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
(202) 673-6402-Fax

CRB No. 05-24

DANIEL WRIGHT,

Claimant–Respondent

v.

POTOMAC ELECTRIC POWER COMPANY,

Employer/Carrier–Petitioner

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
OHA/AHD No. 02-424, OWC No. 576756

William P. Flanagan, Esquire, for the Petitioner[1]

W. Scott Funger, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY, *Administrative Appeals Judges*,
and FLOYD LEWIS, *Acting 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 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005). [2]

[1] Although Petitioner was represented by Jack Strausman, Esquire, at the formal hearing, Mr. Flanagan filed the Application for Review and Memorandum of Points and Authorities in connection with this appeal.

[2] 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

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 November 15, 2004, the Administrative Law Judge (ALJ) granted the relief requested by Respondent, finding that Respondent had sustained an accidental injury, in the nature of a psychological injury, under the Act, and was temporarily totally disabled thereby from March 14, 2002 through August 4, 2002, and temporarily partially disabled thereby from August 5, 2002 through the date of the Compensation Order and continuing.

As grounds for this appeal, Petitioner alleges as error that (1) there is no jurisdiction for this claim under the Act, in that the alleged cause of the claimed injury under the principals enunciated in *Estate of Underwood v. National Credit Union Admin.*, 665 A.2d 621 (D.C. 1995) (Underwood) and *McMillian v. District of Columbia Fire and Emergency Medical Services Department*, Dir. Dkt. No. 20-01, PBL No. 01-041, OBA No. 012316 (Opinion and Remand Order of the Director, September 26, 2002),[3] (2) even assuming that there is jurisdiction for this claim under the Act, the ALJ's decision to award benefits is unsupported by substantial evidence and is not in accordance with the law as enunciated in *Dailey v. 3M Company*, H&AS No. 85-259, OWC No. 066512 (May 19, 1988), and *Spartin v. District of Columbia Dep't. of Employment Services*, 584 A.2d 564 (D.C.

---

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.

[3] Although it is not clear from the citation form and usage in Petitioner's brief whether Petitioner was citing *McMillian* as existing authority from the Director of the Department of Employment Services (DOES), we note that, in the course of the litigation of that case, the Director did not ever reach the question of whether psychological injury claims founded upon racially based harassment are compensable under the workers' compensation laws of the District of Columbia. Rather, in an appeal from a denial of that claimant's claim for psychological injury, the Director remanded the matter to the ALJ with instructions to consider whether such a claim is subject to the jurisdiction of 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), the law governing workers' compensation claims for District of Columbia government employees. In that remand, the Director instructed the ALJ to consider two issues: whether psychological injury claims based upon racial harassment or discrimination are subject to the same bar as those based upon sexual harassment or discrimination as established in Underwood, and whether the claimant in that case presented evidence that work-related conditions other than the claimed racial harassment or discrimination were potentially contributory to the claimed psychological injury, rendering the injury potentially compensable under the principal enunciated in *Parkhurst v. District of Columbia Dep't. of Employment Serv's.*, 710 A.2d 854 (D.C. 1998) (*Parkhurst*). In that case, the Court of Appeals reversed the denial of a psychological injury claim, where the denial was based upon the *Underwood* bar for sexual harassment related injuries, because the claimant in *Parkhurst* alleged that the injury was partially caused by other work-related factors that had nothing to do with the alleged sexual harassment. *See, McMillian v. District of Columbia Fire and Emergency Medical Services Department*, Dir. Dkt. No. 20-01, PBL No. 01-041, OBA No. 012316 (Opinion and Remand Order of the Director, September 26, 2002). In the subsequent Compensation Order on Remand, the ALJ concluded that psychological injury related racial harassment claims are subject to the same bar as sexual harassment related psychological injury claims as established in *Underwood*. *See, McMillian v. District of Columbia Fire and Emergency Medical Services Department*, Dir. Dkt. No. 20-01, PBL No. 01-041, OBA No. 012316 (Compensation Order on Remand, October 31, 2003), page 5. That decision was also appealed, and is currently pending review.

1990), and (3) the ALJ erred in awarding total disability benefits beyond the date that Respondent allegedly resigned his employment with Petitioner, in that any wage loss thereafter was the result of Respondent's having voluntarily limited his income by virtue of said resignation.

Respondent opposed the appeal, asserting that (1) psychological injuries related to racial and sexual harassment are compensable under the Act, citing *Charles P. Young Co. v. District of Columbia Department of Employment Services*, 681 A.2d 451 (D.C. 1996), (2) the ALJ's finding that Respondent's claim meets the Dailey standard is supported by substantial evidence, and (3) that Respondent's resignation from Petitioner was medically necessary rendering the wage loss attributable thereto compensable.

ANALYSIS

As an initial matter, Respondent has filed "Claimant's Motion To Strike Self-Insured Employer's Application for Review", alleging that Application for Review filed by Petitioner was filed on December 16, 2004, and is therefore untimely. In support thereof, Respondent attached a copy of the cover letter attached to that application, which bears a date-stamp of December 16, 2004, from the Office of the Assistant Director of this agency. However, review of the file maintained by this office reveals that, stapled to the letter bearing the December 16, 2004 date stamp is a portion of the external envelope with address label in which the Application for Review letter and memorandum were delivered to the agency. That item bears a date stamp of December 15, 2004, at 4:16 p.m. We conclude that said stamp confirms the timely filing of the appeal in this case. The Motion to Strike is therefore denied.

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 first alleges that the ALJ's decision is not in accordance with the law as there is no jurisdiction for this claim under the Act, in that the alleged cause of the claimed injury is not subject to the Act under the principals enunciated in *Estate of Underwood v. National Credit Union Admin.*, 665 A.2d 621 (D.C. 1995) (*Underwood*) and *McMillian v. District of Columbia Fire and Emergency Medical Services Department*, Dir. Dkt. No. 20-01, PBL No. 01-041, OBA No. 012316 (Compensation Order on Remand, October 31, 2003).

In *Underwood*, the Court of Appeals ruled that a plaintiff was permitted to pursue an intentional infliction of emotional distress tort suit in the Superior Court of the District of Columbia, over the objection of plaintiff's employer, the defendant in that tort action. In that case, the plaintiff had filed, in the Superior Court, two claims: one was a claim for common law intentional infliction of emotional distress, and the second was a separate claim, based upon the same facts, of violation of District of Columbia Code § 11-2501 to 2557, the District of Columbia Human Rights Act. The case went to a jury, which returned a verdict awarding damages for the intentional infliction claim, but rejected the claim of sexual harassment brought under the Human Rights Act. The employer/defendant appealed the award to the Court of Appeals, where it argued that, because the sexual harassment count had been rejected, the remaining count for emotional distress was pre-empted by the Act and its exclusivity of remedy provision.

In a decision containing a lengthy and detailed analysis of the Act (which the Court referred to as the "WCA"), the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (referred to as "CMPA"), and the Human Rights Act, the Court ruled that the emotional distress award was lawful, because, in the words of the opinion,

> We believe it is clear that, when emotional distress allegedly attributable to sexual harassment (in contrast with some other cause) results in disabling injuries in fact, the language of the WCA itself easily demonstrates that these are not statutory "injuries," and thus are not compensable disabilities, under the WCA. Accordingly… the statutory language does not present a "substantial question" whether disabling injuries from emotional distress caused by sexual harassment are covered by the WCA; such injuries "*clearly* are not compensable under the statute."

Underwood, 665 A.2d, at 633 (citation omitted, emphasis in original).

Prior to coming to this conclusion, the Court noted that "[w]e agree that, in cases not premised on allegations of sexual harassment, the decisional law holds that the trial court ordinarily will not have jurisdiction over an emotional distress claim based upon acts of a supervisor or co-worker since there typically will be a 'substantial question' whether [the Act] applies." After detailing numerous cases decided under the Act (covering private sector employment) and Comprehensive Merit Personnel Act (covering public sector, or District of Columbia government, employment), the Court stated that:

> In the present case, [the plaintiff employee] alleges disabling injuries from emotional distress she has suffered from [her supervisor's] actions. … Accordingly, unless there is some special reason why the … line of [private sector] cases … does not resolve the issue, the "substantial question" whether [plaintiff's] emotional distress resulted in disability compensable under the WCA means that DOES (the agency administering workers compensation), not the Superior Court, has primary jurisdiction. … But there is special reason why [these cases] do not necessarily control. The fact that [the plaintiff's] emotional distress claim is based upon the same events that generated her sexual harassment claim under the Human Rights Act substantially affects the analysis.

Underwood, 665 A.2d, at 632. In the language that is the analytical crux of the Court's reasoning, it wrote:

> We conclude *as a matter of law* that sexual harassment is not "a risk involved in or incidental to" employment. We do so not merely because a statute -- the Human Rights Act -- forbids such harassment during day-to-day workplace interaction but, *more fundamentally*, because sexual harassment is altogether unrelated to any work task. Sexual harassment is facilitated on the job only through the happenstance of two person's proximity at the same place of employment; it has nothing whatsoever to do with, and cannot be justified by reference to, any task an employee is called upon to perform, even if persons involved work together and have a supervisor-supervise relationship. [Footnote omitted]. We therefore agree with [the plaintiff] that her injuries resulting from emotional distress attributable to sexual harassment were not statutory "injuries" "arising out of" her employment.

Underwood, 665 A.2d, at 634 (emphasis added).

Petitioner points out that the Human Rights Act prohibits not only sexual employment discrimination and harassment, but also harassment and discrimination based upon race, and notes that, while this matter was pending before DOES, Respondent brought a claim under the Human Rights Act, among other statutes, in the United States District Court for the District of Columbia, Civil Action No. 03-0946. The basis of Respondent's action, as described in the "Memorandum Opinion" dismissing the suit, is the same incident which forms the basis of the claim under review herein, namely "his African American supervisor insulted him with a racial epithet. … Wright claims that he was so humiliated and emotionally distressed as a result of his supervisor's harassment that he resigned from Pepco on August 2, 2002." Exhibit E, Memorandum of Points and Authorities in Support of Self-Insured Employer's Application for Review.

Petitioner argues that, like sexual harassment, and for the same reasons espoused by the Court of Appeals in *Underwood*, claims for psychological injuries from racial harassment are not compensable under the Act.

Respondent's sole response to Petitioner's argument is to cite *Charles P. Young Co. v. District of Columbia Department of Employment Services*, 681 A.2d 451 (D.C. 1996) (*Young*), a case in which the Court of Appeals approved an award of compensation for psychological injuries under the Act, which injuries arose in part from that claimant's being the focus of rude and offensive comments, some of which referred to her gender, from co-workers. Without explicitly stating his argument as such, Respondent appears to be arguing that *Young* overruled *Underwood*. That is, rather than suggest that there is something about *Young* that distinguishes it from *Underwood*, and then positing that the case under review herein is more akin to *Young* than to *Underwood*, Respondent merely states that *Young* "is a D.C. Court of Appeals case decided **after** [*Underwood*]." "Claimant's Memorandum of Points and Authorities in Opposition to Self-Insured Employer's Application for Review", page 3 (bold emphasis in original).

While we grant that *Young* was handed down approximately 11 months after *Underwood*, we also note that the Court in *Young* never uses the term "sexual harassment", never discussed whether the

specific rude and offensive remarks constituted such in a legal sense, and never even mentioned *Underwood*. We also note that, like *Parkhurst v. District of Columbia Dep't. of Employment Serv's.*, 710 A.2d 854 (D.C. 1998) (*Parkhurst*), the claimant in *Young* gave evidence of facts other than gender-based insult, such as loss of authority generally, pressures brought on by the financial problems of the employer, and lack of support from management in dealing with insubordinate workers ostensibly under her authority, that contributed to her psychological injuries.

Further, that *Underwood* remains good law is evident from *Parkhurst*, decided subsequent to *Young*, and in which the Court of Appeals refers to *Underwood* several times, without any indication that it had lost its vitality. See, *Parkhurst*, 710 A.2d, at 854, 856, and 857.

To the extent that *Young* and *Underwood* are not totally in consonance with one another, we are persuaded that *Underwood* presents a fuller, more detailed and compelling discussion of the relevant principles to be considered in connection with the Act, and we adopt its analytical approach in connection with the heretofore unaddressed questions relating to psychological injury claims stemming solely from allegations of racial epithets. That is, as discussed by the Court of Appeals in *Underwood*, we determine that racial harassment "is not 'a risk involved in or incidental to' employment … not merely because a statute -- the Human Rights Act – forbids such harassment during day-to-day workplace interaction but …, [also] because [it] is altogether unrelated to any work task." Like sexual harassment, racial harassment "is facilitated on the job only through the happenstance of two person's physical proximity at the same place of employment; it has nothing whatsoever to do with, and cannot be justified by reference to, any task an employee is called upon to perform, even if persons involved work together and have a supervisor-supervise relationship." *See, Underwood*, 665 A.2d, at 634. The remedy for such unacceptable, anti-social and repugnant behavior is and should be through the specific tribunals legislatively created for or authorized to address such legislative or common law wrongs, and which permit awards for damages not only to compensate for damage caused by, but also to punish, such behavior.

Accordingly, we conclude that the ALJ's award of benefits in this case is not in accordance with the law. We need not reach the additional allegations of error raised in the Application for Review.

CONCLUSION

The Compensation Order of November 15, 2004 is not in accordance with the law, and is hereby reversed.

ORDER

The Compensation Order of November 15, 2004 is not in accordance with the law, and is hereby REVERSED.

FOR THE COMPENSATION REVIEW BOARD

_____

JEFFREY. P. RUSSELL
Administrative Appeals Judge

July 20, 2005
DATE