

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-170

KEVIN ROBIN,
Claimant–Petitioner,

v.

WMATA and SEDGWICK CMS,
Employer-Respondent.

Appeal from a Compensation Order by
The Honorable Leslie A. Meek
AHD No. 12-211, OWC No. 686074

David J. Kapson, Esquire for the Petitioner
Sarah O. Rollman, Esquire for the Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and JEFFREY P. RUSSELL,¹ *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.²

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On July 25, 2010, Mr. Kevin Robin began working for WMATA as a bus driver. On November 9, 2011, Mr. Robin’s bus was parked when an automobile “came in contact with the left rear bumper of the bus”³ causing a 1½-inch scratch in the bus’ bumper. Although there were 22 passengers on the bus at the time of impact, Mr. Robin is the only person who filed a claim for injuries, and although the bus was equipped with a Drive-Cam that activates “when it senses an impact that

¹ Judge Russell has been appointed a temporary Compensation Review Board (“CRB”) member pursuant to the Department of Employment Services’ Director’s Administrative Policy Issuance No. 12-01 (June 20, 2012).

² Jurisdiction is conferred upon the CRB pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, (“Act”), 7 DCMR §250, *et seq.*, and the Department of Employment Services’ Director’s Administrative Policy Issuance 05-01 (February 5, 2005).

³ *Robin v. WMATA*, AHD No. 12-211, OWC No. 686074 (September 20, 2012), p. 2.

occurs at ten or more miles per hour; hard breaking; and turning a corner at ten or more miles per hour,”⁴ the November 9, 2011 incident did not activate the Drive-Cam.

In November 2009, in addition to working for WMATA, Mr. Robin also worked as a security guard with Knight Protective Services. As a result of the bus accident, Mr. Robin alleged he was unable to work for Knight Protective Services or WMATA.

Dr. Chevonne T. Salmon, Mr. Robin’s treating physician, released Mr. Robin to return to full duty work three (3) times before Mr. Robin actually did return to work. Mr. Robin was capable of returning to fully duty with WMATA as of December 13, 2011, but he did not do so until January 15, 2012.

The parties sought a formal hearing to resolve the following issues:

1. Is Claimant’s current medical condition causally related to the work incident of November 9, 2011?
2. What is the nature and extent of Claimant’s current disability if any?
3. Has Claimant voluntarily limited his income? ^[5]

In a Compensation Order dated September 20, 2012, an administrative law judge (“ALJ”) denied Mr. Robin’s request for temporary total disability benefits from November 10, 2011 to January 14, 2012 and temporary partial disability benefits from January 15, 2012 to January 25, 2012. She granted his request for medical expenses.

On appeal, Mr. Robin argues he proved his entitlement to workers’ compensation benefits. He asserts WMATA’s evidence was insufficient to rebut the presumption of compensability because it failed to offer an opinion from an independent medical examination physician. Mr. Robin also asserts it was error for the ALJ to determine he was capable of returning to work as of December 13, 2011 but not award wage loss benefits from the date of his accident to that date. Finally, if the presumption of compensability did fall from the case, Mr. Robin contends he showed by a preponderance of the evidence that his symptoms are causally related to his on-the-job accident and that those symptoms kept him off of work because

[t]he ALJ performs most of the analysis for medical casual [*sic*] relationship, but never specifically makes a finding as to whether the low back and leg symptoms are causally related to the accident. In denying Mr. Robin’s claim for wage replacement benefits, not only did the ALJ not give proper weight to the medical evidence, but made a amounts [*sic*] to a nature and extent determination using the analytical framework of medical casual [*sic*] relationship.^[6]

⁴ *Id.* at pp. 2-3.

⁵ *Id.* at p. 2.

⁶ Memorandum of Points and Authorities in Support of Claimant’s Application for Review, p. 9.

Mr. Robin requests the CRB reverse the Compensation Order and grant his claim for relief.

In contradistinction to Mr. Robin's position, WMATA argues the ALJ properly determined Mr. Robin was not disabled after December 13, 2011 because the presumption of compensability is irrelevant to the ALJ's finding that Mr. Robin had not proven his entitlement to wage loss benefits. WMATA requests we affirm the Compensation Order because it is supported by substantial evidence.

ISSUE ON APPEAL

1. Is the September 20, 2012 Compensation Order on Remand supported by substantial evidence and in accordance with the law?

ANALYSIS⁷

Pursuant to §32-1521(1) of the Act, a claimant may be entitled to a presumption of compensability ("Presumption").⁸ In order to benefit from the Presumption, the claimant initially 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.⁹ "[O]nce 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."¹⁰ There is no dispute the ALJ appropriately ruled that the Presumption properly had been invoked.

Once the Presumption was invoked, it was WMATA's burden to come forth with substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."¹¹ Only upon a successful showing by WMATA would the burden return to Mr. Robin to prove by a preponderance of the evidence, without the benefit of the Presumption, his injuries arose out of and in the course of employment.¹²

⁷ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand 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 contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁸ Section 32-1521(1) of the Act states, "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter."

⁹ *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

¹⁰ *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000).

¹¹ *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

¹² See *Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003).

In addition to voluntary limitation of income (which the ALJ did not address), both causal relationship and nature and extent were in contention at the July 5, 2012 formal hearing; however, the ALJ conflated these two issues in ruling

Claimant's continued work with Knight [P]rotective Services and his medical release to return to work by December 13, 2011 are enough to rebut the presumption. The presumption now falls from the case and the burden of proof rests on the Claimant with the evidence to be assessed by the preponderance of the evidence standard.

Claimant's work with Knight Protective Services during November and December, 2011 [footnote omitted] shows he was capable of work and shows he was not totally temporarily disabled as claimed during the period of November 9, 2011 to December 17, 2011.

Claimant was deemed capable of returning to work on December 13, 2011 by Dr. Salmon. (CE 3, p.51). Claimant is not entitled to TTD or TPD wage replacement benefits from December 13, 2011 to January 15, 2012.

Claimant asserts he was unable to return to work at Knight Protective Services until January 25, 2012. He states that because he was injured and unable to work, he was unable to take a firearm re-qualification test that is required for employment with Knight Protective Services. This assertion is rejected as the evidence shows Claimant was capable of work despite the injuries he suffered as a result of the work incident.

Based upon the evidence of record, I find Claimant is not entitled to any wage replacement benefits. Claimant is entitled to reimbursement of medical expenses incurred.^[13]

Regarding the issue of causal relationship, in order to rebut the Presumption, "an employer only [needs] to offer 'substantial evidence' to rebut the statutory presumption of compensability, [the employer does not need] to disprove causality with absolute certainty."¹⁴ It is unclear how an ability to return to work by December 13, 2011 tends to prove or disprove the causal relationship between Mr. Robin's injuries and the stipulated accident. Similarly, Mr. Robin's ability to work for Knight Protective Services, his release to return to work by Dr. Salmon, and his inability to take a firearm requalification test address the nature and extent of his disability (for which there is no presumption) not the causal relationship between his injuries and the bus accident.

Particularly because of the burdens of proof involved in addressing these diverse issues, they must be isolated and resolved independently. Thus, although it may appear that in awarding medical

¹³ *Robin, supra*, at pp. 6-7.

¹⁴ *Washington Hospital Center*, 744 A.2d at 1000.

expenses the ALJ has determined Mr. Robin's injuries are causally-related to his on-the-job accident, the failure to independently analyze the issues of causal relationship and nature and extent prevents us from making such an assumption and requires we remand this matter.

CONCLUSION AND ORDER

The September 20, 2012 Compensation Order is not in accordance with the law because the issues of causal relationship and nature and extent have been unacceptably intertwined. The September 20, 2012 Compensation Order is VACATED, and this matter is remanded for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

November 29, 2012
DATE