GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-077

BRENDA JOHNSON,
Claimant–Petitioner,

v.

FEDERAL EXPRESS CORPORATION and SEDGWICK CMS,
Employer/Insurer–Respondent.

Appeal from a May 23, 2013 Compensation Order
by Administrative Law Judge Karen R. Calmeise
AHD No. 12-359, OWC No. 688463

Krista DeSmyter for Petitioner
Lisa Zelenak for Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY and HEATHER C. LESLIE, *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Ms. Brenda Johnson worked for Federal Express Corporation ("FedEx") for more than 26 years. On January 27, 2012, she was called to a meeting with supervisors. At that meeting, Ms. Johnson was informed that due to company reorganization, the position she had held for more than 10 years was being eliminated; in return, Ms. Johnson was offered a part-time position at a different location.

Ms. Johnson completed her work day that Friday and returned to work the following Monday. The next day, January 31, 2012, Ms. Johnson sought treatment at Fort Washington Hospital for complaints of headaches, insomnia, and loss of appetite as a result of being "fired." Ms. Johnson was diagnosed with anxiety and was instructed to contact a crisis response hotline for counseling services.

From February 6, 2012 through June 1, 2012, Ms. Johnson treated with a therapist who diagnosed Ms. Johnson as suffering from adjustment disorder with mixed depression and anxiety from the job "rearrangement and decrease in hours on the job."[1] Thereafter, Ms. Johnson began treating with a board certified psychiatrist.

On July 3, 2012 at FedEx's request, Ms. Johnson was examined by Dr. Bruce Smoller, a neuropsychiatric specialist. Dr. Smoller concluded Ms. Johnson's "reaction to the 'job termination' with anger was normal but he opined that her reaction was stronger and more exaggerated."[2]

Ms. Johnson filed a claim for temporary total disability benefits and medical treatment as a result of her mental-mental injury. Following a formal hearing, an administrative law judge ("ALJ") denied Ms. Johnson's request for benefits because her mental-mental injury is not compensable.

On appeal, Ms. Johnson asserts the ALJ did not apply the proper test for determining the compensability of a mental-mental claim; specifically, Ms. Johnson argues the ALJ applied an objective standard and carved out "an exception for events surrounding reorganizations, furloughs, lay-offs, and job eliminations as being immune from identification as workplace stressors with the potential of causing a compensable psychological injury."[3] Furthermore, Ms. Johnson contends the ALJ erred by requiring she demonstrate an unusual incident in order for her injury to be compensable. Finally, Ms. Johnson argues Dr. Smoller's opinion is not sufficient to sever the presumption of compensability. For these reasons, Ms. Johnson requests the Compensation Review Board ("CRB") vacate the May 23, 2013 Compensation Order and enter an award for indemnity and medical benefits.

In response, FedEx contends "conditions of employment" did not cause Ms. Johnson's mental-mental injury; the elimination of Ms. Johnson's job caused her mental-mental injury:

> With regard, to the elimination of the job, Employer and TPA argue that while the body of case law has eliminated the "objective" standard there still needs to be some standard in place to assure the validity of such a claim, particularly in this case. If not, then any employee who loses a job and is upset will have a workers' compensation claim in the District of Columbia. While most employees would clearly be upset under the Claimant's circumstances, her response is an exaggerated response, as stated by Dr. Smoller. Judge Calmeise clearly articles [*sic*] this same sentiment in her decision. She stated that reorganizations, furloughs, lay-offs and job eliminations are all activities that are

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[1] *Johnson v. Federal Express Corporation*, AHD No. 12-359, OWC No. 688463 (May 23, 2013), p. 3.

[2] *Id.*

[3] Memorandum of Points and Authorities in Support of Application for Review, at misnumbered p. 5.

> not accidental injuries covered by the Act. *St. Clair v. DOES*, 1995, 658 A.2d 1040 (Order at 4).[4]

Even assuming Ms. Johnson sustained a compensable injury, FedEx argues Ms. Johnson has not experienced a disability because she was capable of performing her job functions at the time her job was eliminated or because she turned down suitable employment. Consequently, FedEx requests the Compensation Order be affirmed.

ISSUES ON APPEAL

1. Did the ALJ properly apply the *Ramey* test to Ms. Johnson's claim for benefits for a mental-mental injury?

2. Does the *Ramey* test require unusualness of the work-related event or condition alleged to be the cause of the mental-mental injury?

3. Does the *Ramey* test incorporate an exception for business-related personnel actions including but not limited to reorganization, furlough, lay-off, and job elimination?

4. Is Dr. Smoller's opinion sufficient to rebut the presumption of compensability?

ANALYSIS[5]

Since the dawn of workers' compensation in the District of Columbia, a great deal of suspicion has surrounded claims for psychological injuries. In an attempt to address some of that suspicion, the Director of the Department of Employment Services created the *Dailey* test; pursuant to that test,

> in order for a claimant to establish that an emotional injury arises out of the mental stress or mental stimulus of employment, the claimant must show that actual conditions of employment, as determined by an objective standard and not merely the claimant's subjective perception of his working conditions, were the cause of his emotional injury. [Footnote omitted.] The objective standard is satisfied where the claimant shows that the actual working conditions could have

[4] Self-Insured Employer/TPA's Opposition to Claimant's Petition for Review, p. 15.

[5] The scope of review by the 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. 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).

> caused similar emotional injury in a person who was not significantly predisposed to such injury.[6]

In other words, in order to ensure that the claimant truly had sustained a compensable psychological injury, the claimant had to prove that someone else ("a person of normal sensibilities with no history of mental illness")[7] who experienced a similar employment event or condition would have sustained a compensable psychological injury. Of course, if a claimant were to slip and fall at work thereby breaking a leg, no one would ask whether someone else would have fallen at that spot or whether someone else who would have fallen at that spot would have broken a leg, but because of the inherent distrust of injuries that cannot be defined by diagnostic testing, the special *Dailey* test was created.

In 2008, the D.C. Court of Appeals rejected the *Dailey* test in no small part because a third-person test is not consistent with the language and purpose of workers' compensation law:

> Its application deprives an entire class of employees (including claimants with pre-existing psychological conditions) of compensation for injuries *that they can prove* are connected to workplace accidents. Because the workers' compensation statutes exist for the purpose of compensating employees for work-related injuries, the objective test (at least as applied to physical-mental claims) is inconsistent with the statute and must be overturned.[8]

Over time, the quest for objective verifiability had been overcome by in an inappropriate impediment to proving a connection between a disability and the claimant's employment:

> It is clear that the Director and this court have acknowledged the difficulty inherent in evaluating claims of psychological disability and have attempted to address the problem by imposing a measure of objectivity: "[C]laims of work related emotional injury are among the most difficult to handle and adjudicate. While in theory work related mental injuries are as compensable as work related physical injuries, the adjudication of mental injury claims clearly presents more difficult problems. Mental injury claims are more difficult because of the inherent difficulties of objectively determining the existence of an injury and its source." *Dailey*, 1988 DC Wrk. Comp. LEXIS 1 at 15. However, as noted, the test shifted over time from an objective examination of the employee's workplace environment to one that examined both the environment and the employee's particular susceptibilities. If an employee was predisposed to injury, then that employee would have to point to a hypothetical third person. It is within this

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[6] *Dailey v. 3M Co.*, H&AS No. 85-259, OWC No. 066512 (May 19, 1988) (Internal footnote omitted.)

[7] *McCamey v. DOES*, 947 A.2d 1191, 1195 (D.C. 2008).

[8] *Id*. at 1202. (Emphasis in original.)

> admittedly unsettled context that the court expanded the application of the objective test to physical-mental claims.[9]

The Court rejected the *Dailey* test in claims for physical-mental injuries, but it was unwilling to craft a test for mental-mental injuries. In response, the Compensation Review Board "essentially adopted the test announced by this [Court] in *McCamey* for use in physical-mental cases[] for application in mental-mental cases."[10] The *Ramey* and *McCamey* tests now apply in all psychological injury cases:

> [A]n injured worker alleging a mental-mental claim invokes the statutory presumption of compensability by showing a psychological injury and actual workplace conditions or events which could have caused or aggravated the psychological injury. The injured worker's showing must be supported by competent medical evidence. The ALJ, in determining whether the injured worker invoked the presumption, must make findings that the workplace conditions or events existed or occurred, and must make findings on credibility. If the presumption is invoked, the burden shifts to the employer to show, through substantial evidence, the psychological injury was not caused or aggravated by workplace conditions or events. If the employer succeeds, the statutory presumption drops out of the case entirely and the burden reverts to the injured worker to prove by a preponderance of the evidence that the workplace conditions or events caused or aggravated the psychological injury.[11]

Litigants and adjudicators continue to struggle with applying the *Ramey* test, especially when there is an apparent concern that the claimant is not entitled to benefits based upon an " I know it when I see it" reaction rather than an application of the law. In this case, the ALJ did not actually apply the *Ramey* test; the ALJ determined Ms. Johnson's mental-mental injury is not compensable because it was caused by business-related, personnel actions:

> The job action Claimant claims was the cause of her injury is a reorganization and elimination of her position as operations agent. Claimant was offered another job as a Handler where she would be working less hours, at a different location. (HT 33) Claimant was one of six (6) employees who held the position of operations agent whose positions were eliminated in January 2012. Although several of the employees accepted the alternative job position and work schedules, Claimant did not return to work for Employer following the reassignment meeting.

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[9] *Id.* at 1206.

[10] *Ramey v. DOES*, 997 A.2d 694, 700 (D.C. 2010).

[11] *Ramey v. Potomac Electric Power Co.*, CRB No. 06-038(R), AHD No. 05-318, OWC No. 576531 (July 24, 2008).

> Although the job action was not a favorable one for Claimant, the action in and of itself was an activity that is within the Employer's purview. Reorganizations, furloughs, lay-offs, and job eliminations are all activities that are not accidental injuries covered by the Act. [Footnote omitted.] Although the action was clearly work related, Claimant has failed to establish that her disability was other than a subjective reaction to normal working conditions. [Footnote omitted.] In the every day workplace, employees as here are constantly faced with job changes and even with lay-offs because of changing work procedures or economic conditions. A great number of these changes, although understandably traumatic for the individuals directly affected, can hardly be characterized as anything other than 'normal,' and are compensated, if at all, by unemployment compensation rather than workmen's compensation. [Footnote omitted.][12]

In essence, the ALJ *ipse dixit* created an exception to compensability when "an activity that is within the Employer's purview" doesn't cause the same psychological reaction in the claimant as it did in the other "six (6) employees who held the position of operations agent whose positions were eliminated in January 2012 [and who] accepted the alternative job position and work schedules."[13]

The burden-shifting scheme of the presumption of compensability is the same for all injuries, physical and mental. Just as there is no requirement that a physical injury be caused by an unusual occurrence,[14] there is no such requirement for a psychological injury. Furthermore, although it is true that workers' compensation is intended to compensate claimants for work-related injuries and not to insure job security, until the legislature passes specific exceptions or specific additional requirements for proving the compensability of a mental-mental claim, under the *Ramey* test even ordinary personnel actions may result in compensable mental-mental claims.

At this time, the CRB declines to address the sufficiency of Dr. Smoller's opinion. Because the ALJ did not actually apply the *Ramey* test in this case, she must be afforded an opportunity to do so including proper consideration of the sufficiency of Dr. Smoller's opinion to rebut the presumption of compensability.

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[12] *Johnson*, at pp. 4-5.

[13] *Id.* at 4.

[14] *Capital Hilton Hotel v. DOES*, 565 A.2d 981 (D.C. 1989).

CONCLUSION AND ORDER

The *Ramey* test does not require unusualness of the event or condition alleged to be the cause of the mental-mental injury nor does it incorporate an exception for business-related personnel actions including but not limited to reorganization, furlough, lay-off, and job elimination; therefore, the ALJ did not properly apply the *Ramey* test to Ms. Johnson's claim for benefits for a mental-mental injury. The May 23, 2013 Compensation Order is VACATED, and this matter is REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

February 5, 2014
DATE