GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB (Dir. Dkt. No.) 03-87

TCHIKEN'S K. KABAMBA,

Claimant – Petitioner

v.

CECO CONCRETE CONSTRUCTION AND **PROPERTY AND CASUALTY INSURANCE CO.,**

Employer/Carrier – Respondent.

Appeal from an Order of
Claims Examiner Cathy Scruggs
OWC No.544820

Tchiken's K. Kabamba, *pro se*, Petitioner

Allan H. Kittleman, Esquire, for the Respondent

Before: E. COOPER BROWN, *Acting Chief Administrative Appeals Judge*, LINDA F. JORY and FLOYD LEWIS *Administrative Appeals Judges.*

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 32-1521.01 and 32-1522 (2004), 7 DCMR § 230 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[1]

[1] Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005), including responsibility for

Pursuant to § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

BACKGROUND

This appeal follows the issuance by the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES) of a Memorandum of Informal Conference (MIF), which became a Final Order on July 3, 2003 and appealable to the Director, Department of Employment Services (the Director). In that Memorandum, which was filed on February 11, 2003, the Claims Examiner granted Petitioner's request for a change of physicians but found Petitioner's medical documentation did not support a finding that his current complaints are related to the work injury occurring in August 1999 and denied Petitioner's request for temporary total disability benefits.

Respondent has not filed a response to Petitioner's appeal.

ANALYSIS

In the review of an appeal from OWC, the Board must affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, §51.93 (2001). For the reasons set forth herein, the Board concludes herein, that the Claims Examiner's February 11, 2003 is not in accordance with the law and must be remanded to OWC for proper application of the presumption pursuant to D.C. Official Code §32-1521.

According to the MIF, Petitioner, a Carpenter Apprentice, sustained an injury to his toe on or about August 30, 1999 after a jack fell from the ceiling and landed on his right foot. Petitioner asserted at the Informal Conference that as a result of the toe injury he began having memory lapses, headaches, insomnia, loss of appetite, back problems, chest and heart pain, gout condition, and knees, neck, toes, hand, hip, ankle, arms and foot problems. Petitioner asserted that all of his symptoms manifested from the work injury of August 1999 and requested authorization to return to the care of his initial treating physician Dr. Rafael Lopez. Respondent asserted that only the foot and ankle injuries were related to the work injury and that there was no medical record to support the period of disability requested. Respondent also conceded that it would consider returning Petitioner to his prior treating physician Dr. Lopez for treatment for his foot and ankle only.

The Claims Examiner outlined all 17 problems Petitioner alleged were related to the right toes and foot injury he sustained in 1999. In finding that Petitioner invoked the presumption of compensability pursuant to D.C. Official Code §32-1521, the Claims Examiner indicated that she "weighed the evidence" and found Petitioner had "presented sufficient evidence to support that

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administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

his right foot, two right toes, right ankle, right knee and left knee symptoms are causally related to the work injury of August 1999 and thus has "provoked" the presumption that he is entitled to compensation benefits pursuant to the District of Columbia Workers' Compensation Act". MIF at 4. The Claims Examiner found the report and opinion of Respondent's IME physician, Dr. Louis Levitt[2] to be substantial, specific and comprehensive enough to rebut the presumption and found Petitioner's current complaints of low back pain and left knee pain are not the result of the August 1999 injury.

With regard to Petitioner's right knee, right foot, right ankle and two right toe complaints the Claims Examiner found Petitioner's complaints were not supported by any objective findings. With regard to Petitioner's other voluminous symptoms and complaints, the Claims Examiner stated she found no medical evidence to support Petitioner's assertions. Nor did the Claims Examiner make any specific finding with regard to the nature and extent of Petitioner's disability, if any, as a result of Petitioner's work related right foot injuries.

As is well settled within this jurisdiction, the Act mandates that it be presumed, in the absence of evidence to the contrary, that a claim comes within the purview of the Act. D. C. Official Code §32-1521(1)(2001); *Ferreira v. D. C. Dep't of Employment Services*., 531 A.2d 651, 655 (D.C. 1987). This presumption can make the injured employee's burden a heavy one. *See Harrington v. Jeanette Moss*, 407 A.2d 658 (D.C. 1979). When the preliminary evidence has satisfied the threshold requirement, (some initial demonstration of (1) and injury; and (2) a work related event, activity or requirement which has the potential of resulting in or contributing to the injury), the burden of production shifts to the employer to present substantial evidence which is "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event". *Parodi v. D. C. Dep't of Employment Services*, 560 A.2d 524 (D.C. 1989).

When evidence is presented that is sufficient to sever the injury from the work and overcome the presumption that a claimant's injury stems from any work-related event, activity or requirement, the presumption falls from consideration and *all evidence submitted must be weighed without recourse to the presumption.* (emphasis added) *See Georgetown University v. D. C. Department of Employment Services*, 830 A.2d 865 (D.C. 2003); *see also, Barbara Waugh v. D. C. Department of Employment Services,* 786 A.2d 595 (D.C. 2001).

In the instant matter, while the Review Panel finds no error in the claims examiner's invocation (described by the claims examiner as provoking the presumption) of the presumption, the Panel is unclear why the claims examiner based the invocation on a weighing of the evidence of record. While the result may undoubtedly be the same, the claims examiner need only determine if Petitioner submitted "some initial demonstration of an injury and a work related event that has the potential of resulting in or contributing to an injury, *Parodi, supra,* and should not consider what opposing evidence the record may contain.

The statutory presumption plays a significant role in workers' compensation cases. Failure to properly apply the presumption may askew the outcome of the proceeding. To begin the

[2] Although the Claims Examiner consistently refers to Dr. Louis Levitt, orthopedic surgeon and Respondent's IME physician as Dr. Levitz, the Panel notes for the record that Levitt is the physician's last name.

presumption analysis by weighing the evidence creates a burden of persuasion on Petitioner that was not intended by the Act or case law. *See Cynthia R. Thompson v. Ayala Communications*, Dir. Dkt. No. 02-93 , OHA No. 02-180, OWC No. 561690 (December 10, 2003). Given that the presumption is designed to effectuate the important humanitarian purposes of the Act and reflects a strong legislative policy favoring awards in arguable cases, the Panel cannot overlook this error by the claims examiner despite the fact that examiner may in fact find that Petitioner complaints are not causally related to the work incident of August 1999 and the evidence is not sufficient to establish any ongoing right to benefits. *Waugh, supra*; s*ee also Brenda Lampkins v. Washington Metropolitan Area Transit Authority*, CRB No. 05-15, OHA No. 03-509, OWC No. 577630 (June 10, 2005).

Otherwise said, the claims examiner should have saved the weighing of the evidence presented to her until a determination was made as to whether employer met its burden of producing rebuttal evidence. The Panel has found the claims examiner did properly apply the law when finding the Respondent did in fact rebut the presumption. After employer successfully rebuts the presumption, the next step for the claims examiner is then to weigh, or perform an assessment of the evidence presented to her and to state which evidence she relies on to determine the work-relatedness, or lack thereof, of the Petitioner's alleged complaints and disability and why she is persuaded by that evidence. *See Brenda Lampkins v. WMATA*, CRB No. 05-15, OHA No. 03-509 (June 10, 2005).

CONCLUSION

The OWC Order of December 10, 2004 is not in accordance with the law in that it failed to properly apply the presumption of compensability. Specifically, the claims examiner failed to weigh of all of the medical evidence submitted at the informal conference to determine if Petitioner can establish he continues to have a work related disability.[3]

ORDER

The Memorandum of Informal Conference issued on February 11, 2003 and finalized on July 3, 2003 is hereby Reversed, and this matter is Remanded to OWC for further proceedings consistent with the foregoing.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY
Administrative Appeals Judge

August 12, 2005
Date

[3] It is noted that the proper appeal procedure in the event a party is dissatisfied with the disposition rendered by OWC is to file an Application for Formal Hearing with the Administrative Hearings Division of the Office of Hearings and Adjudication pursuant to 7 D.C.M.R. §219.22.