

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-024

RACHEL STOREY,
Claimant-Petitioner,

v.

CATHOLIC UNIVERSITY OF AMERICA and
LIBERTY MUTUAL INSURANCE COMPANY,
Employer/Insurer-Respondent.

Appeal from a January 16, 2015 Compensation Order by
Administrative Law Judge Linda F. Jory¹
AHD No. 12-306A, OWC No. 663766

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JUL 9 PM 1 55

(Decided July 9, 2015)

Bruce M. Bender and Sheila Geraghty² for Claimant
Christopher R. Costabile for Employer

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

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

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Rachel Story (Claimant) was employed as a Media Studies professor at Catholic University of America (Employer). Her claim for workers' compensation benefits alleging that she sustained injuries due to exposure to mold and certain toxic substances was heard by an Administrative

¹ Judge Jory was a hearings Administrative Law Judge in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES) at the time the subject Compensation Order was issued. Judge Jory has subsequently re-joined the Compensation Review Board (CRB) as an Administrative Appeals Judge.

² Ms. Geraghty is representing Claimant as an authorized representative pursuant to D.C. Code § 32-1520 (d). A Motion for Admission Pro Hac Vice was denied without prejudice to being re-filed upon Ms. Geraghty's filing an "Applicant Declaration" as set forth in District of Columbia Court of Appeals Rule (C.A.R.) 49(c)(7)(ii). No such filing has been made to date.

Law Judge (ALJ) in the Department of Employment Services' Administrative Hearings Division (AHD) on October 29, 2014. Following that hearing, the ALJ issued a Compensation Order on January 16, 2015, in which the claim was denied. The denial was premised upon the ALJ's determination that Claimant had failed to adduce sufficient evidence to invoke the statutory presumption of compensability found at D.C. Code § 32-1521. The basis of the ALJ's decision was that the ALJ found Claimant to be an incredible witness, and not credibly generally, which lack of credibility rendered not only her testimony concerning the alleged injury and circumstances surround its alleged occurrence incredible, but also rendered the reports and opinions of her medical and environmental experts to be without probative value, being premised in large part upon the unreliable medical histories and descriptions of the workplace environment provided by Claimant and upon which their opinions were based.

The ALJ's findings of lack of credibility were based upon (1) the ALJ's assessment that there were multiple instances of marked differences between Claimant's memory concerning the events surrounding her claim, and facts related to her past medical history, when she testified on direct examination as opposed to cross-examination; (2) the absence in the medical record, where such references would be expected in 2007, of corroborating complaints related to Claimant's alleged reactive responses to workplace toxins; (3) Claimant's claimed inability to recall significant and substantial details concerning volunteer work in which she was engaged in a presidential campaign at a time that she claims to have been disabled; (4) contradictory, inconsistent and evasive answers to questions regarding her course of treatment with a Dr. Shoemaker; and (5) giving false or misleading testimony concerning the presence of open cans of chemical labeled "toxic" or "hazardous", when no such cans with such labels were present.³

Claimant filed an Application for Review and Memorandum of Points and Authorities in support thereof (Claimant's Brief) with the Compensation Review Board (CRB), alleging first, that the ALJ improperly failed to accord Claimant the presumption of compensability; and second, that even if that failure is deemed harmless, Claimant's evidence is so superior to Employer's that she should prevail as a matter of law.

Employer filed an Opposition the Application for Review and Memorandum of Points and Authorities in support thereof (Employer's Brief). In Employer's brief it argues first, that the ALJ's finding that Claimant failed to adduce evidence sufficient to invoke the presumption of compensability is legally correct, inasmuch as all Claimant's evidence that she sustained a workplace related injury depends completely and directly upon the non-credible testimony and non-credible histories of physical complaints as related to Claimant's expert medical and environmental witnesses, and second, even if the failure to invoke the presumption of compensability was error, it was harmless, inasmuch as the ALJ's ultimate denial of the claim is supported by substantial evidence.

³ Several of these subcategories of lack of candor as found by the ALJ had multiple components, pointed out by the ALJ in the Compensation Order. This is why, in Claimant's Brief, it is stated that the ALJ had "seven" bases underlying the credibility findings.

Because the ALJ's findings concerning Claimant's lack of credibility are supported by substantial evidence, and because the ALJ's conclusion that this lack of credibility rendered her testimony and the opinions of her medical and environmental experts of no probative value regarding whether Claimant had sustained an injury under the Act flows rationally from those facts, the denial of benefits is affirmed.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Code § 32-1521.01 (d)(1)(A). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order 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 different conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

Preliminarily, we address a subject relating to part of the relief requested by Claimant in this appeal, that the remand she requests include a directive that the matter be further considered by a different ALJ.

In numerous instances in Claimant's Brief, counsel makes comments which directly or by implication question the ALJ's competence, fairness and integrity. Counsel's attacks on the ALJ are personal in nature, speculative, and ill conceived. Counsel asks this Board to "consider whether in fact the ALJ brings a bias to the matter that disqualifies her from further involvement." This suggestion is repeated on page 58, where counsel's first requested item of relief is a remand with "assignment to a different, and unbiased ALJ".

We merely point out the following. First, there is nothing in the lengthy excoriation of the ALJ that could in any way be construed as supporting an accusation of bias. Second, we have every confidence that if it were our ultimate determination that a remand is appropriate, the ALJ would professionally, competently and evenhandedly consider the matter further and reach a reasoned decision. Thus, even if we had the power to do so (which we do not) we would not direct that the matter be heard by a different ALJ.

Turning to the merits of the appeal, other than attacking the ALJ's competence and integrity, Claimant's arguments fall into two separate categories: first, that the ALJ improperly failed to accord Claimant the presumption of compensability; and second, that Claimant's evidence is so superior to Employer's that she should prevail as a matter of law.

Employer responds that the ALJ's finding that Claimant failed to adduce evidence sufficient to invoke the presumption of compensability is legally correct, inasmuch as all Claimant's evidence that she sustained a workplace related injury depends completely and directly upon the non-credible testimony and non-credible histories of physical complaints as related to Claimant's

expert medical and environmental witnesses. Employer also argues that even if the failure to invoke the presumption of compensability was error, it was harmless, inasmuch as the ALJ's ultimate denial of the claim is supported by substantial evidence.

Both the ALJ and Claimant in her brief correctly state the standard by which it is to be determined whether a claimant has adduced sufficient evidence to invoke the presumption of compensability, citing *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987), which reads:

In order to benefit from the presumption, a claimant needs to make some "initial demonstration" of the employment-connection to the disability.

* * *

The initial demonstration consists in providing "some evidence" of the existence of two basic "facts": a death or disability and a work-related event, activity or requirement which has the *potential* of resulting in or contributing to the death or disability.

* * *

The presumption then operates to establish a causal connection between the disability and the work-related event, activity or requirement.

Id., at 655 (citations omitted, emphasis in original).

The ALJ determined that Claimant had not met this quantum, writing:

Inasmuch as the undersigned has found claimant not only to [sic] incredible but to have intentionally provided false statements to employer and at the formal hearing before the undersigned, claimant's history as provided to the providers whose reports she relies upon to invoke the presumption cannot be found to be credible, given her propensity to have selective memory and make false statements. Thus I have determined the record does not contain sufficient evidence to invoke the presumption of compensability ... as the record lacks *credible* evidence of an injury and of a work-related event which has the potential of causing the injury and/or disability. *Ferreira, supra* at 659. Without the benefit of the presumption and given the complete lack of credibility of claimant, it cannot be concluded that claimant has sustained any injuries that arose in and out of her employment.

Compensation Order, page 14 (emphasis in original).

Claimant argues that the seven separate bases which it identifies which underlie the ALJ's credibility determination are misunderstandings on the ALJ's part of the nature of her alleged injury, given that the alleged injury has cognitive and memory deficiency components. However, we must reject this argument: it is fundamental that the fact finder's credibility determinations

are to given great deference, given the opportunity to observe the nature and character of a witness's demeanor. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985).

Further, the ALJ gave numerous, specific instances in which Claimant's testimony was found to be untrue (one example being the claim that Claimant was exposed to substances in cans marked "toxic" and "hazardous", when there was substantial and credible evidence that this was not true) or came across as being evasive, or appearing to vary in its precision depending upon whether Claimant was being examined on direct as opposed to cross-examination. The Compensation Order contains lengthy and accurate quotations from the hearing transcript which support the ALJ's impression.

We will not detail all the instances cited by the ALJ as indicating a lack of credibility on Claimant's part or Employer's differing interpretation of their import. We merely note that the arguments put forth in Claimant's brief are just that, arguments, none reaching the level of upsetting the ALJ's credibility finding, which is entitled to great deference. While Claimant posits some legitimate arguments supporting a different interpretation of the transcript, it is for precisely that reason that deference is accorded to the fact finder who was present at the time of the testimony, and had the benefit of assessing the tenor and tone, the tempo and the totality of the context of words which to us are merely black and white quotes on a page.

Claimant does not specifically raise issue in this appeal with the ALJ's requiring that the evidence in support of invoking the presumption be credible. However, Claimant's and the ALJ's reliance upon the formulation in *Ferreira* which does not explicitly include reference to "credible" evidence, requires that we address the matter.

The CRB has on occasion included the words "some credible evidence" in formulating the burden of production required of a claimant seeking to invoke the presumption. *See Warwick v. Howard University*, CRB No. 14-112, AHD No. 12-044A, OWC 691925 (February 10, 2015); *Hare v. Tito Construction*, CRB No. 10-155, AHD No. 10-201, OWC No. 663250 (September 19, 2011). This is in addition to the same usage being applied by the Director of DOES when review authority over Compensation Orders was within the Director's purview. *See Perrin v. Staff Builders*, Dir. Dkt. 02-077, OHA No. 02-292, OWC No. 557924 (February 11, 2003).

And, the only District of Columbia Court of Appeals (DCCA) case that we have found where the issue is addressed, at least by implication, supports the principal that the merely producing "some evidence", if not credible, may not be sufficient to meet a claimant's burden.

In *Murray v. DOES*, 765 A.2d 980 (D.C. 2001), the court wrote:

In this case, Murray produced some evidence in support of the two basic factors required to trigger the presumption. This evidence consisted of his own testimony concerning his fall on the job while engaged in the performance of work for his employer, corroborated to some extent by his co-worker to whom he reported the

incident immediately and his medical records of his treatment that day and subsequently. The hearing examiner acknowledged that there is a presumption of compensability, but declined to give Murray the benefit of it "because his incredible testimony of an injury, harm, or a work related activity with the potential of causing an injury or harm [is] not enough [to] invoke the presumption of compensability." **In other words, the hearing examiner found that Murray had not presented any credible evidence that he sustained an accidental injury on the day in question arising out of and in the course of his employment.** Generally, credibility determinations of the factfinder are entitled to great weight. *Dell v. District of Columbia Dep't of Employment Servs.*, 499 A.2d 102, 106 (D.C. 1985) (citing *In re Dwyer*, 399 A.2d 1, 12 (D.C. 1979)). This court may not substitute itself for the trier of fact who heard, received and weighed the evidence. *King*, supra, 560 A.2d at 1072 (citing *Porter v. District of Columbia Dep't of Employment Servs.*, 518 A.2d 1020, 1022 (D.C. 1986)). **In this case, however, the hearing examiner's credibility determinations against Murray are based, at least in part, upon clearly erroneous factual employment.**

* * *

However, given that the hearing examiner's overall credibility determination included, in addition to demeanor assessment, facts not supported by the record, it is not clear that the examiner would have reached the same result had he not labored under misconceptions about the evidence. **Therefore, the agency should be required to consider whether Murray met the threshold requirement for triggering the presumption of compensability without allowing improper factors to influence its decision.**

Id., at 983 – 984 (italics in original, bold supplied).

In *Murray*, the court found fault *not* with the ALJ's denying the benefit of the presumption because the ALJ doubted the claimant's veracity; rather, the error it found was that the lack of credibility finding was premised upon a demonstrably erroneous reading of the evidence. The court remanded the matter for further consideration as to whether, in the absence of this erroneous reading of the record, the ALJ would reach the same conclusion. And this is sensible: there would be no legitimate reason for the presumption of compensability to be invoked based upon evidence that is not credible. Otherwise put, "some evidence" can reasonably mean "some credible evidence".

While it is true, as Claimant points out, that the ALJ does not discuss many of the technical and medical reports in the record, the ALJ explains that such a discussion is unnecessary, inasmuch as anything in these reports concerning whether the first "basic fact" of the equation had been satisfied was fatally undermined by Claimant's lack of credibility. That is, for example, while it may be that there were airborne irritants or allergens present in the workplace which had the

potential of causing a person to suffer the injuries or reactions *alleged* by Claimant, that would only go to the second “basic fact”, and does nothing to establish that Claimant actually sustained any such injury or reaction. The presumption doesn’t presume an injury based merely upon a claim of one. As the court wrote in *Ferreira* “No harshness results from the proper application of this presumption. It must be remembered that the mere filing of a claim with the Department of Employment Services is insufficient to invoke the presumption. See 1 LARSON, *supra*, § 10.33 at 3-138.” *Ferreira, supra*, 531 A.2d at 655. Claimant has pointed to no objective evidence that Claimant has suffered a malady. The only such evidence is from the Claimant’s mouth, whether at the hearing or to her physicians.

While we may well have approached this case from a different analytic perspective, the approach taken by the ALJ—determining whether Claimant is credible enough to conclude that she suffers from the symptoms that she claims, being the first “basic fact” needed to invoke the presumption—is not a reversible error.

Briefly addressing our colleague’s dissent, we merely point out further language in an unpublished decision relied upon in the dissent, paragraphs which directly precede the quoted passage:

To begin with, we note that there is some support in our cases for allowing a credibility determination at the presumption stage. See *Sibley Memorial Hospital v. DOES*, 805 A.2d 974, 977 (D.C. 2002) (explaining that a claimant is entitled to the presumption after presenting “credible evidence of an injury and of a work-related event which has the potential of causing the injury” (citation omitted)); see also *Murray v. DOES*, 765 A.2d 980, 983-84 (D.C. 2001) (noting without comment that a hearing examiner determined the claimant had not “presented any credible evidence” of an injury sustained at work, but reversing because the examiner’s “credibility determination” was in part based on clearly erroneous factual findings).

There is some additional support for an initial credibility determination moreover, in case law applying the federal Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C. §§ et seq., although the cases are not unequivocal. See *Bartelle v. McLean Trucking Co.*, 687 F.2d 34, 35-36 (4th Cir. 1982); but see *Bath Iron Works Corp v. Fields*, 599 F.3d 47, 55 (1st Cir. 2010) (“The determination that the employer has (or has not) produced sufficient evidence is not dependent on credibility.” (one citation omitted) (citing *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993))).

McCord v. DOES, No. 12-AA-152, Mem. Op. & J. at 5-6 (D.C. August 26, 2013).

We also note even if the ALJ afforded Claimant the presumption, and the Employer rebutted the presumption through the IME’s submitted into evidence, the credibility finding would still prove

lethal to Claimant's case, as in *McCord, supra*. A remand, as urged by the dissent, would be wholly unnecessary even if the ALJ erred in not affording Claimant the presumption at the initial stage, as only but one outcome would occur when the evidence was weighed without the benefit of the presumption, that of a denial of Claimant's claim. As the DCCA stated, we are not required to "remand in futility" as the credibility finding ultimately would prove fatal to Claimant's claim. See *Washington Metropolitan Area Transit Authority v. DOES*, 992 A.2d 1276, n 13 (D.C. 2010).

CONCLUSION AND ORDER

The findings of fact in the Compensation Order are supported by substantial evidence, and the conclusions reached by the ALJ flow rationally from them. Accordingly, the Compensation Order is affirmed.

So Ordered.

MELISSA LIN JONES, *dissenting*:

In the background section of the January 16, 2015 Compensation Order, the ALJ sets forth two events leading up to Ms. Rachel Storey's request for workers' compensation benefits (1) exposure to mold in January 2008 and (2) exposure to darkroom chemicals in March 2009. As a result of either or both of these events, Ms. Storey asserts she suffered a multi-system disorder.

The administrative law judge ("ALJ") identified the issues for resolution as

1. Whether claimant's alleged health conditions are causally related to work related activities that occurred in January 2008 and on March 20, 2009.
2. Determination of the nature and extent of claimant's disability, if any.

Storey v. Catholic University of America, AHD No. 12-306A, OWC No. 663766 (January 16, 2015), p. 2. From these words it is not clear whether the ALJ assessed accidental injury or legal causal relationship. Nonetheless, in either case, the conclusion that "[b]ased upon a review of the evidence in the record as a whole, claimant's alleged physical ailments and alleged disability did not arise out of or in the course of claimant's employment," *Id.* at p. 15, is not in accordance with the law.

To begin, the ALJ did not review the evidence in the record as a whole (or should not have). At the outset, the ALJ weighed Ms. Storey's evidence to determine her testimony was not credible, and based upon that weighing, the ALJ rejected the medical records based upon Ms. Storey's subjective complaints and history:

Inasmuch as the undersigned has found claimant not only to [be] incredible but to have intentionally provided false statements to employer and at the formal hearing before the undersigned, claimant's history as provided to the providers whose reports she relies upon to invoke the presumption cannot be found to be credible,

given her propensity to have a selective memory and make false statements. Thus, I have determined the record does not contain sufficient evidence to invoke the presumption of compensability under § 22 of the Act, D.C. Code 1991, as amended § 32-1521(1), as the record lacks *credible* evidence of an injury and of a work-related event which has the potential of causing the injury and/or disability. *Ferreira, supra at 659*. Without the benefit of the presumption and given the complete lack of credibility of claimant, it cannot be concluded that claimant has sustained any injuries that arose in and out of her employment.

Id. at p. 14. (Emphasis in original.) Even so, it remains unclear if the ALJ ruled Ms. Storey did not sustain an accidental injury or if Ms. Storey's accidental injury did not arise out of and in the course of her employment. Similarly, it is unclear whether the majority affirms a ruling that the record lacks credible evidence of an accidental injury or a ruling that the record lacks credible evidence sufficient to invoke the presumption of compensability that Ms. Storey's accidental injury arises out of and in the course of her employment.

Often it is written that the issues of accidental injury and injury arising out of and in the course of employment are inextricably intertwined; however, sometimes it is important to untwine those issues. Here, the members of the majority may agree that there is not sufficient evidence for the ALJ to find an accidental injury. I disagree.

The ALJ clearly did not believe Ms. Storey, and given the detailed justification for this credibility ruling, I am constrained to accept it. *See Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985). Nonetheless, even assuming for purposes of analysis of this particular issue that Ms. Storey was not credible in any way, there is objective proof of an accidental injury:

- An ultrasound showing right thyroid nodules, Claimant's Exhibit 31;
- A CT scan showing right thyroid nodules, Claimant's Exhibit 33;
- A CT scan showing mild maxillary sinus mucosal disease, Claimant's Exhibit 33;
- A physician's observation of "multiple stroke like episodes manifested by loss of mobility, staring, absence-like seizures, and slurred speech," Claimant's Exhibit 34;
- Lab tests showing the presence of IgG antibodies against aspergillus, penicillium, cladosporium, and chaetomium, Claimant's Exhibit 34;
- Blind testing for sensitivity to petrochemicals encompassing photo processing chemicals which resulted in "all of the signs and symptoms recorded in her long medical history including brain fog, muscle spasm, flushing, unexplainable crying, fatigue, and joint pain, tingling, weakness, numbness, headache, shortness of breath etc....," Claimant's Exhibit 34.

All that is required to prove an accidental injury is that something unexpectedly goes wrong with the human frame. *Washington Metropolitan Area Transit Authority v. DOES*, 506 A.2d 1127 (D.C. 1986). This brief review of just a few of Ms. Storey's exhibits is not intended to be exhaustive, but it clearly demonstrates she satisfied the requirement for an accidental injury as a matter of law. Thus, if the basis for the ALJ's denial of benefits is that Ms. Storey did not sustain an accidental injury, the Compensation Order must be reversed.

On the other hand yet reaching the same conclusion, if the basis for the ALJ's denial of benefits is that Ms. Storey did prove an accidental injury but her incredible testimony and the medical records relying on her subjective complaints and history are insufficient to invoke the presumption of compensability, the Compensation Order, again, must be reversed.

Pursuant to § 32-1521(1) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code § 32-1501 to 32-1545 ("Act"), a claimant may be entitled to a presumption that her claim "comes within the provisions of [the Act ("Presumption").] The Presumption is not a guarantee of compensation, but it is the starting point of any workers' compensation claim in the District of Columbia. In order to benefit from the Presumption, a claimant 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:

While the purpose and origin of the presumption make its scope somewhat obscure, some points are generally accepted. In order to benefit from the presumption, a claimant needs to make some "initial demonstration" of the employment-connection of the disability. 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 10.33 at 3-138 (1986) (hereinafter "LARSON"). The initial demonstration consists in providing some evidence of the existence of two "basic facts": a death or disability and a work-related event, activity, or requirement which has the *potential* of resulting in or contributing to the death or disability. See *Naylor v. Grove Construction Company*, H&AS No. 83-163, DOES Final Order at 8 (DOES, August 1, 1984). The presumption then operates to establish a causal connection between the disability and the work-related event, activity, or requirement. [Footnote omitted.] *Swinton v. J. Frank Kelly, Inc.*, 180 U.S. App. D.C. 216, 223, 554 F.2d 1075, 1082 (the "presumption applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim"), *cert. denied*, 429 U.S. 820, 50 L. Ed. 2d 81, 97 S. Ct. 67 (1976).

Ferreira v. DOES, 531 A.2d 651, 655 (D.C. 1987) (Emphasis added.)

Ferreira is the seminal case when it comes to the Presumption, and importantly, *Ferreira* does not establish a requirement that a claimant prove through credible testimony either a disability (which is distinguishable from an injury although it may require one) or work-related event, activity, or requirement in order to invoke the Presumption. To the contrary, in *Ferreira*, the hearing examiner had recommended the claim be denied because the claimant was not credible:

I conclude that claimant did not suffer a specific traumatic injury. In so finding, I conclude that claimant's testimony regarding the alleged unwitnessed work-injury is too inconsistent to be afforded any weight. Claimant's multiple statements regarding previous symptoms, the actual incident, whom she advised of the incident and how she felt afterwards are all inconsistent. Further, claimant's testimony regarding the alleged incident is contradicted by the credible testimony of Vincent Hilliard, Jonas Finch, Don Wilson and Dr. Feffer and the report of Dr. Rochester. Contrary to claimant's testimony, all of these witnesses stated that claimant did not indicate to them that she had suffered a specific work injury. Therefore, I conclude that there is no credible evidence of record upon which I can conclude that claimant suffered a specific traumatic injury. Since claimant's only argument is that she is entitled to benefits based upon a specific traumatic incident, I conclude that this claim should be denied.

Ferreira v. B&B Caterers, H&AS No. 82-227 OWC No. 0014472 (October 25, 1985). In response, the District of Columbia Court of Appeals reversed the denial.

The Court determined the Presumption had not been applied properly because despite the credibility ruling Ms. Ferreira had offered

more than enough evidence of the existence of the two basic facts necessary to trigger the presumption. First, petitioner indisputably suffered a severe disability. Second, the manifestation of petitioner's disability occurred in the course of her employment at B&B, and petitioner presented sufficient testimonial evidence of the lifting requirements of her work to generate a potential connection between the work-related activity and the disability.

Ferreira, 531 A.2d at 656. The Court remanded the matter to assess whether Ms. Ferreira's disability was employment-bred by requiring the employer rebut the Presumption:

The misfocus of the decision in this case can be appreciated by a summary of the strength of petitioner's prima facie showing of an employment-related injury. Thus, regardless of the exact date of the injury, petitioner was consistent in maintaining that the physical manifestations of her disability started in late October or early November while petitioner was in the sole employment of B&B. The lifting requirements of petitioner's job were severe enough that her supervisor promoted her in order to help alleviate some of the strain. After the severity of the injury became apparent, petitioner's supervisor recommended that she file a workers' compensation claim, and, in deposition testimony, he admitted that her disability may have been work-related. Finally, the four physicians who were primarily responsible for petitioner's treatment and one of the insurer's physicians indicated that lifting requirements on the B&B job at least potentially aggravated petitioner's disability.

With even less compelling evidence, the hearing examiner would have been required to apply the statutory presumption of compensability to this claim.

Indeed, the inquiry in this case should have been focused on whether the employer provided “substantial evidence” of a non-employment related basis to sever the potential employment connection petitioner manifestly proved.

The intervenors argue, however, that a substantially similar question was presented in *U.S. Industries, supra*, with a result contrary to the one we reach today. In *U.S. Industries*, a claimant alleged that as a result of lifting 500 pounds of duct work on November 19, 1975, he was permanently disabled. The Administrative Law Judge (“ALJ”) adjudicating the claim discredited the testimony and denied benefits. The United States Court of Appeals for the District of Columbia Circuit vacated the decision and the Supreme Court reversed. Interpreting the federal Longshoremen’s and Harbor Workers’ Compensation Act, ch. 509, 44 Stat. 1424 (1927) (codified as amended at 33 *U.S.C.* §§ 901-950 (1982)), the Supreme Court determined that the presumption of compensability in the federal act applied only to a “claim,” and a “claim” referred to the specific theory of employment causation the claimant made. Since the ALJ rejected the claimant’s one theory of causation, no presumption attached, and the claim was properly rejected.

Our interpretation of the meaning of “claim” under the District of Columbia Workers’ Compensation Act differs from the Supreme Court’s interpretation under the federal act. Under our Act, a “claim” means nothing more than a simple request for compensation which triggers the process of claim adjudication. [Footnote omitted.] 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.

* * *

We thus reverse and remand for further proceedings on the question of whether the employer can establish by substantial evidence the non-employment basis of petitioner’s disability.

Id. at 659-660. Even as an incredible witness, Ms. Ferreira had invoked the Presumption.

There also is support for the position that it is premature to weigh the credibility of evidence at all when invoking the Presumption. The District of Columbia Court of Appeals specifically has reasoned that it is improper to rule that a claimant has failed to establish an accidental work-related injury based solely upon a credibility finding:

[A]ssuming it was acceptable for the ALJ to weigh credibility at this early stage, it still was not proper for the ALJ to conclude from that determination that Ms. McCord “failed to establish that she sustained an accidental work related injury.” A general credibility determination, with nothing else, should not typically be

dispositive for a case at the presumption stage. See *McNeal v. District of Columbia Dep't of Emp't Servs.*, 917 A.2d 652, 657 (D.C. 2007) (holding that an ALJ's decision to credit the employer's version of events over the claimant's "did not displace the presumption" because "the testimony credible by the ALJ still established a work-related event"). An ALJ must go on to determine whether any credited testimony establishes the presumption.

McCord v. DOES, No. 12-AA-152, Mem. Op. & J. at 6 (D.C. August 26, 2013). Similarly in *Huggins v. DOES*, No. 11-AA-1158, Mem. Op. & J. (March 26, 2013), the Court cautioned that "using words like 'persuasive evidence' as the ALJ did risks exaggerating the claimant's initial burden of production, conflating that with the employer's rebuttal of the presumption and the claimant's resulting failure to meet his burden of persuasion." Admittedly, *McCord* and *Huggins* are unpublished decisions that do not rise to the level of precedent, but they are consistent with the Director's decision in *Johnson v. Omni Shoreham Hotel*, Dir. Dkt. No. 03-006, OHA No. 02-240, OWC No. 573065 (March 21, 2003).

Following a formal hearing, Judge Russell (then an ALJ) denied Mr. James K. Johnson's claim for benefits. Judge Russell did not believe Mr. Johnson's testimony:

I find that claimant's testimony generally is not credible, in light of the prior discussion concerning claimant's lying under oath about the circumstances surrounding his conversation with Mr. Day, which included fabricating the fact that his supervisor was present and additionally fabricating the fact that another co-worker was also present who was also his supervisor. Succinctly put, I do not accept anything that claimant says as evidence in support of his claim to have injured himself, including any statements that he may have made to the health care providers in order to attempt to qualify for workers' compensation benefits. I discredit his testimony regarding having sustained an injury at all, and discredit his testimony that any condition from which he suffers is of sufficient severity to interfere with his duties as a laundry runner. I find that claimant did not sustain an accidental injury arising out of and in the course of his employment, and therefore is not entitled to the benefits claimed.

* * *

D.C. Code §32-1521(2) provides claimant with a rebuttable presumption that the claim for workers' compensation benefits comes within the provisions of the Act. This presumption exists "to effectuate the humanitarian purposes" of the compensation statute, and evidences a strong legislative policy favoring awards in close or arguable cases. *Parodi v. D.C. Dept. Of Employment Services*, 560 A.2d 524 (D.C. 1989). See also, *Spartin v. D.C. Dept. Of Employment Services*, 584 A.2d 564 (D.C. 1990); and, *Muller v. Lanham Company*, Dir. Dkt. 8601, H&AS No. 85-36, OWC No. 0700456 (March 15, 1988).

Against claimant's testimony as described above, employer produced the testimony of Mr. Saddiqui and Ms. Jasquez, who both testified, credibly, consistently and without hesitation, that claimant's version of the conversation in

which he reported the injury is false, that no such three way conversation had ever occurred, and that Ms. Jasquez was not in any way a “supervisor” in relation to the claimant. Their testimony is corroborated by that of Mr. Day, who testified with equal credibility and conviction that he did have a conversation with the claimant about having sustained a work injury, but that no one else was present. Further, Mr. Day testified that claimant had told him that the injury had occurred several days prior to the conversation, and that he, that is, Mr. Day, provided claimant with a claim form and advised him to fill it out with his supervisor.

This testimony is sufficient to overcome the presumption that claimant had indeed sustained a work injury, because claimant is shown thereby to be lying under oath about a fundamental and significant event closely related to the compensability of a claim, to wit, the circumstances surrounding his reporting such an injury to his employer.

Employer having rebutted the presumption, the evidence must be weighed. In this case, on the one hand there is the claimant testifying to a conversation on the date of the alleged incident with a security guard, in front of two other people alleged by claimant to be his “supervisors”. On the other hand, there are three witnesses who deny that any such conversation took place, and one of whom states that a different conversation did take place, but without any one else present except the claimant and the security guard, and that the claimant stated that the injury was several days old at the time of the conversation. In weighing the testimony of three witnesses with no direct interest in the outcome of the case, who testified credibly and, most importantly, consistently with one another, against the testimony of an interested party whose version of events contains unexplained oddities (such as claiming that a co-worker is really a supervisor, or that he was reporting a work accident to a security guard while not one but two supervisors were allegedly right there in the room) leads me to reject claimant’s testimony and accept that of the three witnesses. Having so concluded, I find that claimant did not sustain the alleged work injury.

Johnson v. Omni Shoreham Hotel, OHA No. 02-240, OWC No. 573065 (December 31, 2002).⁴

On appeal, the Director reversed the denial of benefits because Mr. Johnson’s testimony was sufficient to invoke the Presumption even though Judge Russell did not find it credible:

In the case at bar, ALJ Russell acknowledged that the Act provides claimants with a presumption that the claim comes within the provisions of the

⁴ Previously in the same case, Judge Russell had denied Mr. Johnson’s claim on the grounds that he had not provided notice, “I found, in essence, that the claimant lied about the fundamental facts surrounding the conversation, and that he was advised by the security guard about how to report a work injury, that the security guard had no formal role in taking such reports, and that claimant had not filed such a report at any time.” *Johnson v. Omni Shoreham Hotel*, OHA No. 02-240, OWC No. 573065 (December 31, 2002). Similar to the Presumption found at §32-1521(1) of the Act, there is a presumption “[t]hat sufficient notice of such claim has been given,” §32-1521(2), and the Director reversed Judge Russell’s ruling. *Johnson v. Omni Shoreham Hotel*, Dir. Dkt. 02-062, OHA No. 02-240, OWC No. 573065 (December 3, 2002).

Act. Compensation Order at 4-5. While the ALJ did not specifically set out in his Order how the presumption of compensability applied under the facts of this particular case, he ruled that Employer rebutted the presumption. Compensation Order at 5. The Court of Appeals has previously ruled that every compensation order does not have to contain certain magic words in order to demonstrate that the examiner followed the statutory procedures. See *Waugh v. D.C. Department of Employment Services*, 786 A.2d 595, 601 (2001) (citing *Washington Hosp. Ctr. v. D.C. Department of Employment Services*, 744 A.2d 992, 997 (D.C. 2001)). The relevant question is not whether the examiner said he applied the statutory presumption, but whether in fact he properly did so. *Id.* The fact that ALJ Russell began by weighing Claimant's testimony demonstrates that he did not properly apply the presumption. Once Claimant presented testimony that he had hurt himself at work on August 20, 2001, he was entitled to the presumption as a matter of law. *Ferreira, supra.* However, the ALJ in this case did not properly apply the presumption because he weighed Claimant's testimony prior to giving him the benefit of the presumption.

The Director determines that Claimant has provided sufficient evidence to support the presumption of compensability in this case. In this regard, Claimant testified that his job as a laundry runner consisted of pushing linen carts. He further testified that on August 20, 2001, he suddenly experienced pain in his feet and lower back. This event, as described by Claimant, is sufficient to trigger the presumption. The burden then shifted to Employer to produce substantial evidence to rebut the presumption. *Ferreira, supra.*

Johnson v. Omni Shoreham Hotel, Dir. Dkt. No. 03-06, OHA No. 02-240, OWC No. 573065 (March 21, 2003). The Director went on to rule that because Mr. Johnson's employer had not rebutted the Presumption as a matter of law, Mr. Johnson's claim was compensable:

The ALJ ruled that Employer rebutted the statutory presumption of compensability. The ALJ relied upon the testimony of Employer's three witnesses in support of his conclusion in this regard. These witnesses essentially testified that Claimant had not reported the injury the way he testified that he had done so at the hearing. The ALJ found that this testimony as a whole was sufficient to overcome the presumption that Claimant had indeed sustained a work injury because he was lying under oath about his reporting of the injury to Employer which the ALJ noted was a fundamental and significant event closely related to the compensability of the claim. Compensation Order, at 5. The ALJ found that Claimant was not a credible witness and he therefore discredited Claimant's testimony regarding having sustained an injury at all. Compensation Order, at 4.

As noted above, the Director has determined that the ALJ erred in failing to properly apply the presumption in the immediate case. Assuming, arguendo, that the ALJ had properly applied the presumption of compensability in this case, the Director disagrees with the ALJ's conclusion that Employer rebutted the presumption. In this regard, Employer produced no evidence to establish that the

accidental injury did not occur on August 20, 2001. Claimant properly points out in his brief that in the best light, all Employer's evidence may show is that Claimant may not have reported his injury in accordance with proper procedure. Employer's witnesses did not testify that Claimant's injury did not occur as he described. The circumstances surrounding Claimant's reporting of his injury is not evidence to support the conclusion that Claimant's work accident did not occur. The testimony from Employer's witnesses in this case was not specific or comprehensive enough to rebut the presumption. Along those same lines, Employer produced no evidence to establish that there was no potential connection between Claimant's disability and his work injury.

The ALJ's factual finding that Employer rebutted the presumption of compensability is not supported by substantial evidence in the record. Because Employer failed to rebut the presumption of compensability, Claimant's claim is compensable as a matter of law. The case must be remanded for findings of fact on all remaining issues.

Id.

Alaska has the same Presumption as the District of Columbia:

In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

(1) the claim comes within the provisions of this chapter;

Alaska Stat. § 23.30.120. Based upon this exact same language as the Act, the Alaska Supreme Court has ruled weighing the credibility of evidence is not a consideration when invoking the Presumption:

In a workers' compensation case, the Board uses a three-step presumption analysis to evaluate the compensability of a worker's claim. At the first step, the employee must attach the presumption of compensability by establishing a link between his employment and the injury. "For purposes of determining whether the claimant has established the preliminary link, only evidence that tends to establish the link is considered — competing evidence is disregarded." The Board "need not concern itself with the witnesses' credibility" when "making its preliminary link determination."

In this case, the Board improperly considered McGahuey's credibility when it examined the evidence at the first stage of the analysis. Relying on dicta in *Osborne Construction Co. v. Jordan*, the Commission wrote that it was "a close question whether the [B]oard erred in determining that McGahuey failed to raise the presumption of compensability because of 'his lack of credibility to effectively raise the presumption.'" To the extent the Commission suggested that the Board could consider credibility at the first stage, it was mistaken. We have

repeatedly stated that the Board cannot consider credibility at the first stage of the presumption analysis.

* * *

If an employer rebuts the presumption of compensability, at the third step of the analysis the burden shifts to the employee to prove his claim by a preponderance of the evidence. At the third stage, the Board was permitted to weigh the evidence and consider McGahuey's credibility.

McGahuey v. Whitestone Logging, Inc., 262 P.3d 613, 620 (Alaska 2011) (Footnotes omitted.)

The initial threshold to invoke the Presumption is low. It does not permit weighing the evidence until after the employer has offered substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (Citations omitted.)

The majority relies on *Warwick, Hare, Perrin*, and *Murray* for the requirement that credible evidence is necessary to invoke the Presumption. The majority's reliance is misplaced.

Warwick did not rely on a requirement of credible evidence for invoking the Presumption; *Warwick* vacated a compensation order because an ALJ had not applied the Presumption properly. Moreover, *Warwick* inaccurately quotes *Ferreira* for the proposition that "in order to benefit from the presumption of compensability set forth at § 32-1521 of the Act, a claimant initially must show some credible 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. *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987)." *Warwick v. Howard University*, CRB No. 14-112, AHD No. 12-440A, OWC No. 691925 (February 10, 2015). Nowhere in *Ferreira* did the Court require "some credible evidence" to invoke the Presumption. To the contrary, in *Ferreira* it was the agency that had required credible evidence:

- "DOES determined that petitioner failed to establish by credible evidence that a 'specific traumatic injury' at B&B Caterers ("B&B") resulted in her severe cervical spine disability," *Ferreira*, 531 A.2d at 652;
- "In rejecting petitioner's claim, the hearing examiner stated: 'I conclude that there is no credible evidence of record upon which I can conclude that claimant suffered a specific traumatic injury,'" *Id.* at 656;
- "Thus, the agency's denial of petitioner's claim on the grounds that there was no credible evidence of a 'specific traumatic injury' was erroneous as a matter of law," *Id.* at 657. (Footnote omitted.)

and the Court reversed.

Hare is a mental-mental case. As such and as acknowledged in that case, there is a different test for invoking the Presumption in psychological injury cases:

It is settled law in this jurisdiction that an employee's claim is presumed to come within the provisions of the Act absent evidence to the contrary. D.C. Official Code § 32-1521(1) (2001). More specifically however, for an injured worker alleging a mental-mental claim, the statutory presumption of compensability is invoked

by showing a psychological injury and actual workplace conditions or events which could have caused or aggravated the psychological injury. The injured worker's showing must be supported by competent medical evidence. The ALJ, in determining whether the injured worker invoked the presumption, must make findings that the workplace conditions or events existed or occurred, and must make findings on credibility. If the presumption is invoked, the burden shifts to the employer to show, through substantial evidence, the psychological injury was not caused or aggravated by workplace conditions or events. If the employer succeeds, the statutory presumption drops out of the case entirely and the burden reverts to the injured worker to prove by a preponderance of the evidence that the workplace conditions or events caused or aggravated the psychological injury.

Ramey v. Potomac Electric Power Company, CRB No. 06-038, AHD No. 03-035C, OWC No. 576531, at 6 (July 24, 2008).

Hare v. Tito Construction, Inc., CRB No. 10-155, AHD No. 10-201, OWC No. 663250 (September 19, 2011). The language of the *Ramey* test specifically requires credible evidence; the language of the test for invoking the Presumption in physical injury cases does not include that requirement.

Perrin does not support a requirement of credible testimony to invoke the Presumption. To the contrary, in *Perrin*, the Director ruled Administrative Law Judge Linda F. Jory had erred by denying Ms. Dorothy Perrin the benefit of the Presumption based upon inconsistencies in Ms. Perrin's testimony:

On this issue, Administrative Law Judge stated that because of the many inconsistencies between Claimant's testimony and the medical evidence of record, Claimant's own subjective opinion concerning how her knees felt before and after the fall, is not reliable credible evidence to establish an injury due to an aggravation of her symptomatic pre-existing degenerative arthritic knees. Thus, the Administrative Law Judge concluded, "the first prong of the threshold requirement needed to invoke the presumption cannot be met."

Upon reviewing this matter, the Director must conclude that the Administrative Law Judge did err in not applying the statutory presumption of compensability. Claimant's testimony, along with the emergency room records of

July 5, 2000, are sufficient evidence of record to show that a work related activity had the potential of contributing to a disability. Thus, Claimant should benefit from the presumption of compensability.

The Director makes this determination well aware that the Administrative Law Judge did a quite extensive and thorough job in discussing the abundant evidence submitted by Employer sufficient to rebut the presumption, “assuming arguendo” that Claimant had met her burden of making an initial showing of an injury with the potential of causing a disability. Although it may well be true that Employer “successfully would have rebutted the presumed relationship”, the Administrative Law Judge erred by first not simply applying the presumption, before weighing the evidence of record. As a result, the matter must be remanded to the Administrative Law Judge to analyze this case by first starting with the presumption of compensability. See *Murray v. Department of Employment Services*, 765 A.2d 980 (D.C. 2001).

Perrin v. Staff Builders, Dir. Dkt. No. 02-077, OHA No. 02-292, OWC No. 557924 (February 11, 2003).

In a compensation order on remand, Judge Jory “adopt[ed] the Director’s conclusion that claimant’s testimony along with the emergency room records of July 5, 2000 are sufficient evidence of record to show that a work related activity had the potential of contributing to a disability and claimant should benefit from a presumed relationship between the two, i.e., the compensability of her claim.” *Perrin v. Staff Builders*, Dir. Dkt. No. 02-077, OHA No. 02-292, OWC No. 557924 (March 5, 2003). The ALJ still denied Ms. Perrin’s claim for relief, but it was only after the ALJ properly afforded the claimant the Presumption, the employer rebutted the Presumption, and the ALJ weighed the evidence that the Director affirmed the denial of benefits. *Perrin v. Staff Builders*, Dir. Dkt. No. 03-035, OHA No. 02-292, OWC No. 557924 (December 16, 2003).

Finally, the majority characterizes *Murray* as follows:

In *Murray*, the court found fault *not* with the ALJ’s denying the benefit of the presumption because the ALJ doubted the claimant’s veracity; rather, the error it found was that the lack of credibility finding was premised upon a demonstrably erroneous reading of the evidence. The court remanded the matter for further consideration as to whether, in the absence of this erroneous reading of the record, the ALJ would reach the same conclusion.

The majority mischaracterizes the Court’s ruling in *Murray*.

In *Murray*, the Court reversed a denial of benefits based upon a credibility ruling at the initial stage of the Presumption:

Murray argues first that the agency failed to accord him the benefit of the statutory presumption of compensability. In the District of Columbia, there is a

statutory presumption that a claim for injuries suffered by a worker on the job comes within the provisions of the Act, absent evidence to the contrary. *Ferreira v. District of Columbia Dep't of Employment Servs.*, 531 A.2d 651, 655 (D.C. 1987) (citing D.C. Code § 36-321 (1)). The presumption then operates to establish a causal connection between the disability and work-related event. *Id.* (citing *Swinton v. J. Frank Kelly, Inc.*, 180 U.S. App. D.C. 223, 554 F.2d 1075, 1082, cert. denied, 429 U.S. 820, 50 L. Ed. 2d 81, 97 S. Ct. 67 (1976)). To trigger the presumption, the claimant must provide some evidence of “a death or disability and a work-related event, activity, or requirement which has the *potential* of resulting in or contributing to the death or disability.” *Id.* (citation omitted). If such evidence is produced, the burden shifts to the employer to produce “substantial evidence showing that the death or disability did not arise out of and in the course of employment.” *Id.* (citations omitted) (internal quotations omitted).

In this case, Murray produced some evidence in support of the two basic factors required to trigger the presumption. This evidence consisted of his own testimony concerning his fall on the job while engaged in the performance of work for his employer, corroborated to some extent by his co-worker to whom he reported the incident immediately, and his medical records of his treatment that day and subsequently. The hearing examiner acknowledged that there is a presumption of compensability, but declined to give Murray the benefit of it “because his incredible testimony of an injury, harm, or a work related activity with the potential of causing an injury or harm [is] not enough [to] invoke the presumption of compensability.” In other words, the hearing examiner found that Murray had not presented any credible evidence that he sustained an accidental injury on the day in question arising out of and in the course of his employment.

Murray v. DOES, 765 A.2d 980, 983 (D.C. 2001) (Emphasis added.) The Court then went on to criticize the ALJ’s credibility ruling as based upon “clearly erroneous factual determinations.” *Id.* at 984. Finally, the Court indicated that the Presumption applied and it had not been rebutted:

The Act must be construed liberally for the benefit of employees and their dependents. *Ferreira, supra*, 531 A.2d at 655 (citations omitted). To benefit from the presumption of compensability and shift the burden to the employer to provide substantial evidence that the disability did not arise in the course of employment, the claimant only needs to make an initial demonstration of an employment connected disability. Intervenors argue that even assuming that the presumption should have been applied, they rebutted the presumption. Again, they rely upon Silva’s testimony that he did not see the fall and did not hear anything to indicate that Murray was falling. For the reasons previously stated, Silva’s testimony was not specific and comprehensive enough to rebut the presumption that Murray fell at work and injured himself as he claims he did.

Id. at 985.

The Court did not remand the matter to assess whether the Presumption applied. The Court ruled the Presumption did apply as a matter of law, and on remand, in *Murray v. Paul Brothers Oldsmobile*, OHA No. 94-223, OWC No. 242625 (March 31, 2003), the ALJ “conclude[d] claimant suffered an injury on September 25, 1992 that arose out of and in the course of his employment” because the employer had not rebutted the Presumption:

Here the undersigned adopts the Court’s determination that claimant’s testimony and the reports his treating physician are sufficient to invoke the presumption of compensability.

Pursuant to the prevailing case law in this jurisdiction, the burden then shifts to employer to produce substantial credible evidence to sever the now presumed connection between claimant’s particular injury and the work related event or occurrence. Employer produced evidence of inconsistencies in claimant’s testimony with his testimony at the deposition as well as his failure to fully disclose information concerning his prior work related back and leg injuries. The Court noted employer’s evidence and although it was found to impact on the credibility of claimant’s testimony as a whole, the Court found no reason to reject the reports of claimant’s treating physician which likewise indicated claimant sought treatment for a September 1992 work injury to his back.

Therefore the undersigned adopts the Court’s analysis of the evidence and finds that employer’s evidence was not sufficient to sever the presumed nexus between claimant injury and employment. Thus, claimant enjoys the benefit of the statutory presumption of compensability. *Whittaker v. DOES*, 668 A. 2d 844 (D. C. App. 1995).

Id.

Contrary to the majority’s position, credible testimony is not required to invoke the Presumption; however, even assuming credible evidence is required, there is sufficient evidence in the record to substantiate mold in Ms. Storey’s workplace, evidence separate and apart from Ms. Storey’s testimony:

- Photographs, Claimant’s Exhibit 48;
- Video, Claimant’s Exhibit 49;
- A report by Applied Environmental identifying mold spores, Claimant’s Exhibit 95; and
- Dr. Stephen McKenna’s testimony, Hearing Transcript, pp. 229-233.

Again, this review of the record is not exhaustive, but it is enough to satisfy a work-related event as a matter of law.

When considering the second basic fact required to trigger the Presumption, Catholic University of America confounds general causation with specific causation. Catholic University of America asserts

The Administrative Law Judge correctly analyzed and applied the facts to the issue of whether the presumption was triggered by claimant's evidence in this case. A review of the reports of Dr. Solomon, Dr. Shoemaker and Dr. Lieberman all explicitly rely for their opinions on the "factual" information relayed to them by claimant – namely that she experienced a plethora of symptoms of which she complained to them when she was exposed to mold and chemicals. A review of the treatment records reveals that this is simply incorrect. Given that claimant's allegations regarding the onset of symptoms enjoys no support in the records, and given that she was not a credible witness, the ALJ's [*sic*] found that claimant failed to establish that she had a disability that could have been caused by mold exposure.

It is well settled in the District that rejection of a medical opinion is warranted when the factual information on which the opinion is based is premised on false or inaccurate information. *Golding-Alleyne v. DOES*, 980 A.2d 1209 (DC 2009). In *Golding-Alleyne*, the court upheld the rejection by an ALJ of an opinion of a treating physician. In articulating their holding, the court stated that even in the absence of a contrary medical record, "[w]hen the medical records call into question the basis and reliability of the opinion rendered by the treating physician, the ALJ may be justified in finding that opinion unpersuasive[.]" *Id.* at 1214. Similarly, the Compensation Review Board has specifically affirmed the rejection of a treating physician's opinion where it was based in part on evidence from claimant [*sic*] who the ALJ determined was not credible. *Bowser v. Clark Construction and Specialty Risk Management Services*, 2014 D.C.Wrk.Comp. LEXIS 287.

Claimant argues that regardless of claimant's lack of credibility, the opinions of Dr. Vance, Dr. Thrasher and Dr. Lieberman were sufficient to raise the presumption. With respect to the "opinions" of Drs. Thrasher and Vance this contention should be rejected out of hand as neither Dr. Vance nor Dr. Thrasher is a medical doctor. Accordingly, neither expert offered an opinion on causation and neither expert is qualified to offer an opinion on the issue of whether Ms. Story's alleged disability is causally related to a work exposure to mold.

That leaves only the opinion of Dr. Lieberman who first saw claimant in 2014, 5 years after her last exposure to the work environment at Catholic University. Claimant argues that Dr. Lieberman does not rely for his opinions on Ms. Storey's credibility. This assertion is simply unsupported. A review of claimant's own recitation of the basis for Dr. Lieberman's opinion includes recitations of problems reported by Ms. Storey to Dr. Lieberman and to her treating physicians. Claimant's application for review, p.30-34. He specifically notes at page 66 that he relies for his causation opinion on, among other things,

the history she gave to him and the medical records that also contains [*sic*] her history. A close review of Dr. Lieberman's deposition testimony reveals egregious factual errors that further undermine his credibility as well as that of Ms. Storey. He claims her symptoms began as soon as she arrived at Catholic University. Lieberman depo. P. 46-47. There is no support for this assertion in the medical records. It comes only from Ms. Storey.

Statement of Points and Authorities in Support of Opposition to Claimant's Application for Review, unnumbered pp. 7-9.

Properly applying the criteria, Dr. R. Leonard Vance and others testified that exposure to mold has the potential to cause or to contribute to the disability:

- Dr. Vance testified, "[the number of spores found in Ms. Storey's workplace] demonstrates that there were significant quantities of mold present in the area in the rooms where the samples were – were collected, and those kinds of levels, in some people, might be sufficient to cause the kinds of health problems that Ms. Storey exhibited. So these are levels that would threaten the health of some individuals in populations that had these exposures. They're dangerous levels of mold." Claimant's Exhibit 44, p. 51;
- Dr. Vance wrote, "The scientific literature shows that mold can have long lasting health effects even if the patient is removed from the environment." Claimant's Exhibit 36, p. 4;
- Dr. Jack Dwayne Thrasher wrote, "Although all molds are allergenic, some types of mold have long been associated with other adverse human health effects, *e.g.*, neurotoxicity." Claimant's Exhibit 35, p. 3; and
- Dr. Allan D. Lieberman testified he and three others wrote a paper titled "The Adverse Effects of Indoor Mold" published in the Journal of Nutrition and Environmental Medicine in 2004. Claimant's Exhibit 45, pp. 53-54.

At this initial stage Ms. Storey was not required to prove mold caused her disability. She only had to demonstrate mold in her workplace has the potential to cause her disability. Based upon this evidence, the Presumption is invoked as a matter of law.

Similarly, there is sufficient evidence in the record to substantiate the presence of chemicals in Ms. Storey's workplace. That evidence, too, is separate and apart from Ms. Storey's testimony:

- Photographs, Claimant's Exhibit 48;
- Video, Claimant's Exhibit 49; and
- Mr. Will Wood's March 30, 2009 report acknowledging photography chemicals in Room G01A, Claimant's Exhibit 96.

Exposure to these chemicals, whether labeled toxic or not, is a work-related event, and

- Dr. Jack Dwayne Thrasher opined exposure can cause sensitivity to chemicals, Claimant's Exhibit 35;
- Dr. Vance asserted exposure to open chemical containers can result in sequella including respiratory irritation, dermatitis, and skin sensitivity, Claimant's Exhibit 36, p. 5;
- Dr. Adam Wolff asserted his opinion regarding Ms. Storey's diagnosis is based upon over 10 years of experience handling patients with similar diagnoses, Claimant's Exhibit 37; and
- Dr. Barbara A. Solomon's "attendance to the yearly meetings of Environmental Medicine where methods of diagnosing and treating . . . chemical allergies or sensitivities equipped [her] with the ability to apply diagnostic and treatment techniques to the various conditions that [she] saw as a practitioner," Claimant's Exhibit 38.

At this stage, Ms. Storey was not required to prove the chemicals in her workplace caused her disability. She only had to demonstrate chemicals in her workplace have the potential to cause her disability.

If Catholic University of America has submitted sufficient evidence to rebut the Presumption, so be it; if the evidence when weighed compels a particular result by a preponderance, so be it, but an end-result cannot drive the process. The law requires this matter be reversed and remanded because despite the ALJ's credibility ruling, as a matter of law there is sufficient evidence that Ms. Storey has sustained an accidental injury and that she has invoked the Presumption.