CRB No. 17-003

DONALD MURRAY,
Claimant–Petitioner,

v.

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

Appeal of a December 8, 2016 Second Compensation Order on Remand by
Administrative Law Judge Lilian Shepherd
AHD No. 15-224, OWC No. 724884

(Issued April 20, 2017)

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

Before HEATHER C. LESLIE, GENNET PURCELL, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In a prior Decision and Order, the Compensation Review Board ("CRB") outlined Claimant's injury, treatment, and the procedural history of Claimant's claim as follows:

> 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.

Murray v. WMATA, CRB No. 15-173 (March 18, 2016) ("DRO").

After considering the parties' arguments, the CRB determined the Administrative Law Judge ("ALJ") had erred in not invoking the presumption based on the testimony of Claimant. The CRB found the reasons for not invoking the presumption to not be in accordance with the law, and was dissimilar to our decision in *Storey v. Catholic University*, CRB No. 15-024 (July 9, 2015). Instead the CRB pointed out the cautionary language 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-weighing third step.

LaPlant at 7.

The CRB found Claimant's testimony satisfied Claimant's burden of showing a disability and a work-related event which had the potential of resulting in or contributing to Claimant's disability. The CRB remanded the case with the following instructions:

> 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 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.

DRO at 6-7.

A Compensation Order on Remand ("COR") was issued on May 2, 2016. In that COR, the ALJ concluded Claimant had not invoked the presumption of compensability contrary to the DRO instructions, and denied the claim.

> Claimant timely appealed. Claimant argues first the COR fails to follow the remand instructions. Second, Claimant argues the ALJ erred in not affording Claimant the statutory presumption of compensability, and finally, that the ALJ erred in failing to shift the burden to Employer to rebut the presumption of compensability.
>
> Employer opposes the appeal. Employer argues the COR is supported by the substantial evidence in the record and is in accordance with the law.

Murray v. WMATA, CRB No. 16-073 (October 11, 2016) ("DRO2").

After reviewing the COR, the CRB determined the ALJ failed to follow the instructions of the DRO, and remanded the case with the same instructions as before. *Id.*

A Second Compensation Order on Remand ("COR2") was issued on December 8, 2016. The COR2 denied Claimant's claim for relief, concluding Claimant had failed to prove by a preponderance of the evidence that his injury arose out of and in the course of his employment.

Claimant appealed. Claimant argues first, that the ALJ erred in finding Employer had rebutted the presumption of compensability and second, the ALJ's conclusion that Claimant's injury did not arise out of and in the course of Claimant's employment is not in accordance with the law.[1]

Employer opposes the appeal, arguing the ALJ's conclusion that the presumption had not been invoked, was supported by the substantial evidence in the record and in accordance with the law. Employer remained silent on all other issues decided in the COR2.

ANALYSIS[2]

Claimant first argues the ALJ erred in concluding Employer had rebutted the presumption of compensability. In so arguing, Claimant relies upon *Murray v. DOES*, 765 A.2d 980 (D.C. 2001) ("*Murray*").[3]

In concluding the Employer rebutted the presumption of compensability, the ALJ stated:

> In opposition to the Claimant's evidence, the Employer relied upon the credible testimony of Mr. Lucas. Mr. Lucas confirmed that he received the initial phone call

[1] Claimant does not argue the COR2 does not follow the CRB's orders outlined in the DRO2.

[2] 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.

[3] For clarification the Claimant in the cited case was Joseph Murray, not Claimant (Donald Murray) in the present case.

from the Claimant, that Claimant was unable to make it up the drive. Mr. Lucas did not give the Claimant any instructions to park elsewhere. Mr. Lucas had the driveway salted and plowed. Mr. Lucas did not receive a subsequent phone call from Claimant that he was walking up the driveway. The next phone call that Mr. Lucas received from Claimant was at approximately 8:00am, when Claimant called him to tell him that he slipped while walking across the parking lot, Mr. Lucas presumed it to be the Big Lots, and he was going to seek medical attention. Employees are required to sign the sign-in sheet, located at the front door of the trailer once they enter the trailer.

Employer's Exhibit #1, photograph 1, Claimant identified with an "X" the WMATA driveway. He identified with an "O" the gate towards the trailer where he would sign in and with a triangle the approximate location where he fell. On photograph 4, Claimant identifies WMATA's driveway with an "O" and the Big Lots parking lot with an "X" and then he drew a line indicating the route he took after he fell from the "O" to the "X" and it was estimated that it may have been 100 yards. Based on the locations marked on the photographic exhibits, Claimant would have the undersigned believe that he fell several feet away from the trailer but instead of getting help when he was ostensibly that close to the work trailer, he walked back to his vehicle which was yards away on a fractured ankle to then call his supervisor and notify him that he fell outside the trailer.

The testimony of Mr. Lucas is sufficient to rebut the presumption that has been invoked. The record evidence is therefore reviewed without reference to any presumption in order to determine whether the Claimant has shown, by a preponderance of the evidence that his injury arose out of and in the course of employment.

COR2 at 5.

Claimant, argues that in relying upon Mr. Lucas's testimony to rebut the presumption, the case is "strikingly similar to another case in which the ALJ incorrectly failed to credit the claimant's testimony and apply the presumption" relying on *Murray*. Claimant's brief at 13.

A review of *Murray*, and the quoted portions in Claimant's argument, reveals the case primarily discussed and analyzed whether the ALJ incorrectly denied Claimant the presumption of compensability. The District of Columbia Court of Appeals ("DCCA") concluded that the ALJ erred in not affording Claimant the presumption of compensability, as the inconsistencies the ALJ cited in coming to the determination Claimant was not credible, were in fact not supported by substantial evidence.

We remind Claimant that our remand orders specifically instruct the ALJ to accord the Claimant the presumption of compensability. This the COR2 has done. Thus, *Murray* is inapposite in that regard.

However, *Murray* does give some supporting language when stating:

> The Act must be construed liberally for the benefit of employees and their dependents. *Ferreira*, *supra*, 531 A.2d at 655 (citations omitted). To benefit from the presumption of compensability and shift the burden to the employer to provide substantial evidence that the disability did not arise in the course of employment, the claimant only needs to make an initial demonstration of an employment connected disability. Intervenors argue that even assuming that the presumption should have been applied, they rebutted the presumption. Again, they rely upon Silva's testimony that he did not see the fall and did not hear anything to indicate that Murray was falling. For the reasons previously stated, Silva's testimony was not specific and comprehensive enough to rebut the presumption that Murray fell at work and injured himself as he claims he did.

Murray, 765 A.2d at 985.

However, what Claimant fails to acknowledge, and what distinguishes *Murray* from the facts present in the case *sub judice*, is that the Employer rebutted the presumption of compensability with not only Mr. Lucas's testimony, but also with photographic evidence which called into question Claimant's version of events including one key fact, whether Claimant fell on WMATA property or the parking lot at Big Lots. Thus, contrary to Claimant's argument that "there is not substantial evidence in the record upon which the ALJ's finding of incredibility as to where Mr. Murray said he fell could be based," the ALJ found the photographs do provide a basis to doubt Claimant's testimony along with Mr. Lucas's credible testimony. Claimant's brief at 17.

As the DCCA has stated, an Employer is not necessarily required to present expert opinion in order to rebut the presumption of compensability. Circumstantial evidence may be enough. *Ferreira v. DOES*, 531 A.2d 651, 655 (D.C. 1987).[4] The testimony of Mr. Lucas in tandem with the photos provided enough evidence to show that the accident may not have occurred as Claimant described, thus providing enough evidence to rebut the presumption of compensability. The finding that Employer had rebutted the presumption of compensability is affirmed.

We also conclude the ALJ's credibility assessment is supported by the substantial evidence in the record.[5] The ALJ concluded:

---

[4] As the DCCA stated:

> 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. *Hensley, supra*, 210 U.S. App. D.C. at 154, 655 F.2d at 267; *Swinton, supra*, 180 U.S. App. D.C. at 222, 554 F.2d at 1081; *Wheatley, supra*, 132 U.S. App. D.C. at 182, 407 F.2d at 312; *Butler v. District Parking Management Co.*, 124 U.S. App. D.C. 195, 197, 363 F.2d 682, 684 (1966); *see Dunston, supra*, 509 A.2d at 111 (the "presumption requires the employer to take the initial steps to disprove liability"). "Stated otherwise, the statutory presumption may be dispelled by circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Swinton, supra*, 180 U.S. App. D.C. at 224, 554 F.2d at 1983, *quoted in Hensley, supra*, 210 U.S. App. D.C. at 155, 655 F.2d at 268.

[5] A determination of credibility, like other findings of fact, must be supported by substantial evidence in the record when reviewed as a whole. See *Davis v. Western Union Telegraph*, Dir. Dkt. 88-84, H&AS No. 87-751, OWC No. 098216 (March 4, 1992). Such a determination should involve more than a mere consideration of the witness' demeanor and

> At the formal hearing, Claimant was not found to be credible based on his demeanor and on the lack of corroborating evidence between his testimony and the facts of the case. Employer's witness was found to be credible based upon his demeanor.

COR2 at 3.

The ALJ based her credibility finding not only on the demeanor witnessed at the hearing, but also on the other evidence and testimony presented, including the photographs and witness testimony. We are cognizant that the credibility findings of an ALJ are entitled to great weight when properly supported. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985). As we determine the ALJ's credibility assessment is properly supported, we conclude the ALJ's credibility finding is supported by the substantial evidence in the record.

Having determined Employer rebutted the presumption of compensability, the ALJ then weighed the evidence presented without benefit of the presumption to determine whether Claimant proved, by a preponderance of the evidence that his injury arose out of and in the course of his employment. *Washington Hospital Center v. DOES,* 821 A.2d 898 (D.C. 2003).

This leads us to Claimant's second argument that the ALJ failed to properly apply the positional risk doctrine when concluding Claimant had failed in his burden, thus requiring remand. As we stated previously:

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

---

appearance; it should include an overall evaluation of the testimony in light of its rationality, internal coherence, and consistency with other evidence of record. *McAlister v. Flippo Construction Company*, CRB No. 08-045, AHD No. 03-314, OWC No. 585987 (March 25, 2008); *Russell v. WMATA*, CRB No. 03-241, OHA No. 03-241, OWC No. 560813 (September 28, 2005).

> 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.

DRO at 2-3.

In the COR2, the ALJ stated:

> In his testimony, Claimant does not recall telling Mr. Lucas where he fell and believes that if he said the parking lot, he was referring to the driveway because it is sometimes used as a parking lot. Claimant argues that he was trying to get to work and was unable to drive up the driveway because it was icy and he fell between 6:00am and 8:00am, the time he was required to be on duty and by calling into his employer, he was on duty. Claimant argued that the factors of the "Positional Risk Doctrine" are met in this situation. *Grayson v. District of Columbia Dept. of Employment Servs.*, 516 A.2d 909 (D.C. 1986). Claimant argued that because of the nature of his work, he was required to be at work, there is only one route to get to the parking lot and he fell after he had checked in with the supervisor. However, this argument does not support the positional risk doctrine but puts Claimant under the

coming and going rule. Claimant had not signed the sign in book and calling into work did not put Claimant on the clock and at work.

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'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.

COR2 at 7.

Claimant relies on several cases including *Alston v. Washington Hospital Center*, Dir. Dkt. No. 91-64, (May 9, 1997) and *Harding v. Research v. Evaluation Association*, Dir. Dkt. 91-53 (July 26, 1994). We refer Claimant to our more recent cases of *Tompkins v. WMATA*, CRB No. 15-039, (June 16, 2015), *Soriano v. Renaissance Mayflower Hotel*, CRB No. 14-082, (October 30, 2014), *Clark v. DOES,* 743 A.2d 722 (D.C. 2000). As the ALJ determined Claimant's fall occurred off-site, in the Big Lot parking lot, and Claimant had not yet signed into work, the work injury could not have occurred "but for" his employment.

Claimant also argues several other points, however, what remains lethal to Claimant's case at the third step, is the conclusion by the ALJ that Claimant was an incredible witness, a conclusion we affirmed above. Indeed, the ALJ outlined numerous instances wherein the Claimant's testimony was deemed to be incredible and unworthy of belief. See COR2 at 5-8. Such conclusion, that Claimant is an incredible witness, proves fatal to Claimant's case at the third stage, where Claimant is tasked to prove his case by a preponderance of the evidence. *Washington Hospital Center v. DOES*, 821 A.2d 895 (D.C. 2003). As Claimant is an incredible witness, Claimant fails in this burden.

Finally, we also note that much of what Claimant argues also amounts to a reweighing of the evidence in his favor, a task we are prohibited from doing. As stated above, 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. *Marriott,* 834 A.2d at 885.

CONCLUSION AND ORDER

The December 8, 2016 Second Compensation Order on Remand is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

So Ordered.