

DISTRICT OF COLUMBIA, DEPARTMENT OF EMPLOYMENT
SERVICES,

Dir. Dkt. No. 88-7

ETHELBERT WILLIAMS,
Claimant

v.

UPPERMAN PLUMBING CORPORATION,
and PMA INSURANCE COMPANY,
Employer/Carrier

H&AS No. 86-716; OWC No. 0103221

(Decided November 23, 1988)

COUNSEL: Lawrence R. Berger, III, Esquire, for the Claimant; Geoffrey S. Gavett, Esquire, for the Employer/Carrier

DECISION OF THE DIRECTOR

I. Preliminary Statement

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Law 3-77, D.C. Code, § 36-301 et seq. (1981 Edition, as amended) (hereinafter, the "Act").

On December 10, 1987, Hearing Examiner Roebuck issued a Compensation Order which denied claimant temporary total disability benefits.

Claimant filed an Application for Review on January 11, 1988. The employer/carrier (hereinafter, "employer") filed its response to the appeal on March 3, 1988.

II. Background

On August 15, 1986, claimant sustained injuries in a fight with a co-worker. Claimant sought compensation for the injuries he sustained during the fight. Thus, the Hearing Examiner was faced with the issue of whether claimant's injury was compensable.

The Hearing Examiner concluded that [*2] since claimant was the aggressor in the altercation, he was not entitled to compensation.

In his Application for Review, claimant seems to challenge the factual and credibility findings made by the Hearing Examiner in reaching her decision to deny compensation benefits.

III. Discussion

The Director of the Department of Employment Services (hereinafter, "Director") must affirm the Compensation Order under review if the findings of fact contained therein are supported by substantial evidence in the record considered as a whole and if the law has been properly applied. See D.C. Code, § 36-322; 7 DCMR Employment Benefits § 230.

The Hearing Examiner found that the test set forth in *Bird v. Advance Security*, H&AS No. 84-69 (June 7, 1985) was applicable to this case. Under *Bird*, in determining whether an alleged work injury which results from a fight is compensable, there must be:

(1) a showing that the employment required the combatants to work in an environment which brings them together often enough for their temperaments and emotions to interact under strains of the workplace and which tends to increase the likelihood of friction between them, and

(2) a finding [*3] that the injured employee was not the aggressor (emphasis added).

The Hearing Examiner, in applying the *Bird* test, found that under the second prong of the test, claimant was the aggressor and thereby not entitled to compensation. In reaching this conclusion, the Hearing Examiner rejected the testimony of claimant that he was not the aggressor, while accepting the testimony of employer's witness that it was claimant who acted in a physically aggressive manner. As a result, since claimant's aggressive behavior precipitated the altercation in which claimant was injured, claimant was not entitled to compensation benefits.

Moreover, as additional statutory support for the *Bird* test, the Director notes that D.C. Code, § 36-303(d) provides that liability for compensation shall not apply where injury to the employee was occasioned solely by his willful intention to injure himself or another.

A review of claimant's Application for Review seems to indicate that claimant does not challenge the legal tests used by the Hearing Examiner in reaching her decision, rather, claimant appears to be simply rearguing the evidence.

In this case, the Hearing Examiner did not find claimant's [*4] testimony credible as to how the fight occurred and the circumstances surrounding the fight, whereas she found the testimony of employer's witness to be candid and credible. Claimant contests these credibility findings, but as a general rule, the fact finding of a hearing examiner is given great weight with respect to credibility determinations. *Dell v. Department of Employment Services*, 499 A.2d 102, 106 (D.C. App. 1985).

Claimant also argues that the Hearing Examiner improperly relied upon statements attributed to claimant which appear in hospital reports in the record. These hospital records show that claimant indicated to hospital personnel that he suffered his injury by falling off a loading dock. Claimant argued that he did not tell hospital officials that he fell off a loading dock, but the Hearing Examiner found that claimant's credibility was further diminished by this history of the injury found in the records. The Director can find no error in the Hearing Examiner's reliance on the statements in the hospital records to question claimant's credibility.

Based upon the Director's review of the record herein, the decision of the Hearing [*5] Examiner appears to be supported by substantial evidence and a proper application of the law.

IV. Disposition

Accordingly, for the reasons more fully set forth above, the Compensation Order of December 10, 1987 is hereby affirmed, adopted, and incorporated by reference herein.

F. Alexis H. Roberson

Director

Date NOV 23 1988