

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-033

JOSEPH MARCOUX,
Claimant-Respondent/Cross-Petitioner,

v.

LABOR READY and
ACE AMERICAN INSURANCE,
Employer/Third Party Administrator-Petitioner/Cross-Respondent.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JUL 26 AM 9 17

Appeal from a February 29, 2016 Compensation Order by
Administrative Law Judge Nata K. Brown
AHD No. 13-409, OWC No. 703753

(Decided July 25, 2016)

David M. Snyder for Claimant
Anthony J. Zaccagnini for Employer¹

Before LINDA F. JORY, HEATHER C. LESLIE, and GENNET PURCELL *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The following findings of facts of the appealed Compensation Order (CO) have not been challenged by either party:

Claimant, a 54 year-old man, has been a union carpenter worker for 28 years. (Claimant's Closing Argument p. 2) He lives in Rockville, Maryland. Claimant has several union certifications, including licensed scaffolder, OSHA 10, OSHA 30, an interior forklift license, and a flagging license. (HT 23, 30, 32) In between union jobs, Claimant worked intermittently for Employer, about 3 to 4 months of

¹ Tony D. Villeral represented Employer at the formal hearing.

the year. He went to Employer's Rockville location to inquire about jobs. (HT p.27)

In March 2013, Claimant was working for Employer, flagging traffic in Rockville, MD. (HT 33-34) During the last week of March, Fred Dodge, the manager at the Rockville location, told Claimant that he wanted him to go a carpenter job, putting in drywall, that next week. (HT 33) The job site was at 14th and L Streets in Washington, DC. Claimant started the new job on Monday, April 1, 2013. (HT 31)

On Wednesday, April 3, 2013, he worked in a hallway with another employee. Claimant's assignment was to take measurements in a hallway, and he worked on a A-frame ladder. As he came down the ladder, it shifted to the right. He quickly jumped off the ladder, and instead of landing with his knees bent, he landed on his straight left leg, and it jammed. (HT 38-39) Claimant felt pain in his left hip and left buttocks. (HT 41) After the accident, though he was limping, he worked the rest the day. Claimant told his co-worker that he was injured, and, for the last two days of the assignment, his coworker did the climbing. He reported the accident to the foreman and superintendent at the site. (HT 40, 41)

The following week, the union called Claimant for a scaffolding job at the Washington Monument. On the first day, he worked on a deck, taking scaffolding to the top level to put up a railing. Claimant's task on the second day was to connect the safety cables that hold the elevator, which required him to walk up stairs. (HT 44) After walking up one or two flights, he had to stop and rest. His supervisor saw him sitting on the steps, holding his left leg. He told Claimant that he had to send him home, and that he could not hire him until he got better. (HT 45)

On April 9, 2013, Claimant sought medical treatment in the emergency room at Shady Grove Adventist Hospital. He complained of pain in his left lower back that was eight out of ten. An x-ray showed lumbar spondylosis with multilevel intervertebral discogenic disease. He was discharged with medications-Valium, Motrin, and oxycodone. (CE 1, pp. 8, 10, 14) Dr. Thomas V. Joseph, internist, examined Claimant on April 15, 2013, and opined that Claimant could return to work on April 22, 2013.

Claimant went to Dr. A. Roy Rosenthal, orthopaedic surgeon, for an assessment on April 18, 2013. He complained of pain in his left hip, both legs, and also pain and swelling in his left ankle. Dr. Rosenthal examined Claimant and opined that he had acute lumbosacral disk syndrome and lumbar spondylosis with disk disease, and that he was not able to work. (CE 2, pp. 33, 34)

Employer sent Claimant to Dr. Ross S. Myerson, Occupational Medical Specialist, for an independent medical examination (hereinafter, 1MB) on July 5, 2013. In his report, he stated that an MRI of the spine was needed for full

evaluation of his current condition. Dr. Myerson also stated that it would [sic] helpful to know whether or not any records exist for treatment of his lumbrosacral spine between the beginning of 2009 up to the date of the incident in April 2013. (EE, pp. 10-11)

Dr. Rosenthal sent Claimant to have an MRI of his spine on August 1, 2013. (CE 3) On August 9, 2013, Dr. Rosenthal, after seeing the MRI study, again opined that Claimant was unable to work, and he referred Claimant to Dr. Goldsmith, who previously operated on Claimant's cervical spine, for an evaluation for surgical intervention. (CE 2, p. 25)

On December 2, 2013, Dr. Myerson wrote an addendum to the report of July 5, 2013, after reading Claimant's additional medical records from May 15, 2009 through August 1, 2013, when the MRI occurred. Dr. Myerson opined, given all the evidence reviewed, that he did not believe that Claimant's current lumbar symptoms are the result of the April 6, 2013 reported incidents. They are rather the consequence of his underlying ongoing degenerative process in his lumbar spine. (EE 1, pp. 1-5)

On December 1, 2014, Dr. Rosenthal, discussed his frustration in an office visit with Claimant. He stated that in view of his significant persistent pain and the inability to refer him for pain management, he gave Claimant another prescription for Vicodin to be taken as necessary. He hoped that a surgical evaluation would be authorized in the near future.

CO at 2, 3.

The issues presented to the ALJ at the October 20, 2015 formal hearing were:

1. Does Claimant's disability claim fall within the jurisdiction of the District of Columbia?
2. Did Claimant's injury arise out of and in the course of his employment?
3. What is the nature and extent of Claimant's disability?
4. Was Claimant's claim timely filed?
5. Was there timely controversion?
6. What is Claimant's average weekly wage?
7. Is Claimant voluntarily limiting his income?
8. Did Employer unreasonably delay payment of compensation?

CO at 2.

The CO granted Claimant's claim for relief of temporary total disability from April 3, 2013 to the present and continuing, interest on accrued benefits, payment of causally related medical expenses and authorization for additional treatment and prescription medications.

Employer filed Employer and Administrator’s Application for Review and Employer and Administrator’s Memorandum of Points and Authorities in support of Application for Review (Employer’s Brief) asserting the CO is not supported by substantial evidence and not in accordance with the law. Claimant filed Claimant’s Opposition to the Application for Review (Claimant’s Brief) arguing that the CO should be affirmed. Claimant also filed Claimant’s Limited Cross-Application for Review (Claimant’s Cross Appeal) arguing that the CO should be modified to award penalties in accordance with the ALJ’s finding that Employer acted in bad faith.

ISSUE ON APPEAL

Is the February 16, 2016 CO supported by substantial evidence and in accordance with the law?

ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers’ Compensation Act (the Act) and as contained in the governing regulations is limited to making a determination whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). “Substantial evidence” as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int’l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). Consistent with this scope of review, the CRB is bound to uphold 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 the members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Did the ALJ err in finding jurisdiction is proper in the District of Columbia?

Employer asserts:

The Claimant performs the principal services for which he was hired throughout Maryland and was only working intermittently in the District of Columbia. It is undisputed the Claimant has significantly less contacts with the District of Columbia than Maryland. Employer does not dispute the Claimant was assigned to work a one week job to fireproof a library in D.C.; but disputes that this location or any D. C. location is a place of the employer’s business offices or facilities in the District of Columbia nor was this a location from which the Claimant performs the principal services for which he was hired as the evidence supports his primary duties are routinely performed in Maryland.

The first prong of the *Hughes* test is not met by the location of the Employer’s business offices and facilities in Maryland at which or from which the Claimant performs the principal services of flagging; the ALJ must properly address the second prong and look to the Claimant’s residence, the place where the contract

was made and the place of performance. The Claimant resides in Maryland, the contract for hire was made in Maryland and the Claimant was only working intermittently in D.C. at the time of the alleged accidental injury. The second prong of the *Hughes* test does not support a finding that the Claimant's employment is localized principally in D.C. Moreover, following *Petrilli* the Claimant's contacts with D.C. are not more substantial than Maryland and the employment is not localized principally in D.C.

Employer's Brief at 10.

Claimant responds:

Mr. Marcoux is an intermittent employee of Labor Ready, who was hired in Maryland. Each job that Mr. Marcoux works for the Employer is part of a separate business relationship between the Employer and the company for which it is supplying labor. Thus, Mr. Marcoux is hired for a series of independent jobs whose various natures change depending on the job that he was hired for. For the particular job on which Mr. Marcoux was working at the time of his injury, his work was to be performed *only* in the District of Columbia and he did not begin his work day until arriving at the job site in the District of Columbia. He was hired for a specific job and to complete a specific task within the District of Columbia. Thus, Mr. Marcoux's job had more specific contacts with the District of Columbia than any other jurisdiction. See *Huscroft*, 997 A.2d at 716. Similar to the Court of Appeals' findings in *Shipkey v. DOES*, 995 A.2d 718, 724 (2008), Mr. Marcoux's principal performance of the specific job on which he was working in the District of Columbia constitutes sufficient grounds for jurisdiction under the Act. Indeed, the CO noted that under the first two factors of the *Hughes* test, Mr. Marcoux's principal place of services was in the District of Columbia because he was hired to fireproof a library in an office building in downtown Washington, D.C. See CO at 5 and *Hughes*, 498 A.2d at 568. The D.C. Workers' Compensation Act clearly has jurisdiction over Mr. Marcoux's claim for benefits and the CO properly made this finding

Claimant's Brief at 9, 10.

The ALJ correctly referred to the three-step test outlined in *Petrilli v. DOES*, 509 A.2d 629 (D.C. 1986) and earlier adopted by the DCCA in *Hughes v. DOES*, 498 A.2d 567 (D.C. 1985) (*Hughes*) for determining what is *principally localized* employment I concluding:

The record reflects that Claimant was an intermittent employee of Employer. It is undisputed that Employer assigned Claimant to a job at an office building located in the District of Columbia. He was hired to fireproof a library in a building downtown. Claimant began his work day when he arrived at the job site. He reported to the building in the District of Columbia on Monday, April 1, 2013. Claimant's performance of the specific job on which he was working was in the District of Columbia and he worked there for five days. Thus, Claimant's duties

are found to be principally localized with in [sic] the District of Columbia, and jurisdiction of his claim falls within the coverage of the Act.

CO at 5.

We note that consistent with Claimant's argument, the employment relationship Claimant has with employer is unique as there is not an ongoing continuous relationship and each job that Claimant works for the Employer is part of a separate business relationship between the Employer and the company for which it is supplying labor². Thus, we agree with Claimant that:

Although he had worked in Maryland previously for the Employer, Mr. Marcoux's time in Maryland reflected a different job he held with the Employer. The Employer's argument that Mr. Marcoux's employment is principally localized in Maryland and thus D.C. jurisdiction is improper is based on an misunderstanding of the nature of employment. Mr. Marcoux is not an employee who is continually under contract with the Employer and thus has not continuously worked for the Employer for five to six years. Instead, as Mr. Marcoux testified, he is hired and laid off by the Employer depending on the contracts the Employer receives. The Employer further does not contest the finding that Mr. Marcoux was not employed by the Employer from September 2012 to March of 2013, thus implicitly affirming the CO's findings. The Employer's argument regarding jurisdiction is not supported by the substantial evidence and should be rejected. The previous, separate jobs are not relevant in determining Mr. Marcoux's job at the time of the accidental injury.

Claimant's Brief at 10.

We find no error committed by the ALJ in concluding Claimant's employment was principally localized in the District of Columbia. The ALJ's conclusion that jurisdiction vests in the District of Columbia is supported by substantial evidence and is in accordance with the law.

Is the ALJ's finding that Employer had not rebutted the presumption supported by substantial evidence?

With respect to the ALJ's determination that Claimant's current condition is causally related to the work injury of April 3, 2013, Employer asserts:

In the present case, the ALJ improperly chose the opinion of Dr. Rosenthal on the basis of the treating physician's opinion and failed to analyze and address the various issues of credibility, the Claimant's extensive prior back related accidents, injuries and ongoing degenerative disease. In reference to credibility, the Claimant consistently reported that he did not have any prior back related symptoms or injuries to Dr. Rosenthal and Dr. Myerson. Dr. Rosenthal testifies that he had no knowledge of the Claimant's preexisting condition until October or November of 2013. The ALJ accepted the opinion of Dr. Rosenthal but fails to

² Employer did not assert that an employee/employer relationship did not exist.

acknowledge the Claimant was not truthful with his treating physician. Dr. Rosenthal's opinion was based on a lack of knowledge and the Claimant's questionable reporting that he was asymptomatic prior to the alleged accident. When Dr. Rosenthal was originally questioned about the Claimant's May 18, 2009 medical report, where Claimant complained of low back pain, Dr. Rosenthal merely testified that he was not surprised the Claimant didn't remember obtaining an MRI for his back in 2006. (CE 5, p. 90). At the time of Dr. Rosenthal's October 8 2013, discovery deposition he had no knowledge of the Claimant's prior back conditions other than the recently produced 2006 MRI from Claimant's attorney. The Claimant failed to disclose the relevant information to his physician for a minimum of 6 months. The Claimant only presented to Dr. Rosenthal one time (December 1, 2014) after Dr. Rosenthal had knowledge of the Claimant's extensive prior conditions. CE 2, p.16. Its not surprising that Dr. Rosenthal made no mention of the recently discovered evidence in his December 1, 2014 medical report.

Not only does the ALJ fail to address the Claimant's failure to report his extensive back related history, she fails to address the Shady Grove ER Report which indicates the Claimant's current symptoms would have begun on April 6, 2015, three days after the alleged accident.

The ALJ fails to adequately address any of the Claimant's substantial back related medical records and the back related legal award from the MD Workers' Compensation Commission indicating the Claimant has a 17% permanent impairment to the back. Lastly, the ALJ fails to acknowledge the site of the Claimant's current disc extrusion at L4-L5 is the site of the Claimant's pre-existing disc protrusion evidence on the 2006 MRI. Dr. Myerson provides a cleaner and specific opinion that the findings on the August 2013 lumbar MRI and is consistent with his underlying degenerative arthritis and degenerate disc disease.

Employer's Brief at 13, 14.

Claimant responds that employer's evidence, specifically Dr. Myerson's opinion, is not evidence sufficient and comprehensive enough to break the presumption of causation. Claimant asserts:

. . . Dr. Myerson's opinions were vague, at best. During his deposition he testified the mechanism of injury would not be likely to lead to Mr. Marcoux's complaints because he did not have a "significant trauma." EE at 42. Further, Dr. Myerson indicated that, "all this pathology that we're seeing in his back you know, none of this was caused by [the accidental injury]." *Id.* However, upon cross-examination, Dr. Myerson admitted that Mr. Marcoux's underlying degenerative changes could be affected or hasted by a traumatic event. EE at 46. Additionally, in his December 4, 2013 Addendum report, Dr. Myerson indicated that the work accident was "not likely a *significant factor* in the progression of his underlying degenerative progress which also significantly effects his cervical

spine.” EE at 4 (emphasis added). As such, Dr. Myerson has confirmed that it is a possibility that the accident aggravated, contributed to or hastened MR. Marcoux’ underlying condition.

Claimant’s Brief at 15.

Review of the CO reveals that the ALJ initially stated that Employer’s evidence *did* rebut the presumption and the CO appears to weigh the evidence affording the opinion of Claimant’s treating physician, Dr. Rosenthal the treating physician preference. The ALJ did not however state that having afforded Dr. Rosenthal the treating physician preference she found Claimant has established by a preponderance of the evidence a medical causal relationship between Claimant’s condition and the injury. Instead the ALJ stated:

Dr. Rosenthal, his treating physician, initially examined him on April 18, 2013, and the record shows that he examined Claimant 17 times between April 25, 2013 and December 1, 2014. He opined that Claimant was asymptomatic prior to this injury and that his findings are compatible and directly attributed to the accident dated April 3, 2013. (CE 33-34). Dr. Rosenthal has more knowledge regarding the circumstances of Claimant’s injury than that of Dr. Myerson, who saw Claimant in person only one time.

Employer has not rebutted the presumption by evidence specific and comprehensive enough to sever the potential connection between the present disability and the job-related injury. Claimant’s current condition is causally related to the work injury that occurred on April 3, 2013.

CO at 9.

We agree with Employer. Not only is the ALJ’s analysis with regard to the causal relationship issue internally inconsistent, the CO as a whole fails to acknowledge Claimant’s pre-existing back condition. While the ALJ noted that Dr. Myerson issued an addendum to the report of July 5, 2013, after reading Claimant’s additional medical records from May 15, 2009 through August 1, 2013, the ALJ made no mention of the five exhibits submitted by Employer pertaining to the treatment of Claimant’s back and diagnostic test results prior to the work injury.

Although we agree there may exist evidence in the record to establish Claimant sustained an aggravation of a pre-existing condition-- nowhere in the findings of fact or discussion does the ALJ acknowledge any of Employer’s exhibits or make any finding with regard to Claimant’s pre-existing L4-5 disc protrusion or the treatment Claimant received from 2007 to 2009 for his low back pain, or the permanent partial disability award Claimant received in 2009 from the State of Maryland referencing injuries to the neck and back. See EE 4-9.

In order to conform to the requirements of the District of Columbia Administrative Procedure Act, D.C. Code § 2-501, *et seq.*, (APA), (1) the agency’s decision must state findings of fact on each material, contested factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings. *Perkins v. DOES*, 482

A.2d 401 (D.C. 1984) Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate court is not permitted to make its own finding on the issue; it must remand the case for the proper factual findings. *King v. DOES*, 742 A.2d. 460, 465 (Basic findings of fact on all material issues are required; only then can the appellate court “determine upon review whether the agency’s findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law.”)

The CRB is no less constrained in its review of Compensation Orders. *See Washington Metropolitan Area Transit Authority v. DOES*, 926 A.2d 140 (D.C. 2007).

We cannot perform our statutory function of determining whether the factual findings of the CO are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law, when we cannot ascertain what the ALJ found based on the evidence submitted with regard to claimant’s pre-existing back condition as she made no mention of claimant’s prior treatment or the 2006 MRI in the findings of fact.

Moreover, whether an ALJ’s decision complies with the APA requirements is a determination limited in scope to the four corners of the Compensation Order under review. Thus, when, as here, an ALJ fails to make express findings on all contested issues of material fact, the CRB can no more “fill the gap” by making its own findings from the record than can the Court of Appeals but must remand the case to permit the ALJ to make the necessary findings. *See Mack v. DOES*, 651 A.2d 804, 806 (D.C. 1994).

Accordingly the ALJ’s determination that “Claimant’s current condition is causally related to the work injury of April 3, 2013” is not supported by substantial evidence and not in accordance with the law. The ALJ’s award for TTD benefits from April 3, 2013 through the present and continuing with interest is vacated and remanded for further findings of fact and analysis.

Is the determination of Claimant’s average weekly wage in accordance with the law?

On this issue, Employer asserts:

In reaching her determination regarding the average weekly wage, the ALJ disregarded the Claimant’s prior wages and failed to calculate the wages from the assignment in which the Claimant was allegedly injured. The Claimant’s wages from January 2, 2012 to April 5, 2013 should be taken into account in determining the Claimant’s average weekly wage. Under D.C. Code § 32-1511, wages are based on the 26 week period immediately preceding the date of injury. The ALJ reached her determination of an average weekly wage of \$560.00 because the Claimant did not work the full 26 weeks preceding the alleged accident and she completely disregards the Claimant’s wages earned immediately prior to the alleged accident from March 28, 2013 to April 2, 2013. Furthermore, it is reasonable to calculate the average weekly wage based on the amount earned for weeks actually worked by the Claimant, under the assumption that Claimant would have worked during the entire 26 week period at the same rate or in the same pattern as he worked during the period that spanned his actual employment.

George Hyman Const. Co. v. DOES, 497 A.2d 103 (1985). In other words it is reasonable to take into account the Claimant's complete wages based on amount earned for weeks he actually worked, rather than calculate a daily wage based on one day worked. The ALJ failed to take into account the Claimant's wages earned on March 28, 2013 to April 1, 2013, in obvious error. The Claimant did not work 8 hour days from March 28, 2013 to April 2, 2013, and was paid at different rates.

Employer's Brief at 14, 15.

Claimant responds:

Substantial evidence in the record indicates that the CO correctly calculated Mr. Marcoux's average weekly wage in accordance with the law of the District of Columbia. The CO noted that in the calendar year of 2013, prior to the accidental injury, Mr. Marcoux had worked for Labor Ready on March 28 while performing work for Mid-Atlantic Utilities, Inc.; March 29 while performing work for R&R Contracting Utilities, Inc., and April 1-4 while performing work for Maryland Applicators. EE at 65-71. The CO then noted that, prior to 2013, he was last in the employ of the Employer on September 10, 2012, nearly seven months prior to the accident. EE at 74. Mr. Marcoux thus only held the job he was working when he was injured for a period of six days during the twenty-six weeks immediately preceding the accidental injury. *See Wolfe, supra*, at 21. Therefore, his average weekly wage is calculated as 130 times his daily wages, divided by 26. See D.C. Code §32-1511(a)(6).

Claimant's Brief at 11.

We agree with Claimant that the ALJ properly calculated Claimant's average weekly wage pursuant to §32-1511(a)(6) which the ALJ recited:

D.C. Official Code § 32-1511(a)(6) states, in relevant part:

If the injured employee has not worked in this employment during substantially the whole of the period, the employee's average weekly wage shall consist of 130 times the average daily wage or salary, divided by 26 weeks, which an employee of the same class working substantially the whole of the immediately preceding period in the same or similar employment, in the same or a similar neighboring place, shall have earned in the employment during the days when so employed.

CO at 8.

As noted in the jurisdiction discussion above, the employment relationship Claimant has with employer is unique as there is not an ongoing continuous relationship and each job that Claimant works for the Employer is part of a separate business relationship between the Employer and the company for which it is supplying labor. Therefore, we see no reason to consider, as Employer

suggests, Claimant's earnings from January 2, 2012 to April 5, 2013 in determining the Claimant's average weekly wage. Instead we agree that Claimant has not worked for employer for *substantially the whole of the 26 week period* preceding the injury and the ALJ properly found the calculation of Claimant's average weekly wage falls under § 32-1511(a)(6). The ALJ's determination of Claimant's average weekly wage is supported by substantial evidence and is in accordance with the law is therefore affirmed.

Is the ALJ's determination that Employer unreasonably delayed payment of compensation supported by substantial evidence and in accordance with the law.

A conclusion that Employer acted in bad faith would be moot in the event the ALJ finds Claimant's alleged disability is not causally related to a work injury. Accordingly, the ALJ's determination that Employer acted in bad faith must be vacated and the matter reconsidered after findings of fact and conclusion of law are made with respect to Claimant's pre-existing condition.

Since the ALJ's award of benefits has been vacated, we deny Claimant's Cross-Appeal which sought to require the ALJ change the award of disability benefits to Claimant's average weekly wage.

CONCLUSION AND ORDER

The conclusion that jurisdiction for Claimant's alleged injury falls within the scope of the District of Columbia's Act and the calculation of Claimant's average weekly wage are in accordance with the law and are AFFIRMED. The conclusion that Claimant's current condition is causally related to a work injury that occurred on April 3, 2013 is not supported by substantial evidence and is REMANDED for further findings of fact and conclusion of law consisted with this opinion. The conclusion that Employer acted in bad faith is VACATED and REMANDED for reconsideration after the medical causal relationship issue is decided. The award of temporary total disability benefits with interest is accordingly VACATED.

So ordered.