

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-116

**OSCAR O. GOMEZ,
Claimant-Respondent/Cross-Petitioner,**

v.

**C.W. STRITTMATTER, INC., and
CREATIVE RISK SOLUTIONS,
Employer-Petitioner/Third Party Administrator/Cross-Respondent.**

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SERVICES
COMPENSATION REVIEW
BOARD
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Appeal from a July 28, 2016 Compensation Order by
Administrative Law Judge Donna J. Henderson
AHD No. 16-021, OWC No. 726232

(Decided January 12, 2017)

Joseph C. Veith, III for Employer
David M. Snyder for Claimant

Before GENNET PURCELL, LINDA F. JORY and HEATHER C. LESLIE, *Administrative Appeals Judges.*

GENNET PURCELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Oscar Gomez ("Claimant") was a machine operator employed by C.W. Strittmatter, Inc., ("Employer"). In addition to operating Bobcats, small excavators and dump trucks, Claimant would sometimes perform the duties of a timekeeper and laborer. On February 20, 2015, Claimant was in the process of installing a chain link perimeter fence when his left thumb nail and thumb was accidentally stapled to and impaled by a hog ring. Claimant's coworker attempted to free Claimant's thumb but was unable to do so. Claimant alleged he then slipped on the ice and slid on the snow and landed on his left buttock, all while still impaled to the fence and allegedly causing injuries to his left shoulder, left arm, left hand, low back, neck and left leg.

On the day of the accident, Claimant was seen by medical staff at Patient First where he was examined and referred to Dr. Shar Hashemi, who performed emergency surgery to remove the hog ring from Claimant's thumb at Virginia Hospital Center.

Claimant was released after the surgery and restricted from full duty work for a period of one month. On the day of his surgery and release, as a light duty assignment, Claimant was given login and password credentials by Employer with which he was instructed to watch Employer-safety videos from his home. Claimant did not watch the videos from his home. Days later, Claimant informed Employer that he did not have internet access at his home. Employer arranged for Claimant to watch the safety videos in Employer's D.C. office. Claimant stated to Employer that he would go to the D.C. office to watch the videos but he did not. During the course of Claimant's light duty restrictions Employer also offered Claimant the light duty jobs of timekeeping and flagging via letters and phone calls to Claimant.

The first medical reports indicating Claimant had left arm pain, left shoulder pain, low back pain, and left hip and neck pain were dated March 6, 2015, March 23, 2015, April 8, 2015 and May 22, 2015, respectively. The first medical report documenting left leg pain was dated November 20, 2015.

On March 23, 2015, Claimant was again restricted from work by Dr. Hashemi. In response to a letter received concerning light duty work and Claimant's assertion that he "could not do light duty", Dr. Hashemi continued Claimant on an off-work status through June 8, 2015.

On June 8, 2015, Claimant reported for work in the light duty position of a flagger but left as Employer did not have the position available for him. On June 9, 2015, Claimant again reported to work in the light duty position of a flagger but could not continue working after five hours due to pain and due his thigh becoming "sleepy".

On May 22, 2015, and again on October 12, 2015, Dr. James Gardiner examined Claimant on Employer's behalf and opined that Claimant's left shoulder complaints were causally related to the accidental injury to his left thumb. Dr. Gardiner opined that Claimant could return to full and unrestricted work as it related to his thumb injury. Dr. Gardiner also found Claimant had full range of motion in the hip, knees and ankles with negative straight leg raising and no muscle spasm. Dr. Gardiner noted Claimant's subjective complaints of pain on his left side but opined that his neck and low back complaints were not causally related to his injury.

A dispute arose as to whether Claimant's neck and left-side injuries were causally related to the work injury that occurred on February 20, 2015. A full evidentiary hearing was held before an Administrative Law Judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES"). Claimant sought temporary total disability benefits from February 20, 2015, to the present and continuing, authorization for medical treatment and causally related medical expenses. The issues to be decided at the hearing were:

1. Did Claimant sustain an accidental injury to his neck, left shoulder, left arm, left hand, low back, and left leg which arose out of and in the course of his employment on February 20, 2015?
2. Are Claimant's neck, left shoulder, left arm and left leg and symptoms medically causally related to the incident alleged on February 20, 2015?

3. Are Claimant's low back, left hip and left leg symptoms medically causally related to the incident alleged on February 20, 2015?
4. What is the nature and extent of Claimant disability, if any?
5. Where the alternative employment duties offered to Claimant suitable and within his restrictions?
6. Did Claimant voluntarily limit his income?

CO at 2-3.

A Compensation Order ("CO") issued on July 28, 2016, awarding Claimant causally related medical expenses, and medical treatment regarding Claimant's left arm and shoulder, and denying Claimant's claim for medical treatment and expenses related to his neck, low back, left hip and left leg claims. Claimant's claim for temporary total disability ("TTD") benefits was granted for the period of one day, June 8, 2015. Excepting June 8, 2015, TTD benefits from February 20, 2015 to the present and continuing were denied. *Gomez v. C.W. Strittmatter, Inc., et al.*, AHD No. 16-021 (July 28, 2016).

The ALJ found Claimant to be an incredible witness based upon, *inter alia*, the tenor of his voice, his demeanor at the Formal Hearing, uncorroborated statements in his medical records and offered by witness testimony.

Employer timely appealed the CO to the Compensation Review Board ("CRB") by filing an Application for Review of the Employer and Insurer and Memorandum of Points and Authorities in Support of Petition for Review ("Employer's Brief"). In its appeal Employer asserts that the ALJ's conclusion that Claimant is entitled to benefits for TTD for one day, June 8, 2015, is in error. Employer also asserts that the ALJ's application of the presumption of compensability and her consequent findings were neither in accordance with law nor supported by substantial evidence in the record and should be reversed. Employer's Brief at 7.

Claimant opposed the appeal by filing Claimant's Opposition to the Application for Review and Cross-Application for Review ("Claimant's Brief"). In his opposition, Claimant asserts the CO correctly found that he injured his left thumb, hand and shoulder but erred by not finding that his back and left hip/leg conditions were causally related to the accident, and by finding he could return to light duty employment. In his Cross-Application for Review, Claimant contends the CO erred in concluding that he could return to light duty employment and in findings regarding the effect of Claimant's pain medication on his ability to perform his light duty assignment.

ANALYSIS

Employer's initial argument contests the ALJ's award of a single day of disability and denial of disability claims for Claimant's back, neck, left hip and left leg. Specifically, Employer asserts that the ALJ erred in applying the presumption of compensability to the issue of the occurrence of the alleged slip-and-fall. Employer argues further, that in shifting the burden of proof to the Employer, the ALJ failed to consider much of the evidence mitigating against the conclusion that the slip-and-fall, left shoulder and left arm injuries occurred.

Employer asserts:

The underlying issue in this case was whether the claimant's testimony that he fell, injuring his shoulder and arm, after the initial thumb injury, was credible. Did the fall actually occur?

* * *

In the instant case, the ALJ appears to have been of the opinion that the mere assertion of an event was sufficient to invoke the presumption. She was, however, required to make a determination of whether, in light of all of the evidence, the claimant's uncorroborated testimony as to the underlying event, the fall was credible, prior to invoking the presumption.

Employer's Brief at 8, 9.

Citing to *Whittaker v. DOES*, 668 A.2d 844, 846 (D.C. 1995), Claimant argues that his testimony as to the slip-and-fall was sufficient to invoke the presumption of compensability. Claimant asserts:

[Claimant] successfully invoked the presumption of compensability with his testimony of a consequential slip and fall following his hand getting stapled to a fence, and the eyewitness presented by the Employer to rebut that presumption testified that he could not have seen [Claimant] when consequential slip and fall occurred.

Claimant's Brief at 9.

Citing to § 32-521 (1) of the D.C. Workers' Compensation Act, governing the presumption of compensability, the ALJ noted Employer's stipulation to the accidental injury to Claimant's left thumb while installing the perimeter fence and contest regarding Claimant's claim of additional injury including the slip and fall Claimant alleged. The ALJ discussed:

Claimant testified that when his thumb was impaled by the hog ring, he was standing on snow, bending over the three foot fence. HT at 43 - 45, 74 and 104. When he turned to yell at his co-worker to hurry up, Claimant slipped and fell onto his left buttock, while he hand [sic] was still fastened to the fencing. HT at 43 - 44. When he fell, Claimant's arm was above his body. HT at 91 - 92. Claimant testified that when he fell, he had pain in his left shoulder and "a little bit of pain . . . on the left side of my hip . . . buttocks." HT at 45 - 56. Thus, I find Claimant has met his initial burden to invoke the presumption that the sustained an accidental injury to his left arm and shoulder; neck; left hip and low back, which arose out of and in the course of his employment.

CO at 9-10.

The requirement of an accidental injury is satisfied when something unexpectedly goes wrong with the human frame. *Washington Metropolitan Area Transit Authority v. DOES*, 506 A.2d 1127 (D.C.1986). In *Washington Hosp. Ctr. v. DOES*, 744 A.2d 992, 996-97 (D.C. 2000), the District of Columbia Court of Appeals (“DCCA”) explained:

Under the District of Columbia Workers' Compensation Act (“WCA”), once 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. See D.C. Code § 36-321(1). This presumption serves “to effectuate the humanitarian purpose of the statute [and] reflects a ‘strong legislative policy favoring awards in arguable cases.’” *Ferreira v. DOES*, 531 A.2d 651, 655 (D.C. 1987) (“*Ferreira I*”) (citing *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 183, 407 F.2d 307, 313 (1968) (en banc)); accord, e.g., *Brown v. DOES*, 700 A.2d 787, 791 (D.C. 1997). In order to benefit from the presumption, an employee need only present “some evidence” of two things: (1) a disability, and (2) “a work-related event, activity, or requirement which has the *potential* of resulting in or contributing to the . . . disability.” *Ferreira I*, 531 A.2d at 655 (emphasis in original); accord, e.g., *Parodi v. DOES*, 560 A.2d 524, 526 (D.C. 1989). “The presumption then operates to establish a causal connection between the disability and the work-related event, activity, or requirement.” *Ferreira I*, 531 A.2d at 655; accord, e.g., *Davies-Dodson v. DOES*, 697 A.2d 1214, 1217 (D.C. 1997).

Washington Hosp. Ctr. v. DOES, 744 A.2d 992, 996-97 (D.C. 2000).

Accordingly, the standard to invoke the presumption of compensability are intentionally low. Pursuant to D.C. Code § 32-1521, the ALJ need only look to Claimant's evidence or testimony to determine whether the presumption has been invoked. Once the presumption has been invoked, an ALJ can ultimately find a claimant to be an incredible witness when weighing all the record evidence to determine whether claimant satisfied his/her legal burden.

In the case *sub judice*, there is no dispute that Claimant sustained an accidental injury to his left thumb while installing the perimeter fence for Employer. What Employer did dispute was Claimant's claim that he also slipped and fell, and as a result, injuring his left arm, left hip, left leg and neck. It is reasonable to assert, as Employer does, that because there were not any witnesses to Claimant's alleged slip-and-fall, Claimant cannot establish that the fall occurred. This assertion however, either alone or in conjunction with Employer-witness testimony stating that Claimant could not have fallen, otherwise Employer-witness would have seen said fall, is not sufficient to deny Claimant the invocation of the presumption. The ALJ's analysis was consistent with this rationale.

Indeed, in addition to the standard required to invoke the presumption, the presumption is “designed to effectuate the humanitarian purposes of the statute” and “reflects a ‘strong legislative policy favoring awards in arguable cases.’” *Ferreira*, *supra* 531 A.2d at 655, n. 10, (quoting *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 183, 407 F.2d 307, 313 (1968) (en banc)), quoted in *Parodi v. DOES*, 560 A.2d 524, 525-26 (D.C. 1989).

With regard to the ALJ's credibility determination, although the ALJ's detailed and consistent credibility findings regarding Claimant's testimony does cast a cloud of uncertainty over the testimonial support she cited in invoking the presumption of compensability in Claimant's favor, the law of our jurisdiction supports the CO's conclusions.

The following is the discussion of Claimant's credibility from the CO:

I find that Claimant's testimony to lack credibility based upon the tenor of his voice and his demeanor at the Formal Hearing, statements in his medical records; and the testimony of other witnesses. I find that, on February 21, 2015, Claimant had a cell phone and was capable of using it. HT at 82 – 83. However, Claimant did not use his cell phone to tell Mr. Tompkins that he did not have internet at home. Claimant testified that taking the bus would "hurt his spine a little bit more,"(HT at 93) but at the time watching safety videos in the D.C. office was offered, Claimant's medical records do not reflect any complaints of back pain. After February 25, 2015, Claimant was capable of driving, but he chose not to go Employer's office to watch the videos. HT at 93. When asked about his refusal to watch videos in Employer's office, Claimant testified "It's because they wanted me to be in an office and seated all day, just watching videos for the whole day" (HT at 94), but Claimant never tried to go to the office to see whether he need to sit all day or not. I find that Claimant told Ms. Marshall that he would come to watch the videos when his doctor would permit it. When his doctor did permit it, on February 25, 2015, with a prescription for light duty with no use of the left hand, Claimant did not come to Employer's office to what the videos. EE 10, transcript p. 45 and CE 1, p. 63. Finally, on March 6, 2015, when both Claimant and his doctor were aware that Claimant had been offered light duty which he could perform sitting, standing or lying down, Claimant told his doctor that "[h]is work in construction requires the use of two fully functional hands," resulting in an off work slip with "no work at this time." CE 1, pp. 58 and 59. For each and all of these reasons, I find Claimant's testimony and reasons for failing to report for light duty to lack credibility.

* * *

Because I did not find Claimant to be credible, I am not convinced that his testimony concerning his internet service is true.

* * *

I find Claimant's testimony concerning the location of his pain and the extent of his pain to lack credibility.

* * *

In addition, I did not find Claimant's testimony about his ability to guide dump trucks to be credible.

CO at 8–9, 15, 17.

Speaking specifically to the intersection of credibility and the invocation of the presumption, as we routinely point out, witness credibility findings are “within the sound discretion of the ALJ,” *Ogden v. Bon Appetit*, CRB No. 09-031 (March 2, 2009). Further, “normally an ALJ’s decision which is based on credibility findings deserve special weight, because the ALJ has the opportunity to observe the appearance and demeanor of the witness”, *WMATA v. DOES*, 683 A.2d 470 (D.C. 1996). Accordingly, it is fundamental that the fact finder’s credibility determinations are given great deference, given their opportunity to observe the nature and character of a witness’s demeanor. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985). We also point out the cautionary language as stated in *LaPlant v. Tradesman International, Inc.*, CRB No. 15-129 (December 31, 2015):

In some instances, such as *Storey v. Catholic University of America*, CRB No. 15-024 (July 9, 2015), a total lack of credibility may be sufficient to deny invocation of the presumption. However, in most cases, such as the present case, where a credibility determination must be made on inconsistent or conflicting evidence, the presumption should be invoked, and the effect of the inconsistent evidence comprising the complex and nuanced credibility analysis is to be considered at the evidentiary-weighting third step.

LaPlant at 7.

We do not find the ALJ's credibility determination to be inconsistent with the Act or the governing case law on this issue. We determine that the ALJ’s conclusion that Claimant’s testimony that he stood on the snow, bent over a fence and turned to yell at his co-worker when he slipped-and-fell meets the threshold requirements mandated by *Ferreira, supra*, as a matter of law. We affirm the CO’s invocation of the presumption.

Employer next argues that the ALJ erred in basing her conclusion that Employer failed to rebut the presumption of compensability regarding Claimant’s slip-and-fall, solely upon the finding that the Employer’s witness did not have Claimant in his direct line of sight during all times relevant to the alleged slip-and-fall. Employer further contends the ALJ’s credibility findings are inconsistent with the s conclusion that Employer failed to meet its burden of rebuttal. Having already determined that the ALJ’s conclusions regarding Claimant’s credibility were consistent with the law and within her authority as the fact finder in this case we will not reexamine this issue here.

With regard to the sufficiency of Employer’s rebuttal evidence, the following is the discussion of Employer’s rebuttal evidence from the CO:

Employer disputes whether Claimant fell [sic] his left thumb was impaled and whether Claimant’s fall resulted in injuries to his left arm and shoulder; neck; left

hip; and back. Employer's witness, Jose Carbajal, testified that Claimant was always "in front of [him]" and he did not see Claimant fall. HT at 136. However, Mr. Carbajal admitted that as he walked along the perimeter fence, towards Rudy, he was not walking backwards. HT at 140. Mr. Carbajal did not always have Claimant in his direct line of sight. Rather Rudy was walking and facing perpendicular the fence to which Claimant was attached and could not have seen him at all times. Jt. Ex. 1 and HT at 137 – 44. For this reason, Employer has failed to bear its burden to rebut the presumption that, in addition to having his left thumb impaled with the hog ring, Claimant also slipped on snow or ice and fell, which I find had the potential of resulting in injuries to Claimant's left arm and shoulder, neck, hip, back and left leg.

CO at 10.

As mandated by the Act, the presumption of compensability operates, only "in the absence of evidence to the contrary." D.C. Code § 32-1521. Once the presumption is triggered, the burden is on the employer to offer "substantial evidence" that the injury did not arise out of and in the course of Claimant's employment. *McNeal v. DOES*, 917 A.2d 652, 656 (D.C. 2007); *Washington Post v. DOES*, 852 A.2d 909, 911 (D.C. 2004); *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001); evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Id.* (quoting *Ferreira, supra*, 531 A.2d at 655).

In cases where the sufficiency of Employer's rebuttal evidence is at issue, as guidance, the law provides that "the presumption of compensability cannot be overcome merely 'by some isolated evidence,'" *Whittaker, supra*, neither however, is the presumption "so strong as to require the employer to prove that causation is impossible in order to rebut it." *Washington Hosp. Ctr. v. DOES and Juanita O. Callier*, 744 A.2d 992, 1000 (D.C. 2000).

We determine that the ALJ adequately rejected the testimony of Employer-witness Jose Carbajal in concluding that the Employer did not rebut the presumption. Testimony regarding what Jose Carbajal "could have seen" or "would have seen" does not serve as the substantial evidence required pursuant to the Act. We reject Employer's argument on this issue.

Finally, Claimant's argues on cross-appeal, that the CO failed to make findings of fact regarding the effects of Claimant's pain medication, improperly rejected the treating physician's medical decision by not applying the aggravation principle and noted inconsistencies in Dr. Hashemi's reports where none existed in denying his claim for TTD. With regard to each of these arguments, we again refer Claimant to the ALJ detailed and comprehensive credibility findings.

With regard to the effects of Claimant's pain medication on his ability to perform his light duty assignment, his ability to return to light duty, and as a result, his entitlement to TTD benefits, the CO specifically concluded that Claimant's testimony regarding each of these matters were not credible. We decline to substitute our judgement for that of the ALJ as this is an exercise we are not empowered to undertake.

With regard to the CO's rejection of the treating physician's medical opinions, our review of the CO reveals that after noting the treating physician preference and concluding that Claimant had three treating physicians, the ALJ rejected the opinions of Dr. Hashemi and Yousefi, listing several factors including the delayed timing of Claimant's complaints, and omissions and inconsistencies within Dr. Hasemi's reports against Claimant's testimony. We determine that the ALJ's thorough analysis demonstrates a proper understanding of the law as applied to the facts on this matter and reject Claimant's argument on this issue.

CONCLUSION AND ORDER

The Compensation Order's conclusion that Claimant invoked the presumption of compensability regarding the slip-and-fall incident on February 20, 2016, is AFFIRMED. The Compensation Order's conclusion that Employer failed to rebut the presumption of compensability with regard to legal causation is AFFIRMED. The Compensation Order is AFFIRMED.

So ordered.