Government of the District of Columbia

Department of Employment Services

Office of the Director • Employment Security Building • 500 C Street, N.W. • Suite 600 • Washington, D.C. 20001

WILLIAM J. MULLER,	
Claimant,	
v.	Dir. Dkt. 86-1
	H&AS No. 85-346
LANMAN COMPANY,	OWC No. 0070456
and	
AETNA INSURANCE COMPANY,	
Employer/Carrier	

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GENERAL COUNSEL, DOES

Appeal from the Compensation Order of Hearing Examiner, Charles E. Crosby

David M. LaCivita, Esquire of Ashcraft and Gerel for the Claimant

Charles P. Monroe, Esquire for the Employer/Carrier

DECISION OF THE DIRECTOR

I. Preliminary Statement

This proceeding arises out of a claim for worker's compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Law 3-77, D.C. Code, §36-301 et seq. (1981 Edition, as amended) (hereinafter, the "Act").

On April 29, 1986, Hearing Examiner Charles Crosby issued a Compensation Order denying the claimant temporary total disability.

The claimant filed an appeal of the Compensation Order with this office on May 12, 1986.

II. Background

Claimant contends that he was injured at work on December 12, 1984, when working as a pressman, a press gate fell on his thumb. The record would seem to indicate that the occurence was not witnessed by anyone other than claimant. It is undisputed that the injury was not reported to employer for at least two weeks. Thereafter, claimant contends that employer was provided with oral notice of injury on several occasions. The employer denies that it ever received legally sufficient oral notice. It would appear undisputed that the required written statutory notice was not given by claimant until May 1985, nearly five months after the occurrence.

The Hearing Examiner found that claimant was not a credible witness. The Hearing Examiner specifically rejected claimant's testimony that his failure to give employer prompt notice of injury was due to the fact that claimant was reluctant to make a workers' compensation claim because it might jeopardize his job. Due to the fact that claimant had successfully pursued two earlier workers' compensations claims from this same employer, the Hearing Examiner rejected claimant's testimony that he (claimant) did not know that he was under a duty to provide his employer with notice of injury. The Hearing Examiner also rejected claimant's testimony that an additional reason for his failure to give prompt notice was his failure to realize the seriousness of his injury. The Hearing Examiner also noted,

> . . . in the treating physician's reports there is no history as to how the injury occurred except as to what appears to be an after thought in the January 6, 1986 medical report. (one year after the injury).

After weighing all the evidence and finding that claimant was not a credible witness, the Hearing Examiner found and concluded that claimant did not sustain an injury on December 12, 1984 as alleged. Having found that claimant did not sustain an injury as alleged, the Hearing Examiner found it unnecessary to resolve any other issues.

The claimant filed an appeal of the Compensation Order with this office arguing (1) that the Hearing Examiner failed to accord the claimant the benefit of the presumption of compensability found at D.C. Code, Section 36-321, and (2) there was no substantial evidence of record to support the Hearing Examiner's determination.

III. Discussion

In accordance with Naylor v. Grove Construction Company, H&AS No. 83-163, OWC No. 20378 (August 1, 1984), a claimant has the initial burden of introducing persuasive evidence of a basic fact tending to establish coverage under the Act before other facts necessary to establish the claimant's coverage under the Act are presumed. In Naylor it was held that in order for a claimant to benefit from the §22(a) presumption that an injury arises out of the employment, he must offer sufficient proof that his harm occurred during the course of employment. The presumption is clearly a rebuttable presumption. When the presumption arises, it merely shifts the burden of production to the employer to present evidence of the non-existence of facts which are presumed. Naylor v. Grove Construction Company, H&AS No. 83-163.

In this case, and in view of the Hearing Examiner's credibility findings, the Director concludes that claimant failed to introduce persuasive evidence of the facts necessary to trigger the presumption that claimant's injury arose out of and in the course of his employment.

As previously noted, claimant offered his testimony, which the Hearing Examiner did not find credible, to establish that his injury was work related. The D.C. Court of Appeals has cautioned on several occasions that on credibility questions, the fact-finding of hearing officers is entitled to great weight. In Re Dwyer, 399 A.2d 1, 12 (D.C. App. 1979). Thus, where a decision of the Hearing Examiner rests upon credibility findings, the Director's review is especially limited.

Claimant also argues that the Compensation Order was not based upon substantial evidence, that the Hearing Examiner failed to consider Kaiser-Georgetown medical records, and that the Compensation Order was arbitrary, capricious and an abuse of discretion. The Director finds all of these arguments to be without merit.

Since the Hearing Examiner's findings of fact and conclusions of law concerning claimant's claim for temporary total disability benefits are supported by substantial evidence and would appear to be based upon a proper application of the law, the Director concludes that these findings and conclusions should be affirmed.

IV. Disposition

Accordingly, for the reasons more set forth above, the Compensation Order of April 29, 1986 is hereby affirmed, adopted and incorporated by reference herein.

F. ALEXIS H. ROBERSON
DIRECTOR

MAR 15 1988
Date