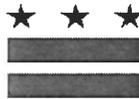


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-173

**DONALD MURRAY,
Claimant–Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer-Respondent.**

Appeal of an September 30, 2015 Compensation Order by
Administrative Law Judge Lilian Shepherd
AHD No. 15-224, OWC No. 724884

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 MAR 18 PM 9 49

(Issued March 18, 2016)

Kasey K. Murray for Claimant
Mark H. Dho for Employer

Before HEATHER C. LESLIE, LINDA F. JORY, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On January 6, 2015, Claimant was employed by the Employer as a double A high voltage power tech. Claimant’s duties included traveling to different locations on the WMATA system to repair problems. Claimant was required to report to the Rhode Island Avenue location and sign in. On that day, the road conditions were less than optimal as weather conditions caused ice and snow to be present. As an essential employee, Claimant was expected to work on that day.

Claimant testified he drove his vehicle to his work location and turned into the driveway. Because of the snow and ice, Claimant’s vehicle could not make it up the driveway which had an incline. Claimant called his supervisor, Clee Lucas, to inform him of his difficulties in making it up the

driveway and that he would park somewhere else. Mr. Lucas indicated he would call Claimant back. Claimant proceeded to park in the Big Lots parking lot awaiting a phone call from Mr. Lucas.

After approximately 45 minutes, Claimant testified he called Mr. Lucas to tell him he would be walking into the office. Mr. Lucas testified Claimant never indicated he was going to walk to the office, and would have told him not to walk as the driveway had been cleared and he could drive.

Claimant indicated he made it halfway up the driveway before he slipped and fell on ice, injuring his right leg. Claimant proceeded back to his car and telephoned Mr. Lucas to let him know he injured his right leg.

A full evidentiary hearing occurred on July 25, 2015. Claimant sought an award of temporary total disability benefits from January 7, 2015 through the present and continuing, a credit for sick and vacation time used, and payment of causally related medical benefits. On September 30, 2015, a Compensation Order (CO) was issued which denied Claimant's claim for relief, finding the injury did not arise out of or in the course of Claimant's employment.

Claimant timely appealed the decision. Claimant argues:

The question presented in this Application for Review is whether Judge Shepherd's determination that Mr. Murray did not establish entitlement to temporary total disability benefits from January 7, 2015 to the present and continuing was in accordance with the law and supported by substantial evidence when 1) Judge Shepherd failed to apply the presumption of compensability even though Mr. Murray presented evidence of a disability and a workplace event that has the potential of causing or contributing to his disability; and 2) Judge Shepherd erred by failing to require the Employer (WMATA) to demonstrate by substantial evidence that Mr. Murray's disability did not arise out of and in the course of his employment with WMATA.

Claimant's argument at 4.

Employer opposes Claimant's Application for Review, arguing the CO is supported by the substantial evidence and in accordance with the law.

ANALYSIS¹

The District of Columbia has adopted the "positional risk" doctrine. As stated in *Jones v. D.C. Office of Unified Communications*:

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.

The District of Columbia has adopted the “positional risk” doctrine in defining and analyzing whether an alleged cause of an injury under its workers’ compensation laws “arises out of a claimant’s employment. See, *Clark v. District of Columbia Department of Employment Services*, 743 A.2d 722 (D.C. 2000). The positional risk doctrine is summarized in the leading treatise on workers’ compensation law at 1 LARSON’S WORKERS’ COMPENSATION LAW, Copyright 2008, Matthew Bender & Company, Inc., (*Larson’s*), PART 2 “ARISING OUT OF THE EMPLOYMENT”, CHAPTER 3 *THE FIVE LINES OF INTERPRETATION OF “ARISING”*, 3.05, Positional-Risk Doctrine, where the following is written:

An important and growing number of courts are accepting the full implications of the positional-risk test: An injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where he was injured. It is even more common for the test to be approved and used in particular situations. This theory supports compensation, for example, in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he or she was injured by some neutral force, meaning by “neutral” neither personal to the claimant nor distinctly associated with the employment.

Citing *Clark*, the treatise then states in footnote 1:

Accordingly, the claimant need not show a strong causal relationship between the employment and the injury, just a “but for” relationship. Here the claimant was assaulted in the employer’s parking lot under circumstances in which it was difficult to determine if the attack was personally motivated or merely random. Since the employer could not produce evidence that the assault was purely personal, compensation was properly awarded.

Larson’s, supra.

Jones v. D.C. Office of Unified Communications, CRB No. 09-049 (May 12, 2009) at 5.²

The District of Columbia Court of Appeals has also reminded us:

The District of Columbia Workers' Compensation Act includes a presumption that a "claim comes within the provisions of this chapter." D.C. Code § 32-1521 (1) (2001).

² The positional-risk test has been applied to private sector workers’ compensation cases in *Bentt v. DOES*, 979 A.2d 1226 (D.C. 2009).

That presumption, "designed to effectuate the humanitarian purposes of the statute, reflects a 'strong legislative policy favoring awards in arguable cases.'" *Ferreira v. District of Columbia Dep't of Employment Servs. (Workers' Compensation)*, 531 A.2d 651, 655 (D.C. 1987) (quoting *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 183, 407 F.2d 307, 313 (1968) (en banc)). The Act's terms, including the presumption, are "to be construed liberally for the benefit of employees and their dependents." *J.V. Vozzolo, Inc. v. Britton*, 126 U.S. App. D.C. 259, 262, 377 F.2d 144, 147 (1967).

To benefit from the presumption, a claimant must make an initial demonstration of "two 'basic facts': [1] a death or disability and [2] a work-related event, activity, or requirement which has the *potential* of resulting in or contributing to the death or disability." *Ferreira*, 531 A.2d at 655 (emphasis in original). If the claimant makes this initial showing, "[t]he presumption then operates to establish a causal connection between the disability and the work-related event, activity, or requirement." *Id.* (citing *Swinton v. J. Frank Kelly, Inc.*, 180 U.S. App. D.C. 216, 223, 554 F.2d 1075, 1082 (1976)). "Once the presumption is triggered, the burden is upon the employer to bring forth 'substantial evidence' showing that death or disability did not arise out of and in the course of employment." *Id.* at 655 (quoting *Hensley v. Washington Metropolitan Area Transit Authority*, 210 U.S. App. D.C. 151, 154, 655 F.2d 264, 267 (1981)). See *Washington Hosp. Ctr. v. District of Columbia Dep't of Employment Servs.*, 744 A.2d 992, 1000 (D.C. 2000) (the employer only needs to rebut the causal connection with "substantial evidence," not "absolute certainty"). There is "substantial evidence" to rebut the presumption where the employer presents "circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Ferreira*, 531 A.2d at 655. See *Whittaker*, 668 A.2d at 847. When considering the evidence, the administrative law judge must resolve "doubts as to whether the injury arose out of the employment . . . in the claimant's favor." *Baker v. District of Columbia Dep't of Employment Servs.*, 611 A.2d 548, 550 (D.C. 1992) (citing *Wheatley*, 132 U.S. App. D.C. at 182, 407 F.2d at 312).

McNeal v. DOES, 917 A.2d 652 (D.C. 2007).

With the above cases in mind, we turn to the case *sub judice*. Claimant's first argues the ALJ failed to apply the presumption of compensability. Claimant argues his testimony and the medical reports are enough to invoke the presumption of compensability. Employer counters this argument by pointing this panel to the ALJ's credibility determination, wherein the ALJ concluded the Claimant's testimony was incredible and that the accident did not occur on WMATA property as claimed, which supports the ALJ's conclusion that Claimant did not invoke the presumption of compensability. We agree with Claimant.

In concluding Claimant's injury did not arise out of his employment, the ALJ noted:

D.C. Code § 32-1521 (1) establishes a presumption in favor of compensability for employees injured on the job. In the instant matter, Claimant was injured on his way to work and had not entered onto the premises of the Employer and accordingly had

not signed in to work so as to be on the job in order to be imbued with the statutory presumption. It thus must be determined whether the manner of Claimant's injury under the doctrine of the positional-risk test or an exception to it allows for coverage under the Act.

Claimant sustained his injury at a time when he had not yet reported for work. Thus, under the positional-risk test, Claimant's injury would not be considered to have arisen in the course of employment as he was not at work and therefore the injury could not have happened but for the conditions and obligation of the employment having placed him in the position where he was injured.

Claimant argued that he's an essential employee; therefore, he had to go to work. However, how he gets to work is a matter of personal choice. Employer did not provide a means for him to get to work; Employer did not give him any instructions when he couldn't get up the driveway. Claimant chose to park somewhere else, it would be the same analysis if Claimant couldn't leave his driveway at his home. The method he chose was personal to him and was not a benefit to the employer. Employer testified that although Claimant is an essential employee, if he failed to appear at work, it meant someone else couldn't go home and the impact would have been whether Claimant was paid for the day or not.

Claimant has not provided any evidence to show he was on the Employer's property at the time of the fall. I don't find the Claimant credible that he had fallen on the Employer's property. If he was a few feet away from the Employer's office and had his cell phone, logic would seem to dictate that he would call his supervisor to say he had fallen at the entrance. Yet it was Claimant's testimony that he was mad and had no reason to go to work and walked approximately 100 yards back to his vehicle with a fractured ankle, and then called the supervisor to notify him that he fell.

Claimant's argument for the "Positional Risk Doctrine" is discounted based on the testimony that Claimant never signed in for duty, calling the supervisor to let him know of the circumstances did not put Claimant on duty. In addition, Claimant was not on duty and doing something else at the Employer's behest.

CO at 6.

First, while acknowledging the presumption of compensability, the ALJ then denies invoking the presumption of compensability, concluding Claimant had not signed in, nor was on Employer's premises. While it is uncontested that Claimant had not signed in when he injured, Claimant's testimony was that he was on Employer's premises when the accident occurred. Injuries which occur right before a Claimant clocks in or immediately after a Claimant clocks out does not necessarily mean the injury did not arise out of or in the scope of Claimant's employment. In *Acosta*, the CRB noted that other jurisdictions have held:

„[T]here is no such thing as 'instantaneous exit.' That is, an employee has a reasonable time after concluding work to absent herself from the employer's premises. Claimant testified that she fell about 1 or 2 minutes after she left her

employer's premises. We find Claimant's accident occurred within a reasonable time after quitting work and her claim is not foreclosed because she fell one or two minutes after leaving work.

Acosta v. Il Creation Inc., CRB No. 13-017, (May 14, 2013) at 4, 5. (Footnotes omitted.)

Nor is there an 'instantaneous entrance.' An employee has a reasonable time to clock into work after arriving on Employer's premises. Such is the case here. Claimant testified he was injured while walking up Employer's driveway on his way to sign in. Such testimony satisfies Claimant's burden of showing a disability and a work related event which has the *potential* of resulting in or contributing to Claimant's disability. It was in error for the ALJ not to conclude Claimant had invoked the presumption.

Employer argues the ALJ's credibility finding that the accident did not happen as Claimant described, is enough to defeat a conclusion that the presumption is invoked, relying on our decision in *Storey v. Catholic University*, CRB No. 15-024, (July 9, 2015) (*Storey*). We find *Storey* to be dissimilar as in that case the ALJ found the Claimant to be an incredible witness based on numerous inconsistencies in the medical records, employer records and testimony at the Formal Hearing.³ Such is not the case here. As we said in *LaPlant v. Tradesman International, Inc.*, CRB No. 15-129 (December 31, 2015):

In some instances, such as *Storey*, a total lack of credibility may be sufficient to deny invocation of the presumption. However, in most cases, such as the present case, where a credibility determination must be made on inconsistent or conflicting evidence, the presumption should be invoked, and the effect of the inconsistent evidence comprising the complex and nuanced credibility analysis is to be considered at the evidentiary-weighting third step.

LaPlant at 7.

As we determine it was an error for the ALJ to conclude Claimant had not invoked the presumption, we remand for further consideration of whether the presumption has been rebutted by substantial evidence (including direct testimony, cross-examination and the ALJ's credibility

³ The CRB noted in *Storey*,

The ALJ's findings of lack of credibility were based upon (1) the ALJ's assessment that there were multiple instances of marked differences between Claimant's memory concerning the events surrounding her claim, and facts related to her past medical history, when she testified on direct examination as opposed to cross-examination; (2) the absence in the medical record, where such references would be expected in 2007, of corroborating complaints related to Claimant's alleged reactive responses to workplace toxins; (3) Claimant's claimed inability to recall significant and substantial details concerning volunteer work in which she was engaged in a presidential campaign at a time that she claims to have been disabled; (4) contradictory, inconsistent and evasive answers to questions regarding her course of treatment with a Dr. Shoemaker; and (5) giving false or misleading testimony concerning the presence of open cans of chemical labeled "toxic" or "hazardous", when no such cans with such labels were present.

Storey at 2.

assessment) that Claimant's disability did not arise out of and in the course of employment. If so, the ALJ must determine whether Claimant, without the benefit of the presumption, has satisfied his burden to produce preponderance of the evidence that his injury arose out of and in the course of employment.

In an effort to avoid further remand, we address Claimant's argument that should the ALJ determine, at this stage, the accident did not occur on WMATA property, such a finding is not fatal to Claimant's case.

As we explained in *Gardner v. D.C. Dep't of Corrections*, CRB No. 08-197 (April 9, 2009):

If, on the other hand, it is determined upon remand that the location of the injury does not constitute Petitioner's premises, the claim may still be compensable if Respondent was nevertheless engaged in some work-connected errand or activity which required that she enter her car in order to perform her job under the "positional-risk" standard previously discussed herein. *Grayson v. D.C. Department of Employment Services*, [516 A.2d 909 (D.C. 1986)].

Gardner at 5.⁴

Claimant in argument relies on two Director decisions, *Alston v. Washington Hospital Center*, Dir. Dkt. No. 91-64, (May 9, 1997) and *Harding v. Research & Evaluation Association*, Dir. Dkt. 91-53 (July 26, 1994). We also point out to the ALJ to our recent decisions in *Bullock v. WMATA*, CRB No. 12-109, (October 10, 2012) and *Williamson v. WMATA*, CRB No. 15-130 (January 8, 2016).⁵

⁴ See also *Vieira v. DOES*, 721 A.2d 579, 584 (D.C. 1998), noting

There are circumstances where the journey itself has been recognized to be a part of the service rendered by the employee for the benefit of the employer. See, e.g., *O'Reilly v. Roberto Homes, Inc.*, 31 N.J. Super. 387, 107 A.2d 9 (N.J. 1954) (compensation awarded for fatal injury sustained while construction worker was returning home after performing a thirty minute job of filling oil heaters to keep plaster from freezing); *Kyle v. Greene High School*, 208 Iowa 1037, 226 N.W. 71 (Iowa 1929) (compensation awarded for fatal injury of janitor en route to school after usual work hours in response to request to turn on lights for basketball game); see also 1 LARSON, LARSON'S WORKMEN'S COMPENSATION § 16.11 (1998) Professor Larson describes the special errand rule, recognized in some jurisdictions, as follows:

When an employee, having identifiable time and space limits on the employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.

⁵ *Bullock* and *Williamson* both dealt with, in part, the personal comfort doctrine. According to Larson, the application of the personal comfort doctrine should be made with the following in mind:

Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

We note reference to these decisions is not meant as an endorsement one way or another. For instance, compare *Tompkins v. WMATA*, CRB No. 15-039, AHD No. 14-372 (June 16, 2015), *Soriano v. Renaissance Mayflower Hotel*, CRB No. 14-082, AHD No. 14-144 (October 30, 2014), *Clark v. DOES*, 743 A.2d 722 (D.C. 2000).

We merely point out that if the ALJ determines that Claimant was not on Employer's premises such a finding does not necessarily negate the compensability of the claim.

CONCLUSION AND ORDER

The September 30, 2015 Compensation Order is not supported by the substantial evidence in the record and is not in accordance with the law. It is VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

So Ordered.

See 1 A. Larson, *The Law of Workers' Compensation* § 21.