

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD

2011 JUL 25 AM 11 08

COMPENSATION REVIEW BOARD

CRB No. 11-045

TODD ALLEN GRABER,
Claimant-Petitioner,

v.

SEQUOIA RESTAURANT/ARK POTOMAC CORP. and CHUBB GROUP INSURANCE CO.,
Employer/Carrier-Respondent.

Appeal from an Order by
The Honorable Heather C. Leslie
AHD No. 10-063, OWC No. 662653

Joseph Veith, Esquire for the Petitioner
Charles Midkiff, Esquire for the Employer/Carrier-Respondent
Frank Morris, Esquire for the Employer-Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY, and LAWRENCE D. TARR, *Administrative Appeals Judges*.

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

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("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 Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

Mr. Todd Allen Graber has a history of alcoholism including drinking on the job as a server for Sequoia Restaurant ("Sequoia"). On August 9, 2009, Mr. Graber was drinking alcohol on the job and was intoxicated.

On that day, Mr. Graber exchanged heated words with a co-worker, Mr. Mehdi Brewer. Mr. Graber and Mr. Brewer were separated by another co-worker, Mr. Bulent Ucar.

Mr. Brewer and Mr. Graber resumed their professional duties. When Mr. Brewer was walking into the service area (away from Mr. Graber), Mr. Graber struck Mr. Brewer in the back of the head. In response, Mr. Brewer turned and punched Mr. Graber. Mr. Graber has no memory of the event, but it was captured on security video.

Both men were fired. Mr. Graber was fired for consuming alcohol while at work and for fighting with a co-worker.

As a result of his injuries, Mr. Graber sought an award of temporary total disability benefits from August 9, 2009 to the date of the formal hearing and continuing. Following a formal hearing, his request was denied.

After reciting in detail the purported facts of the case from a perspective clearly favorable to his claims, Mr. Graber asserts on appeal that the administrative law judge ("ALJ") erred in failing to analyze the presumption of compensability in conjunction with his case. He also argues that the ALJ erred in finding he was the aggressor and that in doing so the ALJ injected an element of fault into the workers' compensation system. Next, Mr. Graber takes exception to the ALJ's failure to draw a negative inference from allegedly spoliated evidence. Finally, regardless of whether or not his injuries are compensable under the Act, Mr. Graber argues he is entitled to relief for retaliatory discharge.

In response, Sequoia asserts the Compensation Order is supported by substantial evidence and must be affirmed. Sequoia argues the aggressor defense was applied properly, as was the essence of the presumption of compensability.

On the issue of retaliatory discharge, Sequoia filed a separate Memorandum of Points and Authorities. Sequoia argues that even in the absence of a specific finding regarding retaliatory discharge, Mr. Graber is not entitled to relief because he was discharged for a legitimate reason and because he is totally disabled.

ISSUES ON APPEAL

1. Was the presumption of compensability properly applied?
2. Were Mr. Graber's injuries occasioned solely by his intoxication or solely by a willful intent to injure Mr. Brewer?
3. Does the aggressor defense impermissibly bar Mr. Graber's recovery under the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* ("Act")?
4. Did the ALJ err in not drawing a negative inference from the overwritten portions of the surveillance video?

5. Is Mr. Graber entitled to recover for retaliatory discharge?
6. Are the findings of fact and conclusions of law contained in the April 13, 2011 Compensation Order supported by substantial evidence in the record?

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence¹ in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.² Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order 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.³

THE PRESUMPTION OF COMPENSABILITY AND INTOXICATION

The Act contains several presumptions:

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;
- (2) That sufficient notice of such claim has been given;
- (3) That the injury was not occasioned solely by the intoxication of the injured employee; and
- (4) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.⁴

When the issue to be decided is causal relationship, in order to benefit from the presumption of compensability, 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. *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987). Once the presumption of compensability is invoked, it is the employer'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." *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

¹ "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott, supra*.

² Section 32-1521.01(d)(2)(A) of the Act.

³ *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁴ Section 32-1521 of the Act.

Only upon a successful showing by the employer does the burden return to the claimant to prove by a preponderance of the evidence, without the benefit of the presumption of compensability, the injuries arise out of and in the course of employment. See *Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003).

This burden shifting scheme for causal relationship is well established at this juncture, but not all of the presumptions in the Act utilize this same scheme. Sections 32-1521(3) and 32-1521(4) of the Act must be read in conjunction with §32-1503(d):

Liability for compensation shall not apply where injury to the employee was occasioned solely by his intoxication or by his willful intention to injure or kill himself or another.

In other words, it is presumed that a work-related injury is compensable unless intoxication or a willful intention to injure or kill oneself or another is the sole cause of the injury. If either exception applies, the injury does not arise out of the employment and is not compensable.

There can be no dispute that the ALJ's finding that Mr. Graber was intoxicated at the time of his injury on August 9, 2009 is supported by substantial evidence. What is absent from the Compensation Order is an analysis as to whether Mr. Graber's injuries solely are the result of intoxication or solely are the result of a willful intention to injure Mr. Brewer, as opposed to whether Mr. Graber's injuries are proximately caused by either exception.

Mr. Graber was injured not as a result of intoxication but as a result of being punched. That much is clear. What remains unsettled is whether Mr. Graber's injury solely is the result of a willful intention to injure Mr. Brewer. Ordinarily, such a determination would require we remand this matter for the ALJ to make the necessary findings regarding whether Mr. Graber's injury solely is the result of a willful intention to injure Mr. Brewer; however, this claim is not one predicated exclusively on intoxication. This matter also involves a claimant-aggressor.

THE AGGRESSOR DEFENSE

In his Memorandum of Points and Authorities, Mr. Graber reweighs the evidence in an attempt to convince us that he was not the aggressor. The ALJ, however, considered the evidence in the record as a whole pursuant to the *Bird* test⁵ and determined:

[I]t is clear to the Undersigned that the Claimant was the aggressor on August 9, 2009. Under the *Bird* analysis, the Undersigned does find that the nature of the Claimant's employment does require regular contact with his co-workers, including Mr. Brewer which can cause a strain on emotions increasing workplace friction. However, the Claimant fails the second prong of the *Bird* test.

⁵ See *Williams v. Upperman Plumbing Corp.*, Dir. Dkt. No. 88-07, H&AS No. 86-716, OWC No. 103221 (November 23, 1988) (adopting the test set forth for altercation cases in *Bird v. Advance Security*, H&AS No. 84-69, 015644 (June 7, 1985) to the effect that in cases involving workplace altercations, aggressors may not recover compensation benefits under the Act.)

The surveillance footage the Undersigned reviewed (as well as the corroborating witness testimony) shows Mr. Brewer walking away from the Claimant when the altercation occurred. Indeed, in the instant before the Claimant pushed or struck the back of Mr. Brewer's head, Mr. Brewer was clearly walking away from the Claimant and had his back fully towards the Claimant. The Claimant chose to come from behind Mr. Brewer while he was walking away and physically attack Mr. Brewer. As such, the Claimant can clearly be labeled the aggressor.

This finding is also supported by the testimony of the Claimant's credible co-workers who were present at the restaurant on the date of the injury. Although the exact verbage [*sic*] used between the Claimant and Mr. Brewer in the moments before the actual physical altercation is unclear, all witnesses agreed that they had begun to separate and walk in different directions. Their testimony is consistent with the surveillance video which reveals that Mr. Brewer was, in fact, walking away. The Claimant chose to follow Mr. Brewer and strike him in the back of the head. As the Claimant has no memory of the incident, he was unable to recall the exact events and refute any of the testimony of the witnesses or to give a clear picture of the substance of the communication right before the physical altercation.^[6]

There is substantial evidence in the record to support the finding that the work-related altercation was over: Mr. Graber and Mr. Brewer walked in different directions, physically had separated, and had resumed their respective duties when Mr. Graber struck Mr. Brewer in the back of his head from behind. At the risk of being redundant, the CRB is constrained to uphold a Compensation Order 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.⁷ Because the ruling that Mr. Graber was the aggressor is supported by substantial evidence, this tribunal simply cannot review and reweigh evidence anew as Mr. Graber would prefer.⁸

In addition, Mr. Graber argues that the aggressor defense inserts into the Act an impermissible element of fault. We disagree.

Although workers' compensation generally is a no-fault system, in specific instances such as intoxication, willful misconduct, and the aggressor defense, there is an element of fault that takes the activity and its consequences beyond the employment situation. Mr. Graber's argument may have been more persuasive if the altercation had been an uninterrupted one; however, because

⁶ *Graber v. Sequoia Restaurant/Ark Potomac Corp.*, AHD No. 10-063, OWC No. 662653 (April 13, 2001) p.5.

⁷ *Marriott, supra*.

⁸ Mr. Graber complains that the ALJ failed to analyze evidence provided by Mr. Nils Thomsen; however, there is sufficient evidence to support the findings of fact and conclusions of law, and the ALJ was not required "inventory the evidence and explain in detail why a particular part of it was accepted or rejected." *Sturgis v. DOES*, 629 A.2d 547, 554 (D.C. 1993).

"Mr. Brewer was clearly walking away from the Claimant and had his back fully towards the Claimant [and because Mr. Graber] chose to come from behind Mr. Brewer while he was walking away and physically attack Mr. Brewer,"⁹ the situation was a willful intent to injure another that degenerated into an altercation of private animosity and vengeance with no work connection.

SPOLIATION AND THE NEGATIVE INFERENCE

Spoliation of evidence incorporates two sub-categories: the deliberate destruction of evidence and the simple failure to preserve evidence. Although a party's bad faith destruction of a evidence relevant to proof of an issue gives rise to a strong inference that production of the evidence would have been unfavorable to the party responsible for its destruction, in a situation involving unintentional destruction or failure to preserve evidence, the fact-finder may, but is not required to, draw an adverse inference.¹⁰

There is no evidence that Sequoia intentionally, deliberately, or in bad faith destroyed any videotapes from the morning of August 9, 2009. To the contrary, the ALJ credited the evidence that the earlier portions of the August 9, 2009 videotape were not overwritten in bad faith.¹¹ Under these circumstances, although the ALJ was permitted to draw reasonable inferences from the evidence presented,¹² she reasonably elected not to draw any negative inferences against Sequoia.

RETALIATORY DISCHARGE

Mr. Graber is correct that there can be a finding of retaliatory discharge in the absence of a compensable claim:

It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter. Any employer who violates this section shall be liable to a penalty of not less than \$100 or more than \$1,000, as may be determined by the Mayor. All such penalties shall be paid to the Mayor for deposit in the special fund as described in §32-1540, and if not paid may be recovered in a civil action brought in the Superior Court of the District of Columbia. Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination; provided, that if such employee ceases to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and

⁹ *Graber, supra*, at 5.

¹⁰ *Battocchi v. Washington Hospital Center*, 581 A.2d 759, 765 (D.C. 1990).

¹¹ *Graber, supra*, at 6.

¹² See *George Hyman Construction Co. v. DOES*, 498 A.2d 563, 566 (D.C. 1985).

compensation. The employer alone and not his carrier shall be liable for such penalties and payments. Any provision in an insurance policy undertaking to relieve the employer from liability for such penalties and payments shall be void.^{13]}

If testimony alone is sufficient to invoke the protection of §32-1542 of the Act, a compensable claim *per se* is not required to invoke that protection.

In this case, however, the ALJ made a specific finding that Mr. Graber “was fired from his employment for breaking company rules. EE -- 1. Specifically, the Claimant violated section 3 and 7 by consuming alcohol while at work and fighting with a co-worker.”¹⁴ This determination is predicated upon and supported by the record evidence as a whole. Again, although there may be evidence to support a contrary position, it is beyond the authority of the CRB to modify a determination that is supported by substantial evidence.¹⁵

CONCLUSION AND ORDER

The presumption of compensability was applied properly. Although Mr. Graber’s injuries were not occasioned solely by his intoxication, Mr. Graber was the aggressor in non-work-related altercation generated by private animosity and vengeance. As such, his claim is barred.

Even though Mr. Graber’s claim is not compensable, retaliatory discharge remained a viable claim. Nonetheless, the finding that Mr. Graber was terminated for reasons unrelated to his workers’ compensation claim is supported by substantial evidence.

Finally, the ALJ did not err in not drawing a negative inference from the overwritten portions of the surveillance video.

The findings of fact and conclusions of law contained in the April 13, 2011 Compensation Order supported by substantial evidence in the record. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES
Administrative Appeals Judge

July 25, 2011

DATE

¹³ Section 32-1542 of the Act.

¹⁴ *Graber, supra*, at 3-4.

¹⁵ *Marriott, supra*.