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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
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CRB (Dir.Dkt.) No. 03-133

WALTER MCNEAL,

Claimant - Petitioner

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer – Respondent**.**

Appeal from a Compensation Order of
Administrative Law Judge Jeffrey P. Russell
OHA No. 03-053, OWC No. 585468

Benjamin T. Boscolo, Esquire for the Petitioner

Donna J. Henderson, Esquire, for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE 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 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.

Pursuant to 7 D.C.M.R § 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 of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on September 30, 2003, the Administrative Law Judge (ALJ), concluded Claimant – Petitioner (Petitioner) did not sustain an accidental injury arising out of and in the course of his employment with Respondent as alleged.

As grounds for this appeal, Petitioner alleges the ALJ did not apply the presumption of compensability to the incident; the ALJ erred in finding that the presumption can be rebutted by a simple finding that claimant's recollection of the incident was not credible; and that the Compensation Order is impermissibly based on the fact finder's substituted medical judgment in contravention of the Court of Appeals holding in *Landesberg v. District of Columbia Department of Employment Services*, 794 A. 2d 607 (D.C. 2002); and finally the ALJ failed to resolve inferences in favor of Petitioner in contravention of the Court of Appeals holding in *Jimenez v. District of Columbia Department of Employment Services*, 701 A.2d 837 (D.C. 1997)

Employer responds asserting that the medical evidence of record is based upon misinformation provided by Petitioner to his physicians and therefore not reliable. Respondent further asserts that a remand for evidence on whether the incident was sufficient to cause the injury simply perpetuates the "false and significantly misleading claim made by claimant". Although not so stated in its reply brief, it is inferred respondent is requesting the Compensation Order be affirmed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the Act and as contained in the governing regulations is 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. D.C. Official Code § 32-1521.01(d)(2)(A). "Substantial evidence", as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this panel are bound to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

The Compensation Order provided the following background as to the nature of the Petitioner's original claim: Claimant alleges that he was injured when he was struck by a bus while working in Employer's bus garage and seeks compensation for that injury. On appeal, Petitioner specifically asserts that the ALJ erred by not applying the presumption pursuant to D. C. Official Code §32-1521. Specifically, Petitioner asserts that ALJ applied the presumption to the incident itself and not to the existence of a causal relationship, legally or medically between the incident and the subsequent injury and disability. In a footnote, Petitioner asserts:

> The Compensation Order's conclusion that Petitioner's description of the incident is not credible is inadequate to rebut the presumption of compensability. *See e.g., Murray v. District of Columbia, Department of Employment Services*, 765 980 (D.C. 2001). This analysis of the incident on which this claim is based is simply an effort to justify the Compensation Order's failure to avoid application on the presumption to the incident which the Administrative Law Judge found to have occurred. In fact, the Compensation Order suggests that the employer rebutted the presumption by showing a difference between the incident as described by the injured worker and the incident described by the employer's witnesses. This analysis misperceives the nature of the presumption. The presumption does not apply to the description of the incident. The presumption concerns the existence of a causal relationship legally and medically between the incident and the subsequent injury and disability. The failure to apply the presumption to this order requires reversal.

After reviewing the ALJ's analysis and application of the presumption in the Compensation Order, Petitioner's argument is respectfully rejected. The Panel notes the ALJ began his analysis of the compensability of the instant claim, applying the presumption pursuant to the Court of Appeals guidelines in *Parodi v. District of Columbia Department of Employment Services*, 560 A.2d 524 (D.C. 1989); *see also Spartin v. District of Columbia Department D.C. Dept. of Employment Services*, 584 A.2d 564 (D.C. 1990); Pursuant to *Parodi*, the ALJ announced that the presumption is invoked upon a showing by the Petitioner of an injury and a work place incident, condition or event that has the potential of causing the injury. The ALJ recited Petitioner's testimony as it concerned the incident in question and noted Petitioner had supplied medical reports of three physicians of varying specialties each of whom attribute a variety of complaints such as headaches, neck pain and the need for neck surgery to the work incident. The ALJ determined that Petitioner's testimony and the medical reports were sufficient to invoke the presumption in Petitioner's favor.

At this juncture the Panel must remind Petitioner that D.C. Official Code § 32-1521 provides that it is presumed that "the claim comes within the provisions of this chapter". *See Ferreira v. District of Columbia Department of Employment Services,* 531 A.2d 651 (D.C. 1987), wherein the Court made clear that "under our Act a claim means nothing more that a simple request for compensation which triggers the process of claim adjudication and a claim is not a specific theory of employment causation and indeed claimants are permitted to argue alternative theories of employment causation in making their claim for compensation. Under our Act, if one theory

of employment causation has the potential to result in or contribute to the disability suffered, the presumption is triggered." *Ferreira, supra* at 653.

In the instant case, the ALJ initially accepted Petitioner's version of how the injury occurred, and found Petitioner had met his burden of production via evidence of an injury and a work place incident, condition or event that has the potential of causing the injury. As the Court described the process in *Ferreira*, the ALJ found Petitioner's initial theory of employment causation was sufficient to trigger the presumption in his favor. After finding Petitioner submitted sufficient evidence to support its claim and trigger the presumption, the ALJ properly shifted the burden to Respondent to produce evidence that is substantial, specific and comprehensive enough to sever the potential employment connection. The ALJ's finding via Respondent's rebuttal evidence that the injury did not occur as Petitioner alleged does not require another application of the presumption. The application of the presumption applies to the entire claim and not just one theory presented by a claimant. *Ferreira, supra.* Thus, Petitioner's assertion that "The Compensation Order does not apply the presumption to the incident which the Administrative Law Judge found to have occurred" is unfounded. To the contrary, the ALJ gave the benefit of the presumption to Petitioner with regard to his testimony as to how the injury occurred. Accordingly, this panel rejects Petitioner's argument that the ALJ committed reversible error by failing to apply the presumption to the latter description and conclude the ALJ properly applied the presumption pursuant to the existing statute and case law.

Petitioner subsequently asserts in his appeal that the Compensation Order fails to address the alternate work-related causes of his injury in contravention of the Court of Appeals decision in *Murray, supra* at 985. The Panel is mindful that the Court in *Murray* has held that after rejecting [petitioner's] contention that a specific [accident] occurred, a hearing examiner should "consider alternative work-related causes of petitioner's disability " on September 25, 1992, *citing Ferreira, supra*. It is noted that the hearing examiner in *Murray* accepted the testimony of a witness who did not actually see *Murray* at the time of the injury; had not seen *Murray* for approximately ten minutes before Murray informed him that he had fallen; and did not know what exactly *Murray* was doing at the time. Thus, the Court determined the witness had no personal knowledge of whether *Murray* did or did not fall. Therefore according to the Court, his knowledge of the aspect of the occurrence had no relevance for refuting *Murray's* testimony since *Murray* did have personal knowledge of the events. *supra* at 985.

Unlike the circumstances in *Murray*, there is no allegation that the witness, who was standing with Petitioner when the bus passed was not in a position to see Petitioner when the alleged injury occurred. Nor is there any indication that Petitioner was doing anything else such as his cleaner/shifter duties at the time the bus passed. Thus the Panel finds no reason to require the ALJ to consider what claimant might have been doing at the time of the injury that could assist Petitioner in demonstrating an activity or event that has the potential to cause an injury and/or disability. Nevertheless, also unlike the circumstances of *Murray*, the ALJ in the instant matter did find Petitioner invoked the presumption of compensation by his own version of how the accident occurred.

Moving on to Petitioner's allegation that the record does not contain substantial evidence to rebut the presumption, Petitioner puts forth three arguments. First that "finding a claimant is not

credible does not meet the burden of production" [necessary to rebut the presumption], citing *Williams v. Safeway Stores, Inc*., OHA No. 94-91, OWC No. 2391278 (1995) Second, "there is no record evidence which reveals any event which could have caused or contributed to the cervical disc herniation besides being struck by a bus". Third, that the ALJ substituted his own "judgment as to what was medically significant evidence for that of the treating physician."

The Panel finds Petitioner's reliance on the ALJ's decision in *Williams* to be misplaced. As Respondent properly retorts, the circumstances in *Williams*, involved a grocery store robbery wherein the robbers beat one employee's head and face with the butt of a gun. *Williams* was present during the robbery but sustained injury when she attempted to get up off the floor and struck her head. After receiving extensive medical treatment, *Williams* learned that the ambulance staff reported to the emergency room that *Williams* had been assaulted by the gunmen which *Williams* did not attempt to correct. While the ALJ found *Williams* was not permitted to rely on medical records based upon the incorrect history, the ALJ nevertheless found *Williams* had provided credible testimony that she suffered a bump on her head and received a "knot" and the employer did not contest the fact that she sustained an injury or that it arose out of and in the course of her employment. Moreover, contrary to Petitioner's assertion the ALJ when considering employer's attempt to rebut the presumption with *Williams'* failure to correct her medical history, the ALJ stated "where it has been found claimant's statements are, in fact, credible, mere allegations of incredibility are insufficiently specific and comprehensive to rebut the invocation of the presumption". *Cf. Robert McDaniels v. Baker-Webster Printing*, OWC No. 0140040, H&AS No. 89-55, Dir. Dkt. No. 89-31 (November 29, 1994). It is clear there was no intent on the ALJ's part in *Williams* to infer that a finding of incredibility cannot rebut the presumption.

It is well settled in this jurisdiction, when faced with contradictory testimony, the ALJ evaluates the credibility and demeanor of witness and draws conclusions based on that evaluation. Moreover, as the Court of Appeals has emphasized, it is widely accepted that when a fact finder's conclusions are based on credibility findings those conclusions are entitled to great weight. *Dell v. Department of Employment Services* 499 A.2d 102 (D.C. 1985)[2]. Accordingly, the Panel rejects Petitioner's argument and concludes the ALJ's reliance on Respondent's witness' testimony to rebut the presumption is in accordance with the law.

The Panel must also reject Petitioner's second argument that because the record contains no other event which could have caused or contributed to the cervical disc herniation, besides being struck by a bus, the record does not contain substantial evidence to rebut the presumption. As the Court of Appeals has held *Ferriera, supra*[3], the burden of production which the opposing party must meet to dispel the statutory presumption if invoked is "circumstantial evidence specific and

[2] In a more recent decision, the Court of Appeals has relied on language used by the Superior Court of New Jersey in the matter of *Ferdinand v. Agricultural Insurance Co*., 22 N.J. 482, 126 A.2d 323 (N.J. 1956), "Where men [or women] of reason and fairness may entertain differing views as the truth or the testimony, whether it be uncontradicted, uncontroverted or even undisputed, evidence of such a character is for the trier of fact. *See Georgetown University v. District of Columbia Department of Employment Services, 862 A.2d 387* (D.C. App. 2004).

[3] *Quoting Swinton v. J. Frank Kelly Inc*., 180 U.S. App. D.C. 216, 223, 554 F.2.d 1075, 1082, *cert denied*, 429 U.S. 820 (1976).

comprehensive enough to sever the potential connection between a particular injury and a job-related event".

In the instant case, the ALJ recorded six separate and different versions of Petitioner's alleged injury as it occurred on December 3, 2002, that Petitioner provided either to his treating physicians, emergency room staff, independent medical examiner or as written in an injury report. The ALJ further noted that Respondent had challenged the fact that Petitioner sustained any injury in the incident and provided the testimony of an eye witness to establish what actually happened on December 3, 2002 is significantly different than the incident as described by Petitioner. The ALJ accepted the witness's testimony as credible and Petitioner has not claimed otherwise. Specifically, the ALJ relied on the witness' testimony that he and Petitioner were standing in the garage talking when a bus making a turn behind Petitioner "lightly contacted Petitioner's upper back and shoulder area; that the force was not sufficient to cause a fall or lunge and Petitioner did not get pushed into the bus next to which they were standing; that the witness did not help Petitioner to get to his feet as Petitioner had not fallen. The witness further testified that Petitioner made no expressions or sounds suggesting injury nor did he appear to be dazed. The ALJ concluded that "employer's evidence if Respondent's "witnesses are to be believed totally undermines [Petitioner's] evidence because of it even the IME opinions are based upon a false and significantly misleading premise . . . that [Petitioner] suffered a severe and significant trauma".

The Panel turns to the second part of Petitioner's rebuttal argument, specifically that the ALJ in characterizing of the incident in question as a consequential brushing of Petitioner's shoulder and that there is no evidence that the "brushing" has the potential to cause the complained of injuries, substituted his own opinion for a medical opinion. CO at 4. As Respondent asserts and the Panel agrees, the dispute is whether Petitioner was struck at all and after hearing testimony and observing the demonstration by witness Fenton Lowrey, the ALJ determined as the bus passed Petitioner, it made a minor brush with Petitioner's' upper back and shoulder area and the incident did not have the potential to cause the injuries described in Petitioner's medical evidence. Review of the Hearing Transcript reveals the ALJ did not substitute his own characterization, but relied upon the description of Fenton Lowery who testified the bus "slightly brushed him". HT at 129. As the ALJ found Lowrey's description to be credible, the Panel cannot disturb the ALJ's finding that Petitioner's medical opinions are not reliable as they are based upon an inaccurate history related by Petitioner.

In sum, the Panel find there is nothing lacking in the ALJ's analysis of Respondent's rebuttal evidence and is satisfied that the ALJ's finding that Respondent has met its burden of producing circumstantial evidence, specific and comprehensive enough to sever the presumption, is supported by substantial evidence of record.

Lastly, Petitioner asserts that the Compensation Order fails to resolve inferences in his favor. Specifically, Petitioner asserts the objective physical findings of a C5-6 radiculopathy and bilateral carpal tunnel syndrome result in three inferences, i.e., that they were caused by the incident description as described by Petitioner; that they were caused by the incident described by the eye witness or they are unrelated in any fashion to the incident on March 19, 2003[4]. Given

[4] Petitioner's use of March 19, 2003 as the injury date is unclear and confusing at best.

the deference accorded the fact finder's credibility findings, *Dell, supra*, specifically the ALJ's finding that the eye witness's version of the December 3, 2002 incident was more credible than Petitioner's version, the Panel finds no error on the ALJ's part for finding more plausible the inference that any objective physical findings were not caused by the December 2002 incident.

CONCLUSION

The ALJ's conclusion that Petitioner did not sustain an accidental injury arising out of and in the course of his employment with Respondent is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order issued on September 30, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY
Administrative Appeals Judge

_____ August 3, 2005_____
DATE