GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
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CRB No. 06-006

SUSAN TIMM,

Claimant – Respondent,

v.

RAPIDIGIM AND FEDERAL INSURANCE CO.,

Employer - Petitioner

Appeal from a Compensation Order of
Administrative Law Judge E. Cooper Brown
OHA No. 03-501, OWC No. 585871

Gerard J. Emig, Esquire for the Petitioner

Robert C. Baker, Esquire, for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE AND JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the 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 (1994), 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 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C.

Pursuant to 7 D.C.M.R § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

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 September 30, 2005, the Administrative Law Judge (ALJ), concluded Respondent's back injury, consisting of a herniated disc at the L4-5 level, is causally related to her work injury and her claim for disability benefits due to said injury falls within the jurisdiction of the D.C. Workers' Compensation Act as her back injury arises out of and in the course of her employment as a traveling computer software programmer.

As grounds for this appeal, Petitioner alleges the ALJ's finding that D.C. Code §32-1503(a-3) does not preclude a finding of District of Columbia jurisdiction is neither supported by substantial evidence nor in accordance with the Law. Petitioner also asserts the ALJ's finding that Respondent's disability is due to the work is neither supported by substantial evidence nor in accordance with the applicable law. Respondent has filed a response asserting the ALJ's finding that Respondent was in fact a traveling employee and therefore her injury covered is in accordance with this jurisdiction's law. Respondent further asserts the ALJ properly found Petitioner had not rebutted the presumption afforded her under the Act and his finding that her disability is causally related to the work injury is supported by substantial evidence.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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. D.C. Official Code § 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. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this panel are bound 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.

In the instant matter the ALJ properly recited the "positional-risk test" articulated in *Grayson v. D.C. Dept. of Employment Services*, 516 A.2d 909 (DC 1986) which is that an injury arises out of employment so long as it would not have happened *but for* the fact that conditions and

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

obligations of the employment placed claimant in a position where he was injured. *See Clark v. D.C. Dept. of Employment Services*, 743 A.2d 722, 727 (D.C. 2000) The ALJ also properly noted that "under the positional-risk standard, the occurrence of employee injuries sustained off the work premises, while en route to or from work, know as the "coming and going rule" generally will be held not to fall within the category of injuries arising "in the course of employment", citing *Grayson*.

The ALJ noted that pursuant to the Court of Appeals decision in *Kolson v. D.C. Dept. of Employment Services*, 699 A.2d 357 (D.C. 1997), the Court not only adopted the "traveling employee" exception, the Court recognized that there is a presumption that a claim comes within the provisions of the Act and adds that the presumption was "designed to effectuated the humanitarian purpose of the statute. . .", *citing Ferreira v. D. C. Dept. of Employment Services*, 531 A.2d 651 (DC 1987). The ALJ relied also on the *Kolson* Court's citation of cases which demonstrated that the traditional meaning of "arising in the course of employment" generally is not followed in traveling employee cases and a traveling employee may be compensated for an injury even though it took place off the work premises, while the employee was going to or coming from work". CO at 7. The Panel agrees this premise is consistent with Professor Arthur Larson's treatise, who as the ALJ notes has stated:

> Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown.

See 2 Larson, Workers Compensation Laws §25.01.

The ALJ made specific findings of fact regarding Respondent's employment circumstances which the Panel finds have not been contradicted by Petitioner. Specifically, the ALJ found that pursuant to the employment contract, Respondent was required to travel to and stay at locations designated by Petitioner in order to perform the consulting work for which she had been hired, to take place on the premises of Petitioner's clients. Respondent's first assignment was consulting with the American Council for Education (ACE) in Washington, D.C. At the time of the assignment Respondent was advised by Petitioner that she would have to move to the Washington, DC area and be expected to remain there for approximately six months. For several weeks Respondent lived in a hotel close to ACE. Petitioner paid for the hotel, provided Respondent with additional money as a per diem for meals and living expenses and covered her expenses in flying back and forth to her home in Florida.

The ALJ found that after several weeks, Petitioner advised Respondent it wanted to change her living arrangement in an effort to reduce expenses related to her employment in Washington, Petitioner agreed to let Respondent's husband and dog accompany her for the duration of her consulting assignment with ACE to live in an apartment selected and paid for by Petitioner. The ALJ further found Respondent maintained her residence in Florida. Respondent began taking the Metro to work. While commuting to ACE's office via the Metro, on July 11, 2002, Respondent injured her back while climbing up escalator stairs.

Applying D.C. Official Code §32-1503 and §32-1521 to the employment and travel facts of the instant matter, the ALJ determined the circumstances of Respondent's employment provided an exemption to the "coming and going rule" and that her employment had the potential to cause a back injury or aggravate a back injury. Having thoroughly reviewed the evidence of record, the Panel concludes the ALJ's invocation of the presumption is supported by substantial evidence.

The ALJ further found petitioner had failed to rebut the presumption that operates to establish a causal connection between the disability alleged and the employment[2]. In so concluding, the ALJ found Petitioner had not submitted any medical evidence or expert medical opinion of its own that might rebut Respondent's invocation of the presumption but relied instead on Respondent's medical records, while challenging the credibility of Respondent's testimony. The ALJ specifically noted Respondent's MRI taken prior to the July 11, 2002 accident did not demonstrate the L 4-5 disc herniation requiring surgery that the subsequent MRI taken after the work injury revealed. *See* CE Nos. 12 & 13. Absent any expert opinion or contradictory medical evidence, the Panel must agree that the ALJ's conclusion that the Petitioner failed to rebut the existing presumption of compensability is supported by the evidence of record. In light of the fact that the ALJ's credibility determinations are to be given special deference, (*see Lincoln Hockey, LLC v. District of Columbia Dept. of Employment Services*, 831 A. 2d 9113 (D.C. 2003), the Panel finds the ALJ's decision in accordance with the law.

CONCLUSION

Having reviewed the record evidence, the Panel agrees the findings of fact and conclusions of law contained in the Compensation Order are supported by substantial evidence of record and the ALJ committed no error of law.

ORDER

The Compensation Order issued on September 30, 2005 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY
Administrative Appeals Judge

February 2, 2006
DATE

[2] *Ferreira v. D. C. Dept. of Employment Services*, 531 A.2d 651 (DC 1987*); Waugh v. D.C. Dept. of Employment Services*, 786 A.2d 595, 600 (D.C. 2001).