GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

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DIRECTOR

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 AUG 5 PM 1 55

COMPENSATION REVIEW BOARD

CRB No. 15-072

FRANCES LEE,
Claimant-Petitioner,

v.

MARRIOTT CORPORATION,
Self-Insured Employer-Respondent.

Appeal from an March 31, 2015 Compensation Order by
Administrative Law Judge Donna J. Henderson
AHD No. 14-099, OWC No. 695616

(Decided August 5, 2015)

David Kapson for the Claimant
Zachary I. Shapiro for the Employer

Before HEATHER C. LESLIE, MELISSA LIN JONES, 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

Claimant is a barista at a Starbucks owned and operated by the Marriott Corporation (Employer). On May 26, 2011, Claimant allegedly injured her left wrist, left arm, and left hand. On June 1, 2011, Claimant alleges she hurt her right arm, right wrist, and right hand which she had been using more since the May 26, 2011 injury. Claimant sought treatment with Kaiser Permanente.

Claimant attended an independent medical evaluation (IME) with Dr. Joel Fecther on August 21, 2013. Dr. Fechter took a history of Claimant's injuries, treatment, and current complaints. Dr. Fechter then performed a physical exam and obtained radiographs of Claimant's right wrist and hand. Dr. Fechter opined Claimant suffered from a 15% permanent impairment to her right upper extremity as a result of the June 1, 2011 injury.

Employer sent Claimant for an IME with Dr. Richard Barth on November 4, 2013. Dr. Barth took a history of Claimant's injury, treatment, and performed a physical examination. Dr. Barth also took radiographs. Dr. Barth opined Claimant suffered from a right thumb sprain, secondary tot the injury of June 1, 2011. Dr. Barth also opined Claimant was at maximum medical improvement and opined Claimant suffered from 0% impairment as a result of the injury of June 1, 2011.

A full evidentiary hearing occurred on February 9, 2015. Claimant sought an award of 15% permanent partial disability to the right arm. The issues presented for resolution were the following:

1. Did Claimant sustain an accidental injury on June 1, 2011?
2. Did Claimant's injury on June 1, 2011 arise out of and in the course of Claimant's employment?
3. Is Claimant's right thumb pain medically causally related to Claimant's alleged work-related injury on June 1, 2011?
4. Is Claimant's right wrist and forearm pain causally related to Claimant's alleged work-related injury on June 1, 2011?
5. Did Claimant give Employer timely notice of her alleged work-related injury on June 1, 2011?
6. What is the nature and extent of Claimant's permanent disability to her right upper extremity, or any necessarily included part thereof, if any?

Compensation Order (CO) at 2.

A CO was issued on March 31, 2015. In that CO, the ALJ concluded that:

> Claimant has failed to bear her burden to "establish that the work event or condition at issue was the cause of the claimed injury," that is, that the injury is in fact work related. *Reynolds* [*v. DOES*, 852 A.2d 909] at 911 (2004). For this reason, all other issues are moot.

CO at 6.

The CO denied Claimant's claim for relief.

Claimant timely appealed. Claimant argues the ALJ failed to analyze the issue of arising out of an in the course of employment pursuant to D.C. Code § 32-1521, representing a legal error that must be reversed and the case remanded. Employer opposes the appeal, arguing the findings of fact and conclusions of law were supported by the substantial evidence in the record and in accordance with the law.

THE STANDARD OF REVIEW

The scope of review by the Compensation Review Board ("CRB") is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code § 32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

DISCUSSION AND ANALYSIS

The first issue presented, and addressed by the ALJ, was whether an accidental injury occurred that arose out of and in the course of Claimant's employment. The Act has been consistently interpreted that to show that an accidental injury has been sustained a claimant only has to prove that something unexpectedly went wrong within the human frame. *WMATA v. DOES,* 506 A.2d 1127, 1128 (D.C. 1986). The D.C. Court of Appeals not only accepted this interpretation as reasonable, it also acknowledged that it has been consistently recognized that in order to be compensable, the accidental injury must arise out of and in the course of employment. *Id.,* n. 2. As the Claimant notes in argument, and the ALJ acknowledged at the outset that there is a presumption, in the absence of evidence to the contrary, that the claim comes within the provisions of D.C. Code § 32-1521 and is compensable. The ALJ determined that through Claimant's testimony this presumption was invoked that a work related accident occurred.

The Act's presumption of compensability operates only in the absence of evidence to the contrary. Once the presumption is triggered, the burden then shifts to the Employer to come forth with substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted). Without this production by an employer, the claim will be presumed to fall within the scope of the Act. *Parodi v. DOES,* 560 A.2d 524, 526 (D.C. 1989).

At this stage, the ALJ stated:

> Employer offered the opinion of Dr. Richard Barth who examined Claimant on November 4, 2013. CE 1. Dr. Barth opined that Claimant sustained a "[r]ight thumb sprain as a result of an injury on June 1, 2011, resolved." CE 1, p. 2.

CO at 5.

No further discussion ensues regarding whether or not the above opinion is sufficient enough to rebut the presumption of compensability that an accidental injury did occur on June 1, 2011. The ALJ, without answering this question, analyzes Claimant's testimony and medical testimony to determine that Claimant failed to prove a work related injury. This is an error.

As Claimant states in her memorandum:

> "The ALJ does not state whether a finding was made that Dr. Barth's opinion rebutted the presumption of compensability on whether her injury arose out of and in the course of her employment. The ALJ does not explain how the evidence is sufficient and comprehensive enough to rebut the presumption, especially in light of the fact that Dr. Barth opines that Ms. Lee did suffer a right thumb injury as a result of the June 1, 2011 work incident."

Claimant's argument at 8.

If the Employer fails to produce substantial evidence specific and comprehensive enough to rebut the presumption, then the ALJ must conclude an accidental injury occurred which arose out of and in the scope of Claimant's employment. If that is the case, the ALJ would then be tasked to analyze the remaining issues, if necessary.

Thus, without further analysis, we cannot say the CO is supported by the substantial evidence in the record or in accordance with the law. Upon remand, the ALJ is to determine whether Dr. Barth's opinion, or some other evidence submitted by Employer, is specific and comprehensive enough to rebut the presumption of compensability.

CONCLUSION AND ORDER

The March 21, 2015 Compensation Order is not supported by the substantial evidence in the record nor in accordance with the law. It is VACATED and REMANDED consistent with the above discussion.

So Ordered.