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. 04-065

FRANK RAWLINGS,

Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Fred D. Carney, Jr.
AHD No. 04-123, OWC No. 590774

Heather C. Leslie, Esquire, for the Petitioner

Detria C. Liles, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, SHARMAN J. MONROE, and LINDA F. JORY, *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 May 28, 2004, the Administrative Law Judge (ALJ) denied Petitioner's claim for benefits under the Act in connection with a claimed psychological injury. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ's decision is not supported by substantial evidence, in that according to Petitioner, there was no medical evidence that the claimed stressors were such that an average worker of normal sensitivities, not predisposed to psychological injury would not have suffered the same or similar psychological injury as that sustained by Petitioner, and that the decision was not in accordance with the law because, in Petitioner's view, the ALJ applied a test of "unusualness" to the facts, which test, Petitioner asserts, is contrary to the Act.

Respondent opposes the appeal, asserting that the ALJ properly applied the applicable legal standards to assessing the facts in this case, and denied the claim because the stressors as found by the ALJ, based upon substantial evidence, failed to meet the objective test for invoking the presumption of compensability as expressed by *Dailey v. 3M Company*, H&AS No. 85-259 (May 19, 1988). Although neither party to this appeal explicitly so noted, said test was considered and approved for application by this Agency in *Spartin v. District of Columbia Dep't. of Employment Services*, 584 A.2d 564 (D.C. 1990).

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.

Turning to the case under review herein, Petitioner alleges that the ALJ's decision, based as it is upon a determination that Petitioner had failed to present sufficient evidence to invoke the

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

presumption of compensability, is not in accordance with the law. Petitioner makes two separate but related arguments in support of this position; first, that the ALJ erred by analyzing the facts with reference to whether the events as found by the ALJ using a standard including assessment of whether the events or stressors were in some way "unusual", and second, that the issue presented in this case is purely a "medical" question, and that the only medical evidence presented which addresses whether the *Dailey* standard has been met was that of Petitioner's psychiatrist, Dr. Hackney, who in Petitioner's view offered an unrebutted medical opinion that meets the *Dailey* test.[2]

Regarding the question of "unusualness", the CRB has recently addressed this argument, and stated as follows:

> [W]hile the *Dailey* test does not by its terms have an explicit requirement of "unusualness", it does by implication assume that there is something out of the ordinary, either intrinsically, or in the frequency, persistence, severity, or intensity, about the claimed stressors, at least in connection with their capacity to produce incapacitating anxiety or emotional harm. There would be no point to such a test in the first instance if normal, common stressors inherent in any or most employment were sufficient for compensability purposes. All that would be required in the absence of such characteristics would be straightforward cause and effect, the rejection of which as the standard in this special class of cases [i.e., psychological injury cases] is the basis of the *Dailey* test.

Brown v. Bloomberg, LLP, CRB No. 05-45, OHA/AHD No. 02-392, OWC No. 568405 (Decision and Order January 10, 2006), at 3. Although that case left open whether such "unusualness" might be inappropriate to consider in cases involving employments which are by their nature "high stress" and which subject workers on an ongoing and routine basis to stressors which could cause emotional or psychological harm to an average worker of normal sensitivities, Petitioner makes no such claim in this appeal, and made no such claim before the ALJ. Thus, we perceive no error in the ALJ's discussing the lack of "unusual" stressors in this case.

Regarding the second allegation of error, that being that the ALJ inappropriately denied the claim because there was no medical evidence in contravention of the alleged causal relationship, under *Dailey* analysis, we respectfully must point out that the ALJ found that Petitioner's evidence was insufficient to invoke the presumption, because, as the ALJ discussed, the opinion of Dr. Hackney included the fact that such an average worker would have a similar response where, among other things, the individual "believ[ed] that one of them [meaning the misbehaving teen and pre-teen passengers on the bus that Petitioner was operating] may actually kill the other" (Compensation Order, page 7; CE 1, Deposition of Dr. Hackney, page 25 – 26), while in his findings of fact

[2] Petitioner also alleges as error that the ALJ "incorrectly stated that Mr. Rawlings had treatment from October 2000 to September 16 2003 from Dr. Hackney. This is incorrect. Mr. Rawlings received an evaluation from Dr. Epstein in 2001. Mr. Rawlings only began treatment with Dr. Hackney after the September 16, 2003 [work related] incident." Petitioner's Memorandum of Points and Authorities in Support of Application for Review (Petitioner's Memorandum), page 6. While review of the record supports Petitioner's point that the ALJ misstated which doctors had treated Petitioner for his acknowledged pre-existent post traumatic stress disorder (PTSD), in that the ALJ's ruling that Petitioner failed to invoke the presumption did not rely in any way, and was not based upon, the incorrect fact that Dr. Hackney had a pre-existent and ongoing relationship with Petitioner, we find such error to be harmless.

concerning the nature of the "actual" conditions of the employment, no such life-threatening conditions were found. Rather, the ALJ found that, after stopping the bus which Petitioner was operating, in order to restore order among a group of passengers including a boy appearing to be about 15 years old and a boy appearing to be about 7 years old, and being accidentally struck in the mouth by a collapsed "Tote" umbrella,[3] "the stress factors which claimant encountered ... [were] a disruptive youth, loud talking and physical fighting which resulted in physical trauma to claimant." He went on to find these "stress factors, though unpleasant, were common to the task of operating public transportation and not such that a person who was not predisposed to emotional injury would suffer a disabling emotional condition." Compensation Order, page 3. That factual finding has not been challenged on appeal.

Further, review of those parts of the evidentiary record to which Petitioner directs our attention at pages 3 and 4 Petitioner's Memorandum makes evident that the perception of a life-threatening circumstance, rather than the actual existence of such a circumstance, formed the basis of Dr. Hackney's opinion that a "normal" or "average" person, not predisposed to psychological injury, could suffer the same (PSTD) or similar psychological injury suffered by Petitioner.

As a corollary to his argument, Petitioner asserts that the determination of whether a worker's evidence is sufficient to pass the *Dailey* test is one that requires evaluation of medical evidence in the nature of "expert testimony". Petitioner's Memorandum, page 2. While it is undeniably true that expert psychiatric or psychological opinion is highly useful in assisting an ALJ in applying the test, the test is a legal one, established in this jurisdiction by the fact finding and policy making processes of this Agency, and reviewed, considered and approved by the Court of Appeals, and hence is a mixed issue of law and fact, to which medical opinion is obviously relevant, but to which it is not dispositive. From Dr. Hackney's testimony, for example, it is apparent that he views the medical causal relationship between the events on the bus and the recurrence or aggravation of the pre-existent PTSD as clear, and he views the "perception" of a life threatening circumstance to be one of if not the single most relevant medical causes. However, *Dailey* asks the further question as to the objective reality of the perceived threat, which is a condition with which, at least on this record, Dr. Hackney does not concern himself. This is not necessarily surprising, in that the *Dailey* test was constructed not by medical professionals for any treatment purposes, but arose from the legal system for policy purposes.

Lastly, after determining, properly in our view, that Petitioner had failed to meet the *Dailey* test, he went on to weigh the evidence again, without reference to the presumption. This step was unnecessary, because, if the *Dailey* test is not met, the inquiry ends, and the claim is non-compensable. In that the ALJ's conclusion remained the same, *i.e*, the claim was not compensable, we do point out that it would have been error to grant the claim following this exercise. If the actual conditions as found by the ALJ based upon substantial evidence in the record are not such that an average worker of normal sensitivities, not predisposed to emotional or psychological injury, could be expected to suffer the same or similar psychological injury as that claimed by a claimant, then, under the Act, the claim must be denied. Consistent with that, the place to "weigh" the medical

[3] We note that there is no claim that Petitioner suffered anything more than a minor physical trauma, if any, from the umbrella, nor is their any claim that the sequalae of suffering that physical injury either caused, or had the potential to cause, PTSD in an average worker of normal sensitivities, not predisposed to suffer an emotional or psychological injury.

evidence on this potentiality question, at least initially, is in the presumption stage. As was recently explained by the CRB:

> [T]he *Dailey* test is part of "presumption" analysis. That is, it must be satisfied in order to invoke the presumption of compensability. It is, as has been noted, a special test which is appropriate to this special class of cases, and which is resolved as the first step in the presumption part of the overall causal relationship issue. As such, it *replaces* the normal "*some* evidence of potential causation" as the trigger for the presumption, with a test that requires the ALJ to make a factual conclusion as to the issue of potential causation. While we are not aware of any existing case authority addressing the specific quantum of evidence required at this stage, we must posit the existence of the test to be a *limiting* factor, the application of which will reduce the number of claims that would otherwise, in the absence of the test, be compensable, rather than an expansive one whose purpose would be to include cases that might otherwise be excluded from compensability. Because of this, we conclude that this initial stage of the analysis places a burden, by the preponderance of the evidence, upon claimants to establish both the nature of the actual conditions or stressors to which a claimant has been subjected, and whether those stressors have the requisite potential to cause the same or similar condition in an average worker of normal sensitivities, not otherwise predisposed to emotional or psychiatric injury.

Brown v. Bloomberg, LLP, supra, page 6 – 7. Although we recognize the complexity to the proceedings that this might add, requiring as it does findings of fact based upon the record as a whole as part of the initial presumption analysis, we can see no better way to proceed in this special class of cases in which there is a test requiring those factual findings before proceeding to whether in a specific given case there is an actual causal relationship between the employment and the claimed injury. Thus, while there is no possibility on this record of conflicting outcomes between the pre-presumption analysis and the outcome following weighing the evidence as a whole, the proper place for the ALJ to have considered all the record evidence of relevance to the *Dailey* test must be at this initial stage.

CONCLUSION

The Compensation Order of May 28, 2004 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of May 28, 2004, is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

_____January 19, 2006_____
DATE