the Administrative Hearings Division (AHD) before rendering a decision. A subsequent formal hearing was conducted on February 9, 2015 which resulted in the March 31, 2015 CO.

Claimant timely appealed. Claimant argues the ALJ failed to analyze the issue of arising out of an in the course of employment pursuant to D.C. Code § 32-1521, representing a legal error that must be reversed and the case remanded. Employer opposes the appeal, arguing the findings of fact and conclusions of law were supported by the substantial evidence in the record and in accordance with the law.

DRO at 1, 2.

After considering the parties arguments, the DRO remanded the case, for the ALJ to determine whether Dr. Barth's opinion, or some other evidence submitted by Employer, is specific and comprehensive enough to rebut the presumption of compensability.

A Compensation Order on Remand (COR) issued on August 27, 2015 which again denied Claimant's claim for 15% permanent partial disability to her right arm. Claimant filed a timely appeal.

ISSUE ON APPEAL

Is the August 27, 2015 CO supported by substantial evidence and in accordance with the law?

ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act (the Act) and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). "Substantial evidence" as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). Consistent with this scope of review, the CRB is bound to uphold 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 the members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Claimant argues in her Memorandum of Points and Authorities in Support of Claimant's Application for Review (Claimant's Brief):

The ALJ's reliance on alleged discrepancies about the date of injury is not specific and comprehensive evidence to rebut the potential connection between the work incident and Ms. Lee's right upper extremity injury including the thumb. Moreover, it is not necessary that the exact date of the incident be determined, so long as there is some evidence of a work-related incident presented. *See, e.g., Gwendetta Stocks v. Washington Hospital Center, et. al*, AHD No. 09-394, OWC

No. 639622 at page 4 (April 27, 2010, The Hon Karen R. Calmeise). The ALJ made a finding that Ms. Lee invoked the presumption here, thus the finding that a discrepancy about the date of injury to then rebut the presumption cannot be supported by substantial evidence. This finding is not supported by substantial evidence and the ALJ's conclusion does not flow rationally from these facts. Accordingly, the Compensation Order on Remand must be reversed and remanded.

Assuming *arguendo*, that the ALJ did not error [sic] with respect to the above analysis, and the employer did rebut the presumption with negative evidence, substantial evidence in the records still supports finding that Ms. Lee demonstrated that her right upper extremity injury arose out of and in the course of her employment on June 1, 2011. As noted above, the ALJ made a finding that the medical records of Ms. Lee's treating physician at Kaiser were sufficient enough to invoke the presumption of compensability. COR-3. Specifically, the ALJ finds that the medical records from Kaiser support Ms. Lee's claim that she had a right thumb sprain and a joint pain in her left hand. COR-3. Then, in attempting to analyze the issue without the benefit of the presumption, the ALJ completely reverses the earlier finding and states 'Claimant's treating physician's medical records do not support an incident on June 1, 2011 that resulted in an incident at work which caused injury to the top of her hand, right wrist, **or even her right thumb**' COR-5 (emphasis added). The ALJ makes specific findings throughout the remainder of that paragraph in the Compensation Order on Remand about treatment for the right thumb injury sustained in this incident. COR-5. The ALJ [sic] analysis is inconsistent and not supported by substantial evidence.

Claimant's Brief at 9, 10.

Employer filed Self-Insured Employer's Opposition to the Claimant's Application for Review (Employer's Brief) and asserted:

The Claimant is misguided to rest her argument that the Administrative Law Judge committed error by determining the Employer rebutted the presumption solely through the numerous dates of accident. The Administrative Law Judge explicitly states the presumption was rebutted due to several factors including the several dates of accident, description of the incident(s) and the treating physician records. COR p.4 (emphasis added). The COR states there are three different descriptions of how the alleged accident occurred. The first was the Claimant's testimony at the Formal Hearing that she was injured when emptying a pot of coffee in the sink. COR p.5; HT p. 26-27. However, the Form 7 and 7A completed by the Claimant indicate she was injured while lifting milk crates and coffee pots. COR p. 5; EE 6, p. 14-15. Last, the Claimant reported to Dr. Fechter that she was injured while lifting gallons of milk. COR p. 5; CE 1, p.1. The three different descriptions of the mechanism of injury cited in the COR provide

additional sufficient substantial evidence that the Employer rebutted the presumption of compensability.

Employer's Brief at 8. (emphasis in original).

We agree with Employer that Claimant's reliance on the AHD decision in *Gwendetta Stocks v. Washington Hospital Center*, AHD No., 09-394 (April 27, 2010)(*Stocks*) is misplaced because an AHD disposition does not have precedential value and because *Stocks* is factually dissimilar to the case at issue. While the ALJ who decided *Stocks* determined the discrepancy in the reported injury dates did not rebut the presumption the ALJ did not find Claimant's testimony concerning the mechanism of the injury to be not credible. We are mindful that the ALJ's credibility discussion related to the ALJ's determination whether Claimant met her burden of producing a preponderance of evidence that she sustained a work related injury. Nevertheless, we do not find error with the ALJ's determination that Employer met its evidentiary burden by producing the various claim forms or evidence of multiple dates of the alleged injury as rebuttal evidence which required a weighing of the evidence as a whole to determine if an injury occurred in the course of Claimant's employment.

With regard to Claimant's argument that substantial evidence in the records still supports a finding that Ms. Lee demonstrated that her right upper extremity injury arose out of and in the course of her employment on June 1, 2011, we remind Claimant that it is well-settled that the question is whether there is substantial evidence in the record to support an ALJ's conclusion as opposed to the opposite view. *See Marriott, supra*.

We further agree with Employer's assertions that:

The Claimant is misguided to aver that the COR is unsupported by substantial evidence by using the same evidence to invoke the presumption of compensability and conversely find that the Claimant did not meet her burden of a compensable work related accident. Specifically, the Claimant confuses the legal standards needed to invoke the presumption and meeting her burden after the presumption was rebutted. In order to invoke the presumption the Claimant has the low threshold of providing evidence that an injury potentially was caused by a work related activity. However, after the presumption is rebutted by the Employer, the Claimant has a higher threshold of proving by a preponderance of the evidence that a work related activity was the cause of the disability.

In the case at issue, the COR is supported by substantial evidence by using the records from Kaiser Permanente to both invoke the presumption and find that the Claimant did not meet her burden. Considering the Claimant has the low threshold of providing evidence that a work related accident is possible, the mere fact that the Claimant presented the records from Kaiser Permanente coupled with her incredible testimony was enough to invoke the presumption. However, when the threshold was heightened after the presumption was rebutted the COR properly found that the medical records from Kaiser Permanente did not support a finding of work related accident. This was due to the fact that the Claimant

denied a history of injury and her complaints clearly pre-dated the alleged date of accident of June 1, 2011. The Claimant's flawed argument can be distilled that the medical evidence can only be used support [sic] her claim without any acknowledgment of the documented discrepancies in the record evidence.

Moreover the Claimant is mistaken to argue that the COR is unsupported by substantial evidence as it fails to reference the evaluations of Dr. Barth and Dr. Fechter. Notably, the basis in the COR for denying the claim was that the Claimant failed to meet her burden that there was a compensable work related incident on June 1, 2011. No analysis was provided in the COR with respect to the medical causal relationship aspect of the claim as this issue was preempted by the finding that the incident on June 1, 2011 did not occur as alleged.

Employer' Brief at 10, 11. (citations and emphasis omitted).

In reaching her conclusion that Claimant failed to bear her burden to establish by a preponderance of evidence that there was in fact a work-related event on June 1, 2011, the ALJ stated:

In assessing the totality of Claimant's evidence in meeting her burden, I start with the fact that Claimant's testimony lacked credibility with regard to how the accidental injury occurred and what body parts she injured.

Claimant's treating physician's medical records do not support an incident on June 1, 2011 that resulted in an incident at work which caused injury to her [sic] top of her right hand, right wrist, right arm or even her right thumb". Employer submitted the 'After Visit Summary' from Claimant's KP visit on June 10, 2011. Dr. Ingrid C. Soderlund stated that Claimant was 'here for eval of pain in right thumb and Left 3rd finger for 1 month No hx of injury". Similarly, Ta'Mesha S. Hawkins, C.A. reported that Claimant came 'here today c/o R thumb and L middle finger problems.' Although there are complaints of pain to the right thumb at KP, Claimant did not complain of pain in the palm or long finger metacarpals which was the basis for Dr. Fechter['s] permanency rating to her right arm.

CO at 5 (citations omitted)

In a footnote, the COR indicates "Claimant submitted some records for this date but not the notations made by treating physicians [which] were submitted by Employer." The COR further provides in a footnote that "hx" is an abbreviation for "history". CO at 5, n 2, 3.

With regard to Claimant's assertion that the COR is not supported by substantial evidence because the ALJ failed to reference either IME opinion of Dr. Barth or Dr. Fechter, we disagree that Dr. Barth provided an opinion that Claimant suffered a right thumb sprain as a

result of a “work injury”. We further disagree that the ALJ did not reference Dr. Fechter’s report.

While we do not agree with Employer’s position that Dr. Fechter’s evaluation is in “no way relevant or probative to the factual issue as to whether the incident occurred on June 1, 2011”, in light of the ALJ’s well documented credibility determination, we also do not agree that failing to recognize that Claimant told Dr. Fechter that on June 1, 2011 she sustained injury to her right hand and wrist while lifting crates of milk is reversible error.

Credibility determinations are to be given great deference, due to an ALJ’s opportunity to observe the nature and character of a witness’s demeanor. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985); *Georgetown University v. DOES*, 830 A.2d 865, 870 (D.C. 2003). Claimant has not appealed the ALJ’s credibility findings. Considering that the ALJ reconvened the formal hearing after she was re-assigned this matter, the ALJ’s observation of the Claimant’s demeanor at the formal hearing, as well as the deference accorded to the fact finder on credibility issues, we will not substitute our judgment for that of the ALJ.

The COR is supported by substantial evidence and is in accordance with the law and is **AFFIRMED**.

So ordered.