

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-124

**VIVIAN SIMMONS,
Claimant–Petitioner,**

v.

**GIANT FOODS, LLC and MAC RISK MANAGEMENT,
Employer/Carrier-Respondents.**

Appeal from a September 9, 2013 Compensation Order by
Administrative Law Judge Anand K. Verma
AHD No. 13-205, OWC No. 696543

Michael D. Dobbs, for the Petitioner
Lisa A. Zelenak,¹ for the Respondents

Before: HENRY W. MCCOY, HEATHER C. LESLIE, and MELISSA LIN JONES, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND AND FACTS OF RECORD

This appeal follows the issuance on September 9, 2013 of a Compensation Order (CO) from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). In that CO, the Administrative Law Judge (ALJ) denied Claimant's request for temporary total disability benefits from July 13, 2012 to October 9, 2012.²

¹ On November 18, 2013, Lisa A. Zelenak filed an entry of appearance as counsel for Employer/Insurer. Kevin E. O'Neill appeared on behalf of Employer/Insurer at the formal hearing and filed Respondent's Opposition to Petitioner's Application for Review. Attorney O'Neill did not file a notice withdrawing from this case.

² *Simmons v. Giant Foods, LLC*, AHD No. 13-205, OWC No. 696543 (September 9, 2013)(CO).

Claimant was initially hired by Employer as a courtesy clerk/bagger but was also moved to other positions to fill-in for absent employees. On July 13, 2012, Claimant was assigned to maintain the salad bar making sure it was fully stocked. As Claimant was in the process of cutting up fruits and vegetables, her supervisor came up behind her speaking loudly about the trash piling up, this startled Claimant causing her to fall. The ALJ found that Claimant slammed her back and neck when she fell.

After first leaving Claimant when she fell to the floor, Claimant's supervisor later returned and called an ambulance which transported Claimant to Howard University Hospital. The emergency room (ER) report listed Claimant's chief complaint as a panic attack with no mention of her falling and no pain to the neck and back. Claimant was discharged with an excuse from work until July 23, 2013.

Claimant had an orthopedic evaluation on August 1, 2012 with Dr. Eric Dawson. Dr. Dawson recorded how Claimant injured herself, conducted a physical examination, and determined she twisted her torso followed by an impact blow where she suffered a sprain and possible annular disc injury. Dr. Dawson also diagnosed a dorsal L5 impingement and ordered x-rays of the lumbar spine, but no approval was given for x-rays and none were taken. Claimant was taken off work and not released to her position as a courtesy clerk until October 9, 2012.

A formal hearing was held on July 11, 2013 to adjudicate Claimant's claim for temporary total disability from the date of injury until she was released to return to work. Relying primarily on the emergency room report and the lack of diagnostic tests, the ALJ determined that Claimant did not sustain an injury on July 13, 2013 that arose out of and in the course of her employment and denied the claim for relief. Claimant timely appealed with Employer filing in opposition.

On appeal, Claimant argues the ALJ erred by failing to apply properly the presumption of compensability because she made the initial showing needed to invoke the presumption. Employer counters the CO should be affirmed.

ANALYSIS

The scope of review by the CRB, 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 CO are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.³ See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a CO 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.

³ "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 International v. DOES*, 834 A.2d 882 (D.C. 2003).

Pursuant to § 32-1521(1) of the Act⁴, a claimant is entitled to a presumption of compensability, “once an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act.”⁵ The threshold for invoking the presumption is 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.⁶

It is Claimant’s argument that the ALJ erred in not properly applying the presumption of compensability to the facts in this case. While the CO sets forth the state of the law in this jurisdiction as it applies to the showing a claimant needs to make in order to invoke the presumption of compensability, the ALJ never makes an initial determination that the presumption has been triggered, but rather assesses the record evidence as a whole, with primary reliance on the ER report, to conclude as a matter of law that Claimant did not make a “*prima facie* case” of sustaining an accidental lumbar injury. In doing so, the ALJ committed error and we must remand.

The ALJ, in a confusing manner, expresses the initial issue for resolution as “Did Claimant sustain an injury on July 13, 2012 and is that injury medically causally related to her employment.” This is actually two separate issues. In fact, the initial issue is contained in the ALJ’s ultimate finding at the end of the findings of fact that “[C]laimant did not sustain a lumbar strain on July 13, 2012 which arose out of and in the course of her employment.” Stated more appropriately, the question is whether Claimant sustained an accidental work injury that arose out of and in the course of her employment, with the injury in question being a lumbar strain.

Claimant testified that she was at work on July 13, 2012 when her supervisor came up from behind and startled her to the extent that she fell backward slamming her back and neck. The ALJ specifically found

As Claimant tried to cut fruits and vegetables, her supervisor Dionne Holliday walked in behind her and abruptly said something about the piled up trash, which startled her. As a result, Claimant slammed her back and neck. (fn. 2) (HT 22).⁷

⁴ 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.”

⁵ *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000).

⁶ *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

⁷ CO, p. 3. In fn. 2, the ALJ stated “On cross examination, Claimant testified that after she was startled by Dionne, she fell back in the water on the floor and then she ran out. (HT 35).” In reading Claimant’s cross examination testimony, it is apparent, although not clear from this awkwardly drafted sentence, that the person who “ran out” was the supervisor and not the Claimant.

The ALJ also found that it was the supervisor who called the ambulance that transported Claimant to the hospital.

While a direct finding was made as to the manner in which the accidental work injury occurred which basically parrots Claimant's direct testimony, the ALJ made the following contradictory credibility finding:

Claimant's testimonial demeanor and presentation were unimpressive in that her testimony on the causality of her neck and back pains was generally disjointed, confusing and incredible.⁸

Although an ALJ's credibility determinations often are entitled to deference⁹, credibility determinations, like all other findings of fact, must be supported by substantial evidence in the record when reviewed as a whole.¹⁰ Given the obvious contradiction between the findings of fact and the credibility determination, the credibility determination is not supported by substantial evidence and must be given further consideration upon remand.

In further support of her showing of an accidental injury arising out of and in the course of her employment, Claimant also submitted not only the ER report, which made no mention of the fall and back injury, but also the August 1, 2012 orthopedic report of Dr. Dawson. While the ALJ focused primarily on the ER report and its treatment of Claimant's panic attack, the ALJ also discredited Dr. Dawson's report because it came two weeks after the date of the work incident and the doctor's assessment being based on Claimant's subjective complaints rather than being corroborated by diagnostic tests. The ALJ's interpretation of Dr. Dawson's initial report constitutes a misapprehension of the substance and meaning of a key piece of evidence.

Dr. Dawson noted that Claimant reported with a chief complaint of "pain, spasm and stiffness to the lower back" and that this was "rather severe, marked and continuing." His recitation of how the injury occurred is very similar to Claimant's testimony and as found by the ALJ and he noted that Claimant developed this pain and discomfort after she fell. Dr. Dawson examined the cervical spine, where he found pain, spasm and stiffness, and the lumbar spine, which he found "very stiff and spastic musculature of the paraspinous muscles." Dr. Dawson determined Claimant had "a torsional moment of injury followed by an impactive blow where she suffered a sprain and possible annular disc injury."

As stated above, in order for the presumption to arise, Claimant must offer some evidence of the existence of two basic facts¹¹ and this evidence has to be credible.¹² Claiming she sustained a disabling lumbar strain on July 13, 2012, Claimant testified to being startled, falling

⁸ CO, p. 2.

⁹ *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985).

¹⁰ See *Davis v. Western Union Telegraph*, Dir. Dkt. 88-84, H&AS No. 87-751, OWC No. 098216 (March 4, 1992).

¹¹ *Ferreira, supra*, 531 A.2d at 655.

¹² See *Murray v. DOES*, 765 A.2d 980, 983 (D.C. 2001).

on her back, which she sought treatment for after two weeks with Dr. Dawson. The ALJ found the work-related incident occurred as Claimant testified, specifically repeating Claimant's words that she "slammed her back and neck."

The ALJ's finding fault in Dr. Dawson's diagnosis for being based on Claimant's subjective complaints as opposed to objective diagnostic tests is without merit. As Dr. Dawson noted in his first report and subsequent follow-ups, he ordered x-rays of the lumbar spine but they were never approved. However, as he also noted, his examinations of Claimant's lumbar spine were "hands-on", thus the pain, stiffness, and spasms he reported were as the result of physical manipulation of the lumbar area and not based on Claimant's subjective complaints.

The ALJ has made contradictory findings of fact with regard to whether Claimant sustained an accidental injury arising out of and in the course of her employment. On remand, the ALJ shall review the evidence anew and make consistent findings of fact in order to make an appropriate determination as to whether the presumption has been invoked. Once that determination is made, and if found to be invoked, the ALJ shall proceed to determine whether the presumption has been rebutted and proceed accordingly.

CONCLUSION AND ORDER

The September 9, 2013 Compensation Order is not supported by substantial evidence in the record and is not in accordance with the law and therefore is REVERSED AND REMANDED for further consideration.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

December 17, 2013
DATE