

DISTRICT OF COLUMBIA,
DEPARTMENT OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD

Dir. Dkt. No. 03-06

JAMES K. JOHNSON, Claimant,

v.

OMNI SHOREHAM HOTEL, and
ZURICH AMERICAN INSURANCE COMPANY,
Employer/Carrier.

Appeal of Compensation Order On Remand of Jeffrey P. Russell
Administrative Law Judge, Department of Employment Services
OHA No. 02-240 OWC No. 573065

(Decided March 21, 2003)

Matthew Peffer, Esquire, for the Claimant
Jamie L. DiSisto, Esquire, for the Employer/Carrier

Gregory P. Irish, Director

DECISION OF THE DIRECTOR

Jurisdiction

Claimant filed the above-captioned appeal from the December 31, 2002 Compensation Order On Remand from Administrative Law Judge (ALJ) Jeffrey P. Russell denying Claimant's claim for workers' compensation benefits, pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Law 3-77, D.C. Official Code 32-1501-1545 (2001) (Act).

Background

Claimant was employed as a "laundry runner" at Employer's hotel. As a laundry runner, Claimant was required to deliver linens and related items to closets on the floors of the hotel where other employees would retrieve them. Claimant's job duties required him to load the linens in the main laundry room onto a cart that was approximately five or six feet tall. Once he loaded the cart, Claimant would push the cart onto the elevator and proceed to the appropriate floor. He [*2] would then push the cart from the elevator to one of the closets and then unload the linens. Claimant testified that on August 20, 2001, he was pushing one of the carts and he suddenly experienced pain in his feet and lower back.

Claimant sought an award under the Act of temporary total disability benefits from October 9, 2001 through and including November 8, 2001, temporary partial disability benefits from November 9, 2001 to the present and continuing, interest thereon, and causally related medical expenses. On June 25, 2002, ALJ Russell conducted a full evidentiary hearing regarding Claimant's claim. By an order dated July 12, 2002, ALJ Russell denied Claimant's claim for workers' compensation based on his finding that Claimant failed to give Employer proper notice of his claimed injury. On August 8, 2002, Claimant filed an Application for Review of the ALJ's Compensation Order along with a supporting memorandum. On August 22, 2002, Employer filed an Opposition to Claimant's Appeal.

On December 3, 2002, the Director reversed the ALJ's conclusion that Claimant did not give proper notice of his injury to Employer since that determination was not supported by substantial [*3] evidence or in accordance with the law. The case was remanded to the Office of Hearings and Adjudication for further proceedings consistent with the decision regarding Claimant's claim for relief. By an Order On Remand dated December 31, 2002, ALJ Russell denied Claimant's claim for benefits. ALJ Russell ruled that Claimant did not sustain an accidental injury arising out of and in the course of his employment with Employer. Having determined that there was no accidental injury, ALJ Russell did not rule on the remaining issues. On January 27, 2003, Claimant filed an Application for Review of the ALJ's Compensation Order On Remand along with a supporting memorandum (appeal).

Analysis

The issue on appeal, based upon the Application for Review, is whether ALJ Russell's conclusion that Claimant did not sustain an accidental injury arising out of and in the course of his employment with Employer is supported by substantial evidence and in accordance with the law.

The Director of the Department of Employment Services (Director) must affirm an order under review if the findings of fact contained therein are supported by substantial evidence in the record considered as a whole [*4] and the law has been properly applied. See D.C. Official Code 32-1522 (2001); 7 DCMR 230 (1986). Substantial evidence is such relevant evidence as a reasonable mind might find as adequate to support a conclusion. *George Hyman Construction Company v. D.C. Department of Employment Services*, 498 A.2d 563, 566 (D.C.1985).

Once 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. See D.C. Code 32-1521(1). This presumption serves to effectuate the humanitarian purpose of the statute [and] reflects a strong legislative policy favoring awards in arguable cases. *Ferreira v. D.C. Department of Employment Services*, 531 A.2d 651, 655 (D.C. 1987) (Ferreira I) (citing *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 183, 407 F.2d 307, 313 (1968) (en banc)); accord, e.g., *Brown v. D.C. Department of Employment Services*, 700 A.2d 787, 792 (D.C. 1997). In order to benefit from the presumption, an employee need [*5] only present some evidence of two things: (1) a disability, and (2) a work-related event, activity, or requirement which has the potential of resulting in or contributing to the . . . disability. *Ferreira I*, 531 A.2d at 655 (emphasis in original); accord e.g., *Parodi v. D.C. Department of Employment Services*, 560 A.2d

524, 526 (D.C. 1989). The presumption then operates to establish a casual connection between the disability and the work-related event, activity, or requirement. *Ferreira I*, 531 A.2d at 655; accord, e.g., *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1217 (D.C. 1997). If such evidence is produced, the burden shifts to the employer to produce substantial evidence showing that the death or disability did not arise out of and in the course of the employment. *Ferreira*, *supra*, 531 A.2d at 655. Where the employer presents evidence specific and comprehensive enough to rebut the potential connection between the work-related incident, event, or activity, the presumption falls from the matter and the evidence [*6] is weighted without reference thereto. *Ferreira*, *supra*, at 655.

In the immediate case, the Administrative Law Judge ruled that Claimant did not sustain an accidental injury arising out of and in the course of his employment with Employer. On Appeal, Claimant argues that the ALJ improperly applied the presumption of compensability in this case. The Director agrees with Claimant that the ALJ improperly applied the presumption of compensability.

In *Murray vs. D.C. Department of Employment Services*, 765 A.2d 980 (2001), the Court of Appeals again held that the presumption is the starting point of the analysis of a workers compensation claim *Id.* at 983 (citing *Ferreira*, 531 A.2d at 655). In *Murray*, the claimant was employed as an auto body mechanic and he allegedly suffered an injury from an un-witnessed slip and fall. There was a witness who testified that he did not see the claimant fall, although he acknowledged that the claimant was out of his sight for approximately ten minutes before the claimant told him about the fall. The Hearing Examiner acknowledged that there [*7] was a presumption of compensability, however, he declined to give the claimant the benefit of the presumption because of his incredible testimony at the hearing regarding his injury.

On review, the Court of Appeals in *Murray* reasoned that the Hearing Examiners credibility determinations against the claimant were based clearly on erroneous factual determinations. *Id.* at 984. Furthermore, the Court concluded that the witnesses testimony that he did not see the claimant fall provided no basis upon which to refute the claimants evidence that he did fall as he described at the hearing. *Id.* In this regard, the Court noted that [t]he rights of persons. . . should not rest, and the law will not permit them to depend, upon uncertain testimony of a witness who says he did not [see], when, he was in no position to see. *Id.* (quoting *Leisure Prods., Inc. v. Clifton*, 44 N.C.App. 233, 260 S.E.2d 803, 807 (N.C. 1979)). The Court determined that the agency should be required to consider whether the threshold requirement for triggering the presumption should apply without allowing improper factors to influence the decision. *Id.* at 985. The [*8] Intervenors argued that even assuming that the presumption should have applied, the employer rebutted the presumption. However, the Court stated that the witnesses testimony that he did not see the claimant fall was not specific or comprehensive enough to rebut the presumption that the claimant fell at work and injured himself as he claimed. *Id.* at 985.

In the case at bar, ALJ Russell acknowledged that the Act provides claimants with a presumption that the claim comes within the provisions of the Act. Compensation Order at 4-5. While the ALJ did not specifically set out in his Order how the presumption of compensability applied under the facts of this particular case, he ruled that Employer rebutted the presumption. Compensation Order at 5. The Court of Appeals has previously ruled that every compensation order does not have to

contain certain magic words in order to demonstrate that the examiner followed the statutory procedures. See *Waugh v. D.C. Department of Employment Services*, 786 A.2d 595, 601 (2001) (citing *Washington Hosp. Ctr. v. D.C. Department of Employment Services*, 744 A.2d 992, 997 (D.C. 2001)). The relevant [*9] question is not whether the examiner said he applied the statutory presumption, but whether in fact he properly did so. *Id.* The fact that ALJ Russell began by weighing Claimant's testimony demonstrates that he did not properly apply the presumption. Once Claimant presented testimony that he had hurt himself at work on August 20, 2001, he was entitled to the presumption as a matter of law. *Ferreira, supra.* However, the ALJ in this case did not properly apply the presumption because he weighed Claimant's testimony prior to giving him the benefit of the presumption.

The Director determines that Claimant has provided sufficient evidence to support the presumption of compensability in this case. In this regard, Claimant testified that his job as a laundry runner consisted of pushing linen carts. He further testified that on August 20, 2001, he suddenly experienced pain in his feet and lower back. This event, as described by Claimant, is sufficient to trigger the presumption. The burden then shifted to Employer to produce substantial evidence to rebut the presumption. *Ferreira, supra.*

The ALJ ruled that Employer rebutted [*10] the statutory presumption of compensability. The ALJ relied upon the testimony of Employer's three witnesses in support of his conclusion in this regard. These witnesses essentially testified that Claimant had not reported the injury the way he testified that he had done so at the hearing. The ALJ found that this testimony as a whole was sufficient to overcome the presumption that Claimant had indeed sustained a work injury because he was lying under oath about his reporting of the injury to Employer which the ALJ noted was a fundamental and significant event closely related to the compensability of the claim. Compensation Order, at 5. The ALJ found that Claimant was not a credible witness and he therefore discredited Claimant's testimony regarding having sustained an injury at all. Compensation Order, at 4.

As noted above, the Director has determined that the ALJ erred in failing to properly apply the presumption in the immediate case. Assuming, arguendo, that the ALJ had properly applied the presumption of compensability in this case, the Director disagrees with the ALJ's conclusion that Employer rebutted the presumption. In this regard, Employer produced no evidence to [*11] establish that the accidental injury did not occur on August 20, 2001. Claimant properly points out in his brief that in the best light, all Employer's evidence may show is that Claimant may not have reported his injury in accordance with proper procedure. Employer's witnesses did not testify that Claimant's injury did not occur as he described. The circumstances surrounding Claimant's reporting of his injury is not evidence to support the conclusion that Claimant's work accident did not occur. The testimony from Employer's witnesses in this case was not specific or comprehensive enough to rebut the presumption. Along those same lines, Employer produced no evidence to establish that there was no potential connection between Claimant's disability and his work injury.

The ALJ's factual finding that Employer rebutted the presumption of compensability is not supported by substantial evidence in the record. Because Employer failed to rebut the presumption of compensability, Claimant's claim is compensable as a matter of law. The case must be remanded for findings of fact on all remaining issues.

Conclusion

The ALJ's conclusion that Claimant did not suffer an injury arising [*12] out of an in the course of his employment is not supported by substantial evidence and in accordance with the applicable law.

Decision

For the reasons set forth above, the above-captioned December 31, 2002 Compensation Order On Remand is hereby REVERSED and REMANDED for further proceedings consistent with this decision regarding Claimant's claim for relief.

/s/Gregory P. Irish
Director

March 21, 2003
Date