

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**CRB No. 15-004**

**JOANN BAUER,  
Claimant–Petitioner,**

v.

**SAFEWAY INC. and  
SAFEWAY RISK MANAGEMENT,  
Employer and Third-Party Administrator-Respondents.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 MAY 12 AM 10 35

Appeal from a December 10, 2014 Compensation Order by  
Administrative Law Judge Gregory P. Lambert  
AHD No. 14-482, OWC No. 713042

David J. Kapson for the Claimant  
William H. Schladt for the Employer

Before HEATHER C. LESLIE, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Claimant worked two jobs, full-time as a hotline operator for Child and Family Services Agency, and part-time as a Courtesy Clerk for Employer. On January 13, 2014, Claimant alleged she injured her head, left shoulder, and neck when a box filled with liquid soap fell on her.

Claimant sought treatment with Dr. Joel Fecther. Dr. Fecther opined Claimant suffered from back and neck strains and medically casually related these injuries to the work injury of January 2014. Claimant also sought treatment with Dr. Lawrence Zumo for headaches. Claimant underwent conservative care and treatment.

Employer sent Claimant for an independent medical evaluation (IME) with Dr. David Johnson on February 20, 2014. Dr. Johnson took a history of the injury, treatment to date, and performed a physical examination. Dr. Johnson opined Claimant suffered from a contusion of the right trapezius with a strain from the January 13, 2014 work injury. Dr. Johnson recommended

physical therapy and opined Claimant could go back to work at both occupations, with a restriction on lifting over 20 pounds while undergoing therapy.

A full evidentiary hearing was held on November 13, 2014. Claimant sought an award of payment of causally related medical expenses. The issues to be adjudicated were whether there was an injury that arose out of and in the course of Claimant's employment and whether there was a medical causal relationship between Claimant's condition and the work injury. A Compensation Order (CO) was issued on December 10, 2014 which denied Claimant's request, concluding an accident did not occur which arose out of and in the course of Claimant's employment. The ALJ found Claimant to be an incredible witness.

Claimant appealed. Claimant argues the ALJ's finding that Claimant's claim did not arise out of and in the course of Claimant's employment is not supported by the substantial evidence in the record. The Employer opposes the appeal arguing the CO is supported by the substantial evidence in the record and is in accordance with the law.

### STANDARD OF REVIEW

The scope of review by the CRB is generally limited to making a determination as to whether the factual findings of the Compensation Order 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. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.* at 885.

### ANALYSIS

Claimant argues that the CO is not supported by the substantial evidence in the record and must be reversed. Specifically, Claimant argues the ALJ erred in concluding Employer had rebutted the presumption of compensability as the Employer only introduced four "unauthenticated" photos into evidence. Claimant's argument at 9. Claimant argues these photos cannot constitute "specific and comprehensive evidence" to rebut the presumption of compensability as the ALJ concluded. Employer counters this argument by pointing out that Claimant authenticated the photos during testimony at the Formal Hearing by describing each photo. Moreover, Employer points out that Claimant did not object to the introduction of the photos into evidence at the Formal Hearing. We agree with Employer.

A review of the hearing transcript reveals Claimant did not object to the exhibits being introduced into evidence after the Claimant had described each one in detail. Hearing transcript (HT) 42-48. At no time during her testimony, or thereafter, did Claimant's counsel raise any objection to the authenticity of what the photographs purported to show or to the admittance of these photographs as Employer's exhibits. The ALJ used this evidence in tandem with Claimant's unconvincing and unreliable testimony as to how the accident allegedly occurred and

found the Employer had rebutted the presumption of compensability. As the District of Columbia Court of Appeals (DCCA) has stated, an Employer is not necessarily required to present expert opinion in order to rebut the presumption of compensability. Circumstantial evidence may be enough. *Ferreira v. DOES*, 531 A.2d 651, 655 (D.C. 1987). The photos provided enough evidence to show that the accident may not have occurred as Claimant described. We conclude that these photos are enough to rebut the presumption of compensability and the ALJ's reliance on the photographs to be in accordance with the law. The finding that Employer had rebutted the presumption of compensability is affirmed.

With the presumption rebutted, the ALJ was then tasked to weigh the evidence without benefit of the presumption to determine whether Claimant had proven her case by a preponderance of the evidence.

The ALJ stated:

Although Ms. Bauer testified that she suspected the mop handle knocked the box from the top of the nearby shelf, persuasive evidence counters her narrative. See HT at 17; EE 1-4. First, the mop was taller than the self. EE 3. Second, Ms. Bauer clearly demonstrated at the hearing that she moved the mop vertically, not horizontally or diagonally, which means she would have hit the box from below. For that to be true, the mop would have to be both taller than the shelf and short enough to fit under the box on the shelf: a physical impossibility. And her testimony was that the bucket was wheeled, which means that the base of the bucket was elevated from the floor by however tall the wheels were, thereby functionally increasing the height of the mop. HT at 48 (The bucket "just rolls in there."). The evidence, coupled with her incredible testimony, supports my conclusion that she did not hit the box with the mop handle.

Boxes similar to the box that she says fell on her were in the photos. EE 2-4; HT at 57. Although the exact dimensions are unclear, those boxes are obviously sizeable: they had to be, since they contained four gallons of soap. EE 3. Her testimony was that the box that hit her was "very heavy." HT at 47. But, despite vigorously thrusting the mop up and down (again, as physically demonstrated by her at the hearing), Ms. Bauer testified that she did not feel the mop handle hit the box that she says fell on her. HT at 17; HT at 49. In essence, she argues that a big and heavy box was positioned in such a way that she was able to knock it off the shelf with a bump so light that she did not feel it. Considering the evidence and her incredible testimony, I am not persuaded.

With the presumption extinguished, Ms. Bauer did not meet her evidentiary burden. Her testimony of what happened when she was alone in the janitorial closet was unconvincing and her demeanor unreliable.

Instead, the evidence supports a finding that there was not a workplace incident that led to Ms. Bauer's injuries. Because there was no workplace injury, analysis of the medical-causal relationship is unnecessary.

CO at 3.

Claimant argues that the ALJ's analysis above is tantamount to "inventing an independent explanation to support the ALJ's own version of the facts, rather than on the evidence produced at hearing." Claimant's argument at 10-11. We disagree.

The ALJ relied on testimony from Claimant and the photographs, as described by Claimant, to determine that the accident as described could not have happened. The ALJ found the testimony of Claimant "unconvincing and her demeanor unreliable." CO at 3. As Claimant's counsel stated in closing, the case in front of the ALJ boiled down to whether Claimant was credible and her testimony believable.

In *Dell v. DOES*, 499 A.2d 102 (D.C. 1985), the DCCA reiterated a "well-established principle[] of administrative law" regarding credibility determinations:

Traditionally, a hearing examiner's decision has been entitled to greater consideration if the examiner, as in this case, has heard live testimony and observed the demeanor of the witnesses. "The significance of [the hearing examiner's] report . . . depends largely on the importance of credibility in the particular case." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496, 95 L. Ed. 456, 71 S. Ct. 456 (1951). Stated differently, the decisions of a hearing examiner are to be "given special weight when they depend upon demeanor of witnesses." 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 17.16, at 330 (2d ed. 1980). This court has also recognized the "general rule that on credibility questions, the factfinding of hearing examiners is entitled to great weight . . . ." *In re Dwyer*, 399 A.2d 1, 12 (D.C. 1979) . . . .

In this case, the ALJ found the Claimant to be unbelievable and not credible. We see no reason to determine otherwise. We affirm this conclusion.

Having found Claimant to be an incredible witness and her version of the event to be unbelievable, the ALJ determined Claimant had not satisfied her burden of proof and denied the claim. As stated above, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Marriott, supra* at 885.

**CONCLUSION AND ORDER**

The December 10, 2014 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. It is **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE  
*Administrative Appeals Judge*

May 12, 2015

DATE