

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-172

ERIC GUNN,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Employer–Petitioner.

Appeal from a Compensation Order on Remand by
The Honorable Nata K. Brown
AHD No. PBL09-076A, DCP No. 30100527985-001

Justin Zimmerman, Esquire for Petitioner
Colleen S. Archer, Esquire for Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY, and HEATHER C. LESLIE,¹ *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.²

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Mr. Eric Gunn worked for the District of Columbia Department of Corrections (“Employer”) as a lead correctional officer. In October 2011, Mr. Gunn was diagnosed with methicillin-resistant staphylococcus aureus septicemia (“MRSA”).

A dispute arose over the compensability of Mr. Gunn’s disease, and following a formal hearing, an administrative law judge (“ALJ”) issued a Compensation Order dated October 7, 2011. The ALJ ruled Mr. Gunn’s MRSA was work-related, and she awarded his claim for relief.³

¹ Judge Leslie has been appointed by the Director of the Department of Employment Services (“DOES”) as a temporary Compensation Review Board (“CRB”) member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

² Jurisdiction is conferred upon the CRB pursuant to D.C. Code §1-623.28, 7 DCMR §118 and the DOES Administrative Policy Issuance No. 05-01 (February 5, 2005).

³ *Gunn v. D.C. Department of Corrections*, AHD No. PBL 10-076A, DCP No. 30100527985-001 (October 7, 2011).

On appeal, the CRB vacated the October 7, 2011 Compensation Order because the ALJ may have applied the wrong burden of proof and because despite distinct medical opinions in the record, the ALJ had referred to “unrefuted testimonial and documentary body of evidence” as the basis for the decision. The CRB remanded the matter:

In order for an assessment to be made as to whether an ALJ has applied the proper standard, we must be able to discern what standard was employed, something which is at least ambiguous. Further, we do not understand how the ALJ can characterize Mr. Gunn’s evidence of a medical causal relationship as being “unrefuted”, when the only medical opinion evidence in the record on this medical question is contrary to Mr. Gunn’s assertion of there being such a relationship. A remand is needed so that the ALJ can apply the preponderance of the evidence standard, and so that she can explain what evidence she relies upon to overcome the only medical evidence in the record on the sole question presented, whether there is a medical causal relationship between Mr. Gunn’s MRSA and his work.^[4]

A Compensation Order on Remand issued on September 27, 2012.⁵ The ALJ, again, granted Mr. Gunn’s request for temporary total disability compensation benefits from October 22, 2009 through March 1, 2010 and medical expenses.

Employer filed another appeal. Employer asserts the Compensation Order on Remand applies the private sector presumption of compensability and requests the CRB reverse the Compensation Order on Remand.

In response, Mr. Gunn asserts the ALJ did not apply the private sector presumption of compensability; he argues the ALJ applied the correct standard and placed the correct burden of proof on him. He requests the CRB uphold the Compensation Order on Remand.

ISSUE ON APPEAL

1. Did the ALJ apply the proper burden of proof?

⁴ *Gunn v. D.C. Department of Corrections*, CRB No. 11-125, AHD No. PBL09-076A, DCP No. 30100527985-001 (April 5, 2012), p. 5.

⁵ *Gunn v. D.C. Department of Corrections*, AHD No. PBL09-076A, DCP No. 30100527985-001 (September 27, 2012).

ANALYSIS⁶

To begin the analysis regarding the compensability of Mr. Gunn's disease, the ALJ correctly stated that in public sector cases, there is no presumption of compensability; however, immediately thereafter, the ALJ stated:

Pursuant to the prevailing case law in this jurisdiction, *McCamey v. District of Columbia Dep't of Employment Servs.*, 947 A.2d 1191 (D.C. 2008) states that, "In order to benefit from the presumption, a claimant needs to make some 'initial demonstration' of the employment-connection of the disability." *Ferreira v. District of Columbia Dep't of Employment Servs.*, 531 A.2d 651, 655 (D.C. 1987), quoting *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 183, 407 F.2d 307, 313 (1968)(en banc)) *Id.* (quoting 1 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW §10.33, at 3-138 (1986)). "The initial demonstration consists in providing some evidence of the existence of two 'basic facts': a death or disability and a work-related event, activity, or requirement which has the *potential* of resulting in or contributing to the death or disability." *Id.* (emphasis in original). "The presumption then operates to establish a causal connection between the disability and the work-related event, activity, or requirement." *Id.* "Once the presumption is triggered, the burden is upon the employer to bring forth 'substantial evidence' showing that the death or disability did not arise out of and in the course of employment." *Id.* This court has held that expert testimony is not required to invoke the presumption. *See McNeal v. District of Columbia Dep't of Employment Servs.*, 917 A.2d 652, 658 (D.C. 2007).^[7]

This quote is taken completely out of context. The opening of the paragraph of this *McCamey* quote makes it clear the presumption of compensability applies to private sector workers' compensation cases:

Indeed, the [private sector workers' compensation act] features a statutory presumption of compensability. Under D.C. Code § 32-1521 (2001), it is presumed that a "claim comes within the provisions of this chapter" in the absence of any evidence to the contrary. "This sound presumption, designed to effectuate the humanitarian purposes of the statute, reflects a 'strong legislative policy favoring awards in arguable cases.'" *Ferreira, supra*, 531 A.2d at 655 (quoting *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 183, 407 F.2d 307, 313 (1968) (en banc)).^[8]

⁶ 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. *See* D.C. Comprehensive Merit Personnel Act of 1978, as amended. D.C. Code §1-623.01 et seq., at §1-623.28(a). 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).

⁷ *Gunn v. D.C. Department of Corrections*, AHD No. PBL09-076A, DCP No. 30100527985-001 (September 27, 2012), p. 4.

⁸ *McCamey v. DOES*, 947 A.2d 1191, 1198 (D.C. 2008).

After reciting pieces of evidence that arguably demonstrate a potential for Mr. Gunn's work conditions to allow him to possibly contract MRSA, the ALJ determined Mr. Gunn had

presented substantial evidence that his disabling condition is causally related to his work injury. He has invoked the presumption that there is a causal connection between the disability and the work-related event. Employer must bring forth "substantial evidence" showing that the death or disability did not arise out of and in the course of employment.^[9]

The ALJ next went on to consider Employer's evidence and determined

Employer has submitted substantial evidence to rebut the presumption, and possibly sever the relationship between the work-place and Claimant's illness.

If the employer proffers substantial evidence to rebut the presumption, then the presumption falls from the case, and the evidence is to be assessed by reference to the preponderance of the evidence standard, with the burden of proof being on the Claimant to prove his entitlement to benefits.^[10]

The ALJ then weighed the evidence without the benefit of the private sector presumption of compensability and reached the conclusion that Mr. Gunn had

shown by the preponderance of the evidence that his work environment was more likely than not the cause of his injury. The evidence is sufficient to bridge the potential connection between Claimant's injury and the performance of his job duties. Claimant contracted MRSA while performing his duties in the crowded institutional environment where he worked.^[11]

This statement and the purported weighing of the evidence after the private sector presumption of compensability supposedly fell from the case do not save this Compensation Order on Remand from another remand because there is no explanation of how the factors tending to show a potential for a connection as delineated in the Compensation Order on Remand overcome the lack of a medical opinion relating Mr. Gunn's MRSA to his employment.

In this public sector case, it is Mr. Gunn's burden to prove his MRSA was caused by his employment. The medical opinions in the record are as follows:

⁹ *Gunn v. D.C. Department of Corrections*, AHD No. PBL09-076A, DCP No. 30100527985-001 (September 27, 2012), p. 6.

¹⁰ *Id.* at p. 7.

¹¹ *Id.* at p. 9.

- Dr. Nader Marzvan - “[A] physician cannot determine, to a reasonable degree of medical certainty, where an individual has contracted MRSA, because MRSA is everywhere (HT 120).”¹²

- Dr. Ross S. Myerson –

Claimant did not acquire his MRSA infection in the course of performing his work duties. He stated that the medical history obtained at the time of hospitalization indicates that Claimant had been likely exposed to MRSA by his girlfriend. In addition, MRSA is quite common in the general population, and MRSA infections are one of the leading causes of cellulitis in the general population.

On February 15, 2011, Dr. Myerson, in an addendum to his previous report, opined that it is significant in Claimant’s case that he had close contact with an individual outside of work known to have a MRSA infection. This outside exposure, he believed, is the most likely cause of his MRSA infection. In addition, he stated that he reached these conclusions with a reasonable degree of medical certainty.^[13]

- Dr. Olakunle O. Abisuga – He “did not opine regarding medical causal relationship between the MRSA and his employment duties.”¹⁴

- Dr. Jonathan H. Rosenthal –

[T]here is “simply no reasonable medical certainty of any kind regarding where this infection was acquired, and it is disingenuous to take the position that one can know where he acquired colonization followed by infection with MRSA. . . any assertion that [one] can know where the infection was acquired ‘to a reasonable degree of medical certainty’ is, frankly, nonsense.”^[15]

Against this evidence, the ALJ considers a number of factual findings, none of which appear to actually relate Mr. Gunn’s MRSA to his employment. On remand, the ALJ must accept it is not sufficient that Mr. Gunn was exposed to conditions that could offer a “potential connection” between his employment and MRSA-- He must prove by a preponderance of the evidence his work conditions did cause his MRSA.

¹²*Id.* at p. 6.

¹³ *Id.* at p. 7.

¹⁴ *Id.*

¹⁵ *Id.* at pp. 7-8.

CONCLUSION AND ORDER

The ALJ applied the wrong burden of proof to this public sector case. The September 27, 2012 Compensation Order on Remand is vacated, and this matter is remanded for further consideration consistent with this Decision and Remand Order as well as the April 5, 2012 Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

December 19, 2012
DATE