GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-146

ANNETTE BURWELL,
Claimant-Respondent/Cross-Petitioner,

v.

IDOC OPTICAL,
Self-Insured Employer-Petitioner/Cross-Respondent.

Appeal from a Compensation Order issued October 5, 2016 by
Administrative Law Judge Gerald D. Roberson
AHD No. 16-381, OWC No. 745048

(Decided February 28, 2017)

Benjamin E. Douglas for Claimant
John Noble for Employer

Before LINDA F. JORY, HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

LINDA F. JORY for the Compensation Review Board.

DECISION AND PARTIAL REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This appeal follows the issuance of a Compensation Order ("CO") from the Administrative Hearings Division ("AHD") of the Department of Employment Services. In that CO which followed a formal hearing conducted on September 21, 2016, an Administrative Law Judge ("ALJ") concluded:

> Claimant established she sustained an accidental injury on May 6, 2016 which arose out of and in the course of the employment and is medically causally related to the employment. Claimant failed to establish entitlement to a penalty under Section 32-1515 of the Act. Claimant failed to establish Employer acted in bad faith under Section 32-1528 of the Act. Claimant established entitlement to temporary total disability benefits from May 6, 2016 through August 23, 2016 at

the correct compensation rate, subject to a credit for receipt of unemployment compensation.

CO at 12.

Employer timely appealed the CO to the Compensation Review Board ("CRB") by filing Employer's Application for Review and Memorandum of Points and Authorities in Support of Application for Review ("Employer's Brief"). Claimant filed Claimant's Opposition to Employer's Application for Review ("Claimant's Brief")and Cross Application for Review "Claimant's Cross –Appeal").

ANALYSIS[1]

Employer's appeal challenges only the ALJ's determination that Claimant had an accident on May 6, 2016 that arose out of and in the course of her employment.

Specifically Employer argues:

> The pertinent parts of the findings of fact by Judge Roberson are as follows:
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> Page 2:
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> > On May 6, 2016 Claimant was seated at a desk typing when her chair broke and she fell backwards. The Claimant struck the back of her head and landed on the floor in the hallway, outside of her office. The Claimant experienced pain in her neck, back and left shoulder. The Claimant previously injured her back in a motor vehicle accident on November 22, 2013 and since then she has had chronic back pain.
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> Page 5:
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> > The Claimant testified she fell backwards out into the hallway, hitting her left side.
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> Further, Judge Roberson discussed the testimony of the office manager, Amy Burriss, on Page 6.

[1] The scope of review by the CRB is generally 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 § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.* at 885.

> In summary, Ms. Buriss testified that normally she could hear Claimant's conversations in the office, where Claimant allegedly fell, although not clearly. Her first knowledge of this was the Claimant shouting. When she got to the Claimant's office, she saw the Claimant off the chair with her right shoulder against the door frame. She earlier that day, told the Claimant to switch chairs when she found the screw on the floor in Claimant's office. She had not heard the noise of a chair falling at the time of alleged accident, but at a later time, pushed another chair down, which made a large noise that could be heard from where she was located at the time of the alleged accident.
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> * * *

It is the contention of the Employer that the finding of facts were not based on substantial evidence. It was contrary to the evidence, as it would be impossible for this accident to occur the way the Claimant stated.

Exhibit 1 of Burwell's Deposition which was Exhibit No. 2 at the hearing is a photograph (attached) of the room where this allegedly occurred. There is a W mark. The Claimant acknowledges that her desk faced the W which stands for "wall" and on her right was the door and the door jamb. If that is so, when the Claimant fell against the door jamb she had to have fallen to the right not left.

This contention was argued in the closing argument, but Judge Roberson states on Page 7:

> While Claimant does not dispute the fact her right shoulder may have struck the door jamb, there is no evidence in the record to contradict Claimant's testimony that she struck her left shoulder during the fall. The evidence does not disclose any element of deceit which would discredit the claim itself. In terms of the accident, the record reveals Claimant fell backwards while sitting in a chair, and the chair completely separated from its base, causing Claimant to strike her head, neck, back and left shoulder.

He did not deal with the issue and the impossibility of the accident happening the way the Claimant testified.

In her deposition the Claimant acknowledges that [sic] was a screw on the floor before she fell. She testified that the screw was there. However, when she testifies that they (she and Ms. Burriss) just looked at the screw and it was discussed that it came from the chair, but left it there. It is more credible that she was told the screw came from the chair and not to use the chair.

> We have a person losing hours from her job, having job issues, with a chronic back condition, and a situation where the chair "collapses' but makes no noise. Further she end up [sic] against the door jamb of her office She describes how it happened in a way that is impossible.
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> She is collecting $250.00 a month from the Employer to pay for her health insurance when she is on Medicare and pays no premium. We contend this puts into question her credibility.
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> The Employer contends the credible story here is that the Claimant knew the chair was defective, was told not to use it, silently pushed the chair down and placed herself with her right shoulder on the door jamb and started screaming.
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> It is contended that Judge Roberson did not address the significant factual issue about the way the Claimant fell and struck the door jamb. There was no explanation given that is credible. Therefore, he did not deal with this factual impossibility of how this accident allegedly happened.

Employer's Brief at 1-4, (citations omitted)(indentation added)

Claimant responds:

> Contrary to Employer's contentions, there was no evidence presented that Claimant manufactured the injury. Employer attacked Claimant for receiving Medicaid and unemployment (when she was eligible for both: CE 6; EE 7 ["Therefore, the claimant listed herein is determined eligible for unemployment benefits effective 05/01/2016"]) and stated that Claimant was warned about the defectiveness of the chair—but it is unclear how even if viewed unfavorably to Claimant any of this would suggest, much less prove, intentional self-harm.
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> . . . In addition to the above, Employer's theory that Claimant "silently pushed the chair down and placed herself with her right shoulder on the door jamb and started screaming" is inconsistent with their own IME's view that Claimant suffered an injury that necessitated restrictions two months after the injury date. Employer's theory that Claimant was not injured is inconsistent with their own evidence, including the supervisor and main witness Amy Burriss's asking Claimant the day of the injury "How you doing from fall today" and referred to the accident as an "accident" three days afterward.

Claimant's Brief unnumbered at 3.

We agree with Claimant and reject Employer's assertion that the ALJ erred in not dealing with a factual impossibility of how the accident occurred. To the contrary the ALJ explained:

> In this case, Employer failed to discredit Claimant's credibility with the testimony of Ms. Buriss and Dr. Rezvani[2]. The adjudicator does not find any element of fraud or deceit stemming from the fact Claimant filed for unemployment compensation benefits on the date of the accident. Employer concedes it had reduced Claimant's working hours, which served as the basis for Claimant receiving unemployment benefits. With respect to the health insurance, Claimant obtained health insurance, and the record does not disclose Claimant was obligated to return the money if she secured health insurance through an alternative method. In terms of whether Claimant struck her right shoulder or left shoulder, Ms. Burris testified when she found Claimant, the chair had separated from its base. Ms. Buriss explained Claimant's legs were around that base part of the chair, and her right shoulder was against that door frame. Ms. Burris further stated her body was on the floor with her one hand on the floor – her left hand on the floor and her legs were positioned around that base. HT p. 55. While Claimant does not dispute the fact her right shoulder may have struck the doorjamb, there is no evidence in the record to contradict Claimant's testimony that she struck her left shoulder during the fall. The evidence does not disclose any element of deceit which would discredit the claim itself. In terms of the accident, the record reveals Claimant fell backwards while sitting in a chair, and the chair completely separated from its base, causing Claimant to strike her head, neck, back and left shoulder. The accident rendered Claimant symptomatic, and she received medical treatment for her neck, back and left brachial plexus. The treating physicians and the IME physician both agreed Claimant sustained an accident at work on May 6, 2016. Therefore, Claimant has sustained her burden to show an accidental injury occurred on May 6, 2016, when something unexpectedly went wrong within the human frame, specifically suffering an injury to her back and neck.

CO at 7.

We note that Employer's entire appeal appears to be based upon the assertion that the ALJ's credibility determinations were erroneous. Such determinations are for the ALJ, and generally will not be disturbed by the CRB on appeal. The record has been reviewed and we find that the ALJ's factual findings are supported by substantial evidence on the record as a whole, and are therefore conclusive. *Marriott Int'l. v. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003); 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).

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[2] In the preceding paragraph the ALJ noted:

> Dr. Rezvani, a part owner and optometrist, testified she paid Claimant $250.00 tax free per month for health insurance, and subsequently learned Claimant had obtained healthcare through Medicaid. HT p. 45. Dr. Rezvani stated she does not pay the [$] 250.00 if employees are receiving healthcare or not paying for the health insurance CO at 7.

An ALJ's credibility determination is given great deference, due to the ALJ's opportunity to observe the nature and character of a witness's demeanor. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985); *Georgetown University v. DOES*, 830 A.2d 865, 870 (D.C. 2003). The record fully supports the ALJ's thorough, well-reasoned decision, and we therefore adopt the reasoning and legal analysis expressed by the ALJ in concluding the Claimant sustained an injury that arose out of and in the course of her employment. *See Burke v. D.C. Water and Sewer Authority*, CRB No. 06-36 (April 2006) 0075694, n.2 (July 2, 1990).

Claimant's Cross Appeal

Claimant asserts that the denial of bad faith penalties is not based on substantial evidence. In support Claimant asserts:

> Employer's supposed evidence of intentional self-harm was that Claimant was likely lying because she allegedly received benefits without entitlement (notwithstanding that she was, in fact, entitled to both Medicaid and unemployment). Employer appears to be arguing that Claimant's chair must have faced a certain direction at the time of the fall without entertaining the prospect that a chair can be moved or rotated or presenting any evidence about the chair apart from photographs. Employer's witness Ms. Burris, with no stated expertise in forensics, claimed that she knew a falling chair would categorically be audible from another room because she knocked it down while she was in the room that Ms. Burwell experienced the accident – without any detection of the sound level in the room in which Ms. Burris heard Ms. Burwell's shout. There was no expert evidence on any of these matters. None of Ms. Burris's account of the alleged "fraud" is consistent with her text messages from the day of the accident and after, which clearly treat the injury as an accident. Indeed, the text messages state that Ms. Buriss warned Claimant that the screw had fallen from the chair *as evidence that Claimant should have known better than to sit in the chair* alleged negligence, in other words – and not as evidence that Claimant intentionally fell or faked the injury.
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> The Compensation Order's statement that supposed disputes about the nature of the witnessed accident give rise to a good faith basis for controverting the claimant do not meet the burden of the law.

Claimant's Brief at 5 (citations omitted)(emphasis included).

We disagree. Initially we must point out that contrary to Claimant's assertion, the accident in question was not a "witnessed" accident. Further, in determining if Employer's Notice of Controversion is pre-textual, the ALJ does not evaluate the persuasiveness or reliability of evidence presented by the Employer at the formal hearing. Instead as the ALJ did in in the instant matter the ALJ determines if at the time the Notice of Controversion is filed and benefits stopped the Employer had a good faith reason for doing so. Although not specifically acknowledged by the ALJ, Employer's IME which Claimant relied upon on at the formal hearing, was performed after Claimant's benefits were terminated and the notice filed. Further we conclude the evidence of the circumstances that occurred on the day of injury with regard to the chair and the reduction in Claimant's hours support the ALJ's analysis and conclusion:

> In this case, Claimant argued the Notice of Controversion was pretextual, stating Employer acted in bad faith given it secured an IME from Dr. Lahr, who medically causally related Claimant's condition to the May 6, 2016 work incident. Given the dispute regarding the mechanism of the injury, the record establishes Employer had a good faith basis to question accidental injury [sic]. Employer offered the testimony of two witnesses to question the occurrence of the accident and challenge Claimant's credibility. Employer's contentions, while not adopted, presented a reasonable basis for challenging the claim, and denying Claimant's benefits. As such, Claimant did not meet her burden to establish that the controversion was filed in bad faith.

CO at 10.

While the ALJ did include a reference to the hearing testimony of Employer's witnesses, it is clear from review of the testimony, especially of office manager Burris that the decision to issue the NOC was due to Burris's doubt that the incident occurred as alleged. Thus, we conclude the ALJ's denial of penalties pursuant to D.C. Code § 32-1528 is in accordance with the law and shall not be disturbed.

In addition to challenging the ALJ's denial of penalties, Claimant asserts the ALJ erred in denying temporary total disability from August 24, 2016 to the present and continuing. Specifically Claimant asserts:

> Claimant remained disabled after August 24, 2016, and the Compensation Order's failure to order benefits for this time period is reversible error. Claimant's restrictions were outside the scope of her duty according to all witnesses. Under the *Logan* test, Claimant's showing that she could not do all her pre-injury duties shifts the burden to Employer.
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> The Claimant and her supervisors described her duties at work, including lifting, bending to mop and dust, pushing and pulling heavy chairs, and working more than forty hours. These restrictions are all beyond the light duty restrictions of Dr. Lahr, Employer's IME, who restricted her to desk work. He never subsequently examined her to modify that restriction. Claimant's treating doctors subsequently restricted her to a maximum of forty hours, without any pushing or pulling, and no lifting over twenty pounds. These restrictions remained in effect at the time of the hearing.

Claimant's Brief at 6.

The ALJ stated:

. . . With the exception of working occasionally more than 40 hours a week, the record establishes Dr. Wagner essentially released Claimant to her pre-injury employment on August 23, 2016. Claimant has not established Employer required her to lift, push or pull more than 20 pounds during the course of her employment. Claimant did not identify any specific items weighing more than 15-20 pounds. Given the weight of individual glass frames and contact lens, the undersigned will concur with Employer that Claimant did not lift, push or pull more than 15-20 pounds during the course of her employment. Therefore, Claimant essentially received a full duty release on August 23, 2016, and is no longer entitled to temporary total disability benefits.

We find the ALJ correctly addressed the physical restrictions imposed by both Claimant's treating physician, Drs. Wagner and Salters as the ALJ found Claimant had not established she had to lift, push, pull or carry anything over 20 pounds. However, we do not find the ALJ addressed Dr. Wagner's restriction of not working more than 40 hours per week.

Thus we agree with Claimant that the ALJ's ruling that Claimant was "essentially released" to her pre-injury employment is not adequately explained. We further find the ALJ's statement: "Therefore, Claimant essentially received a full duty release on August 23, 2016 and is no longer entitled to temporary total disability benefits" is not supported by substantial evidence. Claimant's Brief relies on the hearing testimony of Claimant that sometimes she worked more than forty hours a week, HT at 25, as well as Dr. Rezvani's testimony that Claimant sometimes "got" more than 40 hours per week, HT at 47.

While we note the office manager testified that she cut Claimant's hours on the date of the injury and there is evidence in the record that because of the cut Claimant became eligible to receive unemployment benefits, the ALJ failed to make a finding as to how many hours Claimant was working on the date of the injury, specifically if Claimant' pre-injury duties included working more than 40 hours per week. Otherwise put, what is missing from the analysis is a comparison between Claimant's pre-injury average weekly wage and the earnings after returning to work, and a determination if any diminution in those earnings is premised upon Claimant being unable to work more than 40 hours per week due to the injury.

In order to conform to the requirements of the District of Columbia Administrative Procedure Act, D.C. Code § 2-501, *et seq.,* (1) the agency's decision must state findings of fact on each material, contested factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings. *Perkins v. DOES*, 482 A.2d 401 (D.C. 1984) Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate court is not permitted to make its own finding on the issue; it must remand the case for the proper factual findings. *King v. DOES,* 742 A.2d. 460, 465 (D.C 1999)(Basic findings of fact on all material issues are required; only then can the appellate court "determine upon review whether the agency's findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law.")

The CRB is no less constrained in its review of Compensation Orders. *See Washington Metropolitan Area Transit Authority v. DOES,* 926 A.2d 140 (D.C. 2007). Thus, when, as here, an ALJ fails to make express findings on all contested issues of material fact, the CRB can no more "fill the gap" by making its own findings from the record than can the Court of Appeals but must remand the case to permit the ALJ to make the necessary findings. See *Mack v. DOES,* 651 A.2d 804, 806 (D.C. 1994).

Accordingly, the ALJ's determination that Claimant "essentially" received a full duty release on August 23, 2016 and is no longer entitled to temporary total disability benefits (or temporary partial disability benefits based upon any diminution in wages resulting from a work-related restriction on the number of hours Claimant worked after returning to work) is not supported by substantial evidence because it is insufficiently addressed. The ALJ's limitation of Claimant's

award of TTD benefits as of August 23, 2016 is accordingly vacated and remanded for further findings of fact and analysis.

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant received a full duty release on August 23, 2016 and is no longer entitled to temporary total disability benefits is not supported by substantial evidence and not in accordance with the law and is VACATED. The remainder of the Compensation Order is supported by substantial evidence and is AFFIRMED. The matter is remanded to the ALJ for further findings of fact and analysis consistent with the above and specifically with regard to Claimant's pre-injury hours and wages and her post-injury return to work wages. If the record does not contain sufficient evidence to compete the analysis, the ALJ is free to re-open the record for receipt of such further evidence as is needed.

So ordered.