

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 17-014

KENNETH G. JONES,
Claimant–Petitioner,

v.

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

Appeal of a January 19, 2017 Compensation Order
by Administrative Law Judge Douglas A. Seymour
AHD No. 15-516, OWC No. 727673

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2017 MAY 1 AM 10 33

(Decided May 1, 2017)

Krista N. DeSmyter for Claimant
Mark H. Dho for Employer

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

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On April 6, 2015, Claimant alleges he was injured while working for Employer as a bus driver. As outlined in the Compensation Order:

Claimant, 50 years old, has been a bus operator for Employer for 10 years. On April 6, 2015, Claimant testified he was driving his bus southbound on Georgia Avenue. As he approached a construction area, he saw jersey walls and metal plates. Claimant testified he had to drive over the metal plates before he got to the cross street at Butternut. As Claimant drove over the metal plates, he testified he [sic] steering wheel “jumped” and Claimant grabbed it. After crossing the metal plates, claimant testified he went through the traffic light and pulled into a bus stop. As he pulled into

the bus stop, Claimant testified he looked out the front door and felt a “twinge” in his neck. HT 30, 31, 34-36.

Claimant completed the rest of his route that day. But by the time he finished four to five hours later, in order for him to turn to the right, he had to turn his entire body. He went to Unity Health, which was near Claimant’s abode, the following day and made an appointment with his doctor, Dr. Narashimhan, for the next month. Claimant’s doctor, Dr. Narasimhan, recommended physical therapy. Claimant remains in physical therapy. HT 31, 36-39, 42.

Jones v. WMATA, AHD No. 15-516, OWC No. 727673, 2-3. (January 19, 2017) (“CO”) at 2 -3.

For purposes of this appeal, Claimant continued to seek treatment and has remained off work since the alleged date of injury.

A full evidentiary hearing occurred on November 10, 2016. At that hearing, Claimant sought an award of temporary total disability benefits from April 7, 2015 to the present and continuing, payment of causally related medical expenses, and interest. The issues to be adjudicated were:

1. Did claimant sustain a compensable injury which arose out of and in the course of his employment on April 6, 2015?
2. What is the nature and extent of Claimant’s disability, if any?
3. Is Employer entitled to a credit for long term disability benefits paid to Claimant?

CO at 2.

The CO issued on January 19, 2017 denied Claimant’s claim. Notably, the CO found Claimant failed to prove, by preponderance of the evidence, that he suffered an injury which arose out of and in the course of his employment on April 6, 2015.

Claimant appealed. Claimant argues first, that the CO erred in concluding Employer had rebutted the presumption of compensability. Second, Claimant argues the CO erred concluding he failed to prove a compensable injury did occur on April 6, 2015.

Employer opposes the appeal, arguing the CO’s conclusion that Claimant failed to prove he sustained an injury which arose out of and in the course of his employment is supported by the substantial evidence in the record and in accordance with the law.

ANALYSIS¹

Claimant first argues the Administrative Law Judge (“ALJ”) erred in concluding Employer had rebutted the presumption of compensability. In concluding the Employer rebutted the presumption of compensability, the ALJ stated:

To rebut the presumption, Employer asserts that the OWC Forms 7 and 7A, the Witness Statement, the On the Job Injury Report, the medical records of Unity Healthcare and Howard University Hospital, and the bus video rebut Claimant’s assertion that he sustained an injury which arose out of and in the course of his employment on April 6, 2015.

In support of its position, Employer relies on the above referenced injury reports which reflect different times of the alleged accident. More significantly, the medical records reflect versions of the alleged injury inconsistent with Claimant’s hearing testimony. Finally, Employer relies, in part, on the bus video which does not show Claimant’s bus travelling over the metal plates, nor does it show the steering wheel “jumping”, or Claimant turning his head to the right as he pulls into the bus stop. CE 1,3, EE 2,3,4,5,6,7.

Thus, based on the above findings, I find Employer has offered specific and comprehensive rebuttal evidence that claimant’s alleged injuries did not arise out of his employment and has thus rebutted the presumption of compensability.

CO at 7.

In arguing the above evidence relied upon is not specific or comprehensive enough, Claimant states:

The Compensation Order identified three possible bases in which to challenge the assertion that Mr. Jones sustained an injury on April 6, 2015: 1) Mr. Jones’ initial difficulty recalling the precise time of the injury 2) minor inconsistencies in the details of the incident and 3) the fact that bus video of one of Mr. Jones’ trips did not demonstrate the incident serves as comprehensive and specific evidence sufficient to sever the presumption of causation.

Claimant’s brief at 8.

Employer counters by arguing:

¹ 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.

Claimant's assertion that the reasons given by the ALJ did not rise to the level of specific or comprehensive in order to rebut the presumption is incorrect. The ALJ provided three specific set of facts including the varying details of the incident in the accident reports, varying details of the mechanism of injury in the medical reports, and the bus video to contradict Claimant's version of events.

Employer's brief at 6.

We agree with Employer. Claimant doesn't argue the ALJ erred in pointing out that inconsistencies do exist in the accident reports and in the medical reports, but argues the inconsistencies are "minor" and only "vary slightly on the detail." Claimant's brief at 9. Claimant also acknowledges some "confusion" in recollection on the part of Claimant. Claimant's brief at 10. Furthermore, Claimant does not allege the video show an injury occurred, but states there are other time periods Claimant did in fact drive over the metal plates. While arguably true, the video still shows Claimant performing his job duties without issue and without injury. These inconsistencies the ALJ pointed out and relied upon, along with the video, are specific enough to rebut the presumption of compensability. By arguing the inconsistencies are only minor, what the Claimant is asking this panel to do is reweigh these acknowledged inconsistencies in his favor, a task we cannot do.

Claimant next argues the "CO cannot identify any evidence whatsoever that Mr. Jones did not suffer an injury on April 6, 2015." Claimant's brief at 10. In so arguing, Claimant points this panel to select medical records, as well as argues the ALJ's credibility assessment is not supported by the substantial evidence in the record nor in accordance with the law.

We address Claimant's credibility argument first. Credibility findings are within the sound discretion of the ALJ. *Marriott, supra*. In this jurisdiction, such findings are "entitled to great deference." *See Johnson v. Omni Shoreham Hotel*, CRB (Dir. Dkt.) No. 03-118 (July 8, 2005). Indeed, an ALJ's decisions regarding credibility findings deserve special weight as the ALJ, as the sole fact-finder, has the unique opportunity to observe the appearance and demeanor of the witness. *See WMATA v. DOES*, 683 A.2d 470, 477 (D.C. 1996).

In the case *sub judice*, the ALJ found the Claimant to be an incredible witness:

To begin with, I found many of Claimant's answers non-responsive, evasive, and argumentative, particularly on cross examination. Claimant's answers include such phrases as: "Well, it sounds like you are trying to trick me...."; "...it sounds to me like you're asking the same question a different way." ; "Before I answer that, let me tell you this. I didn't write it"; and, "And rather than keep them, because if I had known I was going to be sitting here I would have kept them." HT 51-68.

Second, I found Claimant's testimony concerning the events of April 6, 2015 inconsistent with the bus video because: 1. Claimant could not recall the orange construction barrels/cones which are plainly visible, and which I find he passed three times on his southbound runs and three times on his northbound runs on that day, for a total of six trips that day; 2. there were no jersey barriers present at the construction

site in question; 3. Claimant's bus could not travel over any of the metal plates which were to the right of his route travelling southbound because the orange barrels/cones guided Claimant's bus, and for that matter, all southbound vehicles, sufficiently to the left of the metal plates so that no vehicles travelled over them; 4. although Claimant admitted he had viewed the bus video prior to the hearing, he denied that the metal plates in question could be seen in the video; 5. the steering wheel, as reflected on the video, did not "jump" as alleged by Claimant; and, 6. Claimant testified that he was "roping" the steering wheel as he turned into the bus stop which the video does not reflect him doing. HT 34, 47-48, 51-68, EE 6, 7. ⁵

Third, Claimant's testimony concerning the mechanism of the alleged injury was inconsistent with the various histories reflected in the various medical records. On April 7, 2015, Claimant was seen at Unity Health Care, he gave a history to the nurse practitioner that his... "pain onset yesterday afternoon after turning head suddenly while at work". However, on cross examination, Claimant denied providing the nurse practitioner with this history. Rather, Claimant testified that he had turned his head in a "...normal motion". CE 1, HT 62.

On May 5, 2015, Claimant gave Dr. Narasimhan, the following history: "On the 6th of April he was driving a bus and the steering wheel jerked. Moments later he noticed he was not able to turn his neck fully." This history contradicts Claimant's testimony that he first felt pain in his neck as he either looked to turn into the bus stop, or looked out the door after arriving at the best stop. CE 2, HT 31, 64. ⁶

Finally, during his IME with Dr. Johnson on August 10, 2015, Claimant gave Dr. Johnson a history of "...driving his bus, had driven over a metal plate, then hit a pothole as he was turning the steering wheel to the right and looking to the right, felt a sudden onset of pain on the right side of his neck." This version of the alleged accident is wholly inconsistent with Claimant's other versions of his allege [sic] injury because, for the first time, it refers to claimant's bus hitting a pothole. There are no other references to a pothole in any of the other medical records, claim forms, or incident/witness reports. EE 1.

⁵ Claimant argues that "Although the video does not show Mr. Jones's bus going over steel plates in his driving lane at that particular time, it does not negate that he turned the steering wheel to the right and turning his head." Claimant also argues that the bus video reflects just one of Claimant's three southbound runs on April 6, 2015. Thus, Claimant argues, this "...does not negate that the that [sic] Mr. Jones's bus did go over the plates causing it to jump and for him to control the steering wheel." CWCA at 3. However, even assuming *arguendo* that Claimant is correct that the video in question did not reveal Claimant's bus going over the metal plates on that particular run, it does not alter the fact that the orange construction barrels/cones, by their placement as shown on the video, prevented all southbound traffic from travelling over the metal plates (emphasis added). Thus, Claimant's testimony that his bus travelled over the metal plates, and that, as a result, his steering wheel "jumped", is simply not credible.

With respect to Claimant's turning his head to the right and thus injuring his neck, the video in question does not show Claimant turning his head as he pulled into the bus stop. However, since I have

found Claimant not credible, whether or not Claimant turned his head to the right while approaching the bus stop, or while at the bus stop, during his other two southbound runs that day, is of no moment.

⁶ In fact, Claimant presented two different versions of the onset of his neck pain during his direct testimony. He first testified that as he pulled into the bus stop, he looked out the front door and felt a “twinge” in his neck. HT 30-31. Then, a short while later, Claimant testified that as he was turning the steering wheel to move into the bus stop, that he felt the “pinch” in his neck. HT 35-36.

CO 7-9.

Claimant argues the ALJ’s conclusions based upon his demeanor at the hearing and the inconsistencies in his version of the injury are not sufficient reasons to find Claimant to be an incredible witness. Claimant further argues that the ALJ’s credibility analysis “implicitly” uses the Commonwealth of Virginia’s “injury by accident” standard. Claimant’s brief at 14. We disagree.

The ALJ began his credibility analysis by noting the behavior and demeanor of Claimant at the hearing, concluding that his answers were often “non-responsive, evasive and argumentative” pointing out specific instances wherein Claimant demonstrated said behaviors. CO at 7. Claimant, in arguing that the ALJ was wrong in his assessment of Claimant’s credibility, states the CO fails to explain how Claimant’s “attitude” towards defense counsel proves he did not suffer an injury on April 6, 2015. Claimant’s brief at 13. As Claimant concedes, the demeanor of a witness is an element an ALJ can consider in making a credibility determination. What Claimant fails to acknowledge, is that in light of the credibility finding Claimant fails in his burden of proving, by a preponderance of the evidence, that he suffered an injury which arose out of and in the scope of his employment.

Pursuant to *Grant-Hopkins v. Alion Science and Technology*, CRB No. 14-207 (June 26, 2014), “a specific factual determination that an injured worker lacks credibility must be accompanied by a discussion as to how the workers’ testimony was in conflict with the record evidence”. The ALJ took into consideration inconsistencies between the testimony of a Claimant and the rest of the evidence of record, including medical reports and the video, to also conclude Claimant is an incredible witness. In so doing, we do not find the CO “implicitly” uses the “injury by accident” standard utilized by our neighboring jurisdiction, the Commonwealth of Virginia. Claimant’s brief at 14. As Claimant does point out, we are aware that the ALJ does on at least two occasions categorize the legal causation issue as whether “Claimant sustained a compensable injury by accident which arose out of and in the course of his employment.” Hearing transcript at 8 and 123. However, these statements are harmless as the ALJ did not subsequently engage in any analysis similar to the “injury by accident” standard utilized in Virginia. As the ALJ stated:

Accordingly, based on: the conflicting and inconsistent histories of the alleged injury as set forth in the medical records and in the claim forms and incident/witness reports; the bus video which establishes that Claimant’s bus could not have travelled over the metal plates in question; and, Claimant’s less than credible testimony, *I find Claimant has failed to prove, by a preponderance of the evidence, that he sustained an injury which arose out of and in the course of his employment on April 6, 2015.*

CO at 9. (Emphasis added).

The ALJ concluded Claimant was an incredible witness not only on the personal observations made at the hearing, but also in light of the rest of the evidence presented. Stated another way, the ALJ based his overall credibility finding “the overall evaluation of testimony in light of its rationality, internal consistency and the manner in which it hangs together with other evidence of the record.” *McAlister v. Flippo Construction Co.*, CRB No. 08-045 (March 25, 2008).

Quite simply, the ALJ ultimately found the testimony of Claimant unworthy of belief. As such, Claimant was unable to carry his burden of proof to show that an alleged injury occurred on April 6, 2015. We affirm this finding and conclude the CO’s denial of Claimant’s claim is supported by the substantial evidence in the record and in accordance with the law.²

Finally, we also note that much of what Claimant argues also amounts to a request for 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 January 19, 2017 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. It is **AFFIRMED**.

So Ordered.

² Inexplicably, after having found an accidental injury did not occur which arose of and in the course of Claimant’s employment, the CO goes on to analyze the nature and extent of Claimant’s injury and whether Employer was entitled to a credit for long term disability paid to Claimant. Such an analysis is wholly unnecessary in light of the finding that an accidental injury at work did not occur.