

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-024

KEVIN ROBIN,  
Claimant-Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY  
and SEDGWICK CMS,  
Employer-Respondent.

Appeal from a February 10, 2014 Compensation Order on Remand by  
Administrative Law Judge Leslie A. Meek  
AHD No. 12-211, OWC No. 686074

David Kapson for the Petitioner  
Sarah O. Rollman for the Respondent

Before MELISSA LIN JONES, JEFFREY P. RUSSELL, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board; JEFFREY P. RUSSELL, *concurring*.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On July 25, 2010, Mr. Kevin Robin began working for Washington Metropolitan Area Transit Authority ("WMATA") as a bus driver. On November 9, 2011, Mr. Robin's bus was parked when an automobile "came in contact with the left rear bumper of the bus"<sup>1</sup> causing a 1½-inch scratch on the bus' bumper. Although there were 22 passengers on the bus at the time of impact, Mr. Robin is the only person who filed a claim for injuries, and although the bus was equipped with a Drive-Cam that activates "when it senses an impact that occurs at ten or more miles per hour; hard breaking;

<sup>1</sup> *Robin v. WMATA*, AHD No. 12-211, OWC No. 686074 (September 20, 2012), p. 2.

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and turning a corner at ten or more miles per hour,”<sup>2</sup> the November 9, 2011 incident did not activate the Drive-Cam.

In November 2011, in addition to working for WMATA, Mr. Robin also worked as a security guard with Knight Protective Services. As a result of the bus accident, Mr. Robin alleged he was unable to work for Knight Protective Services or WMATA.

Dr. Chevonne T. Salmon, Mr. Robin’s treating physician, released Mr. Robin to return to full duty work 3 times before Mr. Robin actually did return to work. Mr. Robin was capable of returning to fully duty with WMATA as of December 13, 2011, but he did not do so until January 15, 2012.

The parties sought a formal hearing to resolve the following issues:

1. Is Claimant’s current medical condition causally related to the work incident of November 9, 2011?
2. What is the nature and extent of Claimant’s current disability if any?
3. Has Claimant voluntarily limited his income?<sup>[3]</sup>

In a Compensation Order dated September 20, 2012, an administrative law judge (“ALJ”) denied Mr. Robin’s request for temporary total disability benefits from November 10, 2011 to January 14, 2012 and temporary partial disability benefits from January 15, 2012 to January 25, 2012. She granted his request for medical expenses.

Mr. Robin appealed the Compensation Order, and in a Decision and Remand Order issued on November 29, 2012, the Compensation Review Board (“CRB”) vacated that Compensation Order. In the Compensation Order, the ALJ conflated the issues of causal relationship and nature and extent:

Regarding the issue of causal relationship, in order to rebut the Presumption, “an employer only [needs] to offer ‘substantial evidence’ to rebut the statutory presumption of compensability, [the employer does not need] to disprove causality with absolute certainty.” [Footnote omitted.] It is unclear how an ability to return to work by December 13, 2011 tends to prove or disprove the causal relationship between Mr. Robin’s injuries and the stipulated accident. Similarly, Mr. Robin’s ability to work for Knight Protective Services, his release to return to work by Dr. Salmon, and his inability to take a firearm requalification test address the nature and extent of his disability (for which there is no presumption) not the causal relationship between his injuries and the bus accident.

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<sup>2</sup> *Id.* at pp. 2-3.

<sup>3</sup> *Id.* at p. 2.

Particularly because of the burdens of proof involved in addressing these diverse issues, they must be isolated and resolved independently. Thus, although it may appear that in awarding medical expenses the ALJ has determined Mr. Robin's injuries are causally-related to his on-the-job accident, the failure to independently analyze the issues of causal relationship and nature and extent prevents us from making such an assumption and requires we remand this matter.<sup>[4]</sup>

On remand, the ALJ again granted Mr. Robin's request for medical expenses while denying his claim for wage replacement benefits.<sup>5</sup> Mr. Robin now appeals the Compensation Order on Remand.

On appeal, Mr. Robin contends the Compensation Order on Remand continues to intertwine the issues of medical causal relationship and nature and extent in contravention of the CRB's directives on remand; "[t]he February 10, 2014, Compensation Order on Remand is virtually identical to the September 20, 2012 Compensation Order and does not follow the directive of the CRB to analyze the [issues of causal relationship and nature and extent] separately."<sup>6</sup> In addition, Mr. Robin does not dispute that the presumption of compensability was properly invoked by the ALJ; however, he does dispute that WMATA introduced evidence sufficient to rebut the presumption of compensability because it failed to offer any medical evidence on this issue and because Ms. Erica Adams' testimony is "merely speculative and secondhand information from a non-eye witness employee of WMATA."<sup>7</sup> Mr. Robin requests the CRB reverse the Compensation Order on Remand and grant his claim for relief.

In response, WMATA argues the ALJ correctly ruled Mr. Robin is not entitled to wage loss benefits. WMATA also argues it presented sufficient evidence to rebut the presumption of compensability even though it did not submit the opinion of an independent medical examination physician. Finally, WMATA argues whether it rebutted the presumption of compensability is irrelevant because the ALJ ruled Mr. Robin had failed to meet his burden of proving he was totally disabled. For these reasons, WMATA requests the CRB affirm the Compensation Order on Remand.

#### ISSUE ON APPEAL

Is the February 10, 2014 Compensation Order on Remand supported by substantial evidence and in accordance with the law?

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<sup>4</sup> *Robin v. WMATA*, CRB No. 12-170, AHD No. 12-211, OWC No. 686074 (November 29, 2012).

<sup>5</sup> *Robin v. WMATA*, AHD No. 12-211, OWC No. 686074 (February 10, 2014).

<sup>6</sup> Memorandum of Points and Authorities in Support of Claimant's Application for Review, p. 9.

<sup>7</sup> *Id.*

## ANALYSIS<sup>8</sup>

Pursuant to §32-1521(1) of the Act, a claimant may be entitled to a presumption of compensability (“Presumption”).<sup>9</sup> In order to benefit from the Presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.<sup>10</sup> “[O]nce 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.”<sup>11</sup> There is no dispute the ALJ appropriately ruled that the Presumption properly had been invoked.

Once the Presumption was invoked, it was WMATA’s burden to come forth with substantial evidence “specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event.”<sup>12</sup> Only upon a successful showing by WMATA would the burden return to Mr. Robin to prove by a preponderance of the evidence, without the benefit of the Presumption, his injuries arose out of and in the course of employment.<sup>13</sup>

To rebut the Presumption, the ALJ relied upon the testimony of Ms. Adams:

Employer’s evidence shows there were other passengers who were on the bus at the time Claimant asserts he suffered his work injury, and not any of those passengers claimed they were injured as a result of said accident. Testimony from Employer’s witness, Ms. Adams relaying the observations of one of the passengers on the bus shows, the impact with the bus was so minimal that the passengers were unaware of the collision. Ms. Adams testified the DriveCam failed to initiate upon the impact from the auto, and further states that when the car struck the bus, it only caused a one and one-half inch scratch to the bus. These factors, when considered together, rebut the presumption invoked in this matter. The evidence must now be assessed pursuant to the preponderance of the evidence standard.<sup>[14]</sup>

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<sup>8</sup> 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* 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).

<sup>9</sup> Section 32-1521(1) of the Act states, “In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter.”

<sup>10</sup> *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

<sup>11</sup> *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000).

<sup>12</sup> *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

<sup>13</sup> See *Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003).

<sup>14</sup> *Robin v. WMATA*, AHD No. 12-211, OWC No. 686074 (February 10, 2014), p. 7.

Mr. Robin argues that because WMATA did not rely upon medical evidence the Presumption was not rebutted. Medical evidence is not required to rebut the Presumption:

“To rebut the presumption the employer must show by substantial evidence that the disability did not arise out of and in the course of the employment.” *Baker, supra*, 611 A.2d at 550. “The statutory presumption may be dispelled by circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event.” *Ferreira I, supra*, 531 A.2d at 655 (citations omitted).<sup>[15]</sup>

In this case, however, Ms. Adams’ testimony does not qualify as circumstantial evidence specifically severing the potential connection between an injury and a job-related event. That no other passenger on the bus was injured is irrelevant when assessing whether Mr. Robin was injured. Similarly, that the impact was minimal does not negate that there was an impact.

The analysis of this case is similar to the analysis in *McNeal v. Department of Employment Services*.<sup>16</sup> In *McNeal*, even though the ALJ believed the testimony of another witness over that of the claimant, the other witness’ testimony still established a work-related event and medical evidence of an injury. The District of Columbia Court of Appeals ruled the other witness’ testimony was not enough to rebut the Presumption:

Here the ALJ did not have to look far to find an alternative, work-related, potential cause of petitioner’s disability – Lowery’s testimony provided it. To be sure, the ALJ opined that “a physical contact of [such] insignificant force” did not have the potential to cause McNeal’s injuries. In doing so, however, the ALJ essentially substituted his own judgment on the issue of causation. His conclusion is not supported by any evidence, expert or circumstantial, and it is not self-evident to us that contact between a moving bus and a person’s upper back and shoulder area lacks the potential for causing such injuries, even when the contact is only a “minor brush.”

We will assume that ALJ Russell could disregard the medical opinions regarding causation offered by McNeal, having concluded that they were based on inaccurate descriptions of the event. *See Olson v. District of Columbia Dep’t of Employment Servs.*, 736 A.2d 1032, 1038 (D.C. 1999) (hearing examiner did not err by discrediting the testimony of claimant’s doctor as to causation when the doctor “did not have [claimant’s] complete medical history”). But WMATA offered no evidence of its own on this subject. [Footnote omitted.] We thus confront the question of which side loses in circumstances like this, where we are left with no competent evidence to explain whether the event described by Lowery could have

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<sup>15</sup> *Waugh, supra*, at 600.

<sup>16</sup> *McNeal v. DOES*, 917 A.2d 652, (D.C. 2007).

caused McNeal's injuries. The presumption of compensability provides the answer.<sup>17</sup>

Thus, in this case as in *McNeal*, the Presumption was not rebutted; Mr. Robin's injury is causally related to his November 2011 accident; and the burden of proof fell upon him to prove by a preponderance of the evidence that his disability prevented him from working.

The ALJ's error in ruling that the Presumption was rebutted is harmless because she went on to consider the issue of nature and extent of disability even though she had erroneously determined Mr. Robin's injury was not causally related to his November 9, 2011 accident. When weighing the evidence on the issue of nature and extent, the ALJ wrote:

Claimant's work with Knight Protective Services during November and December, 2011 shows he was capable of work and shows he was not totally temporarily disabled as claimed during the period of November 10, 2011 to January 14, 2012.

Claimant's evidence shows he worked for, and was paid by Knight Protective Services during the months of November and December 2011. (CE 6, p. 111). While it is not clear exactly what days Claimant worked during these months, it is evident he worked during the week he alleges he was injured with Employer. It is also evident Claimant worked for Knight Protective Services during pay-periods that ended on November 12 and 19, 2011; and December 3 and 17, 2011. It is further evident Claimant claims he was totally disabled from working during a period of time that he did, actually work for Knight Protective Services. CE 6 shows Claimant was not totally disabled from November 10, 2011 to December 17, 2011.

Claimant was deemed capable of returning to work on December 13, 2011 by Dr. Salmon. (CE 3, p.51). However, Claimant did not return to work with Employer until January 15, 2012. Claimant's evidence shows, as of December 13, 2011, he was not totally or partially disabled, but able to return to work, full duty. Claimant is not entitled to TTD or TPD wage replacement benefits from December 13, 2011 to January 15, 2012.

Claimant asserts he missed time from working his second job at Knight Protective Services as he was unable to return to work there until January 25, 2012. He states his firearms certification expired in December 2011, and because he was injured and unable to work, he was unable to take a firearm re-qualification test that is required for employment with Knight Protective Services. I reject Claimant's testimony in this regard as it is unsupported by any other evidence and Claimant's testimony lacks credibility. This assertion is also rejected as the evidence shows Claimant was released to work full duty as of December 13, 2011, and capable of working long before his alleged return to Knight Protective Services on January 25, 2012. Further, the record evidence controverts Claimant's assertion that he was

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<sup>17</sup> *Id.* at 657-658.

unable to take his firearm re-qualification test due to his inability to work as the evidence shows Claimant did in fact work, even in December 2011, despite the injuries he suffered in the instant work incident.

Based upon the evidence of record, I find Claimant is not entitled to any wage replacement benefits. Claimant voluntarily limited his income with Employer and Knight Protective Services, and Claimant is entitled to reimbursement of medical expenses incurred.<sup>[18]</sup>

The ALJ's findings of fact are supported by substantial evidence in the record and her conclusions rationally flow from the weight she gave those findings; therefore, the CRB is prohibited from reweighing the evidence and must affirm the Compensation Order on Remand.<sup>19</sup>

Finally, WMATA argues the ALJ's failure to render a ruling on the issue of causal relation is irrelevant because the ALJ ruled Mr. Robin failed to meet his burden of proving he was totally disabled:

Finally, Claimant argues that the ALJ used the incorrect analytical framework to analyze the case. He is mistaken. The ALJ first evaluated whether Claimant invoked the presumption that his disability was related to the work accident. Upon finding that he did, the ALJ next evaluated whether WMATA rebutted the presumption of compensability. After finding that WMATA in fact rebutted the presumption, the ALJ was left to evaluate whether Claimant demonstrated by a preponderance of the evidence that he was totally disabled and, if so, whether the disability was causally related to the accident. The ALJ first evaluated the issue of nature and extent of the disability and found that Claimant failed to meet his burden of proving that he was totally disabled for the period in question. That finding ended the analysis. Given that she found him not to be totally disabled, causal relationship was no longer an issue. As such, if the ALJ had started her analysis with the nature and extent instead of causal relationship, she would have saved herself some effort as the presumption analysis turned out to be unnecessary.<sup>[20]</sup>

Given the outcome of this appeal, this argument is moot; however, the CRB would be remiss if it did not note that contrary to WMATA's argument, the determination of whether Mr. Robin's injuries are causally related to his November 9, 2011 accident is foundational and reaches beyond his entitlement to the wage loss benefits at issue in the July 5, 2012 formal hearing. Thus, proper resolution of this issue by the ALJ was necessary.

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<sup>18</sup> *Robin v. WMATA*, AHD No. 12-211, OWC No. 686074 (February 10, 2014), pp. 7-8.

<sup>19</sup> *Marriott, supra*.

<sup>20</sup> Opposition to Claimant's Application for Review, p. 10.

CONCLUSION AND ORDER

The February 10, 2014 Compensation Order on remand is supported by substantial evidence and is in accordance with the law. Although the ALJ erroneously ruled the presumption of compensability had been rebutted, she went on to weigh the evidence on the issue of the nature and extent of Mr. Robin's disability, thereby providing an appropriate ruling on the claim for relief in light of the compensability of Mr. Robins' injury. The February 10, 2014 Compensation Order on Remand is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

  
MELISSA LIN JONES  
*Administrative Appeals Judge*

May 22, 2014  
DATE

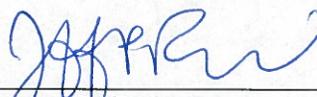
Jeffrey P. Russell, *concurring*.

I agree with the outcome of this case. However, I must respectfully disagree with the majority's discussion of the whether the ALJ was correct in determining that WMATA had overcome the presumption of compensability, wherein, citing *McNeal*, the majority states that the ALJ committed error, albeit harmless error.

The *McNeal* court faulted the ALJ because it felt that the ALJ concluded that the incident as the ALJ found it to have occurred did not have the capacity to cause the complained of injury, despite the lack of evidence to that effect.

In this case, WMATA adduced evidence that 22 other similarly situated persons were exposed to the same "force" as was experienced by Mr. Robin, and that based upon certain technological components in the bus there is good reason to believe that the impact was minor (i.e., less than the force of a 10 mile an hour impact).

I respectfully submit that a reasonable person confronted with such evidence could conclude as the ALJ did. In other words, the ALJ's conclusion was supported by substantial evidence.

  
JEFFREY P. RUSSELL  
*Administrative Appeals Judge*