

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



ODIE DONALD II
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 17-023

**CHARLES THIBODEAUX,
Claimant-Petitioner,**

v.

**FREESTATE ELECTRICAL and
GALLAGHER BASSETT SERVICES,
Employer/Third-Party Administrator-Respondent.**

Appeal from a February 28, 2017 Compensation Order
by Administrative Law Judge Nata K. Brown
AHD No. 16-459 OWC No. 743149

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2017 MAY 25 PM 12 01

(Decided May 25, 2017)

Krista N. DeSmyter for Claimant
John C. Duncan, III for Employer

Before GENNET PURCELL, HEATHER C. LESLIE, and LINDA F. JORY *Administrative Appeals Judges.*

GENNET PURCELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Charles Thibodeaux ("Claimant") is 56 years old and has worked as a residential trainee on three construction sites for FreeState Electrical ("Employer"). On January 19, 2016, Claimant was transferred to the Uline Arena site in Washington, D.C., where he worked under the lead foreman at the site, Jeffery Kratz.

On February 24, 2016, while working at the site, Claimant tripped on a reinforcing steel bar and fell. Mr. Kratz, testified that he asked Claimant, "Are you hurt? Are you okay? Are you embarrassed?" that Claimant responded that he was "just embarrassed", and went back to work. Claimant however, testified that he responded, "I don't know, but you can start an accident report."

A few days later, after carrying 150 to 200 pounds of metal clad cable up stairs, Claimant experienced testicular pain and weakness in his right lower side and back. Additionally, Claimant testified to experiencing days where he could not get out of bed. Claimant testified that he sent text messages communicating these experiences to Mr. Kratz, as well as to another Employer representative, Mr. John Chantilis.

On March 7, 2016, Claimant sought care with Dr. Carolyn Phillips at a MedStar, Emergency Department where he underwent an ultrasound and was diagnosed with acute low back pain. Dr. Phillips reported that Claimant was able to return to work on March 9, 2016 with no limitations.

On March 8, 2016, Claimant was examined by Dr. Annick Hebou at Metrohealth for a follow-up exam regarding his back pain, hypertension, and worsening right testicular burning pain. During the follow-up, Dr. Hebou asked if Claimant had been to any hospital or emergency room since his last office visit, to which Claimant responded 'no', notwithstanding that he was examined at MedStar the day before.

On March 27, 2016, Claimant again contacted Mr. Kratz via text message, to inquire whether he witnessed the fall on the reinforced steel bar on the job site.

Mr. Kratz replied, "No, no I did not see it... Did you report it, fill out an accident report, go to clinic/hospital, and have a drug test?"

Claimant then stated, "You must be blind because I fell right in front of you and you said are you hurt or just embarrassed."

Mr. Kratz stated, "That one??? The one where u laughed and said embarrassed [sic] and kept working the rest of the day and made no mention of it again till now?" "4+ weeks later?"

Claimant answered, "No you said that are you hurt or just embarrassed and I said give me a couple of days I'll let you know and then started missing days because of back problems, never in my life have I had any type of back problems."

Mr. Kratz replied, "to your recollection, because I can tell u I know u did not, did u bring up this 'injury' since it happened to me before now?"

Claimant answered, "No worries be happy".

Mr. Kratz asked, is that a no that u did not report anything alter that day?" Again,

Claimant answered, "No worries be happy".

Mr. Kratz, replied, "I'm going to send these texts to John Chantiles and Kathy

Mason. My ability to help in any way was taken away when u did not properly report this to me.”

Thibodeaux v. Freestate Electrical, AHD No. 16-459 (February 28, 2017) (“CO”) at 3.

Claimant returned to MetroHealth on March 28, 2016, where he complained of pain located in the lower back, with radiation to the thigh posterior right thigh and leg. He reported the pain as moderate, intermittent, and present during activities, and further, that his gait was leaning to the left side.

Claimant filed the Workers Compensation First Report of Injury on April 5, 2016.

At Claimant’s request, on April 6, 2016, Claimant underwent an independent medical evaluation (“IME”) by Drs. Harvey Mininberg and Joel Fechter. Dr. Fechter diagnosed Claimant with a lumbosacral spine with low back pain and radicular complaints into the right lower extremity secondary to his injury at work on February 24, 2016. Dr. Fechter told Claimant to limit activities to light duty with limited bending, stooping, lifting, and ordered physical therapy for the pain, spasm, and limited range of motion.

Dr. Mininberg examined Claimant on May 17, 2016. Dr. Mininberg recommended physical therapy for pain and spasm, a lumbar spine MRI, an electromyogram c (“EMG”) of lumbar paraspinals and lower extremities for radicular complaints.

Claimant returned to Dr. Mininberg on September 12, 2016. Since his last visit, Claimant’s August 17, 2016 MRI showed no evidence of a herniated disc or spinal stenosis, but did show degenerative disc disease with a small protrusion L5-S1. Dr. Mininberg reported that Claimant was not experiencing any radicular complaints, did not want an EMG evaluation, and continued to have pain in his low back. Dr. Mininberg also reported that Claimant was able to return to light duty work if it was available.

At Employer’s request, on October 31, 2016, Claimant underwent an IME by Dr. Marc Danziger, who opined that Claimant’s February 24, 2016 fall was a single event requiring “no ongoing future or further treatment”. CO at 4.

A dispute arose as to Claimant’s entitlement to workers’ compensation benefits as a result of the February 24, 2016 work fall. A formal hearing was held before an Administrative Law Judge (“ALJ”) in the Administrative Hearings Division (“AHD”) of the Department of Employment Services (“DOES”). The claim for relief and issues to be decided at the hearing as described in the CO is:

CLAIM FOR RELIEF

Claimant seeks temporary total disability benefits from March 21, 2016 through June 17, 2016, and temporary partial disability benefits from June 18, 2016 through October 21, 2016.

ISSUES

1. Did Claimant sustain a workplace fall on February 24, 2016?
2. Did Claimant's current disability arise out of and in the course of his employment?
3. Did Claimant give timely notice of his injury?
4. What is the nature and extent of Claimant's disability?
5. Is there a medical causal relationship between Claimant's fall and his [sic] Claimant's disability?

CO at 2.

The CO denied Claimant's claim for relief stating:

CONCLUSION OF LAW

Claimant has no injury resulting from the fall that occurred when he was at work.

ORDER

It is hereby ORDERED that Claimant's claim for relief be, and hereby is, DENIED.

CO at 7.

Claimant timely appealed the CO to the Compensation Review Board ("CRB") by filing Claimant's Application for Review ("AFR") and Memorandum in Support of Claimant's Application for Review ("Claimant's Brief"). Claimant argues that Compensation Order's determination that Claimant was not credible was based on a misreading of the medical records, and without reference to the law regarding the presumption of compensability, and as such, it must be reversed and remanded.

Employer opposed the appeal by filing Employer/Third Party Administrator's Memorandum in Opposition to Claimant's Application for Review. ("Employer's Brief").

ANALYSIS¹

Claimant's argues that the CO's conclusions the Claimant had not invoked the presumption of compensability was not based on substantial evidence and must be reversed. Claimant asserts that the ALJ erred in finding that Claimant did suffer a fall at work, but "did not mention to" Drs. Mininberg and Fechter "that he had a fall at work, or that he had an injury." In support of his argument, Claimant asserts that Drs. Mininberg and Fechter's medical reports constantly refer to Claimant having suffered a work injury that his causing his disability. Claimant's Brief at 7. Claimant argues:

The Compensation Order's finding that Mr. Thibodeaux did not invoke the presumption of compensability is clearly erroneous when reviewed in accordance with Dr. Fechter's medical opinions and Mr. Thibodeaux's testimony; as well as the testimony of Mr. Kratz. The Court of Appeals, when discussing the statutory presumption of compensability, explained in *Murray v. DOES*, 765 A.2d 980 (D.C. 2001) what an injured worker must provide in order to make an initial showing to invoke the presumption. The Court explained 'to trigger the presumption, the injured worker must provide some evidence of 'a death or disability and a work-related event, activity, or requirement which has the potential of resulting in or contributing to a death or disability.' *Murray*, 765 A.2d at 983. The Court explained that the injured workers' testimony, when corroborated to some extent by his co-worker to whom he reported the incident immediately, and his medical records of his treatment was sufficient evidence upon which to invoke the presumption. *See Id.* at 983-85.

Claimant's Brief at 6.

In opposition, Employer asserts that the inclusion of Drs. Mininberg and Fechter in the list of providers to which "[C]laimant provided a history inconsistent with his hearing testimony is a scrivener's error and a harmless error." Employer's Brief at 10.

Regarding Drs. Mininberg and Fechter's medical report summary of Claimant's examination, the ALJ made the following findings of fact:

On April 6, 2016, Claimant went to the offices of Dr. Harvey Mininberg and Dr. Joel Fechter, orthopaedic surgeons, for an initial evaluation. Dr. Fechter diagnosed Claimant with a lumbosacral spine with low back pain and radicular

¹ The scope of review by the CRB 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 a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d) (2) (A). "Substantial evidence" as defined by the District of Columbia Court of Appeals ("DCCA"), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES*, 834 A.2d 882 (D.C. 2003) ("*Marriott*"). Consistent with this scope of review, the CRB is also 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

complaints into the right lower extremity secondary to his *injury at work* on February 24, 2016.

CO at 4 (*italics added*).

As such, we determine that the characterization of the reports from Drs. Mininberg and Fechter as not supporting Claimant's communication of the February 24, 2016 work injury to Drs. Mininberg and Fechter is indeed a 'scrivener's error' on the part of the ALJ. The record evidence supports that Claimant was first examined by Dr. Fechter on April 6, 2016, well after the February 24, 2016 trip and fall at work. We agree with Employer's argument on this specific issue.

Regarding the ALJ's failure to accord Claimant the presumption of compensability in the CO, on this issue the DCCA has found:

[A claimant] is entitled to a statutory presumption of compensability, which provides, in the absence of substantial evidence to the contrary, that a claim is compensable in accordance with the worker's compensation provisions. *See* D.C. Code § 32-1521(1) (2001) ("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 [the worker's compensation] chapter. . . ."); *see also Dunston v. D.C. Dep't of Employment Servs.*, 509 A.2d 109, 111 (D.C. 1986) ("This preliminary shifting of the burden to the employer exemplifies the humanitarian nature of the Act [] and the strong legislative policy favoring awards in arguable cases." (citations omitted)).

Jackson v. DOES, 955 A.2d 728, 731 – 732 (D.C. 2008).

Acknowledging the statutory presumption in the CO, the ALJ concluded:

Claimant tripped over rebar and fell down at work. There were three witnesses that saw him fall—Aaron, Mr. Kratz, and Mr. Adamski. Claimant testified that he was not 100 percent that he tripped at work on February 24, 2016. (HT 62) The testimony of Mr. Kratz was more credible than that of Claimant. Mr. Kratz, who had pictures of the progress in the construction site, was able to pinpoint a timeframe wherein he and the others saw Claimant fall, which was between January 24, 2016 and February 2, 2016, before concrete was poured.

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... To raise the statutory presumption of compensability, Claimant must make an "initial demonstration" of "both an injury and a relationship between that injury and the employment". Claimant tripped and fell at his workplace between January 24, 2016 and February 2, 2016. The fall did not cause an injury. Claimant continued to work until he was furloughed on March 7, 2016.

CO at 5-6.

With regard to Claimant's credibility, the CO also concluded:

I find that Claimant is not credible. He claimed that he had an injury on February 24, 2016, which was refuted with the date-stamped picture, showing that his fall occurred no later than February could and the dates of the time the concrete was poured. He waited for two months to file a First of Injury on April 5, 2016. Claimant also sought medical treatment with several physicians—Dr. Phillips, Dr. Hebou, Dr. Mininberg, and Dr. Fechter. He did not mention to any of them that he had a fall at work, or that he had an injury.

CO at 6-7

Claimant argues:

While the Court of Appeals and the CRB have previously noted that while credibility issues can be a basis for finding the presumption of compensability is not invoked, that is only possible when the injured workers' testimony is the sole basis for credibility. *See Id.* at 985 and *LaPlant v. Clark Foundations*, CRB No. 15-129, 2015 DC Wrk. Comp. LEXIS 668, *14 (Dec. 31, 2015). When medical records support the injured workers' initial testimony, the injured worker has as a matter of law invoked the presumption of compensability. *See Id.* [*Murray v. DOES*, 765 A.2d 980 (D.C. 2001)] . An ALJ's misreading of the medical evidence to find that the presumption was not invoked will likewise not be supported on appeal. *Id.*

Claimant's Brief at 6-7.

Claimant is correct regarding the application of the DCCA's opinion in *Murray* concerning misreading medical records in conjunction with the finding that the presumption of compensability was not invoked. Although it is well-settled that credibility findings of an ALJ are entitled to great weight, *Id.* at 984-985, *citing Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985), we agree with Claimant's argument on this issue.

Although the date of the fall was in dispute, we determine that the ALJ found that Claimant suffered a fall at work. Most pointedly, the section of the CO entitled Conclusions of Law acknowledged that Claimant sustained "a fall that occurred when [Claimant] was at work".

Further, having determined that the ALJ's conclusion that Claimant's medical records did not reference evidence of his work-related fall and subsequent claim of injuries to be harmless error, notwithstanding the ALJ's credibility determination and the conclusion that substantial evidence supported the finding that Claimant's fall occurred earlier than the date asserted by Claimant, -- a conclusion relevant to the ALJ's consideration of the issue of timely notice -- we also determine that the ALJ erred in failing to afford Claimant the presumption of compensability.

The CO's conclusion that Claimant has not made an initial demonstration of an injury and a relationship between that injury and his employment entitling him to a presumption of compensability is not supported by substantial evidence in the record.

Finally, Claimant argues that the ALJ erred in deducing, and ultimately concluding, that Claimant tripped and fell at his workplace, between January 24, 2016 and February 2, 2016, a date range earlier than the specific date of injury Claimant asserts. Claimant argues further that the CO's finding that the fall did not cause any injury, and that Claimant failed to give timely notice of his injury, -- since, given the CO's date range of the alleged fall -- timely notice of the injury would have been required by March 2, 2016, was in error.

A determination that Claimant provided timely notice of his work-related injury would be moot in the event the ALJ finds that Claimant's disability did not arise out of and in the course of his employment.

Therefore, we determine the ALJ erred by not finding Claimant invoked the statutory presumption of compensability. This determination shall not be interpreted as a conclusory of whether Claimant has met his burden of proof on the ultimate issue. To the contrary, on remand, the ALJ shall afford the Claimant the presumption, determine whether Employer sufficiently rebutted the presumption and if so, determine whether Claimant has met his burden of proving by a preponderance of the evidence that he sustained a work injury as alleged and that the claimed periods of disability were medically causally related to the work accident.

CONCLUSION AND ORDER

The Compensation Order is not supported by substantial evidence and is not in accordance with the law. The Compensation Order is VACATED and REMANDED to the Administrative Hearings Division for a new decision consistent with this Decision and Remand Order.

So ordered.