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 No. 05-258

NKUSI THEONASTE,

Claimant–Respondent,

V.

HYATT REGENCY WASHINGTON,

Self-Insured Employer–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 04-108, OWC No. 590537

Michael D. Dobbs, Esquire, for the Petitioner

Matthew Peffer, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY, and FLOYD LEWIS, *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 (2005), 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' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

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 July 29, 2005, the Administrative Law Judge (ALJ) granted Claimant-Respondent's (Respondent's) claim for benefits in connection with an alleged work-related injury. Employer-Petitioner (Petitioner) now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the Compensation Order is not in accordance with the law because, in Petitioner's view, the ALJ failed to address the legal issue of whether Respondent's injury was the result of "horseplay," of which conduct he was the instigator, and whether said conduct barred recovery for the injury. Respondent did not file any opposition to this appeal.

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 is contrary to established precedent, found in *Williams v. Upperman Plumbing Corp.*, Dir. Dkt. No. 88-07, H&AS No. 86-716 (November 23, 1988), adopting the test set forth for altercation cases in *Bird v. Advance Security*, H&AS No. 84-69 (June 7, 1985) to the effect that "aggressors" in cases of a workplace altercations may not recover compensation benefits under the Act. Petitioner asserts that this principle is applicable not only to workplace altercations, but also to horseplay cases, citing 2 *Larson's Workers' Compensation Law*, § 23.04, page 23 – 24 (1999).

Petitioner argues that the ALJ impermissibly failed to specifically address its argument that the incident leading to Respondent's injury was the result of horseplay, and is hence not compensable, and that the failure to address this issue is reversible error.

Review of the Compensation Order reveals that the parties stipulated that "claimant's injury arose out of and in the course of his employment"; the Compensation Order's recitation of this stipulation is corroborated by review of the hearing transcript (HT) on page 6. Review of Petitioner's opening statement reveals that Petitioner's counsel made no reference to such a defense. Rather, Petitioner's defense was that the claim of an injury occurring was fabricated. HT 14 – 15. In that both altercation and horseplay defenses are in the nature of "deviation" from employment, this stipulation renders moot Petitioner's arguments: by stipulating that the claimed injury "arose out of and in the course of his employment", Petitioner has stipulated that, if the injury occurred, it is compensable.

Even in the absence of these stipulations, the only discussion of horseplay and its potential effect on this claim is found in Petitioner's closing argument, where counsel asserted that Respondent and a co-worker were "probably" "horsing around", that "neither one of them wanted to admit to it" because in Petitioner's counsel's view, the co-worker would get in trouble for such conduct, and Respondent "knows that horseplay would deny him benefits". HT 120 – 123. Whether this constitutes an abandonment of the "it never happened" defense, or an attempt by Petitioner to raise a new defense, or both, is not clear. However, even if it is a belated attempt to raise a horseplay-related defense, counsel's argument before the CRB in this appeal is starkly different than the one made at the formal hearing. That is, to the extent that Petitioner raised a horseplay defense in closing argument, the transcript shows that Petitioner's counsel at that time was arguing that any injury arising from horseplay is, *ipso facto*, non-compensable, a very different argument than that raised in the AFR and Memorandum of Points and Authorities in Support of its Application for Review (Memorandum), wherein Petitioner asserts that "aggressors" or "instigators" of horseplay are barred from recovery.

In that Petitioner never raised this defense (that is, the instigator defense) or argument at the formal hearing, the ALJ's failure to address it was not error. Further, the ALJ's failure to address the generalized horseplay defense raised by Petitioner's counsel in closing argument was not error, because the argument as framed by counsel at that time (as opposed to the argument raised in the AFR and Memorandum), that any horseplay-related injury is non-compensable, is a misstatement of the law, even if one were to accept the arguments raised in the AFR and Memorandum. Further, there was simply no evidence to support a conclusion that Respondent was an instigator of the alleged horseplay. Rather, the only evidence of horseplay, the written statement of a second co-worker, was as follows: "They were horsing around. Theo (claimant) grabbed Tim (Jones) by the arm—Tim reversed the play. I am not sure who started it." CE 6, cited at Memorandum, page 6 and read into the record at HT 106. There is nothing else in the record which sheds any light upon the question of who, if anyone, instigated the alleged horseplay, and hence neither the ALJ nor this body are presented with the question of whether horseplay cases are to be resolved under the *Bird* test, as posited by Petitioner in the AFR and Memorandum.

CONCLUSION

The Compensation Order of July 29, 2005 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of July 29, 2005 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

September 29, 2005
DATE