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. 03-141

JOSEPH P. MURPHY,

Claimant–Petitioner,

v.

LINCOLN HOCKEY, LLC, D/B/A WASHINGTON CAPITALS, AND CHUBB INSURANCE,

Employer/Insurer-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Linda F. Jory
OHA/AHD No. 03-160, OWC No. 568001

Benjamin T. Boscolo, Esquire, for the Petitioner

Stewart S. Manela, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation 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, 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 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers'

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 October 21, 2003, the Administrative Law Judge (ALJ) denied Petitioner's claim for compensation under the Act, finding that the claimed injuries did not arise out of and occur in the course of Petitoner's employment with Respondent. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that (1) the ALJ's decision is not in accordance with the law in that Petitioner asserts that the ALJ misapplied the test enunciated by the Court of Appeals in *Kolson v. District of Columbia. Dept. of Employment Serv's.*, 699 A.2d 357 (D.C. 1997)[2], and (2) the ALJ improperly failed to interpret the Act as permitting the parties to a Collective Bargaining Agreement (CBA) and/or a written contract of employment to expand the coverage of the Act by resort to such extra-legislative documents.

Respondent opposes the appeal, asserting that the ALJ's findings of fact are supported by substantial evidence[3] and that the decision is in accordance with the law.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained 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.

Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

[2] Petitioner asserts that the ALJ erroneously applied *Kolson, supra*, both in the analysis of the facts as found, and by determining that that case did not adopt the holding in *Appeal of Mark S. Griffin*, 671 A.2d 541, 140 N.H. 650 (N.H. 1996) as the law of this jurisdiction for cases under the Act. Petitioner requests that, should it be determined that the ALJ was not incorrect in so determining that the *Kolson* court did not adopt *Griffin* as the law of this jurisdiction, that we nonetheless do so.

[3] It is noted that Petitioner has asserted no error in the factual findings contained in the Compensation Order; that is, Petitioner does not argue or assert that the findings of fact contained in the Compensation Order are not supported by substantial evidence.

We first address the argument raised by Petitioner to the effect that the ALJ erroneously interpreted *Kolson* by not reading that case to have adopted the holding of the Supreme Court of New Hampshire in *Appeal of Griffin, supra,* in its entirety, as the law of this jurisdiction.

Review of *Kolson* does not support Petitioner's claim of incorporation or adoption of *Griffin* by the Court of Appeals. Rather, it is evident that the Court reviewed numerous decisions of other jurisdictions by way of surveying the general principals underlying "traveling employee" cases in workers' compensation jurisprudence. The Court discussed cases not only from New Hampshire, but also from Virginia (*Sentara Leigh Hospital v. Nichols*, 414 S.E. 2d 426 (Va. Crt. App. 1992)), Minnesota (*Voight v. Rettinger Trans. Inc.*, 306 N.W. 2d 133 (Minn. 1981)), Maine (*Boyce v. Potter*, 642 A.2d 1342 (Me. 1994)), New York (*Capizzi v. Southern Dist. Reporters*, 61 N.Y. 2d 50 (N.Y. 1984)), Pennsylvania (*Port Auth. Of Allegheny County v. W.C.A.B.*, 452 A.2d 902 (Pa. 1982)), Arizona (*Peterson v. Industrial Comm'n.*, 490 P.2d 870 (Ariz. Ct. App. 1971)), and Illinois (*District 141, Int'l. Ass'n. v. Industrial Comm'n.*, 404 N.E.2d 787 (Ill. 1980)), as well as *Larson's Law of Workers' Compensation* generally, in concluding that, under some circumstances, injuries sustained by traveling employees who are injured while engaged in activities that are not directly part of a the employee's employment activities may nonetheless be compensable. Rather than incorporate any specific case or holding from any other jurisdiction, the Court in *Kolson*, held specifically as follows:

> We conclude that, notwithstanding our decision in *Grayson* [*v. District of Columbia Dep't. of Employment Serv's.*, 516 A.2d 909 (1986)], when a traveling employee is injured while engaging in a reasonable and foreseeable activity that is reasonably related to or incidental to his or her employment, the injury arises in the course of employment. His [Kolson's] injury also grew out of his employment because it resulted from a risk created by his employment—his arrival at odd hours in places away from his home and the necessity of using the public streets to seek lodging.

Kolson, supra, at 361.

Further, we note that, looking to the facts of *Griffin*, even were it to be controlling, one need not necessarily conclude that this case is compensable thereunder. In that case, the claimant employee was injured when he and several co-workers were returning from an employer-paid meal in a company vehicle provided to the employees in part for the purpose of permitting the employees to conduct personal, non-work related travel, including going for meals, while off duty. "Because [Griffin] was required by his employment to live away from home, the risk of injury to him during travel to take his meals was created by his employment", and "[Griffin] was not injured while driving from a voluntary 'pick up ball game' […] but was returning from a meal on the road necessitated by the condition of being employed away from home", the *Griffin* court (considering also explicitly that his employer furnished the meal allowance and allowed "use of a company vehicle for personal travel"), found the injury to Griffin to have arisen out of and in the course of his employment. *Griffin, supra,* at 655 – 656.

In contrast to *Griffin*, the ALJ in this case found that the incident in which Petitioner was injured was not related to the necessary activity of obtaining a meal while on the road, but rather occurred hours after Petitioner had dined (found by the ALJ not to have been at Respondent's expense) at a

location far removed from the place of the meal or the nexus of the employment to the travel (being Madison Square Garden where the game was played and the nearby hotel), at a location to which Petitioner had sojourned in non-employer provided transportation. None of these distinguishing facts are challenged on appeal. Indeed, the *Griffin* court recognized that not every injury that is sustained by a traveling employee is perforce compensable, by citing *Larson*:

> Employees whose work entails travel away from employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, *except when a distinct departure on a personal errand is show*. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.

Griffin, supra, at 655, quoting from 1A *The Law of Workers' Compensation*, § 25.00, at 5-275, Arthur Larson (1995) (emphasis supplied).

Lastly in this regard, we note that, despite the ALJ's declining to accept the proposition that the *Griffin* test was adopted *in toto* by the Court in *Kolson*, the ALJ nonetheless considered and rejected that part of the test that Petitioner urges we adopt. That is, Petitioner suggests error by the ALJ because she did not conduct an analysis of the facts under the "personal activity" part of the *Griffin* test, being that injuries arising out of such "personal activities" are compensable if the activity is reasonably expected and not forbidden, or is of mutual benefit to the employer and the worker. Review of the Compensation Order reveals that the ALJ based her decision in part upon her conclusion that while a meal with teammates near the location of the game and the team hotel was a reasonably foreseeable event in the context of a professional hockey player on a road trip, no such conclusion was warranted when the player takes his leave of the meal and sojourns across town to a night club, which he leaves at 4:00 a.m., and is injured when he appears to be assaulted by a person previously unknown in apparent response to unwelcome overtures towards a female acquaintance of the assailant. The ALJ rejected Petitioner's assertion that such conduct was nonetheless "of mutual benefit", because of the "bonding" with teammates that it entails. The ALJ's rejection of the characterization of Petitioner's post-meal conduct at Club Chaos, culminating in an injury sustained while making unwelcome advances to a woman at 4:00 a.m. which advances included an uninvited physical contact by Petitioner with the woman, as "bonding" with his teammates, is not, as a matter of law, erroneous. Nor, for that matter, is the implied conclusion that the events leading to the injuries anything other than an errand or mission of a purely personal nature.

We note that there is a general rule in compensation law that injuries sustained in a criminal attack while at work are generally not compensable where the attack is purely personal to the worker, as opposed to being the result of either a co-worker's reaction to work place friction, or the result of random criminality by unknown or unrelated third parties. See, *Clark v. District of Columbia Dep't. of Employment Serv's.*, 743 A.2d 722 (2000), at 727, and *Larson, supra*, §3.05. The ALJ appears to have been convinced as a factual matter that this assault, described by Petitioner at the formal hearing and in this appeal as being criminal in nature, resulted from a personal affront, whether deserved or not, taken by the assailant to Petitioner's overtures to the woman. This assessment is not contested on appeal, and appears to be a reasonable conclusion based upon the evidence cited by the ALJ. In the context of this case, such a rule militates in favor of the ALJ's decision.

Further, we note that in this area of questions relating to compensability under the Act, a level of discretion must be yielded to the ALJ. That is because of an aspect of the nature of the "arising out of and in the course of employment" concept which is addressed in Chapter 29 of *Larson's Workers Compensation Law,* LEXIS Publishing (2000 Edition) (*Larson's*) treatise. Section 29.01 summarizes the issue as follows:

> The discussion [in the treatise] of the coverage formula, "arising out of and in the course of employment," was opened with the suggestion that, while "course" and "arising" were put under separate headings for convenience, some interplay between the two factors would be observed in the various categories discussed [footnote omitted]. [...][T]he two tests, in practice, have not been kept in air-tight compartments, but have to some extent merged into a single concept of work-connection. One is almost tempted to formulate a sort of quantum theory of work connection [footnote omitted]: that a certain minimum quantum of work connection must be shown, and if the "course" quantity is very small, but the "arising" quantity is large, the quantum will add up to the necessary minimum, as it will also when the "arising" quantity is very small but the "course" quantity is relatively large.
>
> But if both the "course" and "arising" quantities are small, the minimum quantum will not be met.

2 *Larson's,* § 29.01. The "quantum" approach has been adopted by the Agency. See, *Lafette Austin v. Eichberg Construction,* OWC No. 137446, H&AS No. 88-311 (Dir. Dec. February 16, 1990) and, *Lafette Austin v. Eichberg Construction,* H&AS No. 88-311, OWC No. 137446, (Compensation Order on Remand April 19, 1990). See also, *Lajuanda Hill v. MVM, Inc.,* OHA No. 03-473, OWC No. 583448 (October 24, 2003). In the context of this case, it is apparent that the ALJ engaged in an analysis that mirrors this approach. That is, the ALJ allowed as the incident outside Club Chaos had some "arising out of" qualities, in that but for the employment relationship, Petitioner would (probably, at least) not have been in New York in the first place, but she viewed the attenuation from work as having progressed sufficiently—by the lateness of the hour, the distance from the work venue, the purely recreational nature of the activities leading to the injury (night clubbing as opposed to eating a meal), and the purely personal nature of the apparent trigger to the assault sustained (taking offense at trying to entice the woman into leaving with him in the limousine)---such that, in general, there was insufficient connection to employment to satisfy the "quantum" test. We decline to substitute our judgment for that of the ALJ, who was in the best position to assess the testimony from Respondent's witnesses as to its expectations concerning Petitioner's activities that evening, and the reasons for the assault that occurred. Further, while we decline to explicitly adopt every aspect of *Griffin* as part of our concept of employer liability for injuries to traveling workers, we detect no divergence from the essential aspects of that decision in the Compensation Order.

Petitioner also asserts as error that the ALJ improperly declined to consider the effect of the Collective Bargaining Agreement (CBA) between Petitioner's labor union and Respondent's league of hockey team owners, upon whether the events in question are compensable under the Act. Petitioner argues that nothing in the Act prohibits parties from "expanding, by agreement, the rights of an injured worker". As a corollary, Petitioner asserts that "it is entirely competent for an employer and an employer by express contract to supplement benefits under [a workers'

compensation statute] or to relax its restrictions and requirements in favor of an employee", citing *Nelson v. Victory Electric Works*, 227 F. Supp. 404 (D. Md. 1964).

Petitioner may well be correct that parties, including employers and employees, are free to enter into contracts that call for greater protections and benefits than does the Act alone. Indeed, one assumes that CBAs and employment contracts generally have provisions which allow for greater compensation, workplace health and safety protections or other conditions of employment, than statutory law compels, for such agreements would have no reason for existing if they provided for no more than the law compels in their absence. However, the Act does not grant this agency jurisdiction over the interpretation and enforcement of such extra-legislative agreements, and we therefore do not consider what effect, if any, the facts of this case might have upon their terms, or vice versa.

CONCLUSION

The Compensation Order of October 21, 2003 is in accordance with the law.

ORDER

The Compensation Order of October 21, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

_____October 19, 2005_____
DATE