

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-109

**CYNTHIA T. BRAY,
Claimant-Petitioner,**

v.

**BATTLE TRANSPORTATION, INC. and AIG CLAIM SERVICES, INC.,
Employer and Insurer-Respondents.**

Appeal from a September 21, 2011, Compensation Order By
The Honorable Anand K. Verma
AHD No. 10-306A, OWC No. 571174

David J. Kapson, Esquire, for the Claimant
Joel E. Ogden, Esquire, for the Employer and Insurer

Before MELISSA LIN JONES, HENRY W. MCCOY, and JEFFREY P. RUSSELL,¹ *Administrative Appeals Judges*.

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

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 Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

At a formal hearing, Ms. Cynthia T. Bray alleged she had suffered an accidental injury to her neck and right arm on November 9, 2009. In a Compensation Order dated September 21, 2011, an administrative law judge (“ALJ”) ruled that Ms. Bray had not sustained an accidental injury. Consequently Ms. Bray’s request for temporary total disability benefits and medical expenses was denied.

¹ Judge Russell has been appointed by the Director of the DOES as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

On appeal, Ms. Bray asserts the ALJ erred “by failing to properly invoke the presumption of compensability.”² Specifically, Ms. Bray details her version of the alleged facts in this matter and argues, “The finding that Ms. Bray did not successfully invoke the presumption of compensability is unsupported by any evidence in the record.”³

In response, Ms. Bray’s employer, Battle Transportation, Inc., argues “Judge Verma properly weighed the presumption of compensability and found that it was rebutted and that the claimant did not sustain a compensable accidental injury.”⁴ Battle Transportation, Inc., requests the September 21, 2011 Compensation Order be affirmed.

ISSUE ON APPEAL

Is the September 21, 2011 Compensation Order supported by substantial evidence and in accordance with the law?

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 evidence⁵ in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.⁶ 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.⁷

Pursuant to §32-1521(1) of the Act, a claimant is entitled to a presumption of compensability.⁸ 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.⁹ There is no presumption of the

² Claimant’s Memorandum of Points and Authorities in Support of Application for Review, p.5.

³ Claimant’s Memorandum of Points and Authorities in Support of Application for Review, p.6.

⁴ Employer/Insurer’s Opposition to Claimant’s Application for Review, p. 4.

⁵ “Substantial evidence” is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁶ Section 32-1521.01(d)(2)(A) of the Act.

⁷ *Marriott, supra*.

⁸ §32-1521(1) of the Act states, “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.”

⁹ *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

existence of a work-related event, activity or requirement which has the potential to cause or to contribute to the disability.

Although Ms. Bray may have testified to an alleged event on November 9, 2009, the ALJ clearly did not credit Ms. Bray's testimony in that regard; throughout the Compensation Order, the ALJ refers to Ms. Bray's testimony in terms of disbelief: "claims to have injured her neck and right arm, while lifting up a passenger's mobile wheelchair"¹⁰ and "Claimant alleges she suffered neck and right arm injury on November 9, 2009, while aiding a wheelchair passenger at the Washington Hospital Center stop by lifting his wheelchair onto the bus. However, the adduced evidence of an emergency room (ER) treatment she admittedly received does not buttress the alleged injury."¹¹ Clearly, the disbelief is predicated at least in part upon inconsistencies between Ms. Bray's testimony and the medical records:

Rather, the Washington Hospital Center emergency department notes appropriately reflect claimant's admission therein with the complaint of right side pain at 3:45 p.m. on November 8, 2009. After an initial assessment therein by a nurse practitioner who checked off a box for "No Injury," and indicated neck pain at right side, claimant was examined by an ER physician, Dr. Sakla who diagnosed her with myalgia and muscle spasm. In amelioration of the complained of pain, Dr. Sakla prescribed Hydrocodone and Flexeril and discharged her with the instruction to follow up with her primary physician within a week. The record evidence does not demonstrate any treatment thereafter on November 9, 2009 for the alleged neck and right arm injuries. (EE 6, pp 18-28). In fact, the only treatment claimant received following her November 8, 2009 ER treatment was on November 27, 2009 by Dr. Lee, her primary care physician, who, without specifying any specific date of injury, merely referenced her treatment at "the emergency room several days ago with right neck pain." (CE 4, p.63).

In fact, claimant's subsequent examination on December 3, 2009 by Dr. Tozzi at referral from Dr. Lee pertinently noted in the history of present illness paragraph "[t]he patient reports that she has been having severe pain in her neck, shoulder and down her right arm to her right hand which is her nondominant extremity. The symptoms first came on 2 months ago." Dr. Tozzi continued the narrative that "[s]he has no history of injury." (CE 3, p.55). Accordingly, claimant's neck, shoulder and right arm symptoms should have first precipitated on or about October 3, 2009.^[12]

¹⁰ *Bray v. Battle Transportation, Inc.*, AHD No. 10-306A, OWC No. 571174 (September 21, 2011), p.2. (Emphasis added.)

¹¹ *Bray v. Battle Transportation, Inc.*, AHD No. 10-306A, OWC No. 571174 (September 21, 2011), p.3. (Emphasis added.)

¹² *Bray v. Battle Transportation, Inc.*, AHD No. 10-306A, OWC No. 571174 (September 21, 2011), pp.3-4.

In addition, the ALJ did not credit the medical evidence based upon a history provided by Ms. Bray. “Dr. Fechter’s testimony further confirmed that claimant’s history of illness as given to Dr. Tozzi ‘would have come directly from the claimant.’ (CE 2, p. 34).”¹³

Having weighed the evidence in the record, an act the CRB cannot repeat, the ALJ determined Ms. Bray had failed to show credible evidence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the alleged disability. Consequently, Ms. Bray was not entitled to the presumption of compensability.

CONCLUSION AND ORDER

The September 21, 2011 Compensation Order is supported by substantial evidence and is in accordance with the law. The law requires the September 21, 2011 Compensation Order be AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

March 8, 2012
DATE

¹³ *Bray v. Battle Transportation, Inc.*, AHD No. 10-306A, OWC No. 571174 (September 21, 2011), p.4.